Supreme Court Cause No. 97153-6

Court of Appeals Cause No. 35734-1-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

EGP INVESTMENTS, LLC, RESPONDENT,

vs.

MARVIN R. FREAR JR and JANE DOE FREAR, PETITIONERS.

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Petitioners Marvin and Laurie Frear, by and through their counsel of record, submits this Petition for Discretionary Review of the April 2, 2019 Unpublished Opinion by the Court of Appeals, Div. III. See Appendix. This petition seeks reversal of the Court of Appeals (Div. III) decision affirming the trial court's refusal to vacate a void default judgment entered against the Petitioners in 2011.

II. ISSUES PRESENTED FOR REVIEW

A. Conflict with Decisions by Washington Supreme Court, the Court of Appeals, and a Plain Reading of Washington Law.

In this case, the Court of Appeals held that it is not necessary for a process server to identify the person served. While it is the fact of service and not the affidavit that controls, contrary to the Court of Appeals decision, the trial court did not find that service was "accomplished on a person living at the residence." *Id.* In fact, the trial court specifically refused to make any finding regarding who was served or whether it happened at the Defendants' abode. The only initially facially valid affidavit of service was unequivocally refuted by proof that the person identified was never a "resident therein" who could accept service of process for the Defendants. Although this Court and the Court of Appeals have opined on the definitions of specific words in the statute, the law in Washington is clear that abode

service is properly accomplished only when service is accomplished on a person of suitable age and discretion who is then a resident therein. The trial court did not make that finding and the Court of Appeals erred in affirming the trial court's misapplication of Washington law.

III. STATEMENT OF THE CASE

On May 20, 2011, EGP filed an action against the Frears in Spokane County District Court. (CP 1.) The process server alleged that on May 29, 2011, he accomplished abode service of the summons and complaint on the Frears by handing a copy of the pleadings to "Dave Nolan, roommate, a person of reasonable age and discretion, then resident therein." (CP 79.) The Frears were completely unaware that an action had been commenced against them, so they did not appear or contact EGP and EGP obtained a default judgment against the Frears. (CP 10 – 11, 24 – 27.) In 2017, while attempting to refinance their home, the Frears were made aware that a default judgment had been entered several years prior. (CP 5 – 6.) On October 10, 2017, the Frears filed a motion to vacate the judgment. *Id.*

It is uncontested that Mr. Nolan did not live with the Frears. (CP 10 – 23.) Mr. Nolan was not a "roommate" or, more precisely, a resident at the Frears' abode. *Id.* Mr. Nolan filed an uncontroverted declaration stating that he regularly visited the Frears but did not live with them. *Id.* In support

of his declaration testimony, Mr. Nolan submitted copies of official Washington State and IRS tax documents and correspondence, all corroborating his testimony that his address in and around 2011 was not at the Frear's residence. (CP 10 – 23.) Mr. Nolan also testified as to his actual residence at the time of service. *Id.* The Frears and Mr. Nolan appeared at the hearing on the Frear's Motion to Vacate Default Judgment.

In response to the Motion to Vacate, the process server filed a second declaration retracting the allegation in his original declaration that he served Dave Nolan. (CP 80 – 81.) Instead, he suggests that he "believe[s] I did in fact serve Mr. Frear himself". (CP 81:1 – 5.) His belief, however, is not based on any memory of serving Mr. Frear but on a comparison of the very general description contained in his original declaration of service with a recent observation of Mr. Frear. *Id.* Mr. Rhodes was unwilling or unable to offer any sworn testimony that Mr. Frear was in fact served. *Id.* Mr. Rhodes did not claim any recollection or personal knowledge that he, in fact served Mr. Frear with process. *Id.* Nothing contained in Mr. Rhodes' supplemental declaration cures the defect in the original declaration that he did not serve Mr. Nolan. *Id.* To the extent that Mr. Rhodes' second declaration could be considered at all, Mr. Frear filed a declaration directly contradicting the allegation that he was served. (CP 88:19 – 89:3 – 8.)

On November 6, 2017, the trial court held oral argument on the motion to vacate, denied the Frears' motion to vacate, and awarded EGP its attorney's fees for defending the motion. (CP 113, 119 – 123, 371 – 373.) The Frears timely appealed. (CP 115 –118.) The Frears assigned error, in relevant part, to the trial court's findings, as follows:

1. "there doesn't seem to be a dispute that someone was served on May 29, 2011, at an address of 3214 East 23rd Avenue in Spokane, Washington." On the contrary, the Frears never conceded that "someone was served" and specifically rebutted the declaration of service. Additionally, the process server filed a supplemental declaration of service, admitting that his 2011 declaration of service was incorrect.
2. "Central to CR 60 is the requirement these motions be brought within one year after judgment was taken." (Judge's Ruling Tr. app. at 6:18 – 19.) "The rule contemplates one year, and we're at least six years past that here." (*Id* at 11:4 – 5.) The trial court misstated the law and wholly ignored the fact that the Frears' basis for vacating the judgment was exclusively under CR 60(b)(5) and related cases. (CP 5.) Nowhere in its oral or written decision does the Court ever

mention CR 60(b)(5) or provide any analysis of the proper standard for vacating a void judgment.

3. "[T]he burden...is on the party seeking vacation of the judgment. That burden is clear and convincing." (Judge's Ruling Tr. app. at 7:3 – 5.) This would be true only if the affidavit of service is facially valid. Here, the process server admitted his original declaration was incorrect and only speculates regarding who he may have served. (CP 80 – 81.) The burden does not shift to the Frears to disprove an admittedly erroneous declaration of service. *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 292 P.3d 128 (2012).

4. "[T]he Court can consider equity, and that's just inherent in CR 60..." (Judge's Ruling Tr. app. at 7:21 – 22.) On the contrary, Washington law is abundantly clear that "[t]o grant such relief without notice and an opportunity to be heard denies procedural due process." *Matter of Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013, 1017 (1989). "[V]oid judgments may be vacated irrespective of the lapse of time." *Id.*

Despite the specific findings of the trial court to the contrary, on April 2, 2019, the Court of Appeals, Div. III held the following in error:

1. "The trial court found that Rhodes served someone at the house claiming to be Nolan". This statement was presumably based on the trial court's erroneous assertion that the Frears conceded that someone was served at the Frears house, when the Frears and Nolan both testified that they were not served. The trial court never found that the person served claimed to be Nolan.
2. "While the evidence suggested that the "someone" was in fact Mr. Frear, the trial court correctly noted that it did not have to specify who was served." The trial court did not find that the evidence pointed to Mr. Frear being served. Moreover, while failure to specify who was served is not fatal, the person's identity is essential to determining whether such person is of suitable age and discretion and, importantly here, then resident therein.
3. "The evidence presented did not establish that service was not properly accomplished". This would be a correct statement if a facially valid declaration of service was on file. Since the process server recanted his earlier declaration and was unwilling

or unable to swear to an alternative, it is not the Frears burden to prove the negative.

4. "The fact that the person's name was unknown does not diminish the fact that service was properly accomplished on a person living at the residence." Again, there is no competent evidence or any finding by the trial court that the person served lived at the residence. The trial court was pressed on this subject and specifically refused to make any finding as to who was served.
5. "We do not read the trial court's oral ruling as finding that the motion was untimely brought, so we do not discuss that concern." It is unclear how the Court of Appeals could have reached this decision despite the Court unequivocally stating that "[c]entral to CR 60 is the requirement these motions be brought within one year after judgment was taken."

The Court of Appeals affirmed the trial court's denial of the Frear's motion. This petition for review timely followed.

IV. ARGUMENT

This Court may grant review and consider a Court of Appeals opinion if it involves a significant question of law under the Constitutions of Washington State or the United States, if it involves an issue of

substantial public interest, or if the decision conflicts with other decisions of this Court or the Court of Appeals. RAP 13.4(b)(1)- (4).

The Court of Appeals' dismissal of this case raises a fundamental issue of due process: does serving a summons for a lawsuit on a non-resident confer personal jurisdiction over the defendant? The most basic tenet of due process is that citizens must have notice and an opportunity to oppose any action that would deprive them of property or a right. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). By statute, the Washington legislature says that such notice may be accomplished "by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein." RCW 4.28.080(16). No Washington Supreme Court case, nor any Washington Court of Appeals decision has ever gone so far as to assert that whether the person who received the summons is or is not a resident simply does not matter. Yet, in affirming the trial court, which made no finding as to the residency status of the person served, much less his or her identity, the Court of Appeals now seems to suggest exactly that. The Court of Appeals decision conflicts with prior decisions of this Court, the other appellate divisions, and its own prior decisions.

Since abode service is a common method of acquiring personal jurisdiction over defendants in civil cases, and particularly debt collection cases, the ruling of the Court of Appeals here has substantial public interest.

In *Dalen v. St. John Med. Ctr.*, 436 P.3d 877, 888 (Wash. Ct. App. 2019) (published in part, this section unpublished), CoA Div. II recently held that:

> service was improper with respect to Dr. Kranz in his individual capacity. Service was made on a PeaceHealth risk management employee, not on Dr. Kranz personally. And the summons was not left with a resident of Dr. Kranz's abode. And there is no statutory provision that would allow a third person to accept service on behalf of an individual defendant apart from the requirements of RCW 4.28.080(16).

CoA Div. III has also directly addressed the issue, analyzing the residency issue with deference to two Washington Supreme Court decisions:

> The Washington Supreme Court has addressed the "then resident therein" element in two recent cases. Mr. Baker relies on the first of these two cases, *Wichert v. Cardwell,* 117 Wash.2d 148, 152, 812 P.2d 858 (1991), where the court found sufficient substitute service. There, the defendant wife's adult child, who had her own apartment and infrequently stayed at the defendants' home, had stayed overnight at the defendants' residence the night before, accepting service on their behalf. *Id.* at 150, 812 P.2d 858.
>
> Mr. and Ms. Hawkins rely on *Salts* arguing that the facts here are more similar to the facts in *Salts* than *Wichert.* In *Salts,* the court held that service of

> process on a person unrelated to the defendant, who was temporarily in the defendant's home to feed dogs and take in mail, was insufficient for substitute service of process. *Salts,* 133 Wash.2d at 163–64, 170–71, 943 P.2d 275.

Baker v. Hawkins, 190 Wn. App. 323, 329, 359 P.3d 931, 934 (2015)

Div. III has also recognized the requirement that the statutory process must be followed:

> In Washington, proper service of process must not only comply with constitutional standards but must also satisfy the requirements for service established by the legislature. The fact that the due process requirements of Central Hanover have been met, standing alone, is not enough. *Thayer v. Edmonds,* 8 Wash.App. 36, 40, 503 P.2d 1110 (1972) ("beyond due process, statutory service requirements must be complied with in order for the court to finally adjudicate the dispute"), review denied, 82 Wash.2d 1001 (1973); *Powell v. Sphere Drake Ins. PLC,* 97 Wash.App. 890, 899, 988 P.2d 12 (1999) ("Service of process is sufficient only if it satisfies the minimum requirements of due process and the requirements set forth by statute."); *Gerean v. Martin–Joven,* 108 Wash.App. 963, 971, 33 P.3d 427 (2001) (plaintiff's general observation that constitutional due process was satisfied by method of service "ignores specific statutory requirements for effecting service on an individual defendant in Washington"), review denied, 146 Wash.2d 1013, 51 P.3d 88 (2002).

Farmer v. Davis, 161 Wn. App. 420, 432–33, 250 P.3d 138, 144–45 (2011); see also: *Scanlan v. Townsend*, 181 Wn.2d 838, 336 P.3d 1155 (2014); *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996).

While the Court of Appeals may be correct that identification of the person served is not dispositive, the status of the person served as a resident or non-resident in the defendants' abode is dispositive. In this case, it is uncontested that the person identified in the declaration of service was a non-resident. There is no supplemental declaration swearing that any resident was served. The Frears should not have been tasked with disproving service until there was a facially valid declaration to refute.

V. CONCLUSION

For the reasons set forth herein, the Petitioners respectfully request that this Court accept review.

DATED this 2nd day of May, 2019.

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of May, 2019, I caused a true and correct copy of this Petition for Discretionary Review to be served on the following in the manner indicated below:

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By: _____
Rachel Elston

Appendix

FILED
APRIL 2, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

EGP INVESTMENTS, LLC, a Washington limited liability company, Respondent, v. MARVIN R. FREAR JR, individually, and the marital community comprised of MARVIN R. FREAR JR and JANE DOE FREAR, husband and wife, Appellants.	)	No. 35734-1-III UNPUBLISHED OPINION

KORSMO, J. — Marvin and Laurie Frear appeal from a trial court ruling denying their request to vacate a 2011 default judgment against them. Concluding that the trial court did not err, we affirm.

FACTS

EGP Investments obtained a judgment in the Spokane County District Court against the Frears for unpaid credit card debt in 2011. The process server, Stanley Rhodes, filed a return of service indicating that he had served the summons and complaint on May 29, 2011, by leaving a copy with "Dave Nolan, roommate, a person of reasonable age and discretion, then resident therein." Clerk's Papers (CP) at 79. The

affidavit further identified Nolan as a white male, 30 years of age, standing 5'9" and weighing 150 pounds. CP at 79.

The Frears did not appear and a judgment was entered against them. EGP mailed garnishment documents to the home a year later. Laurie Frear signed for them. CP at 44, 49-51. Believing that they referred to another legal matter they had pending, the Frears did not respond to the garnishment.

The clerk of the superior court advised the Frears about the judgment in September 2016, and they contacted EGP on September 23, 2016. Represented by counsel, they moved to vacate the judgment on October 10, 2017. They filed affidavits confirming that they lived at the house where service was allegedly made, that Nolan had never lived there, and that they had never received any papers from Nolan. Nolan filed an affidavit stating that he never lived with the Frears and had lived elsewhere at the time of service. He visited the Frears regularly, but denied ever being served with papers when visiting them. He also provided a copy of his driver's license to confirm that his height was 6'4" and could not have been the person served by Rhodes.

Rhodes filed his own affidavit confirming that he had served a man claiming to be Nolan, a resident of the home, on May 29, 2011. Observing that residence in the summer of 2017, he believed that Mr. Frear fit the description of the man he had served six years earlier. He believed Frear was the one he had served.

The trial court heard argument on the motion to vacate and denied the request. The court noted that the Frears had waited a long time and should have known about the judgment sooner than they claimed to know. The court determined that Rhodes did serve someone at the house, but declined the request by the Frears to name who that person was since "I don't need to go there."

The court awarded EGP its costs in accordance with a contractual provision. The Frears then timely appealed to this court. A panel considered the case without hearing argument.

ANALYSIS

This appeal presents contentions that the court erred in rejecting the motion to vacate and in awarding costs. Both parties seek costs in this court. We address the three issues in the order listed.

Motion to Vacate

The Frears argue that the original affidavit of service was shown to be erroneous, requiring the judgment to be set aside. However, they did not prove that argument.

CR 60 allows a party to challenge a judgment for a number of reasons, including when the judgment is void. CR 60(b). A judgment can be void for a number of interrelated reasons, including having been entered (1) without jurisdiction, (2) as a result of improper service, or (3) with inadequate notice in violation of due process. *In re Marriage of Ortiz*, 108 Wn.2d 643, 649, 740 P.2d 843 (1987); *Sheldon v. Sheldon*, 47

Wn.2d 699, 702, 289 P.2d 335 (1955); *State v. Fishing Appliances*, 170 Wash. 426, 428, 16 P.2d 822 (1932). Although most challenges under CR 60 must be brought within one year, a challenge to an allegedly void judgment need only be brought within a reasonable time. CR 60(b).[1]

This court normally reviews a decision under CR 60 for abuse of discretion, but a trial court *must* grant the motion where the judgment is void. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). Thus, this court reviews de novo whether a trial court erred by failing to grant a motion to vacate a void judgment. *Id.* It is the burden of the party claiming defective service to prove that there was no valid service. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994). The post-judgment moving party has the same burden of upsetting an affidavit of service that the party would have prior to judgment. *Id.* Moreover, the fact that an affidavit of service may be defective in some manner is not the equivalent of saying that service was not properly accomplished. CR 4(g)(7). When an affidavit is insufficient, a plaintiff may file an amended affidavit or provide additional evidence. *Williams v. S.S. Mut. Underwriting Ass'n*, 45 Wn.2d 209, 226-227, 273 P.2d 803 (1954).

[1] We do not read the trial court's oral ruling as finding that the motion was untimely brought, so we do not discuss that concern.

Here, the Frears demonstrated that Nolan was not the person served by Rhodes. However, this does not mean that service was not properly accomplished. The trial court found that Rhodes served someone at the house claiming to be Nolan. While the evidence suggested that the "someone" was in fact Mr. Frear, the trial court correctly noted that it did not have to specify who was served. The evidence presented did not establish that service was not properly accomplished. The fact that the person's name was unknown does not diminish the fact that service was properly accomplished on a person living at the residence.

The trial court did not err in concluding that the Frears failed to demonstrate that service was invalid. They did not satisfy CR 60(b)(5); the trial court therefore correctly rejected the motion to vacate.

Attorney Fees and Costs in the Trial Court

The Frears also contend that the trial court erred in granting attorney fees to EGP, claiming that EGP was not properly licensed as a collection agency at the time. After briefs were filed in this appeal, we rejected this argument in *Fireside Bank v. Askins*, 6 Wn. App. 2d 431, 430 P.3d 1145 (2018).

In order to pursue collection work in Washington, a collection agency must be properly licensed in this state. RCW 19.16.110; RCW 19.16.250(1). Violations of the collection agency act (ch. 19.16 RCW) also constitute violations of the consumer protection act (ch. 19.86 RCW). RCW 19.16.440. An entity that violates RCW 19.16.250

may lose the right to collect interest and costs; recovery is limited to the amount of the original claim. RCW 19.16.450.

In *Askins*, we recently concluded that a party cannot assert a collection agency act claim as a defense to a collection action. 6 Wn. App. 2d at 437-439. Instead, violations of the act must be pursued as consumer protection act claims by filing an action or counterclaim under chapter 19.86 RCW. *Id*.

Accordingly, we reject the Frears' challenge in light of *Askins*.

Attorney Fees on Appeal

Both parties seek attorney fees in this court. Since the Frears do not prevail, we deny their claim.

EGP claims fees under the original credit card contract. RCW 4.84.330. Although a copy of the contract is attached to the pleadings filed in the trial court, that copy is not signed by the Frears. The existence of the original judgment against the Frears, supported by a standard contract containing an attorney fees provision, allowed the trier of fact to conclude that the Frears were parties to the agreement. The trial court implicitly made such a determination here, a decision supported by the evidence.

However, this court declines at this time to make the same finding. In the absence of a contract signed by the Frears, we deny attorney fees on appeal to EGP. We caution the parties not to read more into this aspect of our ruling than the fact that we are denying

the fees. Neither party should consider this an invitation to further litigation of this matter.

Affirmed.

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

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

EGP INVESTMENTS, LLC, a Washington limited liability company,	)	
Plaintiff,	)	Sup. Ct. Cause No. 11-2-04025-3
v.	)	
MARVIN R. FREAR JR, individually, and the marital community comprised of MARVIN R. FREAR JR and JANE DOE FREAR, husband and wife,	)	
Defendant.	)	

HONORABLE MICHAEL P. PRICE

VERBATIM REPORT OF PROCEEDINGS

(November 6, 2017 - Judge's Ruling)

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I N D E X - November 6, 2017

VERBATIM REPORT OF PROCEEDINGS

(November 6, 2017 - Judge's Ruling)

THE COURT: Counsel, I appreciate your giving me a few minutes to get my notes together. This is the matter of EGP Investments, LLC, which is a Washington limited liability company as plaintiff v. Marvin R. Frear Jr. individually and the marital community comprised of Marvin R. Frear Jr. and Jane Doe Frear, husband and wife, as defendants. Cause number in Superior Court in Spokane, Washington is 11-2-04025-3.

Just to start out, this matter is somewhat unusual in that the default that was taken was actually taken in the District Court, not in Superior Court.

Counsel, just in case I forget, I want to say that I do appreciate your argument today. It's very helpful. I also appreciated all the pleadings you provided to me so I could have a chance to thoroughly study your respective positions.

I did read all the material in detail, and there were a significant amount of pleadings. Frankly, the issue is pretty straightforward in terms of the analysis and the law. And the central question is whether the Frears were properly served pursuant to a default that was then taken against them back in 2011, and I'll touch on this a number of times. We're on the cusp of the year 2018, so this was quite some time ago. Give or take, that's about seven years.

As Counsel mentioned, there doesn't seem to be a dispute that someone was served on May 29, 2011, at an address of 3214 East 23rd Avenue in Spokane, Washington. I don't recall counsel suggesting there wasn't service of process on a human being at that property.

First of all, I have a licensed and/or registered process server, Mr. Rhodes, and it should be noted that process servers have to, when they submit a declaration of service, sometimes they do affidavits of service, but a declaration of service will say: I swear under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

So, when a process server signs his or her name to a declaration of service, they are subjecting themselves to criminal penalties should they lie or fail to tell the truth. Here, I have a process server who has subjected himself to those penalties who swears that he served a 150-pound white male, five-foot-nine inches, about 30 years old, with brown hair, who identified himself as Mr. Frear's roommate, Dave Nolan.

And the attorneys didn't really get into CR 60, at least in oral argument, and counsel usually reserve oral argument for what they believe is the most succinct point to get the Court's attention. But, for purposes of the law I have to focus on CR 60. CR 60 is the tool that a lawyer or a

party will employ when they're seeking to vacate a judgment. And I'm not reading the rule, but paraphrasing right now. CR 60 does enable a party to seek vacation of a judgment for any number of reasons. It could be because of newly discovered evidence. It could be because of clerical error or mistake or inadvertence of some sort. It could be because of erroneous proceedings against a minor. I've only seen that once in my 15 years down here, but that does happen. It could be because of unavoidable casualty or misfortune.

For example, someone is overseas and is injured in a catastrophic act of nature, earthquake, or something like that. They don't know about this court action because of some extraordinary life event. It could be because of fraud, which is almost nonexistent, frankly. I know it does happen, but it's very rare.

But, usually, the reason that is cited for the Court to vacate a judgment pursuant to CR 60 is CR 60(b)11, which is -- and, frankly, I call it the catch-all provision of CR 60. Any other reason justifying relief from operation of the judgment. That is almost always what Counsel or a party will fall back on, or at least they'll cite that as a secondary option for their motion.

Now, I have the benefit of having good lawyers here, and, so, in that regard, counsel are aware that just about every appellate case that -- at least that I can recall

seeing -- that deals with the question of CR 60 and deals with the issue of a default judgment, the appellate courts seem to always use this particular nomenclature. The quote is that: "The Court abhors a default." You see it constantly in appellate rulings in Washington State.

The Court abhors a default, which is kind of our fancy way of saying we don't like defaults for all sorts of reasons, because it goes against everything that we hold dear to a certain extent in the judicial system, which is due process and opportunity for someone to be heard and to respond. And the very nature of our system adversarial, which enables someone to bring their position to the Court and a party to respond in opposition. That's how this all works.

When someone is defaulted, it's clear that only one party is heard, which is not the preferred way we would like to see these cases resolved. We would like everybody to be at counsel table, not just one side.

Central to CR 60 is the requirement these motions be brought within one year after judgment was taken. That's a very important requirement of the rule because, if you think about it, without some responsibility for an individual to be reasonably diligent here, frankly, if there wasn't a timeframe contemplated in the rule, a party could otherwise just be that proverbial snake in the grass. You know, you could wait, for any number of reasons, until -- the suggestion here has been

to wait around, and how convenient the statute of limitations has run.

So, circling back to the burden, which is on the party seeking vacation of the judgment. That burden is clear and convincing. Clear and convincing isn't -- it's not reasonable doubt, which is the highest standard we have. It's not preponderance. It's clear and convincing. And it allows me to really focus in on some of the detail that I think the parties and counsel would expect the Court to focus on.

Central to the Court's analysis would be: Why did the Frears wait? Why did they wait almost seven years before they pursued this motion, before they pursued an action to vacate this default? It doesn't seem to be disputed that, in some fashion, the Frears have been aware that a judgment, or perhaps a collection action of some sort, was ongoing, or a judgment had been taken against them. And yet, they did nothing, at least in terms of seeking relief as to the default. So, this could be, in many circumstances, a fatality to your CR 60 motion.

This isn't an equitable proceeding. It's a proceeding at law, but the Court can consider equity, and that's just inherent in CR 60, which is a basis I hear consistently in opposition to a motion to vacate. Counsel often cite the equitable principle of laches in matters such as this.

Laches, if you've ever looked it up, literally translates to "equity aids the vigilant." All that really means is, if you get off your tail and address this, you're going to be in a lot better shape than if you just sit on it. Equity aids the vigilant. Pursue relief from the Court if you know there's a problem. And to have it out there, if you will, for all these years after a judgment entered that you knew about, that question just isn't answered here at all.

Again, it was to some extent touched on in the pleadings, which is that, in 15 minutes, you can go get online and pull a copy of your credit report. Literally, in 15 minutes, you can do that. Everyone is certainly aware that this is a major issue right now because of some of the recent problems with Equifax. Regardless, you can easily get an up-to-date credit report on yourself, and that credit report will tell you in minutes whether someone has entered a judgment against you.

If there's a judgment against you for money owed, that can have extraordinary ramifications. It can prevent you from purchasing a home, from selling a home, from receiving money that you thought you were going to get in closing that you were going to use on another home. It can prevent you from getting a credit card that you might need. It can prevent you from getting a loan to buy a vehicle. There really are extraordinary ramifications when there's a judgment

against you.

I don't agree with counsel's suggestion that it's no big deal, that anybody can become a registered process server. They just pay the fee, and that's all there is to it, or, as I heard, somebody could just throw the pleadings over the fence. There are certainly examples where service of process was far from perfect.

But, again, I come back to my earlier statement that a process server is swearing under penalty of perjury under the laws of the State of Washington that what they're saying is true and correct, and it just strikes the Court as completely nonsensical to suggest that a process server, who, in fact, makes their living conducting service of process, would act in a cavalier fashion about this. It's just nonsensical to suggest that took place here.

Process servers are completely reliant on the same thing lawyers are. Your word is your bond, and if people don't trust you and if you have a reputation for not being the most thorough process server or thorough and complete attorney, you're not going to get a lot of work. It's only going to take a short amount of time before that catches up to you, and you'll be looking for a new career.

An appellate decision from quite a few years ago reminded me of a case that I presided over. If you're aware there's a judgment that's been taken against you, if you're

aware that there's an issue out there that conceivably could harm you, you have a duty to mitigate your damages. That's probably something we all hear in law school in the first week of contracts and then forget. But clearly, everyone has a duty to mitigate their damages if they know about it.

For example, the pipe breaks in the basement of your home because of subzero weather, and your basement starts flooding, and you discover it when there's two inches of water in the basement. You have a couple options. One option would be, you can shut the water off and call the insurance company and let them know that you've had this damage to your house. The other option would be, you don't shut the water off, and you decide to let the water go ahead and flood all the way to the first floor. Might sound absurd, but these kind of crazy things happen. You don't get to do that, obviously. You don't get to say to your insurance company "my house flooded, so fix everything," when you could have easily prevented much of the damage.

Applying this principle to the instant case, once you become aware that you have an issue, that there's a judgment that may have been taken against you, or a collection action that's being pursued, you have a duty to mitigate and go forward with your action before the Court.

The Frears had a duty to mitigate, and, for whatever reason, they did nothing for seven years. As the Court looks

at this case, I'm aware that the statute of limitations would be expired if the Court was to vacate the judgment. You have a duty, pursuant CR 60, to bring this motion within a reasonable period of time. The rule contemplates one year, and we're at least six years past that here.

I want to mention, since counsel spent a significant amount of time on it, whether the credit report was or was not inappropriately obtained. The point of the report was to discern whether the person has crimes of dishonesty on his record, and the Court can properly consider that. Here, Mr. Nolan does indeed have crimes of dishonesty in his history, which is not contested. I'm going to take a guess and say that's why the report was obtained in this case, to advise the Court regarding the veracity of his testimony.

Having said all of this, I'm satisfied that the defendants have failed to demonstrate, by clear and convincing evidence, that service of process, approximately six and a half years ago, was defective, or that there is otherwise a basis pursuant to CR 60 to set aside this judgment.

So, with that in mind, Counsel, I will be denying the motion. Counsel, do you want to draft something back at your offices, or do you want to try to pencil out something here?

MR. MILLER: Your Honor, I think we can probably pencil something out back at the office and maybe set a

presentment date. I'd ask for a couple points of clarification though, if I might?

THE COURT: Sure.

MR. MILLER: It's my understanding that the Court ruled that the defendant's basis for bringing this motion was under 60(b)(11); is that correct? That's your understanding?

THE COURT: No. What I said was that's one part of the rule that parties often cite in support of their motion.

MR. MILLER: Okay. And is the Court making any finding of fact about who was served, if anyone?

THE COURT: No. I'll make a finding that there was service. I'm satisfied of that, and there wasn't any response in opposition to that. So, I'm going to make a finding that service was completed.

MR. MILLER: And, I mean, it belabors the point, but the declaration says it was Mr. Nolan. Are you thinking Mr. Nolan was served or somebody else or are you --

THE COURT: I don't need to go there, Counsel.

MR. MILLER: Okay. And then, lastly, are you ruling that, pursuant to some rule, that the Court is allowed to consider a credit report submitted on a nonparty?

THE COURT: No. Again, that's not what I said. What I said was the Court can consider a person's criminal history, as it pertains to their truthfulness when they testify, if they have crimes of dishonesty on their criminal

record. And here, Mr. Nolan, who submitted a declaration, does have crimes of dishonesty on his criminal record.

MR. MILLER: So, the Court is not ruling on the motion to strike then?

THE COURT: I'm not going to strike it, but, frankly, it really didn't play into my decision to any degree.

MR. MILLER: Thank you.

THE COURT: Okay. And, Counsel, just, you know, a courtesy heads up. We don't do presentments in here anymore because we've discovered that when you do that, it ends up being an additional opportunity to argue. So, what we can do is Ms. Dorman will give you a date that I need to have the order back. If you two don't agree on what it should say, then just do your own orders.

MR. MILLER: Sure.

THE COURT: I don't know that you necessarily need findings and conclusions. I'll leave that up to you.

MR. MILLER: We want them.

THE COURT: I'll have Ms. Dorman step out in a minute. She'll give you a date that we can put on the calendar to make sure I get the pleadings back. All right. Counsel, thank you very much.

MS. ASAN: Thank you, your Honor.

(End of proceedings.)

KIRK D. MILLER, P.S.

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