Supreme Court No. 99714-4
Court of Appeals No. 53763-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

KENNETH AND VICTORIA ZIMMERMAN,

Petitioner,

v.

WILMINGTON SAVINGS FUND SOCIETY FSB, AS TRUSTEE FOR STANWICH MORTGAGE LOAN TRUST A,

Respondent.

PETITION FOR REVIEW

By:

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Attorney for Petitioner

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1. IDENTITY OF THE PETITIONER

Petitioner Kenneth and Victoria Zimmerman ("the Zimmermans") ask this Court to review the decision of the Court of Appeals, Division 2, referred to in Section 2.

2. COURT OF APPEALS DECISION

Pierce County Superior Court found that the Zimmermans substantially complied with RCW 4.28.185 when serving the summons and complaint in this action, out of state, on Respondents. Despite this finding of proper service and personal jurisdiction, the Superior Court vacated the default judgment against Respondents. It did so even though Respondent's motion to vacate was solely based on insufficient service of process and lack of personal jurisdiction. The finding of proper service was correct but vacating the default judgment given such a finding did not have a basis in law.

Division 2 of the Court of Appeals, on March 30, 2021, ruled that RCW 4.28.185, Washington's long-arm statute, is "*applied narrowly* because jurisdiction obtained through service out of state is in derogation of the common law." (emphasis added). No other explanation of how the derogation of common law doctrine, and its purported strict scrutiny standard, applied to the statute or case at hand was given. Contradictorily, Division 2 then held that the evidence presented to the trial court was

insufficient to constitute "substantial compliance" with "RCW 4.28.185(4)." This was error, an erroneous application of strict scrutiny, and an improper re-weighing of evidence by a court of appeal.

3. ISSUES PRESENTED

3.1. Whether under RAP 13.4(b)(1), this Court should accept review of Division 2's decision because such decision conflicts with decisions of this Court and courts of appeal regarding the proper standard of review for RCW 4.28.185, not re-weighing the evidence on appeal, and not disturbing trial court factual findings supported by substantial evidence? Yes.

3.2. Whether under RAP 13.4(b)(4), this Court should accept review of Division 2's decision, as a matter of substantial public interest, to "craft a proper and meaningful principle of construction when a statute purports to change an identified common law rule" and a court of appeal decides the case based on the much criticized derogation of the common law doctrine? Yes.

4. STATEMENT OF THE CASE

4.1. In 2010, the Zimmermans defaulted on a promissory note secured by a deed of trust. (CP at 3).

4.2. In January of 2016, the Zimmermans received a notice regarding their loan. (CP at 7-8). This notice informed the Zimmerman's that their loan had been sold to Wilmington Savings Fund Society FSB, as Trustee for Stanich Mortgage Loan Trust A ("Wilmington Savings"). (CP at 7-8). The notice provided Wilmington Savings address for service of "legal notices." (CP at 8). The address was unambiguously in Delaware:

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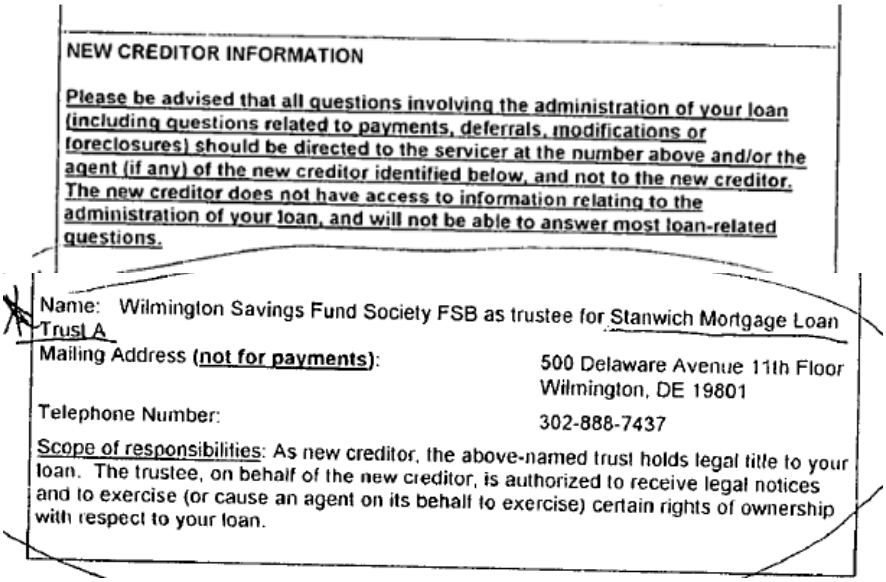

NEW CREDITOR INFORMATION

Please be advised that all questions involving the administration of your loan (including questions related to payments, deferrals, modifications or foreclosures) should be directed to the servicer at the number above and/or the agent (if any) of the new creditor identified below, and not to the new creditor. The new creditor does not have access to information relating to the administration of your loan, and will not be able to answer most loan-related questions.

Name: Wilmington Savings Fund Society FSB as trustee for Stanwich Mortgage Loan Trust A

Mailing Address (not for payments): 500 Delaware Avenue 11th Floor Wilmington, DE 19801

Telephone Number: 302-888-7437

Scope of responsibilities: As new creditor, the above-named trust holds legal title to your loan. The trustee, on behalf of the new creditor, is authorized to receive legal notices and to exercise (or cause an agent on its behalf to exercise) certain rights of ownership with respect to your loan.

(CP at 8). Specifically, the notice stated that Wilmington Savings "held legal title to" the Zimmerman's "loan" and that it was "authorized to receive legal notices" in Delaware. (CP at 8). No city or town in Washington State is named "Wilmington."

4.3. Also in January of 2016, the Zimmerman's received a "Notice of Foreclosure" informing the Zimmerman's that their property would be sold in May of 2016. (CP at 11-12).[1]

4.4. In November of 2016, the Zimmerman's filed a complaint to quiet title against the deed of trust, under RCW 7.28.300, on the basis that the applicable statute of limitations period had passed. (CP at 3-4).

[1] Wilmington Savings had issued IRS tax form 1099-C in effect accelerating the debt, forgiving it, and placing the entire loan debt on the Zimmermans for tax purposes. (RP August 2, 2019, at 6-7, 10-12, 162-63).

4.5. The Complaint alleged that the Superior Court had jurisdiction over Wilmington Savings because it conducted in a transaction in Washington State and held debt in Washington State encumbering real property. (CP at 2). The Complaint alleged that jurisdiction was properly over North Cascade Trustee Services, Inc., based on it serving as trustee over the real property.

4.6. The Zimmermans served North Cascade Trustee Service, Inc., at its Seattle, WA address as provided in the Notice of Foreclosure. (CP at 14). The Zimmermans attempted to serve Wilmington Savings (CP at 15) at the Delaware address that was "authorized to receive legal notices." (CP at 8). The process server reported that the "[s]ervice [was] rejected by Debbie Green, Legal Administrator" because she "was not authorized to accept service at th[at] location." (CP at 15). Instead, the process server was told by the "Legal Administrator" that "All documents related to a trust must be served on their trust division at 501 Carr Road, Wilmington, DE 19809":

XXXX Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed above, I have been unable to effect process upon the person/entity being served because of the following reason(s):

Date Attempted: December 2, 2016 Time Attempted: 4:26 p.m.

** Service rejected by Debbie Green, Legal Administrator as they are not authorized to accept at this location. All documents related to a trust must be served on their trust division at 501 Carr Road, Wilmington, DE 19809.

I declare under penalty of perjury that the information contained herein is true and correct and this affidavit was executed on:

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December 4, 2016 at Wilmington, Delaware
Date City State

Daniel Newcomb, Process Server
Delaware Attorney Services
3516 Silverside Rd. # 16
Wilmington, DE 19810

State of Delaware
County of New Castle

Subscribed and sworn before me, a Notary Public of the State of Delaware on December 4, 2016

Witness My Hand and Official Seal To

Kimberly J. Ryan, My Commission Expires 4/29/2020
Notary Public, State of Delaware

(CP at 15).

4.7. The process server then perfected service on Wilmington Savings, as directed, at 501 Carr Road, Wilmington, DE 19809:

I declare that I am a citizen of the United States, over the age of eighteen and not a party to this action. And that within the boundaries of the state where service was effected, I was authorized to perform said service.

Service: I served Wilmington Savings Fund Society FSB, as Trustee for Stanwich Mortgage Loan Trust A

with the documents: Summons; and Complaint

Person Served: Patti Smith, Legal Administrator authorized to accept

Service Address: Wilmington Savings Fund Society, FSB - Trust Division 501 Carr Road, Wilmington, DE 19809

Date of Service: December 2, 2016 Time of Service: 2:10 p.m.

Manner of Service: (X) By personally delivering copies to the person/authorized agent of entity being served.
( ) By leaving, during office hours, copies at the office of the person/entity being served, leaving same with the person apparently in charge thereof
( ) By leaving copies at the dwelling house or usual place of abode of the person being served, with a member of the household 18 or older and explaining the general nature of the papers.
( ) By posting copies in a conspicuous manner to the address of the person/entity being served.

Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed above, I have been unable to effect process upon the person/entity being served because of the following reason(s):

( ) Unknown at address ( ) Evading ( ) Moved, left no forwarding
( ) Address does not exist ( ) Service canceled by Litigant ( ) Unable to serve in a timely fashion ( )Other

Service Attempts: Service was attempted on _____at_____, _____at_____, _____at_____, _____at_____, _____at_____, _____at_____,

Description: Age: 65 Sex: F Race: W Hgt: 5'6" Wgt: 145 lbs Hair: Gray Glasses: Yes

I declare under penalty of perjury that the information contained herein is true and correct and this affidavit was executed on:

December 4, 2016 at Wilmington, Delaware
Date City State

Sharlene Ryan, Process Server
Delaware Attorney Services
3516 Silverside Rd. # 16
Wilmington, DE 19810

State of Delaware
County of New Castle

(CP at 16). Wilmington Savings expressly accepted the service of the summons and complaint at this location. (CP at 16).

4.8. In February of 2017, the Zimmermans moved for a default order as Wilmington Savings did not answer the complaint. (CP at 18-23).

Later in the month, North Cascade Trustee Service, Inc., was dismissed from the suit via a joint motion with the Zimmermans. (CP at 35). On the same day, Wilmington Savings was held in default by the trial court. (CP at 36). In March of 2017, the Zimmermans obtained an order quieting them title to the property over the deed of trust. (CP at 64).

4.9. Almost two years after service of the complaint, and only after a beneficial change in the law, Wilmington Savings moved for an order to show cause to set aside the default order. The sole basis of the motion was under CR-60(b)(5) based the lack of personal jurisdiction. (CP at 65-68). Wilmington Savings argued that the Zimmermans did not effectuate proper personal service under RCW 4.28.185, Washington State's long arm statute. (CP at 75). It, later, argued that the loan was not accelerated, and that the statute of limitations should only bar enforcement of payments due more than six years ago (due to a change in the law). (*e.g.*, CP at 126).

4.10. The Zimmermans responded by pointing out that the affidavit of non-service demonstrated that the Wilmington Savings insisted on being served at its 501 Carr Road, Wilmington, Delaware address. Wilmington Savings stated in its correspondence with the Zimmermans that all documents "must" be served there. (CP at 15, 94-99). The Zimmermans argued that since Wilmington Savings directed "all legal notices" to be sent out of state to Delaware, Wilmington Savings could not claim foul for the

Zimmermans doing exactly that they were told. (CP at 8; RP August 2, 2019, at 8-9).

4.11. The trial court, after hearing arguments at the show cause hearing and then on reconsideration, weighed the evidence and found that the Zimmermans substantial complied with the long arm statute and that service of process was properly perfected. (CP at 186, 205). The trial court, however, reviewed the merits of the case and granted Wilmington Savings motion in part by finding "no injury" to "payments not barred by the statute of limitations. . . ." (CP at 186-87, 205-06).

4.12. The Zimmermans appealed.

4.13. On appeal, Division 2 held that the Zimmermans "personally served defendant Wilmington Savings Fund Society FSB in Delaware, but they failed to file a declaration stating that Wilmington could not be served in Washington as required by our long arm statute." *Zimmerman v. Wilmington Sav. Fund Soc'y FSB*, 16 Wn. App. 2d 1092 (2021). It further held that "The facts do not support a logical conclusion that service could not be had in Washington" and that "We disagree with the trial court and conclude that there was no substantial compliance" with "RCW 4.28.185(4)." *Id.* Finally, the Court of Appeals held, with no further analysis, that RCW 4.28.185 is "applied narrowly because jurisdiction obtained through service out of state is in derogation of the common law."

Id.

5. WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals Decision is in Conflict with Decisions of this Court and Courts of Appeal Regarding the Proper Standard of Review Under RCW 4.28.185, Not Re-Weighing the Evidence on Appeal, and Not Disturbing Trial Court Factual Findings Supported by Substantial Evidence.

"A trial court must make findings of fact as to all the ultimate facts and material issues." *In re Marriage of Lutz*, 74 Wn. App. 356, 370, 873 P.2d 566, 574 (1994). Thus, a trial court's findings of fact are reviewed for substantial evidence. *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227, 245 (2012).

"Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Id*. In other words, courts of appeal defer to the trial court's determinations of the weight of the evidence. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580, 583 (2016). This is because a court of appeal should not vacate a factual finding made by the trial court unless it is clearly erroneous. *Tricore Investments, LLC v. Estate of Warren through Warren*, 168 Idaho 596, 485 P.3d 92, 106 (2021) (applying substantial evidence test and holding "the trial court's findings of fact will be liberally construed in favor of the judgment entered.").

The trial court need not "delineate which evidence went to any particular proposition." *Mueller*, 185 Wn.2d at 17. Direct and circumstantial

evidence is properly considered by the trial court. *Id*. The trial court may draw reasonable inferences from the evidence presented and those inferences are substantial evidence. *McEwen v. Tucci & Sons, Inc.*, 71 Wn.2d 539, 539, 429 P.2d 879, 879 (1967) (holding reasonable inferences from the evidence is substantial evidence and court of appeal has no ability to overturn such findings).

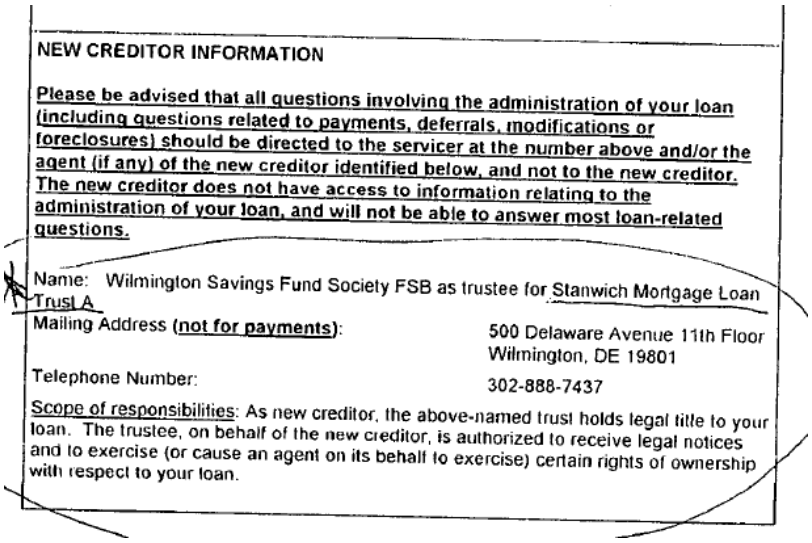
An appellate court may not substitute its judgment for that of the trial court even though it might have resolved the factual dispute differently. *Beeson v. Atl.-Richfield Co.*, 88 Wn.2d 499, 503, 563 P.2d 822, 824 (1977); *McEwen*, 71 Wn.2d at 539. Therefore, it is improper for a court of appeal to reweigh evidence considered by the trial court even if there is conflicting evidence. *Mueller*, 185 Wn.2d at 17 (holding appellate court erred by reweighing the evidence on appeal); *Merriman v. Cokeley*, 168 Wn.2d 627, 632, 230 P.3d 162, 165 (2010) (holding appellate court erred by reweighing the evidence on appeal). This is especially true since decisions to vacate a default judgment are reviewed for "abuse of discretion" and such abuse only occurs when the trial court is manifestly unreasonable.

Here, this Court should accept review of this case because Division 2's decision is in conflict with this Court's precedent. Division 2 erroneously re-weighed the evidence on appeal. It erroneously applied a strict interpretation standard to the appliable statute. Thus, this Court is

called upon to provide guidance to the Division 2 against re-weighing evidence on appeal and substituting its own judgment for that of the trial court. The trial court's finding was that the evidence, as a whole, "in effect" demonstrated that Wilmington Savings could not be served in Washington State. The trial court's factual finding was not manifestly unreasonable.

First, the Zimmermans were expressly told that Wilmington Saving purchased their loan. (CP at 8). Washington State has no city or town named "Wilmington." The common-sense factual conclusion—supported by reality—that Wilmington Savings in an out of state bank and does not have a Washington State presence cannot be reasonably ignored. The trial court acted within its discretion to draw the reasonable inference that the purchase notice given to the Zimmermans helped support the fact that Wilmington Savings did not have a Washington State presence to effectuate service of process.

Second, Wilmington Savings expressly told the Zimmermans that "legal notices" were to be "received" in Delaware, not Washington State:



NEW CREDITOR INFORMATION

Please be advised that all questions involving the administration of your loan (including questions related to payments, deferrals, modifications or foreclosures) should be directed to the servicer at the number above and/or the agent (if any) of the new creditor identified below, and not to the new creditor. The new creditor does not have access to information relating to the administration of your loan, and will not be able to answer most loan-related questions.

Name: Wilmington Savings Fund Society FSB as trustee for Stanwich Mortgage Loan Trust A

Mailing Address (not for payments): 500 Delaware Avenue 11th Floor Wilmington, DE 19801

Telephone Number: 302-888-7437

Scope of responsibilities: As new creditor, the above-named trust holds legal title to your loan. The trustee, on behalf of the new creditor, is authorized to receive legal notices and to exercise (or cause an agent on its behalf to exercise) certain rights of ownership with respect to your loan.

(CP at 8). Wilmington Savings has unclean hands and is estopped from arguing that out of service on them was improper. It is notable that the Zimmermans filed their complaint and summons *pro se*, relying on this direction from Wilmington Savings to serve legal notices on them in Delaware. The trial court was within its discretion to draw the reasonable inference that Wilmington Savings' instruction to serve legal notices on it in Delaware supported the fact that Wilmington Savings did not have a Washington presence to effectuate service of process.

Third, the process server reported that the "[s]ervice [was] rejected by Debbie Green, Legal Administrator" at the above address because she "was not authorized to accept service at th[at] location." (CP at 15). Instead, the process server was told by Wilmington Savings that "All documents related to a trust *must* be served on their trust division at 501 Carr Road,

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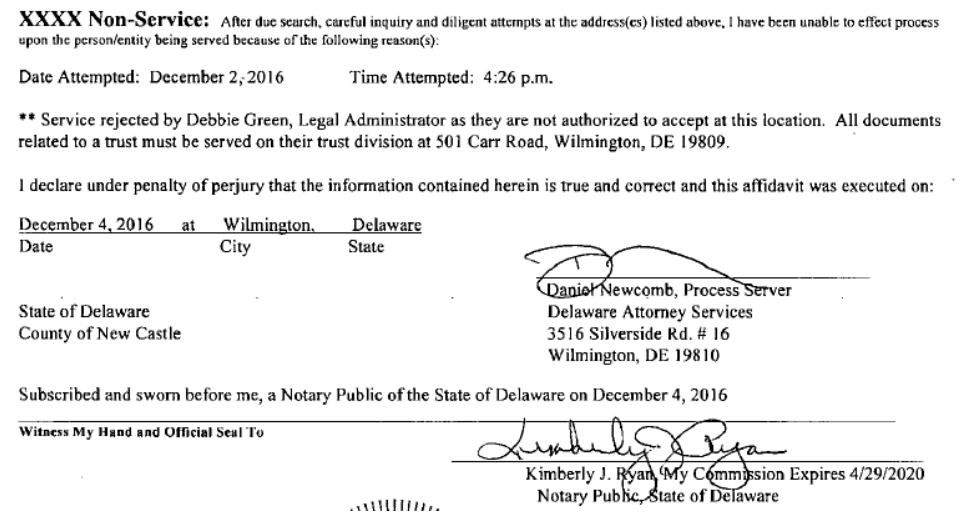

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I declare under penalty of perjury that the information contained herein is true and correct and this affidavit was executed on:

December 4, 2016 at Wilmington, Delaware
Date City State

Daniel Newcomb, Process Server
Delaware Attorney Services
3516 Silverside Rd. # 16
Wilmington, DE 19810

State of Delaware
County of New Castle

Subscribed and sworn before me, a Notary Public of the State of Delaware on December 4, 2016

Witness My Hand and Official Seal To

Kimberly J. Ryan, My Commission Expires 4/29/2020
Notary Public, State of Delaware

(CP at 15) (emphasis added).[2] Thus, the trial court was within its discretion to draw the conclusion, or reasonable inference, that Wilmington Savings' direct instruction that all notices "must" be served on it in Delaware supported the fact that Wilmington Savings did not have a Washington presence to effectuate service of process.

Fourth, the process server's successful service on, and Wilmington Savings acceptance of service of, *Washington State court pleadings* at the address he was expressly instructed to serve such documents on by Wilmington Savings support that fact that Wilmington Savings did not have a Washington presence to effectuate service of process. The trial court was

[2] Wilmington Saving made arguments that this was a hearsay statement. Clearly, it would have been subject to the presence sense impression exception and admission by a party-opponent.

within its discretion to make such finding.

On appeal, Wilmington Savings cited *Sharebuilder Sec., Corp. v. Hoang*, 137 Wash.App. 330, 335, 153 P.3d 222 (2007). In *Sharebuilder*, the sole basis of the out of state service was that *Sharebuilder* "had a California address . . . where at one check had been mailed to [the party to be served]." *Id.* at 333. *Sharebuilder* than gave the summons and complaint to an adult resident at that address. *Id.* Clearly, these facts are entirely distinguishable from the case at hand. *Sharebuilder* had no reason to believe that the party to be served did not reside in Washington State. *Sharebuilder* had no verification from the party to be served of the out of state address to perfect service. *Sharebuilder* did not even know the party to be served correct name. *Sharebuilder* was not directed to serve to "legal notices" by such party anywhere, let alone at that address. Moreover, the party to be served did not direct service of process to a certain out of state address. The party to be served did not ever accept service. The party to be served was not a bank that just from reading its name was clearly not located in Washington State. All of which is true in this matter. Thus, it was understandable why the court of appeals in *Sharebuilder* reversed the order denying the motion to vacate for failure to obtain substantially comply with RCW 4.28.185. *Sharebuilder* is distinguishable and not helpful to Wilmington Savings's case.

Wilmington also cited *Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wn. App. 366, 203 P.3d 1069 (2009). This case's attenuated daisy chain of attempted and ultimately failed service of process is concisely summarized by the court of appeals:

> [A] process server attempted to serve [the party at its] . . . office in Rosalia, Washington. The web site [obtaining the address of this office] expressly disclaims the accuracy, reliability and timeliness of the information on its web site. The Rosalia office was locked and closed. An employee at a nearby business informed the process server that [the party to be served] office was relocated to Lewiston, Idaho, approximately 75 miles away.
>
> At the Lewiston office, the process server asked for [who he believed was the registered agent], but was told [that person] was no longer with the company and that Ray Leiterman was in charge. The process server served the summons and complaint on Mr. Leiterman. Mr. Leiterman forwarded the summons and complaint to Carlton Kennard, [the party to be served] parent company's assistant general counsel in Kansas. Mr. Kennard claims he asked an assistant to forward the summons and complaint to William J. Schroeder, an attorney and [the party to be served] local registered agent. Mr. Schroeder declared the summons and complaint were not received by him.

Id. at 369. Again, this case is entirely distinguishable and nothing like the case at hand. The party to be served was never in fact served with anything by the complaining party to the litigation. The party serving the complaint and summons had no verification of any address for service of process and was not specifically directed to serve anything anywhere. Thus, it is understandable why this case's attenuated daisy chain of attempted

services did not substantially comply with RCW 4.28.185. This case is also distinguishable and not helpful to Wilmington Savings.

Respondent cited *Barr v. Interbay Citizens Bank of Tampa, Fla*., 96 Wash. 2d 692, 649 P.2d 827, 827 (1982). This case supports the Zimmermans not Wilmington Savings. In *Barr*, this Court made clear that "substantial not strict compliance is sufficient." *Id.* at 696. The case discusses how there is an "injury prong" of substantial compliance applies *if the affidavit is filed after the summons and complaint are served*. *Id.* (citing *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wash.2d 469, 472, 403 P.2d 351 (1965) (holding "The statute does not provide that the affidavit must be filed *before the summons and complaint are served*, but simply that the service will be valid only when such an affidavit is filed.") (emphasis added). The Zimmerman's affidavit of service and affidavit explaining why service was made in Delaware, out of state, were filed on the same date, before the judgment, and nothing was "late." Therefore, the injury prong is not applicable. Even if could be, Wilmington Savings cannot claim injury where it specifically directed the Zimmermans where to serve them.[3] As in *Barr*, the Zimmermans were not using the

[3] It is also worth noting that Wilmington Savings only brought the motion to *vacate almost two years after a change in law occurred subsequent to trial court entering default orders against it*. *See Edmundson v. Bank of Am., N.A.*, 194 Wash. App. 920, 927, 378 P.3d 272 (2016). Thus, no injury occurred to Wilmington *at the time the default orders were entered*.

long-arm statute to "burden or harass defendant." They were using it at Wilmington's Savings specific and repeated instruction for out of state service. Moreover, the trial court in the case at hand weighed the evidence presented as to out of state service. This included the affidavit where the process server was told by Wilmington Savings that he "must" serve the entity at a specific out of state address. The trial court then made a specific finding that RCW 4.28.185(4) was substantially complied with. It cannot be said the trial court abused its discretion in viewing the evidence presented as to out of state service "to the effect that c[ould not] be made within the state." *See Barr*, 96 Wn.2d at 696. Thus, *Barr* supports the Zimmermans' position.

Wilmington Savings, last, cited *Meeker Court Condo. Owners Ass'n v. Gonzalez*, No. 77735-1-I, 2018 WL 1907812 (Wash. Ct. App. Apr. 23, 2018). This case too is readily distinguishable. In *Meeker*, no affidavit to the effect of why service could not be perfected in Washington State was filed *prior* to the default judgment entered. In the case at hand, the affidavit and all evidence demonstrating to the effect that service could not be perfect in state was filed *before* judgment was entered. Moreover, the trial court made no factual finding in *Meeker* that RCW 4.28.185 was substantially complied with, as the trial court did in this case. *Meeker*, an unpublished decision, is not helpful to Wilmington Savings.

In sum, the trial court judge was certainly "a rational fair-minded person." That is indisputable. She was presented the substantial quantum of evidence stated above, all of which supported to "the effect" that Wilmington Savings did not have a Washington presence to effectuate service of process. The trial court drew reasonable inferences. As the fact finder it was within its discretion to determine that there was substantial compliance" with RCW 4.28.185(4) to "*the effect*" that service could not be made within the state. (emphasis added). The finding was not clearly erroneous and many a fair-minded persons would come to the same conclusion. Division 2 would have come to a different conclusion if sitting in the trial court's shoes. But, as a court of appeal, it was not empowered to re-weigh the evidence and vacate this finding even though it did not find the evidence persuasive enough. Division 2 inappropriately re-weighed the evidence and held the Zimmermans to strict compliance with RCW 4.28.185(4), not substantial compliance, and this Court should take review of the matter.

5.1. <u>As a Matter of Substantial Public Importance this Court should grant this Petition for Review in Order to "craft a proper and meaningful principle of construction when a statute purports to change an identified common law rule" and a Court of Appeal Decides the Case Based on the Much Criticized Derogation of the Common Law Doctrine.</u>

This Court stated in *Wickert* that the "whole principle of strict

construction of statutes in derogation of the common law 'has been the object of a great deal of criticism in modern times.'" *Wickert v. Cardwell* 117 Wn.2d 148, 155, 812 P.2d 858, 861 (1991) (citing 3 J. Sutherland, Statutory Construction § 61.04 (4th ed. 1986)). The Court further explained that "Dean Pound has said that the derogation of the common law doctrine 'has no analytical or philosophical justification.'" *Id.* (citing 3 R. Pound, Jurisprudence 664 (1959)).

This Court went on to say in *Wichert* that a future case would be beneficial to "craft a proper and meaningful principle of construction when a statute purports to change an identified common law rule." This is because "[m]ere quotation of the [derogation of the common] 'rule' is not enough, be it in a brief or an opinion." *Id.* at 155–56. The derogation of the common law doctrine appears to be "merely justification[] for decisions arrived at on other grounds, which may or may not be revealed in the opinion." *Id.* at 153.

Additionally, this Court noted that the derogation of the common law rule is at odds with RCW 1.12.010, which mandates "[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction." *Wichert*, 117 Wn.2d at 154.

This Court further suggested in *Wichert* that it is possible that statutes regarding service of process should be liberally construed, not strictly construed in favor of the common law because there are substantial

problems with the derogation of the common law doctrine. *See id.* For example, this Court's decision in *Barr*, that "substantial and not strict compliance is sufficient" to comply with RCW 4.28.185(4) is in accord with the proposition that it is inappropriate to apply the derogation of the common law doctrine to RCW 4.28.185 and that the entire doctrine is problematic and easily misapplied.

Here, Division 2's reasoning relied on the derogation of the common law doctrine and its purported mandate requiring strict construction of RCW 4.28.185. *Zimmerman*, 16 Wn. App. 2d 1092 (holding RCW 4.28.185 is "applied narrowly because jurisdiction obtained through service out of state is in derogation of the common law."). In doing so, Division 2 did exactly what this Court in *Wichert* found so troubling—"[m]ere quotation of the [derogation of the common] 'rule' . . . in . . . an opinion." *Wichert*, 117 Wn.2d at 155–56. Division 2 failed to acknowledge that "substantial and not strict compliance is sufficient" and that the affidavit of service of the complaint and summons in this case was filed at the same time as the affidavit of non-service. Along the other evidence previously filed and attached to the complaint, all of which reasonably demonstrated "to the effect that service c[ould not] be made within the state."

The Zimmermans, like this Court in *Wichert*, believe that merely holding that RCW 4.28.185 should be strictly or narrowly construed in

favor of the common law—without more and without reasoning why—is not enough to vacate the trial court's express finding of fact that there was substantial compliance with RCW 4.28.185.

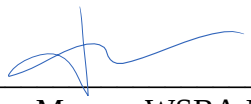
In sum, the Zimmermans request this Court grant their petition for review so that this case—can be that other "case with thorough briefing and analysis" and "cause a complete review and resolution" of appropriateness of the derogation of the common law doctrine, as applied to RCW 4.28.185(4) and other statutes. This briefing, analysis, and ultimate resolution of how to properly apply, if at all, the derogation of the common law doctrine is a matter of substantial public interest, and this Court should grant this Petition for Review.

6. CONCLUSION

Pursuant to RAP 13.4, the Zimmermans respectfully requests this Court grant review, for the reasons stated herein.

Respectfully submitted this 19th day of July, 2021.

HARBOR APPEALS AND LAW, PLLC



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SUPREME COURT OF THE STATE OF WASHINGTON

KENNETH AND VICTORIA ZIMMERMAN, Appellant, v. WILMINGTON SAVINGS FUN SOCIETY FSB, AS TRUSTEE FOR STANWHICH MORTGAGE LOAN TRUST A, Respondent.	No. 99714-4 Court of Appeals Case No. 53763-0-II DECLARATION OF SERVICE

My name is Stacia Smith, I am over the age of 18. I declare this statement to be true and correct, under penalty of perjury under the laws of the state of Washington. I caused to be served the July 19, 2021, Petition for Review and Declaration of Service, filed today, on

1. Steven K. Linkon, WSBA No. 34896
   1100 Bellevue Way NE, #474
   Bellevue, WA 98004
   (949) 697-8889

via electronic mail, and via USPS first class mail, this 19th day of July, 2021.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENNETH P. ZIMMERMAN, JR. and VICTORIA L. ZIMMERMAN, husband and wife, Appellants, v. WILMINGTON SAVINGS FUND SOCIETY FSB, as trustee for STANWICH MORTGAGE LOAN TRUST A, Respondents, NORTH CASCADE TRUSTEE SERVICES, INC., trustee to deed of trust, Defendant.	No. 53763-0-II UNPUBLISHED OPINION

GLASGOW, J.—Kenneth and Victoria Zimmerman defaulted on their mortgage. Six years later, they filed an action seeking to quiet title against their deed of trust because any action to foreclose would be barred by the statute of limitations. They personally served defendant Wilmington Savings Fund Society FSB in Delaware, but they failed to file a declaration stating that Wilmington could not be served in Washington as required by our long arm statute.

Wilmington failed to appear, and the trial court granted the Zimmermans a default order and judgment. Wilmington later moved to vacate the default order and judgment, arguing that the trial court lacked personal jurisdiction based on failure to comply with the long arm statute. The trial court vacated the default order and judgment.

The Zimmermans appeal, asserting that they substantially complied with the long arm statute because the record contains an affidavit from which the trial court could logically conclude

that Wilmington could not be served in Washington and, if Wilmington was properly served, there is no defect in the default order and judgment. We disagree and affirm.

FACTS

Wilmington held a promissory note secured by a deed of trust on the Zimmermans' home. The note required monthly installment payments until 2038. It is undisputed that the Zimmermans stopped making their monthly payments and that they were in default as of July 1, 2010. Wilmington did not accelerate the debt, and the Zimmermans never resumed payments.

RCW 7.28.300 allows the owner of real estate to quiet title against a deed of trust where an action to foreclose would be barred by the statute of limitations. In 2016, the Zimmermans brought an action to quiet title over the deed of trust based on RCW 7.28.300 seeking to have the deed of trust declared null and void.

The Zimmermans filed two affidavits related to service on Wilmington. First, a process server attempted to serve Wilmington at 500 Delaware Avenue in Wilmington, Delaware. The process server's first affidavit explained that service was rejected and a "[l]egal [a]dministrator" told them that "[a]ll documents related to a trust must be served on their trust division at 501 Carr Road" in Wilmington, Delaware. Clerk's Papers (CP) at 15. The second affidavit established personal service of the summons and complaint at the Carr Road address. Neither affidavit mentioned any attempt to serve Wilmington in Washington. Nor is there any information in this record explaining why Wilmington could not be served in Washington.

North Cascade Trustee Services answered the complaint and was dismissed by agreed order. Wilmington did not appear and the trial court entered an order of default in February 2017. The trial court also entered a final order concluding that the underlying debt secured by the deed

of trust would be barred by the statute of limitations, quieting title, and requiring that the deed of trust be removed from the county auditor's record.

Then in December 2018, Wilmington filed a CR 60 motion to show cause why default should not be set aside and vacated. Wilmington argued that under RCW 4.28.185(4), Washington's long arm statute, the Zimmermans were required to file an affidavit establishing that Wilmington could not be served in Washington, but they failed to do so. As a result, the trial court lacked personal jurisdiction over Wilmington. Wilmington argued that the default judgment was therefore void and had to be vacated.

The trial court entered an order requiring the Zimmermans to show cause. In response, the Zimmermans argued that they had substantially complied with the long arm affidavit requirement because they had submitted an affidavit explaining that all documents related to a trust had to be served at Wilmington's Carr Road address in Delaware. The logical conclusion from this affidavit, they said, was that Wilmington could not be served in Washington.

The trial court initially declined to vacate the default order, finding substantial compliance. Wilmington moved for reconsideration. Recognizing that a substantial compliance analysis included consideration of harm or injury, Wilmington argued on reconsideration that the entire amount owed under the note should not have been excused as a result of the six-year statute of limitations. The note required monthly installment payments, and the statute of limitations accrued for each missed payment when that payment became due. *See Edmundson v. Bank of Am. N.A.*, 194 Wn. App. 920, 927-28, 378 P.3d 272 (2016). Thus, when Wilmington filed its motion for reconsideration in 2019, only two to three years of payments that had been due for more than six years were barred. But the default order deprived Wilmington of the ability to enforce payment

obligations that were not barred by the statute of limitations.

Upon reconsideration, the trial court entered an order that effectively granted the relief Wilmington was requesting. The final order on reconsideration stated: "The [d]efault and [d]efault [j]udgment entered against Wilmington are vacated only with respect to installment payments not barred by the statute of limitations related to [p]laintiffs' complaint." CP at 206. The trial court also included language stating that it "hereby finds" "[t]he [p]laintiffs substantially complied with RCW 4.28.185 and service was valid on the [d]efendants in Delaware. The court finds there was no injury to the [d]efendants with respect to the [d]efault of payments not barred by the statute of limitations."[1] CP at 205.

The trial court later entered a judgment for money and decree of foreclosure in Wilmington's favor under the same cause number. In part, this later order granted summary judgment to Wilmington on the Zimmermans' quiet title claim.

The Zimmermans appeal the order on reconsideration vacating the default order and judgment against Wilmington. Wilmington did not cross appeal.

ANALYSIS

The Zimmermans contend that the trial court erred when it granted Wilmington's CR 60 motion to vacate the default order and judgment. They assert that the portion of the order finding substantial compliance with the affidavit requirement in RCW 4.28.185(4), the long arm statute, cannot be revisited because Wilmington did not appeal. Alternatively, the Zimmermans argue that service was proper because they substantially complied by filing an affidavit explaining that

[1] The "not" in this sentence appears to be a mistake. CP at 205.

Wilmington would only accept service at the Carr Road address in Delaware. The Zimmermans assert that if service was proper, then Wilmington raised no valid basis under CR 60 to vacate the default order and judgment, and they contend that the trial court improperly modified a final order. Finally, the Zimmermans argue that there was no basis for the trial court to consider the merits of the underlying statute of limitations issue when addressing the motion to vacate. We disagree and conclude that the trial court was correct to vacate the default order and judgment.

Default judgments are generally disfavored because we prefer to determine cases on their merits. *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 446, 332 P.3d 991 (2014). Under CR 55(c)(1), a default order may be set aside "[f]or good cause shown and upon such terms as the court deems just," and a default judgment may be set aside in accordance with CR 60(b). CR 60(b), in turn, provides that a court may relieve a party from a final order or judgment for several enumerated reasons, including that the judgment is void. CR 60(b)(5). A default judgment is void when entered without personal jurisdiction. *Ha*, 182 Wn. App. at 446.

We generally review a decision on a motion to vacate for abuse of discretion. *Morrin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). But "[w]hether a judgment is void is a question of law that we review de novo." *Ha*, 182 Wn. App. at 447. When the facts are not in dispute, whether the trial court had personal jurisdiction is a question of law. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992).

A. Scope of Review

The Zimmermans rely on the portion of the trial court's order where the trial court "finds" substantial compliance with the long arm statute and proper service. They note that Wilmington

has not cross appealed. Thus, the Zimmermans contend, they can conclusively rely on this portion of the order. We disagree.

Despite the trial court's use of the term "finds," the actual facts here were undisputed. No party disputes that the affidavit reflects what the Zimmermans' process server was told. But resolving whether those facts amount to substantial compliance with the long arm statute and whether service was valid both require legal conclusions. Where a finding is mislabeled, we review it for what it really is, here a legal conclusion. *See, e.g.*, *State v. Conway*, 8 Wn. App. 2d 538, 552 n.8, 438 P.3d 1235 (2019); *see also*, *Lewis*, 119 Wn.2d at 669 (When the facts are not in dispute, whether the trial court had personal jurisdiction is a question of law.).

Moreover, even though Wilmington did not appeal any portion of the trial court's order vacating the default order and judgment, the Zimmermans did appeal this order and the entire order is designated in the notice of appeal. The trial court's determinations regarding substantial compliance and proper long arm service prejudicially affect its ultimate determination as to whether the default order and judgment must be vacated. *See* RAP 2.4(b). So even if we were to parse the various portions of the appealed order, which we are not inclined to do, the trial court's decisions regarding long arm service would still be within the proper scope of our review.

B. Personal Jurisdiction and Washington's Long Arm Statute

To invoke personal jurisdiction over an out-of-state defendant, the plaintiff must comply with Washington's long arm statute. The statute provides that "[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) (emphasis added). Personal service on the out-of-state defendant ordinarily does not become valid until the affidavit is filed, making a judgment entered

absent the required affidavit void for lack of personal jurisdiction. *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 380, 534 P.2d 1036 (1975). The party seeking to show proper jurisdiction has the burden to show compliance. *See John Does v. CompCare, Inc.*, 52 Wn. App. 688, 693, 763 P.2d 1237 (1988). And the statute is applied narrowly because jurisdiction obtained through service out of state "is in derogation of the common law." *Hatch*, 13 Wn. App. at 380.

Substantial compliance with the affidavit requirement can be enough, however. *Sharebuilder Secs., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007). First, substantial compliance requires that when "viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state." *Id.* at 334-35. Second, there must have been no injury to the defendant from the noncompliance. *See Barr v. Interbay Citizens Bank*, 96 Wn.2d 692, 696, 649 P.2d 827 (1982).

In *Sharebuilder*, the mere fact that the defendant was served in another state was not enough to support a logical conclusion that they could not be served in Washington. 137 Wn. App. at 335. In contrast, affidavits establishing a business was not licensed in Washington, did no business of any sort in Washington, and had no employees or agents in Washington, were enough to support a logical conclusion that service in Washington was impossible. *Barr*, 96 Wn.2d at 696.

Here, the Zimmermans relied on a single sentence in an affidavit of attempted service explaining that a Wilmington "[l]egal [a]dministrator" told the process server: "All documents related to a trust must be served on their trust division at 501 Carr Road" in Wilmington, Delaware. CP at 15. The Zimmermans contend that the logical conclusion to be drawn from that sentence is that service in Washington was impossible. *See Sharebuilder*, 137 Wn. App. at 334.

The affidavit never mentioned any attempt to serve Wilmington in Washington and instead only addressed service attempts made in Delaware, nor is there any other evidence in this record that service in Washington was attempted. The affidavit also does not mention any discussion with the legal administrator about whether or how service in Washington could be accomplished. The facts do not support a logical conclusion that service could not be had in Washington. We disagree with the trial court and conclude that there was no substantial compliance. The Zimmermans failed to satisfy RCW 4.28.185(4).[2]

Washington courts have consistently held that where a party has not complied with the long arm statute prior to judgment, the judgment is void for lack of jurisdiction. *E.g.*, *Morris v. Palouse River & Coulee City R.R.*, 149 Wn. App. 366, 372, 203 P.3d 1069 (2009) (judgment void where prejudgment affidavits did not substantially comply); *see also Sharebuilder*, 137 Wn. App. at 335. Where the underlying default judgment is void for lack of jurisdiction, the trial court has a nondiscretionary duty to vacate. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). Thus, the trial court was correct to vacate the default order and judgment under CR 60(b)(5).[3]

The Zimmermans also assert that the trial court should not have considered the underlying statute of limitations arguments. We need not address this issue because we have already

[2] To the extent the Zimmermans also argue that Wilmington failed to establish the injury prong of the substantial compliance test, we need not reach this issue because the Zimmermans failed to establish that service could not be had in Washington.

[3] Wilmington concedes it is not entitled to enforce installment payments barred by the statute of limitations, and it does not object to the corresponding language in the trial court's order vacating the default order and judgment.

concluded that the Zimmermans' substantial compliance argument fails because the Zimmermans failed to satisfy RCW 4.28.185(4). Whether the underlying statute of limitations analysis was a proper consideration in the trial court's substantial compliance analysis need not be addressed here.[4]

CONCLUSION

While we disagree with the trial court's reasoning in part, we affirm the trial court's order to vacate the default order and judgment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Sutton, A.C.J.

Maxa, J.

[4] The Zimmermans also raise the timeliness of the motion to vacate and they mention res judicata and the concept of finality in their reply brief. Neither issue was raised below. We therefore decline to address these issues.

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