COURT OF APPEALS **No. 77214-7-I**

SUPREME COURT **No. 96869-1**

FILED
Court of Appeals
Division I
State of Washington
3/7/2019 3:37 PM

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KIRK AND JENNIFER BANKS,

Petitioners,

v.

MARK AND GEORGIA HOPKINS,

Respondents.

CORRECTED PETITION FOR SUPREME COURT REVIEW

Jose F. Vera of Vera & Associates PLLC
WSBA #25534, Attorney for Petitioners
200 West Thomas Street, Suite 420
Seattle, WA 98119
(206) 793-8318

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

WASHINGTON STATUTES

WASHINGTON STATE CIVIL RULES

WASHINGTON RULES OF PROFESSIONAL CONDUCT

I. INTRODUCTION

On January 27, 2015, Mark and Georgia Hopkins (the "Hopkins" or "Respondents") took a default judgment against 79 year old, Billie E. Getschmann Skyles ("Skyles"). The default judgment largely perfected the Hopkins $50,000 purchase of Skyles' Gold Bar Washington real property that was then valued at $250,000. The January 27, 2015 Default Judgment relied on (1) a defective service of process, (2) a defective ***proof of service by mail*** for the Default Motion pleadings that was executed and filed without being made "under penalty of perjury", and (3) the Hopkins' lawyers remaining silent before the ***ex parte*** commissioner during the Default Motion (i) about their efforts to appoint a guardian for Skyles to consummate the underlying real estate transaction, (ii) about their decision to communicate only through Skyles' caretaker, Ms. Jennifer Wilson (n/k/a Ms. Jennifer Banks) because they acknowledged that communicating with Skyles about the real estate transaction was ineffective, and (iii) about the Hopkins' lead counsel declining the Hopkins' request to evaluate Skyles to assure her mental capacity to participate in the underlying transaction. Informing the commissioner about these last three items may have triggered judicial scrutiny of the underlying real estate deal because Washington Civil Rules prohibit a Court from issuing default judgments against incompetent

parties not represented by guardians' ***ad litem***. Skyles passed away 8 months later on September 26, 2015. The Petitioners, Kirk and Jennifer Banks (the "Banks") are Skyles' Assignees who continue the challenge initiated by Skyles against the Hopkins' January 27, 2015 default judgment.

Division I of the Court of Appeals addressed the above first question regarding the defective service of process on Skyles in Hopkins v. Banks, No. 74068-7-I at pp. 8-9, (Wash. Ct. App. Apr. 3, 2017) by affirming that effective personal service occurred on Skyles when her former tenant hand-delivered the summons and complaint to her ranch hand, Mr. Kirk Banks[1], without saying a word.

This leaves two issues for possible consideration by the Supreme Court. First, whether a ***proof of service by mail*** for the Hopkins' Default Motion issued by a legal assistant without CR 5(b)(2)(B)'s required "under penalty of perjury" language invalidated the Hopkins' January 27, 2015 Default Judgment under either CR 5 or CR 55. And relatedly, whether the Hopkins' corrective January 6, 2016 ***proof of service by mail*** remedied the fatal problem of initial ***proof of service by mail*** either retroactively or only as of January 6, 2016.

---

[1] On January 8, 2015, the Snohomish County Court Commissioner determined that Mr. Kirk Banks was a ranch hand. CP 546. However, Division I of the Court of Appeals made a contrary finding of fact to the effect the Mr. Kirk Banks was one of Skyles' "caretakers" and that as such he could be expected to deliver legal documents to her. CP. 165.

The second possible issue for consideration by the Supreme Court is whether a RPC 3.3(f) violation occurred when Hopkins' counsel failed to disclose to the *ex parte* commissioner his knowledge about Skyles' incompetency to participate fully in the real estate transaction underlying the Hopkin's default motion. And relatedly, whether such violation (if one occurred) would void the default judgement because the nondisclosure deprived the *ex parte* commissioner of a full and fair opportunity to account for all known, material information regarding a defendant's competency to ensure that a default judgment did not issue against an incompetent defendant.

Division I of the Court of Appeals addressed these two issues in summary fashion. With respect to the ***proof of service by mail*** issue, Division I found that the January 6, 2016 corrective Declaration by the legal assistant "remedied the irregularity of the original proof of service filed with the court[,]" back to the date of the original ***proof of service by mail***. Hopkins v. Banks, No. 77214-7-I, slip at 7. Division I further determined that CR 55 lacked any requirement that a proof of service for the default motion be on file with the trial Court before the trial court could issue the default judgment against the defendant. Hopkins v. Banks, No. 77214-7-I, slip at 9.

With respect to the possible violation of RPC 3.3(f) caused by counsel's nondisclosure of known facts to the *ex parte* commissioner about

Skyles' possible lack of sufficient competency relative to the underlying real estate transaction, Division I found no supporting authority for the proposition that violations of disclosure duties imposed by RPC 3.3(f) should be considered as a basis for vacating a default judgment when the nondisclosed information related to the defendant's competency. Hopkins v. Banks, No. 77214-7-I, slip at 9. Division I noted in a footnote that to reach a decision on whether an RPC violation may appropriately be considered outside of a disciplinary hearing, the court would need a basis in law to apply the RPC to the case at hand. Id. at 9, fn 20 (as an example, Division I noted RPC 1.8 as being recognized as a proper basis for refusing to enforce fee agreements with attorneys as being against public policy, citing, LK Operating, LLC v. Collection Grp., LLC, 168 Wn. App. 862,875, 279 P3d 448 (2012)).

The Banks petition Washington's Supreme Court to accept review of Division I's decision in this matter to hold: (1) curative Declarations for Proof of Service by Mail render the service by mail effective on the date of execution "under penalty of perjury," (2) CR 55 requires that a valid proof of service for the default motion shall be on file before the trial court may issue an Order of Default or Default Judgment, and (3) failure to comply with any applicable disclosure obligations under PRC 3.3(f) shall be grounds to challenge a default judgment under the civil rules.

IDENTITY OF PETITIONER

Petitioners are Kirk and Jennifer Banks ("Banks") who are Assignees of Billie E. Getschmann Skyles. Mrs. Skyles initiated the challenge to the below judgment and assigned her rights to the Banks before she passed away, on September 26, 2015.

II. DECISION

Petitioners, Kirk and Jennifer Banks ("Banks") respectfully request this Court to accept review of the decision entered by Division I of Washington Court of Appeals on January 22, 2019 (Court of Appeals No. 77214-7-I)(the "Decision" or "Opinion"). Attached hereto as **Appendix A**.

III. ISSUES PRESENTED FOR REVIEW

A. Whether Court below committed three errors in addressing the problems created by Hopkins' failure to make their ***proof of service by mail*** for their default motion under penalty of perjury:

1. Erred by finding that a ***proof of service by mail*** not made under penalty of perjury constitutes an irregular ***proof of service by mail*** as opposed to an invalid ***proof of service by mail***,
2. Erred by finding that a curative ***proof of service by mail*** cures the problem of the missing "under penalty of perjury" language back to the date of the

original defective ***proof of service by mail*** as opposed to finding the problem cured when the curative ***proof of service*** is executed and filed, and

3. Erred by finding that Civil Rule 55 does not require a valid ***proof of service by mail*** for the default motion pleadings to be filed with the trial court *before* the trial court may issue a default judgment against a defendant.

B. Whether the Court below err when considering the failure of Hopkins' counsel to disclose to the *ex parte* commissioner during default motion proceedings knowledge reasonably related to Skyles' lack of competency by: (1) not finding that such nondisclosure in an *ex parte* setting violated RPC 3.3(f), (2) not finding that violating RPC 3.3(f) in this manner constituted grounds to void the January 27, 2015 Default Judgment, and (3) by not finding that the trial court has the inherent authority to consider whether such RPC violations occurred *and* whether the trial court has the inherent authority to remedy such violations by voiding the related default judgment.

V. STATEMENT OF THE CASE

A. GENERAL BACKGROUND FACTS

Skyles owned about 20 acres of real property just outside of Gold Bar, Washington. CP 132. Unfortunately by 2014, Skyles found herself at the end of her proverbial rope: Skyles was in failing health, had no available cash and dwindling food reserves, and believed she had unpaid county real

estate taxes. CP 132-135. Skyles was afraid.

In very early 2014, Skyles asked Ms. Banks to reach out to the Hopkins' to see if they wanted to purchase about half of her land. CP 134. The Hopkins understood Skyles' predicament and offered to purchase about 10 acres of her real property. CP 774-778. The Hopkins controlled the purchase process that resulted in an agreement to purchase about 10 acres (the "Property") from Skyles as manifest in the February 27, 2014 ***Purchase and Sale Agreement*** ("PSA"). CP 665-671, 672. Throughout the entire sales process for the Hopkins transaction, the Hopkins, the Gourley Law Firm, Mr. Carleton F. Knappe (WSBA # 5697), and Snohomish Escrow communicated mostly with Ms. Banks because all recognized that for practical purposes Skyles could not effectively communicate about the transaction in any meaningful way. CP 775.

Under the PSA, the purchased price for all the Property was about $50,000. CP 665. Yet unknown to Skyles and Ms. Banks, online valuation websites valued the Property between $240,000 and $300,000. CP 287.

The extreme difference between the PSA's purchase price and the Property's market value caused immediate problems. These problems were compounded by Skyles' vulnerable health and economic condition and ignorance as to the Property's true market value. The Hopkins, the title company, and the escrow company all knew about the problem created by

the difference between the sales' price and the Property's market value. CP 302-308. The title company was concerned enough by the difference in the PSA price and the market price that it requested the Hopkins to have Skyles evaluated by a lawyer. CP 302.

According to an April 2, 2014 letter from lawyer Mr. Charleton F. Knappe (WSBA # 5697) to Georgia Hopkins, Mr. Gourley would not provide the Hopkins with such an independent statement. CP 302. Instead of Gourley evaluating Skyles, the Hopkins retained Mr. Knappe to provide the independent lawyer's statement. Mr. Knappe provided the requested statement after meeting with Skyles and assessing her knowledge of and ability to understand the sale of her property to the Hopkins via Snohomish Escrow. CP 300-1. Mr. Knappe issued his assessment statement dated April 8, 2014 to the Hopkins stating that he found that Skyles lacked the acuity to participate in the transaction, and he requested no further direct contact with Skyles. CP 300-1.

The Hopkins responded by leaving a voicemail message for Mrs. Banks on April 14, 2014 indicating that the escrow company (which is a dba of The Gourley Law Group) now wanted a doctor to evaluate Skyles ***or*** to have Mrs. Banks made Skyles' guardian. CP 329-332. The Knappe evaluation process is how Skyles learned that the PSA price may be as much as $250,000 below the Property's market value. CP 306.

B. GENERAL FACTS RELATED TO THE UNDERLYING LITIGATION

The Hopkins' commenced the underlying litigation in November 2014 when they filed a lawsuit to enforce the PSA (Snohomish County Superior Court Cause No. 14-2-07395-8). The Hopkins obtained a Default Judgment in this initial action on January 27, 2015. CP 240. The trial court's minute entry from January 27, 2015 stated that service was proper, Skyles had not appeared and had not filed a response to Hopkins' Default Motion. ***Id***.

Once Skyles learned of the BLA Default Judgment, Skyles both challenged the Default Judgment and later filed a lawsuit that claimed damages related to the entire transaction, including the PSA (Snohomish County Superior Court Cause No. 15-2-05719-5) seeking mainly to reform the PSA sales price to a market price. Unfortunately, under the doctrine of Res Judicata, Skyles filed lawsuit is mostly precluded by the January 27, 2015 Default Judgment.

C. THE TWO PROBLEMS WITH HOPKINS' DEFAULT JUDGMENT

The January 27, 2015 Motion for a Default Judgment and resulting default judgment suffer from two fatal problems. First, the Hopkins' served the ***Default Motion*** pleadings by mail, but failed to make their ***proof of service by mail*** "under penalty of perjury." Second, the Hopkins' lawyer in the default motion proceedings failed to meet the minimum disclosure

requirements applicable to lawyers seeking a default by an ***ex parte*** proceeding because he failed to disclose knowledge relevant to the defendants' lack of mental capacity, when such information is material to the trial court under Civil Rule 55 to enable to court to avoid issuing a default judgment against an incompetent person.

Skyles would have raised the two above issues immediately and in time for Skyles' first appeal in this matter, but for an error in the trial court's ***Minute Entry*** for Hopkins' January 27, 2015 Default Motion. This error delayed Skyles' discovery of these issues until early November 2015. CP 240, 741. The trial court's ***Minute Entry*** incorrectly stated that the trial court entered the Default Judgment after proper service and after Skyles failed to appear in the matter, which, if accurate, would have potentially rendered any defects in the Hopkins ***proof of service by mail*** for the Default Motion moot. CP 240. Skyles discovered the accurate state of affairs after ordering and reviewing the transcript for the January 27, 2015 Default Motion. (Appellate # 74068-7-I, RP January 27, 2015 Hearing Pages 1-5).

D. SKYLES' SECOND MOTION TO VACATE THE HOPKINS' DEFAULT JUDGMENT

Skyles formally raised the defective ***proof of service by mail*** and nondisclosure issues in her Second Motion to Vacate that was heard on January 8, 2016. Docket No. 83. The Hopkins admitted that they failed to

comply with Civil Rule 5(b)(2)(B) and admitted that they failed to disclose information known to their counsel about specific concerns with Skyles' mental capacity. CP 402, 406-7.

1. DEFECTIVE PROOF OF SERVICE BY MAIL FOR HOPKINS' DEFAULT MOTION

Ms. Tracy Swanlund, a legal assistant of The Gourley Law Group, signed the Certificate of Service by Mail *without* making the certification under penalty of perjury under Washington law. CP 237. Skyles directed the trial court to CR 5(b)(2)(B)'s requirement the ***proof of service by mail*** made by a person (not a lawyer) must be by affidavit. CP 224-225. Ms. Swanlund, with all due respect, is not a lawyer, and her proof of service was not by affidavit or compliant with RCW 9A.72.085. ***Id***. It is a mere out of court unsworn statement offered for the truth of the matter asserted. Skyles ultimate point on the defective ***proof of service by mail*** was that Civil Rule 55(b)(4) required a proof of service on file with the Court before the trial court issue a default judgment.

2. FAILURE TO DISCLOSE THE HOPKINS CONCERNS RE SKYLES' MENTAL CAPACITY TO THE TRIAL COURT.

Skyles noted for the trial court that Civil Rule 55 prohibits courts from issuing default judgments against incompetents. CP 227. This prohibition makes a defendant's competency a material fact in the trial court's decision to issue a default judgment. ***Id***. Skyles next noted for the trial court that the Hopkins obtained their Default Judgment in an ***ex parte***

proceeding, which triggered the application of RPC 3.3 (f) with its heightened duty of disclosure for lawyers advocating in an ***ex parte*** proceeding. CP 227.

The Hopkins' only response was that "Mr. Craig Gourley" had no knowledge regarding Skyles' condition—despite the fact that everyone working at Snohomish Escrow worked for and reported to him; and despite the fact that as the supervising lawyer in the 2 person law firm and related small escrow company housed in the same building, he was responsible for all those working below him. CP 406.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept review because both of the primary issues in this appeal involve issues uniquely suited to the Supreme Court's authority and responsibility within our state. The first issue, whether a proof of service by mail not made subject to penalty of perjury for default motion pleadings prevents the trial court from issuing a default judgment against the defendant directly challenging the default judgment, turns on the meaning to two Washington State Civil Rules: CR 5(b)(2)(B) and CR 55(b)(4). The Supreme Court is the final authority on the meaning of Washington Court rules.

The second issue, whether failing to meet the disclosure obligations of RPC 3.3(f) with respect to knowledge (known to the plaintiffs' counsel)

of the defendant's mental competency, renders a default judgment obtained in an ***ex parte*** proceeding voidable because such nondisclosure withholds from the ***ex parte*** trial court facts material to the trial court meeting its Civil Rule 55 imposed duty not to issue default judgments against the mentally incompetent who are not represented by a guardian. This case appears to present this issue as a matter of first impression in Washington. Under the current law, in which a possible RPC 3.3(f) violation may only be considered in the context of a Bar Grievance, both the lawyer and client have every incentive to withhold material information in an ***ex parte*** proceeding because only the lawyer bears the remote risk of a negative consequence from withholding such information—after all who would file the grievance, the client who benefited from the lawyer's silence. If this Court holds that the violation of RPC 3.3(f) may be the basis for voiding an ***ex parte*** issued default judgment, then at least both the lawyer and client/plaintiff bear the risk of a negative consequence when the plaintiffs' lawyer withholds known information from the ***ex parte*** trial court. By reducing the incentives for remaining silent in ***ex parte*** proceedings, this Court would increase the protections for Washington's vulnerable citizens—those in the twilight of competency who have not yet lost, yet who might be in the early stages of losing their grip on the captainship of their soul.

A. <u>What consequence to making a Civil Rule 5(b)(2)(B) proof of service by mail not under penalty of perjury.</u>

The Hopkins' January 13, 2015 Certificate of ***proof of service by mail*** failed to meet the proof requirements of CR 5(b)(2)(B). <u>Hopkins v. Banks</u>, No. 77214-7-I, slip at 6. This happened because the required ***proof of service by mail*** failed to be made "under penalty of perjury" as required by CR 5(b)(2)(B). Certifications not made under penalty of perjury are not competent proof in motion proceedings. <u>Wilkerson v. Wegner</u>, 58 Wn.App. 404, 408 at fn.3, 793, P.2d 983 (Div. III 1990). Division I of the Court of Appeals took this idea a step further when it stated: [A]bsent the "under penalty of perjury" language the certificate of mailing is not proof at all. <u>Brackman v. City of Lake Forest Park</u>, 163 Wn.App. 889, 892, 262 P.3d 116 (Div. I 2011).

Here, Division I of the Court of Appeals resolved the issue by following tightly in the analytical footsteps of the Snohomish County trial court when it found that the ***proof of service by mail*** made under penalty of perjury and filed on January 6, 2016 remedied the January 13, 2015 Certificate of Mailing retroactively back to January 13,2015. <u>Hopkins v. Banks</u>, No. 77214-7-I, slip at 7. Both Division I and the trial court failed to address the legal status of the parties' litigation for the almost 12 months between the two ***proofs of services by mail***. The Banks filed their first ***Notice of Appeal*** in this matter on October 14, 2015.

During the almost 12 months of litigation between the Banks and Hopkins via numerous motions and the commencement of the parties first appeal, no valid proof of service by mail was of record with the trial court. The Brackman Court specifically stated that "[p]roof of service by mail occurs when the mailer signs an affidavit, declaration or certificate [under penalty of perjury] that the documents were mailed[.]" Brackman, 163 Wn.App. at 892 (underline annotation added). The Brackman Court continued that, "[r]equiring "under penalty of perjury" language is important to ensuring that the statement that the documents have been mailed is true, and its absence cannot be equated with "[the] . . . failure to incant four magic words." Id. Thus under the ruling established by the Brackman Court, the Hopkins complied with the service by mail requirements set forth in CR 5(b)(2)(B) on January 6, 2016 when the legal assistant signed the ***proof of service by mail*** declaration. By any measure, Skyles and the Banks appeared in and opposed the Hopkins lawsuit and asserted their rights long before January 6, 2016. The Hopkins simply failed to follow the rules for motion notices under the civil rules and Skyles had neither notice of their January 27, 2015 Default Motion, nor opportunity oppose it—as noted by the trial court's Minute Entry for January 27, 2015. CP 473.

This matter gives the Supreme Court the opportunity to determine

the effective date for curative declarations of proof of service by mail as to whether such curative declarations relate back to the date of the original defective proof of service by mail, or do they cure the prior defective proof of service as of the date signed?

Division I's decision created an unintended consequence that needs the Supreme Court's attention. Under the decision below the unscrupulous could file an initial proof of service by mail that is not "subject to penalty of perjury," and then not mail the default motion pleadings to the defendant. The defendant would fail to show at the hearing on the default motion, and the plaintiffs would obtain their default judgment. Once the plaintiffs began collection activities, the defendant would complain about not receiving the default motion pleadings and in response the plaintiff would file a corrective declaration that would related back to the date of the initial, intentionally created defective ***proof of service by mail***. The corrective declaration would turn the lie of the initial ***proof of service by mail*** into a judicially created fact without risk from the initial ***proof of service by mail***, which was issued without being subject to penalty of perjury. Unfortunately, Division I's current holding on the next issue would serve to further the risk presented by this hypothetical of the unscrupulous.

B. <u>Does Civil Rule 55(b)(4) require proof of service of the Default Motion pleadings to be on file with the trial court to issue a Default Judgment</u>

In its decision below, Division I of the Court of Appeals' holds that

CR 55(b)(4)'s requirement that a "default judgment shall not be rendered unless proof of service is on file with the court," applies only to proofs of service of process and never to proofs of service of default motion pleadings. Hopkins v. Banks, No. 77214-7-I, slip at 8.

The below Court's read of CR 55(b)(4) would authorize trial courts to issue default judgments even when plaintiffs fail to file proofs of service for their default motion pleadings with the trial court. This reading of CR 55(b)(4) could create a way for wrongful parties filing proofs of service by mail not made under penalty of perjury without any check on this conduct being contained in CR 55. It strains creditability that the Supreme Court interprets CR 55 in way that would create an obvious pathway for abuse.

The more credible read of CR 55(b)(4) is that the phrase a "default judgment shall not be rendered unless proof of service is on file with the court," applies to all proofs of service required by the Civil Rules and any applicable statutes that require any type of proof of service prior to applying to the trial court for default judgment. It's an axiom of the American judicial system that defendants be given a notice and opportunity to be heard—especially when they have specifically filed a Notice of Appearance in the underlying civil matter.

Division I's read of CR 55(b)(4) appears contrary to the intent expressed by CR 55(f) that specifies the required proofs of service when a

plaintiffs seeks a default judgment more than a year after commencing the underlying civil action. CR 55(f)(1) specifically states that "[p]roof by affidavit of the service of the notice [of the time and place for the hearing on the default motion] shall be filed *before* entry of the judgment." CR 55(f)(2)(B) specifically requires that any service by mail directly on a ***pro se*** defendant of notice for the default pleadings be by certified mail return receipt to be attached to the above referenced affidavit of service. At no time does CR 55(f) address proof of service of process. Thus, the decision below gives the Supreme Court the opportunity to affirm that CR 55(b)(4) contains a general requirement that any required proof of service be of record *before* the trial court may issue a default order or judgment while CR 55 (f) contains specific requirements for the types of proof of service that must be on file with the Court *before* the trial court may issue default orders or judgments when such proceedings are commenced more than one year after service of process.

C. It's a question of first impression: whether possible violations of RPC 3.3(f) may for the basis for relief in voiding a default judgment obtained via an *ex parte* proceeding

The Supreme Court ought to accept review of this issue because it's an issue of first impression. Division I of the Court of Appeals noted that for it to consider whether a possible violation of RPC 3.3(f) could serve as a basis for voiding an ***ex parte*** issued default judgment, it would need to be

provided a basis in law and fact to apply to RPC to the case at hand. . Hopkins v. Banks, No. 77214-7-I, slip at 10.

RPC 3.3(f) imposes on lawyers the following duty:

> (f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RPC 3.3(f). The duty of candor in an ***ex parte*** proceeding directly influences the administration of justice. In the Matter of the Disciplinary Proceeding against Stephen T. Carmick, 146 Wash.2d 582, 48 P.3d 311 (2002). We cannot, and will not, tolerate any deviation from the strictest adherence to this duty. Id.

The heightened disclosure obligations of RPC 3.3(f) for ***ex parte*** proceedings seem a natural fit for CR 55's prohibition on issuing default judgments against incompetents not represented by guardians. Creating a remedy for RPC 3.3(f) violations outside of discipline proceedings would create a number of positive results for furthering important public policy considerations. It would create a preference for default proceedings with the defendant present. It would force plaintiffs to share in the risk created by RPC 3.3(f) violations which in turn would create incentives for full disclosure in the first instance. And, it would enhance the protections envisioned by CR 55 for the elderly and otherwise incompetent who are not yet represented by guardians. See, e.g., Louisiana State Bar Ass'n v. White,

539 So. 2d 1216, 1220 (1989)(citing a number of cases where default judgments are voided due to innocent nondisclosures and representations by lawyers). By adopting the position of linking nondisclosures under RPC 3.3(f) with the voiding of *ex parte* issued default judgments this Court could create such protections for some of Washington's most vulnerable citizen and articulate a standard for disclosure under RPC 3.3(f) that a trial court or Court of Appeals could use to determine when such nondisclosures would lead to voiding or vacating an *ex parte* issued default judgment.

VII. Conclusion

Based on the foregoing, the Banks respectfully request the Supreme Court to accept review of this matter.

Submitted March 7, 2019.

Respectfully submitted,

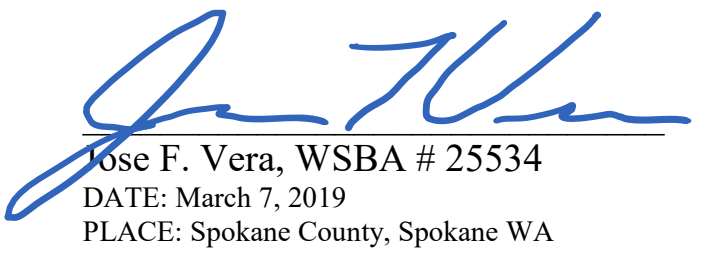
Jose F. Vera, WSBA # 25534
Vera & Associates PLLC
200 W. Thomas Street, Suite 420
Seattle, WA 98119
P. (206) 793-8318

CERTIFICATE OF SERVICE

I, Jose F. Vera, hereby declare under penalty of perjury of the laws of Washington State, that on the dates listed below that I caused a true and correct copy of the documents listed below to be delivered to the below listed parties in the manner indicated.

PETITION FOR REVIEW

Gourley Law Group P.O. Box 1091/1002 Tenth Street Snohomish, Washington 98290 Date: March 7, 2019	☐ ☒ ☐ ☒	Cert. U.S. Mail, postage prepaid Delivered by Court E-filing System Overnight Courier Email
Court of Appeals Clerks Office One Union Square 600 University Street Seattle, WA 98101-1176 Date: March 7, 2019	☐ ☒ ☐ ☐	Cert. U.S. Mail, postage prepaid Filed by Court E-filing System Overnight Courier Email



Jose F. Vera, WSBA # 25534
DATE: March 7, 2019
PLACE: Spokane County, Spokane WA

Appendix A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

MARK HOPKINS and GEORGIA HOPKINS, husband and wife, Respondents, v. KIRK and JENNIFER BANKS, as assignees for MRS. BILLIE E. GETSCHMANN SKYLES, Appellants.	No. 77214-7-I DIVISION ONE UNPUBLISHED OPINION FILED: January 22, 2019

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2019 JAN 22 AM 8:56

LEACH, J. — Kirk and Jennifer Banks,[1] putative assignees of Billie Getschmann Skyles, appeal the denial of their motion to vacate a default judgment in favor of Mark and Georgia Hopkins.[2] Banks contend that Hopkins did not file adequate proof that they served Skyles with their motion for default judgment before the court entered judgment. They also contend that Hopkins's counsel withheld from the court facts material to the default judgment.

Because Hopkins corrected their proof of service error and Banks fail to show that the trial court abused its discretion when it denied the motion to vacate, we affirm.

[1] We refer to Kirk and Jennifer Banks collectively as Banks.
[2] We refer to Mark and Georgia Hopkins collectively as Hopkins.

BACKGROUND

Billie Getschmann Skyles owned 20 acres of land near Gold Bar, Washington. Jennifer and Kirk Banks lived on the property and helped Skyles. In February 2014, Skyles signed a purchase and sale agreement (PSA) to sell half of the property to her neighbors, Mark and Georgia Hopkins. The PSA included an addendum providing for the transfer of .75 acres of the parcel after the parties completed a boundary line adjustment (BLA). Sale of 9.25 acres closed on May 8, 2014. After a surveyor completed the BLA paperwork in June 2014, Skyles refused to sign it.

Hopkins filed a lawsuit to enforce the transfer of the .75 acres in November 2014. They served Skyles on December 18, 2014. Skyles filed a pro se notice of appearance on January 6, 2015. On January 13, 2015, Hopkins served Skyles by mail with notice of a January 27, 2015, default judgment hearing date. Legal assistant Tracy Swanlund signed a certificate of mailing affixed to the calendar note to show service. Skyles did not appear at the hearing, and the superior court entered a default judgment in favor of Hopkins.

In June 2015 the Snohomish County Auditor recorded a quitclaim deed Skyles apparently signed in October 2014 transferring the property to Banks. In July 2015, Skyles filed a motion to vacate the default judgment. She claimed that Hopkins did not properly serve her with the summons or complaint. On appeal,

we concluded that the service of summons and complaint was proper and affirmed the default judgment.[3]

Skyles purportedly assigned her interest in the PSA and this lawsuit to Banks on August 20, 2015.[4] She died on September 26, 2015.

On December 30, 2015, Banks filed a second motion to vacate. They claimed that Hopkins's counsel withheld material facts at the default judgment hearing and failed to properly serve her with their motion for default judgment. The superior court declined to consider the motion because Skyles had died and no party had been substituted for her. This court substituted Banks for Skyles in the first appeal but declined to review issues relating to the second motion because the trial court had never considered the merits of the motion.[5]

After our decision in the first appeal, Banks filed a third motion to vacate in May 2017.[6] They asserted that Hopkins failed to file proper proof of service of the default judgment motion on Skyles before the court entered judgment, making it void. They also claimed that Hopkins had withheld material information from the court. A court commissioner denied the motion. The superior court denied Banks's motion to revise the commissioner's ruling and awarded

---

[3] Hopkins v. Banks, No. 74068-7-I (Wash. Ct. App. Apr. 3, 2017) (unpublished), http://www.courts.wa.gov/opinions/pdf/740687.pdf.

[4] On August 26, 2015, Skyles filed suit against Hopkins for several claims, including conversion. The trial court dismissed her claims on summary judgment; she appealed the dismissal of the conversion claim. That appeal is also before this panel. Banks v. Hopkins, No. 77218-0-I.

[5] Hopkins, slip op. at 4, 10.

[6] The motion is titled "Second Motion to Vacate Default Judgment," although it was the third filed in this matter.

judgment to Hopkins for attorney fees and costs. Banks appeal the commissioner's decision and the court's denial of their motion to revise that ruling.

ANALYSIS

Banks appeal the denial of their motion to vacate a default judgment. They claim that the default judgment is void because Hopkins failed to file with the court a proper proof of service of their default judgment motion on Skyles before the court entered the default judgment. They also claim that Hopkins and their attorney failed to disclose information about Skyles's competency. Thus, they contend, the superior court abused its discretion by not granting their motion to vacate the default judgment. Because Hopkins remedied the irregular certificate of service and Banks fail to show that Hopkins withheld material information, we affirm the superior court.

Timeliness

As a preliminary matter, we consider Hopkins's challenge to the timeliness of Banks's May 16, 2017, motion to vacate. Unless a superior court abuses its discretion when it determines that a motion under CR 60(b) was or was not timely, this court will not overturn that court's decision.[7]

[7] Luckett v. Boeing Co., 98 Wn. App. 307, 312-15, 989 P.2d 1144 (1999) (finding that the trial court did not abuse its discretion when it found a motion to vacate a default judgment was untimely despite the court's preference for resolving cases on the merits).

In their motion to vacate, Banks identify, generally, CR 60(b) factors: (4) "[f]raud . . . misrepresentation, or other misconduct of an adverse party," (5) "[t]he judgment is void," and (11) "[a]ny other reason justifying relief from the operation of the judgment" as providing authority for the court to vacate the default judgment. A motion to vacate for these reasons must be filed "within a reasonable time" but, unlike the reasons described in CR 60(b)(1), (2), and (3), CR 60 does not limit that reasonable time to within one year.

During the motion hearing, the superior court noted that issues raised by Banks were probably no longer timely since both had been raised long after Skyles had died. The superior court also stated that it could not make a finding about whether the actual notice of the default judgment hearing was served properly or about Skyles's competency because of the amount of time that had passed. But the superior court did not identify untimeliness as the basis for its denial of the motion to vacate. Thus, we decline to decide the case on this issue and evaluate the substantive questions below.

Motion to Vacate

CR 60(b) authorizes a court to set aside a default judgment upon a showing of circumstances described in the rule.[8] We review a superior court's denial of a motion to vacate a default judgment under CR 60(b) for abuse of discretion.[9] If a superior court bases its decision to deny a motion to vacate

[8] CR 55(c)(1).
[9] Luckett, 98 Wn. App. at 309.

"upon tenable grounds and is within the bounds of reasonableness, it must be upheld."[10]

Because Banks do not show that the superior court abused its discretion by denying their motion to vacate either on the basis that proof of service was irregular or that the Hopkins withheld information material to the proceedings, we affirm.

i. Proof of Service

Banks claim that Hopkins's failure to file proof of service in the form required by CR 55(b)(4) before the default judgment hearing left the superior court without authority to enter a default judgment. They maintain that the judgment the court signed is void and that CR 60(b)(5) requires its vacation.

CR 55(a)(3) requires that a party who has appeared in a lawsuit be served with written notice of a default motion at least five days before a hearing on the motion. CR 5(b)(2)(B) describes how to prove service by mail: "Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney."

Here, Hopkins filed a certificate signed by paralegal Swanlund to prove that their motion for default was mailed to Skyles at least five days before the hearing on the motion. Because Swanlund was not an attorney, this certificate did not satisfy the proof requirement of CR 5(b)(2)(B).

---

[10] Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

However, on January 6, 2016, Swanlund filed a sworn declaration of service stating that she served Skyles by mail on January 13, 2015. This declaration remedied the irregularity of the original proof of service filed with the court. As the superior court noted, the declaration reaffirmed that the service was achieved at the proper time, it did not "chang[e] the date [of the service to Skyles] or mail[ ] it later or anything like that."

Banks begin their argument by reminding this court that service of a summons and complaint must occur for a superior court to have personal jurisdiction over a party. RCW 4.28.020 declares that once a superior court acquires personal jurisdiction over a matter, that court has continuing jurisdiction over the controversy from beginning to end.[11] A motion to vacate is part of the original lawsuit; the court "does not require independent jurisdictional grounds."[12] This court found that Hopkins properly served Skyles with the summons and complaint.[13] So Hopkins's failure to file a proper proof of service of the motion before the hearing did not create a jurisdictional issue.

Banks cite Brackman v. City of Lake Forest Park[14] to support their position. But Brackman does not help them here. In Brackman, this court considered whether filing an unsworn certificate signed by a legal assistant satisfied the strict time requirements for service of a trial de novo request

---

[11] Lindgren, 58 Wn. App. at 591.
[12] Lindgren, 58 Wn. App. at 591.
[13] Hopkins, slip op. at 1-2.
[14] 163 Wn. App. 889, 262 P.3d 116 (2011).

imposed by MAR 7.1(a).[15] MAR 7.1(a) requires a party to file a request for a trial de novo and proof of service within 20 days of the arbitration award. A failure to strictly comply results in a loss of the right to a trial de novo. Because the certificate did not provide proof of service, this court affirmed the dismissal of Lake Forest Park's request.[16]

But MAR 7.1(a) does not apply here, and its filing requirement differs from that for CR 55(a)(3). Also, the policy reasons for the strict application of MAR 7.1(a) described in Nevers v. Fireside, Inc.[17] are not present in this case.

CR 55(b)'s requirement that proof of service be filed before a default judgment enters refers to proof of service of the summons and complaint. It cannot refer to proof of service of notice of the default motion because the provision applies equally to cases where no defendant has appeared and no notice of the motion is required. Given that Hopkins ultimately provided proper proof of service, Banks provide no persuasive reason for vacating the default judgment on this basis.

Banks also contend that Hopkins did not comply with the original PSA when they mailed the notice directly to Billie Skyles Getschmann instead of in care of Jennifer Wilson (now Banks). The PSA states, "All notices required by this Purchase and Sale Agreement shall be considered properly delivered . . .

---

[15] Brockman, 163 Wn. App. at 898 (holding that "[a]n unsworn certificate of mailing that is not under oath or does not contain language 'that it is certified or declared by the person to be true under penalty of perjury' does not constitute 'proof' that a copy has been served under MAR 7.1(a)").

[16] Brockman, 163 Wn. App. at 898.

[17] 133 Wn.2d 804, 812-13, 947 P.2d 721 (1997).

(3) on the second day following mailing, postage prepaid, certified mail, return receipt requested: to Seller: Billie Skyles Getschmann . . . c/o Jennifer Wilson 425-231-6895." But the notice at issue here is not one "required by this Purchase and Sales Agreement." CR 55(b)(3) requires it, and CR 5(b)(1) requires that it be given directly to the party unless represented by counsel. Banks's PSA argument has no merit.

Banks fail to demonstrate that the irregularity of the certificate of service resulted in a void judgment rather than a voidable judgment because the superior court had jurisdiction to enter the default judgment. Because they show no prejudice to Skyles caused by the defective proof of service certificate, they cannot show that the superior court abused its discretion by denying the motion to vacate on this basis.

ii. Disclosure of Material Facts

Banks also challenge the superior court's rejection of their claim that "[t]he Hopkins withheld information about red flags, concerning Skyles' mental competency during the January 2015 default hearing." They assert that evidence regarding Skyles's competency was material because a court cannot enter a default judgment against an incompetent person.

Banks rely in part on the duties imposed on counsel by RPC 3.3(f) but do not provide any authority supporting their claim that the superior court should consider alleged violations of RPC 3.3(f) in a case not involving attorney discipline. Instead, they cite as supporting authority In re Disciplinary Proceeding

Against Carmick[18] and Louisiana State Bar Ass'n v. White.[19] But both of these cases involve review of disciplinary proceedings by bar associations. Since they fail to provide authority or argument supporting their claims under RPC 3.3(f), we decline to review them.[20]

We do consider their assertions under CR 60(b)(4) and (11), each of which authorizes the superior court to vacate a default judgment. To succeed on a CR 60(b)(4) motion, the party asserting that an opposing party obtained the judgment through fraud or other improper means must prove the supporting facts by clear and convincing evidence.[21] The party attacking the judgment must show improper conduct that causes "the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense."[22] CR 60(b)(11) authorizes the superior court to vacate a judgment for "[a]ny other reason justifying relief from the operation of the judgment."

---

[18] 146 Wn.2d 582, 48 P.3d 311 (2002).

[19] 539 So.2d 1216, 1220 (1989).

[20] In some cases a court has determined that consideration of an RPC outside of a disciplinary hearing is appropriate. For example, courts have identified RPC 1.8 as being a proper basis for "refus[ing] to enforce fee agreements with attorneys as being against public policy." LK Operating, LLC v. Collection Grp., LLC, 168 Wn. App. 862, 875, 279 P.3d 448 (2012). However, to reach this decision, a court must be provided a basis in fact and law to apply the RPC to the case at hand. Banks provide this court with neither. If an appellant provides no argument supporting an assignment of error, we generally do not consider it. Shelcon Constr. Grp., LLC v. Haymond, 187 Wn. App. 878, 889, 351 P.3d 895 (2015).

[21] Peoples State Bank v. Hickey, 55 Wn. App. 367, 371-72, 777 P.2d 1056 (1989).

[22] Lindgren, 58 Wn. App. at 596.

The record does not contain evidence supporting Banks's claim. They contend that Hopkins withheld from the court information showing issues with Skyles's competency. They support their argument with a hodgepodge of declarations, letters, e-mail messages, and voice-mail transcripts, none of which show that Hopkins withheld material knowledge.

This hodgepodge includes a transcript of a voice-mail message from Georgia Hopkins to Jennifer Banks that indicates both parties discussed Skyles's competency. This transcript shows that Hopkins discussed the issue of competency with Banks and undermines any assertion by Banks that Hopkins hid any question of Skyles's competency from Banks.

As the superior court indicated, the failure of Banks to raise the issue of Skyles's competency earlier further undermines their argument. They "were in [the] best position to determine whether or not [Skyles] was competent and whether this issue should be addressed" and the voice-mail demonstrates that they were aware of the potential issue before the default judgment.

Banks also assert that Hopkins withheld attorney Carleton Knappe's letter indicating that Skyles was probably incompetent. They do not establish that Hopkins's attorney or the escrow company had possession of the letter. Lori O'Neil of Snohomish Escrow, who oversaw the closing, and Hopkins's attorney, Thomas L. Hause of Gourley Law Group, provided declarations stating that neither the escrow company nor the attorney knew of Knappe's letter. Further, the record indicates that neither the Gourley Law Group nor Snohomish Escrow

had a copy of the Knappe letter in their files. B. Craig Gourley asserted in his declaration that he first received the Knappe letter on June 10, 2015, from Banks's attorney, after the default judgment was entered.[23] Without demonstrating that the Hopkins' attorney had notice of the letter before the default judgment, Banks cannot establish that Hopkins withheld this letter from the superior court.

Banks do not establish that the superior court abused its discretion by not vacating the judgment under CR 60(b)(4). They also do not provide any other persuasive reason why the superior court abused its discretion in failing to vacate under CR 60(b)(11).

Attorney Fees

Banks request attorney fees on appeal. Because they do not prevail, we deny this request.

Hopkins also request attorney fees on appeal, citing the PSA and RCW 4.84.330.

The PSA states,

> In the event that any suit or other proceeding is instituted by either party to this [PSA] or that any costs, expenses or attorney fees are incurred or paid by either party in enforcing this [PSA], the substantially prevailing party, as determined by the court or in the proceeding, shall be entitled to recover its reasonable attorneys fees and all costs and expenses incurred relative to such suit or proceeding from the substantially non-prevailing party, in addition to such other relief as may be awarded.

---

[23] The letter was copied to Skyles. Presumably this is how it reached Banks's attorney.

RCW 4.84.330 requires that a court award attorney fees to the prevailing party if the contract provides for an award of reasonable attorney fees in an enforcement action. Hopkins have prevailed. Upon compliance with RAP 18.1, they are entitled to recover attorney fees and costs for this appeal.

CONCLUSION

We affirm. Banks fail to show that the superior court abused its discretion by not vacating the default judgment. They do not establish that irregularities in Hopkins's proof of service of the default motion on Skyles rendered the default judgment void. They also failed to establish that Hopkins hid concerns about Skyles's competence.

Leach, J.

WE CONCUR:

VERA & ASSOCIATES PLLC

March 07, 2019 - 3:37 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77214-7
Appellate Court Case Title:	Mark Hopkins and Georgia Hopkins, Res. v. Kirk and Jennifer Banks, Apps.
Superior Court Case Number:	14-2-07395-8

The following documents have been uploaded:

- 772147_Petition_for_Review_20190307153437D1418039_9087.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Corrected Banks Pet for Review signed with Appendix.pdf

A copy of the uploaded files will be sent to:

- tom@glgmail.com

Comments:

Filing Correct Petition for Review as per instruction

Sender Name: Jose Vera - Email: josevera@veraassociates.com
Address:
200 W THOMAS ST STE 420
SEATTLE, WA, 98119-4218
Phone: 206-217-9300

Note: The Filing Id is 20190307153437D1418039