CASE NO. 96402-5

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON
(Court of Appeals Division I, Case No. 76646-5-I)

STAR HOVANDER, a/k/a STARLARE HOVANDER and STEVEN HOVANDER, wife and husband and their martial community

Plaintiffs/Appellants,

v.

OPTION ONE MORTGAGE CORPORATION,

Defendants/Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners are Star and Steve Hovander (the "Hovanders" or "Hovander").

II. CITATION TO COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(2) and (4), this Court should review the unpublished decision by Division I of the Court of Appeals filed on September 10, 2018 in re: *Star Hovander aka Starlare Hovander and Steve Hovander v. Option One Mortgage Corporation, et al.* **(Appendix A).**

III. ISSUES PRESENTED FOR REVIEW

A. ASSIGNMENT OF ERROR NO. 1

Defendant/Appellant Was NEVER Personally Served by Substitute Service Under RCW 4.28.080(16) or Otherwise and the Judgment Entered on the Basis that Defendant/Appellant was So Served was Without Jurisdiction and Must be Vacated.

1. *Without Proper Service of Process the Jurisdiction of the Superior Court was Never Properly Invoked.*

2. *5268 Olson Road was not the Hovanders' "Center of Domestic Activity."*

3. *Actual Notice of the Lawsuit Is Not Statutory Service of Process.*

B. ASSIGNMENT OF ERROR NO. 2

Defendant/Appellant Did Not Waive the Affirmative Defense of Insufficiency of Service of Process.

IV. STATEMENT OF CASE

On or about December 17, 2007, Plaintiff filed suit in Whatcom County Superior Court against the Defendants Star and Steve Hovander (collectively referred to as the "Hovanders") to judicially foreclose certain residential real property owned by the Hovanders. On December 28, 2007, at 3:36 p.m., the process server served a person named "Clark (Doe)." "Clark (Doe)" was allegedly an occupant of a motorhome parked at 5268 Olson Road. 5268 Olson Road was not the Hovanders' residence and the Hovanders did not reside in the motorhome. The Hovanders resided in a single family house situated next door to 5268 Olson Road at 5206 Olson Road, which are separate tax parcels.

The Hovanders have never resided at 5268 Olson Road, because it is a dairy farm and milking parlor with no single family residence situated thereon—it is entirely commercial. Nonetheless, the purported service on "Clark (Doe)" with the "Amended Summons and Complaint for Judicial Foreclosure" led to the entry of a decree of foreclosure on the Hovanders' personal residence at 5206 Olson Road. CP 249-252

On January 14, 2008, approximately two (2) weeks after the purported service on "Clark (Doe)," Star Hovander filed the following pleading:

Re: DEMAND TO FILE WITH COURT

> I, Star Hovander of 5206 Olson Road, Ferndale, WA 98----, Whatcom County, Washington, as stated as my rights herein on the Amended Summons, Case No. 07-2-02975-0 hereby demand the plaintiff, Option One Mortgage Corporation and their attorney's in this case, file aforementioned lawsuit with the court *after* proper service has been issued to myself, the defendant, Star Hovander.

CP 00089 (emphasis added).

Neither Star Hovander, nor her husband, Steve, was ever personally served with the Summons, Amended Summons or Amended Complaint or served by substituted service at their residence at 5206 Olson Road, which is next door to the Hovanders single family residence. (CP 01045-01046 (paras 3, 4, 5, 6 and 8)).

The property commonly known as 5268 Olson Road, where "Clark (Doe)" was purportedly served is a farm and milk barn that was owned by Aron Hovander, Star Hovander's adult son, at the time of the purported service. Aron Hovander did not live on the property at the time of this purported service; in fact, no one lives at 5268 Olson Road, because no residential structures are situated thereon. CP 01045-01046 (paras 3, 4, 5, 6 and 8). Nonetheless, this service on "Clark Doe" was proffered as service upon "PERSONS IN POSSESSION OR CLAIMING A RIGHT TO POSSESSION, 5268 OLSON ROAD, FERNDALE, WA 98248." Although the affidavit infers that service was made upon Star and Steve

Hovander, it doesn't boldly make such a conclusion. The conclusion stated is that service was accomplished by:

> **INDIVIDUAL/PERSONAL:** served by delivering a true copy of the Amended Summons; Complaint for Judicial Foreclosure; and Exhibits "A", "B", "C" and "D" to Clark (Doe) who was living in a motorhome on the property at the address of 5268 Olson Road……

CP 00101-00102

All the process server's declaration states is that "Clark (Doe)" was served. There is no mention of serving Star Hovander, Steve Hovander or anyone as occupants living in Star and Steve Hovander's house at 5206 Olson Road, the house where Star and Steve Hovander actually resided and the subject of this foreclosure action.

5206 Olson Road is a single family residence separate and distinct from 5268 Olson Road, where the motorhome was parked and in which "Clark (Doe)" was allegedly residing and the person served. CP 00101-00102. Star and Steve Hovander's house is next door to 5268 Olson Road and it is an entirely separate, residential structure. It is not part of the farm and milk barn located at 5268 Olson Road, the address where the substituted service allegedly occurred. CP 01045-01046.

The legal descriptions for 5268 and 5206 are also separate and distinct and each has its own tax parcel number:

1. 5268 Olson Road is TPN 390136-069380-0000; and

2. 5206 Olson Road is TPN 390136-028308-0000.

Star Hovander, while she was representing herself, filed a "Response to Amended Summons," in which she demanded that the lawsuit be filed and in which she acknowledged that she had not yet been personally served with the lawsuit. CP 00087. In Star Hovander's "Notice of Appearance" she requests notices of the proceedings be sent to her at 5206 Olson Road, Ferndale, WA, her personal residence. CP 00089. Notwithstanding that request, Star Hovander was never served personally served at this address and the lawsuit was premised on her having been served, not at her usual abode, but at another address for a property owned not by her, but by her son, Aron Hovander (e.g. 5268 Olson Road, the farm and milk barn). Star and Steve Hovander are not and were not residents of 5268 Olson Road.

V. ARGUMENT

A. ASSIGNMENT OF ERROR NO. 1:

Option One's Affidavit of Service Did Not Show on its Face that Service on Hovander was Proper, In Fact, It Showed the Opposite—The Party Served Was "Clark (Doe) Who Was Living in a Motorhome on the Property," which was a Farm and a Milk Barn Owned by a Third Party and the Hovanders Lived in a Single Family Residence Next Door to the Farm and the Milk Barn They Did Not Own.

CR 4(d)(2) provides (in pertinent part) that personal service in state "shall be as provided in RCW 4.28.080." RCW 4.28.080(16) provides for personal service by leaving a copy at the defendant's "usual abode with some person of suitable age and discretion then resident therein."

RCW 4.28.080(16) states:

> Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:
>
> …….
>
> (16) In all other cases, to the defendant personally, or by leaving a copy of the summons *at the house of his or her usual abode with some person of suitable age and discretion then resident therein*.

(emphasis added).

Star and Steve Hovander were never personally served as required by RCW 4.28.080(16) or otherwise under the same statute. The substitute service was made on:

> "Clark(Doe) – who was living in a motorhome on the property at the address of 5268 Olson Road." CP 00101-00102

5206 Olson Road, a single family residence, is Star and Steve Hovander's "usual abode," NOT 5268 Olson Road, which is a farm and milk barn. CP 00089. Star and Steve Hovander have resided at 5206 Olson Road for multiple years and they were never served at their residence address by anyone in spite of the request for notice for service at

that address: ("…file aforementioned lawsuit with the court *after* proper service has been issued to myself, the defendant, Star Hovander") CP 00086.

1. *Without Proper Service of Process the Jurisdiction of the Superior Court was Never Properly Invoked.*

Proper service of the summons and complaint is essential to invoke personal jurisdiction of the superior court and a judgment entered without proper service is void. *In re the Marriage of Markowski*, 50 Wn. App. 633, 635-636, 749 P.2d 754 (1988), citations omitted; *and see: Brenner v. Port of Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 133 (1989). In addition, no exercise of discretion is involved in vacating a judgment entered without jurisdiction. *Brickum Investment Co. v. Vernham Corp*., 46 Wash.App. 517 (1987), *in accord*, *Long v. Harrold*, 76 Wash. App. 317 (1994).

The attempt to serve Star and Steve Hovander by serving: "Clark (Doe)" – who was living in a motorhome on the farm and milk barn at 5268 Olson Road" is not substitute service of process on the Hovanders at the Hovanders' "house of usual abode," as required *Sheldon v. Fettig*, 129 Wn.2d 601, 610 (Wash. 1996), a case where the defendant resided at his parents' home and in an apartment in Chicago where he was training to be an airline flight attendant:

> We therefore conclude "house of [defendant's] usual abode" in RCW 4.28.080(16) is to be liberally construed to effectuate service and uphold jurisdiction of the court. This is consistent with our procedural rules in (1) RCW 1.12.010, which mandates that "[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction"; and (2) CR 1, which states the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action," which promotes a policy to decide cases on their merits. Indeed, "'[m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.' " *Carle v. Earth Stove, Inc.*, 35 Wash.App. 904, 908, 670 P.2d 1086 (1983) (quoting *Fox v. Sackman*, 22 Wash.App. 707, 709, 591 P.2d 855 (1979)).
>
> ……..
>
> "[U]sual place of abode" must be taken to mean such center of one's domestic activity that service left with a family member is reasonably calculated to come to one's attention within the statutory period for defendant to appear. *Sheldon v. Fettig*, 77 Wash.App. 775, 781, 893 P.2d 1136 (quoting *Thoenes v. Tatro*, 270 Or. 775, 529 P.2d 912 (1974)), *review granted*, 127 Wash.2d 1016, 904 P.2d 300 (1995)).
>
> Thus, the inquiry here is whether the Fettig family home was a center of domestic activity for Ms. Fettig where she would most likely receive notice of the pendency of a suit if left with a family member. *See Black's Law Dictionary* 1544 (6th ed. 1990) (one definition of usual place of abode is the "place where [a] person would most likely have knowledge of service of process....").

2. *5268 Olson Road was not the Hovanders' "Center of Domestic Activity."*

This Court thereafter decided *Gross v. Evert-Rosenberg*, 85 Wash.App. 539 (1997). In the *Gross* case, the defendant was served at a

home she owned, but leased to her daughter and son in law and she no longer lived there. This Court ruled that this residence was *not* her "place of usual abode" and central to that determination was whether the home occupied by her daughter and son in law was the mother's "center of domestic activity?"

This Court distinguished ***Sheldon v. Fettig*** on the grounds that the *Sheldon* holding, where the adult child was deemed to have had more than one usual abode and *Evert-Roseberg*, where the mother moved from the house her adult child rented from her and established a different center of domestic activity in another house. In order to satisfy requirements for substitute service of process, a copy of summons must be left at defendant's "usual place of abode" with a person of suitable age and discretion, then residing therein. *Scott v. Goldman,* 82 Wash.App. 1 (1996), review denied, 130 Wash.2d 1004.

Defendant/Appellant's "usual place of abode" was 5206 Olson Road, the Defendant/Appellant's "center of domestic activity" and the address stated in Star Hovander's "Response to Amended Summons:"

> I, Star Hovander, have not been served a summons or default notice of foreclosure on properties known as 5268 Olson Road, Ferndale, Washington 98248 and 5249 Imhoff Road, Ferndale Washington 98248.
>
> Foreclosure proceedings shall therefore be halted and the aforementioned complaint voided until suitable notice,

service and action has taken place.

Re: Demand to file with Court

> I, Star Hovander of 5206 Olson Road, Ferndale, WA, 98248 Whatcom County, Washington, as stated as my right herein on the Amended Summons, Case No. 07-2-02975-0 hereby demand the plaintiff, Option One Mortgage Corporation and their attorneys in this case, file the aforementioned lawsuit with the court after proper service has been issued to myself, the defendant, Star Hovander.

CP 00086-00089 ("Response to Amended Summons; Demand to File Lawsuit")

Baker v. Hawkins 190 Wash.App. 323, 359 P.3d 931, review denied at 185 Wash.2d 1012, 367 P.3d 1083 (2015) was another case involving a temporary occupant of a residence being served for the owner. The person served in *Baker* was a contractor doing work on defendants' home while defendants were out of town on vacation. The Court ruled that serving the contractor was inadequate service of process even though the contractor had the access code to the home, was in possession of home during the day, and the contractor was the one person in the state most likely to give notice of lawsuit to defendants; the contractor and his wife returned to their own home each evening, slept, and departed therefrom each morning. The contractor was not "actually living in" the defendants' home and was not considered to be "residing therein" for the purpose of substitute service.

In the case at bar, the person served, "Clark (Doe)," was living in a motorhome (not a mobile home) parked on 5268 Olson Road, a farm and a milk barn, the property *adjacent* to the Hovanders' "usual place of abode," 5206 Olson Road, a single family residence. This service is *not* the equivalent of: "… leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein." The resident in this case, was not a resident of Defendant/Appellant's home, but a resident of a motorhome parked on the adjacent farm and milk barn, which was owned by a third party.

The Hovanders' "center of domestic activity" is 5206 Olson Road, not 5268 Olson Road, the farm and milk barn on adjacent property owned by a third party, who occupied a motorhome at the time of the purported service of process. CP 1044-1049. The person served did not have his usual place of abode at 5206 Olson Road, his motorhome was not parked on 5206 Olson Road and the summons and complaint was not served upon a person of suitable age and discretion then a resident in the single family dwelling with the address of 5206 Olson Road.

The person served, "Clark (Doe)," simply parked his motorhome on 5268 Olson Road, was supposedly occupying the motorhome at the time he was served and was served for and on behalf of Star and Steve Hovander. Equally important is the fact "Clark (Doe)" was not a resident

of 5206 Olson Road. Star and Steve Hovander were also not residents of the "Clark (Doe)" motorhome parked on 5268 Olson Road. Finally, 5268 Olson Road and the motorhome were not Star and Steve Hovanders' "center of domestic activity," as required by *Sheldon v. Fettig,* cited by the Plaintiff/Respondent and *by Baker v. Hawkins,* cited by the Defendant/Appellant.

3. Actual Notice of the Lawsuit is Not Good Service

Defendant/Appellant had "actual notice" of the lawsuit in the same way Ms. Fettig received notice of the actual lawsuit in *Sheldon* v. *Fettig,* 129 Wash. 2d 601 1996. The Fettigs' son, who caused an automobile accident, was residing in the Fettigs' home on a part time basis when he wasn't away training to be a flight attendant in Chicago. The Court noted:

> Headnote 2:
>
> Term "usual place of abode", as used in statute allowing for substituted service of process, refers to place at which defendant is most likely to receive notice of pendency of suit and is taken to mean such center of one's domestic activity that service left with family member is reasonably calculated to come to one's attention within statutory period for defendant to appear. West's RCWA 4.28.080(15).
>
> ……
>
> Headnote 3:
>
> Home of parents of defendant was defendant's "usual place of abode," and thus service of process left with defendant's brother at parents' home was reasonably calculated to

> accomplish notice of action and was valid under statute allowing substituted service of process, notwithstanding fact that defendant was living in another city training as flight attendant and maintained apartment there, where she was registered to vote in state, she used her parents' address on her car registration, car's bill of sale, and on her speeding ticket, she told her car insurer that address was her parents, she returned home frequently when not in flight, and when plaintiff's attorney sent correspondence to parents' home, response was immediately given. West's RCWA 4.28.080(15).

Sheldon v. *Fettig*, therefore, supports the Defendant/Appellant's analysis of the statute.

B. ASSIGNMENT OF ERROR NO. 2

Defendant/Appellant Did Not Waive the Affirmative Defense of Insufficiency of Service of Process.

1. Prima Facie Case of Improper Service

Defendant/Appellant was NEVER personally served by substitute service under RCW 4.28.080(16) or otherwise and the judgment entered on the basis that Defendant/Appellant was properly served is without jurisdiction and must be vacated.

To establish a prima facie case of proper service, a plaintiff must produce an affidavit of service that on its face shows that service was properly carried out. *Witt v. Port of Olympia,*126 Wn.App. 752, 757, 109 P.3d 489 (2005). Or the plaintiff can establish proof of service by the written acceptance or admission of the defendant, his agent, or his attorney. *Scanlan,*181 Wn.2d at 848.

But when a statute requires that a particular person be served, the affidavit of service must be sufficient to show that the specified person was served. *Witt,*126 Wn.App. at 757–58. In *Witt,* the plaintiff was required to follow the direction of RCW 4.28.080(9) and deliver a copy of the summons and complaint to the "president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant" of those persons. *Witt,*126 Wn.App. at 757 (quoting RCW 4.28.080(9)). The process server's affidavit of service merely stated that summons and complaint were signed by "'the clerk at the Port Office.'" *Id.* at 758. The "clerk" was in fact a 17–year–old student intern. *Id.*at 755. This court held that the plaintiff in *Witt* failed to make a prima facie case because she only showed evidence of service on a "clerk," rather than any of the named positions listed in RCW 4.28 .080(9). *Id.*at 758.

Furthermore, even if the "clerk" was understood to be the equivalent of an "office assistant," the plaintiff gave no proof that the person served was the assistant to one of the persons named in the service statute. *Id.*

In this case, Option One similarly failed to make a prima facie case of good service. Whether service *actually* occurred relates to the

defendant's burden to show by clear and convincing evidence that service was improper. *Scanlan,*181 Wn.2d at 847.

2. Clear and Convincing Evidence Showing Insufficient Service

Assuming arguendo that Option One established a prima facie case showing proper service, the Hovanders have presented clear and convincing evidence showing that service was insufficient. The Hovanders have no ownership interest in the farm and dairy farm. Finally, the declaration of service clearly shows the purported service was not made on someone who was a resident in the Hovanders' home. The totality of the record establishes by clear cogent and convincing evidence Option One did not perfect service on the Hovanders at any time or in any manner.

The Court of Appeals ruled, however, that:

> Hovander lost her affirmative defense of insufficient service when she failed to provide evidence to support the defense in response to Option One's summary judgment motion.

Unpublished Opinion, pg. 7 (emphasis added)

On the contrary, Defendant/Appellant in the first document she filed in the foreclosure action states:

> I, Star Hovander, have not been served a summons or default notice of foreclosure on properties known as 5268 Olson Road, Ferndale, Washington 98248 and 5249 Imhoff Road, Ferndale Washington 98248.

> Foreclosure proceedings shall therefore be halted and the aforementioned complaint voided until suitable notice, service and action has taken place.

CP 00087 "Response to Amended Summons."

> Plaintiff/Respondent counter-argues:
>
> While these arguments of insufficient service appear in the answer to the complaint, these arguments were not advanced after Certificate of Service was made a part of the court file and provided in the Motion for Summary Judgment.

CP 01064 Plaintiff's Response to Defendant Hovanders' Order to Appear and Show Cause Why Judgment Entered Against Steve and Star Hovander Should Not be Vacated, pg. 9.

> On that basis, Plaintiff/Respondent speculates that:
>
> The only logical conclusion to draw is that upon presentation of this evidence, sufficiency of process had been established and accepted by Defendant Star.

Id.

> This speculation is inconsistent with CR 4(d)(5), which states:
>
> (5) ***Appearance***. A voluntary appearance of a defendant does not preclude the defendant's right to challenge lack of jurisdiction over the defendant's person, insufficiency of process, or insufficiency of service of process pursuant to rule 12(b).
>
> CR 12(h) – Waiver or Preservation Defenses – clearly states that

waiver occurs only if the affirmative defense of lack of jurisdiction is

NOT included in a responsive pleading. As Defendant/Appellant states in

her "Response to Amended Summons" she was not served with the summons and all proceedings should be halted until she is served.

Furthermore, the responsive pleading submitted in opposition to the motion for summary judgment was not admitted into evidence by the trial judge. It would be patently unfair to have the stricken pleading be considered part of the record when it was never admitted into evidence and, if it had been, would have been evidence of a loan modification that would have been a complete defense to the foreclosure action.

VI. CONCLUSION

For the reasons set forth above, the Court of Appeals ruling should be overruled.

Date: October 10th, 2018

THE LANZ FIRM, P.S.:

By: _____
Bernard G. Lanz, WSBA #11097
Attorney for Appellants Hovander

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

OPTION ONE MORTGAGE CORPORATION, Respondent, v. STAR HOVANDER a/k/a STARLARE HOVANDER, Appellant, and STEVEN HOVANDER, wife and husband and their marital community; NORTH WASHINGTON COLLECTIONS; ARON C. HOVANDER; GUY HOVANDER; HAL HOVANDER; CLARK "DOE"; "JOHN DOE" NELSON; JOHN CALENE; JANIS THEOPIK; IRA MELANTHY; VIRGINIA PATLETTE; JAMES DAILEY; ROBERT WHITE; SANDRA STACEY; UNKNOWN PARTIES IN POSSESSION; UNKNOWN PARTIES CLAIMING A RIGHT TO POSSESSION; and UNKNOWN OCCUPANTS, Defendants.	No. 76646-5-I DIVISION ONE UNPUBLISHED OPINION FILED: September 10, 2018

LEACH, J. — Star Hovander appeals the trial court's denial of her request to vacate a judgment and decree of foreclosure. She claims that Option One

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Mortgage Corporation failed to serve her with the summons and complaint, so the judgment is void. But Hovander's failure to provide evidence to support this affirmative defense in response to Option One's summary judgment motion resulted in her losing it. We affirm.

FACTS

Mariner's Capital Inc. loaned Star Hovander $400,000, evidenced by a promissory note. A deed of trust encumbering the property known as 5268 Olson Road, Ferndale, Whatcom County, Washington, secured the note. Mariner's Capital later assigned the note and deed of trust to Option One.

After Hovander missed note payments, Option One filed a lawsuit to foreclose the deed of trust. On December 28, 2007, a process server served the amended summons, complaint, and related exhibits on Hovander by delivering them to "CLARK (DOE)," who was living in a motor home at 5268 Olson Road. Option One filed the process server's affidavit of service.

On January 14, 2008, Hovander filed a "Response to Amended Summons Demand to File Lawsuit." She claimed that she had not been served a summons or default notice of foreclosure on the property. She did not sign this response under oath.

In November 2008, Option One moved for summary judgment with a supporting declaration. Appearing pro se, Hovander responded to the motion.

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Her response included no evidence supporting her claim that she had not been served. Instead, Hovander asserted that she had entered into a loan modification agreement with Option One.

In January 2009, the trial court granted summary judgment to Option One, and in February 2009, it entered a judgment of foreclosure against the Hovanders. The Whatcom County Sheriff sold the property at a foreclosure sale.

In December 2016, Hovander filed a motion to show cause why the judgment should not be vacated. Hovander claimed that the 2009 judgment was void because she was not properly served. The trial court ordered Option One to appear and show cause why the judgment should not be vacated. The trial court determined that Hovander's service objection came too late and denied the motion to vacate with prejudice. Hovander appeals.

ANALYSIS

Hovander sought relief under CR 60(b)(5). This rule allows a court to vacate a void judgment. She claims that because she never received proper service, the court did not have personal jurisdiction over her when it entered the challenged judgment, making it void. So the trial court should have vacated it.[1] Generally, a trial court has broad discretion in ruling on motions to vacate a

[1] See Am. Express Centurion Bank v. Stratman, 172 Wn. App. 667, 672, 292 P.3d 128 (2012); Morris v. Palouse River & Coulee City R.R., 149 Wn. App. 366, 370-71, 203 P.3d 1069 (2009).

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judgment.[2] But a trial court has a nondiscretionary duty to vacate a void judgment.[3] An appellate court reviews a claim that a judgment is void de novo.[4]

First, Option One contends that laches bars Hovander's defense because of her substantial delay in filing the motion to vacate. We disagree. Washington case law is clear that laches does not bar a motion attacking a judgment for lack of personal jurisdiction.[5]

But Hovander lost her right to challenge personal jurisdiction when she did not include any evidence supporting this affirmative defense in her response to Option One's summary judgment motion. Option One had the initial burden of producing an affidavit of service "that on its face shows that service was properly carried out."[6] The burden then shifted to Hovander to prove by clear and

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[2] Leen v. Demopolis, 62 Wn. App. 473, 478, 815 P.2d 269 (1991).

[3] Servatron, Inc. v. Intelligent Wireless Prods., Inc., 186 Wn. App. 666, 679, 346 P.3d 831 (2015); Leen, 62 Wn. App. at 478; Allied Fid. Ins. Co. v. Ruth, 57 Wn. App. 783, 790, 790 P.2d 206 (1990); but see Kennedy v. Sundown Speed Marine, Inc., 97 Wn.2d 544, 548 (plurality opinion), 550-51 (Utter, J., dissenting), 647 P.2d 30 (1982) (in which the justices disagreed about the standard of review on a CR 60(b)(5) motion).

[4] ShareBuilder Sec., Corp. v. Hoang, 137 Wn. App. 330, 334, 153 P.3d 222 (2007).

[5] Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 548-49, 111 P. 785 (1910) (rejecting a claim of laches and stating, "'It is universally conceded that a judgment void for want of jurisdiction over the person of the defendant may be vacated on motion, irrespective of the lapse of time.'" (quoting Dane v. Daniel, 28 Wash. 155, 165, 68 P. 446 (1902))); (Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323-24, 877 P.2d 724 (1994) (stating that a motion attacking a void judgment may be brought at any time and not even laches can bar the attack); see Stratman, 172 Wn. App. at 672.

[6] Stratman, 172 Wn. App. at 672.

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convincing evidence that service was improper.[7] Counsel for Hovander suggested at oral argument that because she initially appeared pro se, we should hold her to a more lenient standard. But the law holds pro se litigants to the same standard as attorneys.[8]

Here, Option One filed an affidavit of service that on its face showed proper service on Hovander. The affidavit states that the process server delivered the summons and amended complaint to "CLARK (DOE) – Who was living in a motorhome on the property." This affidavit provides prima facie evidence of proper service. Hovander raised the service issue in her unsworn response to the summons, demonstrating her awareness of the defense. Yet, in her summary judgment response, she presented no evidence creating a material issue of fact about service. She failed to meet her burden of presenting evidence to support her claim of insufficient service. Thus, the trial court properly granted summary judgment.

A party can waive the defense of lack of personal jurisdiction. CR 12(b)(6) provides that a party waives this defense by failing to raise it either in an

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[7] Stratman, 172 Wn. App. at 672.

[8] Edwards v. Le Duc, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010) ("A trial court must hold pro se parties to the same standards to which it holds attorneys."); In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (stating that "'the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws'" (quoting In re Marriage of Wherley, 34 Wn. App. 344, 349, 661 P.2d 155 (1983))).

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appropriate motion or a responsive pleading. Our Supreme Court has held that a defendant also may waive this affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense.[9] This case illustrates yet another way a party can lose this affirmative defense, by failing to present sufficient evidence to create a genuine issue of material fact in response to a summary judgment motion.

Hovander included sworn statements to support her service challenge with her CR 60(b) motion, but she presented this evidence too late. CR 60 is not a substitute for a direct appeal.[10] If Hovander disagreed with the court's summary judgment decision, her remedy was to appeal that decision directly or ask the court to exercise its discretion to consider additional evidence on a motion for reconsideration. CR 60(b) does not provide another means of seeking relief.

Finally, at oral argument Hovander's counsel attempted to make an issue out of the trial court's decision to strike Hovander's untimely pleadings in opposition to the summary judgment motion. But counsel acknowledged that those pleadings do not contain any argument or evidence about service. So

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[9] Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000).

[10] See Kern v. Kern, 28 Wn.2d 617, 619, 183 P.2d 811 (1947); In re Marriage of Thurston, 92 Wn. App. 494, 499, 963 P.2d 947 (1998).

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Hovander does not show that the trial court prejudiced her lack of personal jurisdiction defense by striking those pleadings.

Under the circumstances presented here, Hovander lost her affirmative defense of insufficient service when she failed to provide evidence to support the defense in response to Option One's summary judgment motion.[11]

CONCLUSION

We affirm the trial court's denial of Hovander's motion to vacate.

Leach, J.

WE CONCUR:

Dwyer, J.

Appelwick, C.J.

[11] Because we decide that Hovander lost her personal jurisdiction defense, we do not address Option One's contention that it properly served Hovander or its argument that Hovander failed to serve the motion to vacate on a necessary party as required by CR 60(e)(3).

APPENDIX A

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

OPTION ONE MORTGAGE CORPORATION,, Respondent, and STAR HOVANDER, a/k/a STARLARE HOVANDER and STEVEN HOVANDER, wife and husband and their martial community, Appellants.	Case No.: 76646-5-I DECLARATION OF SERVICE

I, KATHRYN M. DAINES, declare under penalty of perjury as follows:

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action. My business address is Suite 333, Grand Central Building, 216 1st Avenue South, Seattle, Washington 98104.

On October 10, 2018, I delivered via electronic service, the foregoing document described as "Petition for Review" to the following:

Wendy Walter - wwalter@mccarthyholthus.com
Joseph McCormick - jmccormick@wrightlegal.net;
Robert LaRoccorlarocco@me.com;
Lucy Ballard - lucyballardgilbert@gmail.com;
John Thomas - jthomas@mccarthyholthus.com;

The Lanz Firm, P.S.
Grand Central Building, Suite 333
216 1st Avenue South
Seattle, WA 98104
206-382-1827 FAX 206-327-9000

Executed on October 10th 2018 at Seattle, Washington.

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

/s/Kathryn M. Daines
Kathryn M. Daines

The Lanz Firm, P.S.
Grand Central Building, Suite 333
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