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ORIGINAL
67335-1

No. 67335-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC,

Plaintiff/Appellant,

v.

WELLS FARGO BANK, NA,

Garnishee Defendant/Respondent.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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DIVISION ONE

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I. INTRODUCTION

Wells Fargo (“Wells”) seeks to escape liability on a default judgment validly entered under Washington’s garnishment statutes. Wells has abandoned its arguments that “extraordinary circumstances” justify relief or that the judgment was obtained by fraud, misrepresentation or misconduct. Thus, Wells must establish either that service of the writ was improper or that the judgment was obtained due to mistake, inadvertence or excusable neglect; otherwise, the trial court’s order vacating the judgment must be reversed and the judgment reinstated.

Wells fails to establish either of these grounds. Service was proper, as Wells failed to present clear and convincing evidence to rebut Bellevue Square’s declaration of service and the other evidence demonstrating valid service. The argument that Wells should be exculpated from the judgment due to excusable neglect (raised for the first time on appeal) must be rejected because Wells concedes that it intentionally ignored the motion for default.

Therefore, Bellevue Square is entitled to the reinstatement of its judgment against Wells. This is not a “windfall,” but the statutory consequence of a series of conscious decisions by Wells in responding to the writ. Bellevue Square is unquestionably owed the judgment amount

by Jimi Lou Steambarge and will not seek a double recovery. To affirm the trial court on these facts would be to invite any garnishee defendant to ignore the garnishment statutes with impunity.

II. ARGUMENT

A. The Record Establishes That Wells Was Properly Served.

1. The De Novo Standard of Review Applies to the Question of Whether Service Was Valid.

Wells challenges Bellevue Square's contention that the Court reviews *de novo* the question of whether service of the garnishment documents was valid. While reversal is appropriate under any standard, the law is clear that a trial court decision regarding whether a judgment is void as a result of improper service is reviewed *de novo*, because the effect of lack of proper service is to render a judgment void and courts have a non-discretionary duty to vacate void judgments. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). "To be valid, service of process must comply with statutory requirements." *Morris v. Palouse River and Coulee City R.R.*, 149 Wn. App. 366, 370-71, 203 P.3d 1069 (2009). "Proper service of the summons and complaint is essential to invoke personal jurisdiction." *Id.* See also *American Discount Corp. v. H.B. Gerrard*, 156 Wash. 271, 273-74, 286 P. 666 (1930) (default judgment

against garnishee void for lack of jurisdiction where not properly served).

To avoid *de novo* review, Wells argues that it attacked the validity of the “writ”, not the validity of “service of the writ.”¹ (Respondent’s Brief, pp. 9-11, n. 4.) This argument contradicts its pleadings below, portions of its own brief on appeal, and the law on which it relies.

Wells has consistently argued both below and on appeal that the judgment was void because of improper service. “Wells Fargo moved under CR 60(b) to have the Default Judgment vacated on the grounds that Bellevue Square failed to serve the Answer Fee with its writ, as required by RCW 6.27.110(1) and, therefore, the **judgment against it was void.**” (Respondent’s Brief, p. 5.) (emphasis added.) “The Default Order **Must Be Vacated Because Service** of the First Writ **was Invalid** Under Washington Law.” (CP 35, emphasis added.) Indeed, on appeal Wells cites cases reiterating that where a judgment creditor does not comply with the garnishment statutes, courts do not have discretion and must vacate the judgment because it is void. *See Shreve v. Chamberlin*, 66 Wn. App. 728,

¹ On appeal, Wells quotes only a portion of the garnishment service statute on which it relied below to make it appear that the statute (and their attack on the judgment) is aimed at the validity of the writ, rather than service. “Under Washington law, “the writ of garnishment on the garnishee is invalid unless. . .” (Respondent’s Brief, p. 9.) However, Wells omits the first two words of the statute. RCW 6.27.110(1) begins, “*Service of the writ is invalid unless...*” RCW 6.27.110(1) (emphasis added).

730-32, 832 P.2d 1355 (1992) and cases cited therein.

Wells tries to have it both ways by attacking the validity of service but avoiding the applicable standard of review. But if the trial court found that the \$20 check was not served, the court would not have had jurisdiction to enter the judgment and to this extent its decision to vacate was not discretionary. This Court thus reviews the determination of whether service was valid *de novo*. *Leen*, 62 Wn. App. at 478.

2. Wells Must Provide Clear and Convincing Evidence to Rebut the Presumption that Service Was Valid.

Wells disputes that it was required to produce clear and convincing evidence to contest service. Again, while Wells's evidence fails any objective standard, courts have apply the clear and convincing standard when a judgment is attacked by contesting service.

Wells argues that the clear and convincing evidence standard does not apply where there is no jurisdictional attack on the judgment.²

² Wells insinuates that there was an irregularity in the declaration of service because the declaration was not filed with the trial court until after Bellevue Square received Wells's form letter. Because Wells never raised this below, Bellevue Square never had an opportunity to respond to this argument on the record. In any case, this fact is irrelevant. Bellevue Square waited until it received the return receipt before it filed its declaration of service because the garnishment statute requires a judgment creditor to attach the return receipt to the declaration filed with the court. RCW 6.27.110(3). For the same reason, there was a similar delay with regard to the declaration of service as to the JP Morgan Chase garnishment, which was executed December 21, 2011 and filed December 28, 2011. (The JP Morgan Chase garnishment documents were processed by the bank several days earlier than the Wells documents.) (CP 166-68.)

(Respondent's Brief, p. 10, n. 4.) This argument has two flaws. First, as explained above, the attack on service of the writ *was* jurisdictional, even if not labeled as such. Second, none of the cases cited by Wells indicate that the presumption only applies where jurisdiction is at issue.

An examination of the origins of the clear and convincing evidence burden of proof reveals that it applies wherever a judgment is being attacked "in order that judicial conclusions may possess regularity and stability." *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918).

Washington courts first applied the presumption not to the affidavit of service, but to a court's finding of proper service in the judgment being attacked. *See Rogers v. Miller*, 13 Wash. 82, 87-88, 42 P. 525 (1895). Similarly, in the default judgment at issue in this case, the trial court found, after examining Bellevue Square's declaration of service and evidence and Wells's letter, that proper service had been made. (CP 31.)

Recently, Division Three of this Court explained that the factor determining whether the clear and convincing evidence standard applies is whether a judgment is being attacked. *Farmer v. Davis*, 161 Wn. App. 420, 428-29, 250 P.3d 138 (2011). In *Farmer*, the party alleging improper service did so in a motion to dismiss the action before judgment was rendered. In declining to apply the standard, the Court explained that

Washington cases have long held that the clear and convincing evidence standard applies to challenges of existing judgments due to “considerations of the regularity and stability of judgments entered by the court.” *Id.* at 428. Wells chose to wait and attack an existing judgment on the basis that the writ was improperly served. As such, its attack on service is subject to the heightened clear and convincing standard. Whether this standard was met is reviewed *de novo* by this Court.

3. The Oliver Declaration Cannot Meet the Clear and Convincing Evidence Standard As a Matter of Law.

With the applicable evidentiary standard and standard of review determined, the Court can consider Bellevue Square’s evidence of service and Wells’s evidence to rebut it. Bellevue Square submitted a declaration of service regular in form stating that the check was mailed. (CP 12-14.) Bellevue Square submitted a copy of the check maintained in its file. (CP 25.) Unrebutted testimony showed that Wells never mentioned the absence of the check in its first conversations acknowledging receipt of the writ. (CP 96.) A Wells representative admitted that the check may have been lost. (CP 81.) Wells admitted to falsely accusing Bellevue Square of failing to provide an answer fee check for a second writ based on Wells’s erroneous “notations” on documents concerning whether an answer fee had

been received. (CP 74.)

Wells submitted only a declaration of a paralegal, stating that based on her review of Wells's records (which were not attached or described) it appeared that no answer fee had been received. (CP 44-46.) The paralegal made no effort to establish the process by which Wells ordinarily handles garnishment writs, how answer fees are recorded and handled, or that such procedures are reliable. (CP 44-46.) In fact, the record shows that Wells's "answer fee" records are unreliable.

4. The Hearsay Evidence in the Oliver Declaration Is Not Clear and Convincing Evidence.

Wells claims that Bellevue Square never raised its hearsay objection below. This is not true. Bellevue Square vociferously objected to the declaration in its briefing and specifically raised the hearsay objection at oral argument. (CP 57-58; RP 8.) It simultaneously disputed the evidence's sufficiency, along with its admissibility.

Wells's argument that the business records exception applies fails. The exception is used to admit business records when a custodian testifies that records were kept in the ordinary course of business. RCW 5.45.020. The Oliver Declaration is a case of hearsay within hearsay. One level of hearsay is Ms. Oliver's testimony as to what the business records say; the other level is the business records themselves. As such, each part of the

combined statements must meet an exception to the hearsay rule. ER 805. Though the records themselves may be admissible if properly authenticated (such as by the testimony of a proper custodian), the records themselves were never submitted. Ms. Oliver's testimony cannot be classified as a "business record" and no other exception applies to her testimony.

Wells relies on *Discover Bank v. Bridges*, 154 Wn. App. 722, 226 P.3d 191 (2010), but in *Bridges*, the business records themselves were attached to the affidavits and declarations at issue. *Id.* Here, they are not. Moreover, *Bridges* does not address the business records exception to the hearsay rule; it addresses the "personal knowledge" requirement for affidavits submitted under CR 56(e). *Id.* at 725-26. Wells also attempts to argue that Ms. Oliver's testimony is admissible under ER 803(a)(7), but that rule requires that:

[T]he matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

ER 803(a)(7).

Ms. Oliver's declaration contains no testimony to establish that the matter was a kind of which a record was regularly made and preserved. In fact, un rebutted testimony shows that a Wells representative told Bellevue Square that the garnishment was never entered into the Wells "system."

(CP 81.) This alone would explain the lack of an entry in Wells's records. Ms. Oliver makes no effort to describe the process by which Wells tracks and records answer fees in its "Fee Records". Her declaration does not even contain a statement that any such notation was absent in the Fee Records. It only contains her conclusory statement that based on her review, no answer fee was received. (CP 45.) There is no foundation for the admission of her testimony under ER 803(a)(7).

Moreover, Bellevue Square submitted evidence concerning Wells's handling of the "Second Writ" showing that its "fee records" are untrustworthy, making the admission of Ms. Oliver's testimony under ER 803(a)(7) even less appropriate. Even if the testimony is admissible, it is insufficient evidence to meet any applicable standard.

Oliver's declaration does not necessarily rebut Bellevue Square's evidence of service. Nowhere is there a declaration from Wells by the person who first reviewed the contents of Bellevue Square's mailing stating that no check was included. If Wells lost the check some time after it opened the envelope, but prior to the time (eight days later) when it mailed the letter to Bellevue Square, all declarations submitted by both parties could be true, yet valid service of the writ still would still have occurred.

This Court should rule that Wells failed as a matter of law to meet its burden of showing a lack of proper service by clear and convincing

evidence. The fact that Wells's evidence does not rebut Bellevue Square's evidence demonstrates that it is error under any standard to conclude that service of the garnishment documents was invalid.

B. It Would Be an Abuse of Discretion to Find Excusable Neglect or Inadvertence Where Wells Fails to Meet the Four Part Test for Vacating Defaults on That Basis.

If this Court determines the writ was served with the check, then to affirm the vacation of the default judgment Wells must establish excusable neglect or inadvertence.

Wells argues for the first time on appeal that excusable neglect, inadvertence or mistake justified vacation of the judgment. Wells devotes half of its brief to this new theory never argued below, and in fact disavowed³. Even if Wells is permitted to argue this new factual and legal theory on appeal, there are no facts in the record to support such a finding.

To rely on excusable neglect or inadvertence, Wells must now meet

³ Wells explicitly argued below that the usual four-part test for excusable neglect did not apply because Wells was attacking the judgment based on "irregularity" (lack of proper service) rather than excusable neglect. (CP 35, n. 2.) It offered no argument or evidence as to how the four-prong test was met. At oral argument, when questioned as to whether Wells misplaced the check, Wells's counsel stated, "**No, your honor.**" While it is true that this Court may affirm on any ground *developed in the record*, this Court generally will not decide whether alternative grounds justified the trial court's decision when those grounds were neither raised below, nor mentioned by the trial court in its ruling. *In re Shoemaker*, 128 Wn.2d 116, 121, 904 P.2d 1150 (1995) (refusing to decide whether CR 60(b) could have formed basis for trial court's decision to vacate judgment where it was never raised below or mentioned by trial court.) Wells should also be judicially estopped from making an inconsistent factual argument on appeal. *Mastro v. Kumakichi*, 90 Wn. App. 157, 163-64, 951 P.2d 817 (1998).

the four-part excusable neglect test it argued below does not apply. The four part test consists the following factors:

- (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party;
- (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect;
- (3) that the moving party acted with due diligence after notice of entry of the default judgment; and
- (4) that no substantial hardship will result to the opposing party.

TMT Bear Creek Shopping Center, Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 201, 165 P.3d 1271 (2007). "The four elements vary in dispositive significance as the circumstances of the particular case dictate."

Id. (Internal citations and quotation marks omitted.)

1. Wells Has No Defense on the "Merits"; Wells Possessed the Funds of Ms. Steambarge.

The concept of the "merits" is different in the garnishment context than in other civil matters. Generally, a default judgment is a truncation of a case; only a complaint is filed, and then a declaration of the plaintiff supporting her claim, and the Court accepts those statements without any contravention. However, in the garnishment context, there is no "trial on the merits," and the only issue is whether the garnishee possessed funds of the judgment debtor.

Further, while default judgment is the unequivocal end of most civil

litigation absent a motion to vacate, the garnishment statutes expressly reference default judgments and grant a garnishee defendant with an additional right to reduce its liability to the amount of funds possessed at any time within 7 days of receipt of a writ of execution or writ of garnishment on the default judgment. RCW 6.27.200. Thus, the prejudicial effects of a default judgment on a defendant with a valid defense to the merits are far greater than the prejudicial effect of a default judgment against a garnishee defendant. In addition, where a defendant's failure to respond is willful, as here, the strong defense on the merits element is given less weight. *TMT Bear Creek Shopping Center*, 140 Wn. App. at 201. Wells made a conscious, and thus willful, decision not to respond to the motion for default. (CP 34.)

Even if the "merits" of the garnishment action are considered, Wells has no defense on the merits as to liability. Wells admits that at the time it received the writ of garnishment, it possessed funds of Ms. Steambarge, yet it failed to answer the writ.

If a garnishee defendant is properly served and does not respond, the Legislature has imposed an independent liability on the defaulting garnishee defendant (in addition to its liability for the amount of the judgment debtor's funds held) for the full amount of the judgment against

the judgment debtor. RCW 6.27.200.

Any claim by Wells that there was only “around \$200,” in Ms. Steambarge’s account should not be confused with a defense on the merits. A trial court abuses its discretion if it sets aside a default judgment solely because the defendant is surprised by the amount, or the damages might be less in a contested hearing. *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 408, 196 P.3d 711 (2008).

If banks could argue that the disparity between the amount in a judgment debtor’s account and the full judgment amount is enough of a “defense on the merits” to set aside the default judgment, the additional liability imposed by the Legislature in RCW 6.27.200 for the full judgment amount would be rendered a nullity and the procedure to reduce the judgment would be rendered superfluous. This was not the intent of the Legislature. The garnishment statute grants garnishee defendants the right under RCW 6.27.200 to escape the effects of a judgment for the full amount owed by the judgment debtor by filing a motion within 7 days of service of a writ on the default judgment by tendering the amount of funds possessed. Wells chose not to avail itself of this procedure.

2. Wells's Decision to Wilfully Ignore the Motion for Default Is Not Excusable Neglect as a Matter of Law.

The second factor is that the moving party's failure to timely appear was occasioned by excusable neglect, inadvertence, surprise or excusable neglect. *TMT Bear Creek Shopping Center, Inc.*, 140 Wn. App. at 201. Wells has admitted that it was given proper notice of the default motion, that it was aware of the hearing, but that it chose not to respond or appear because it did not think the court would believe that it was served with the \$20 fee. In Wells's own words, "Wells Fargo admittedly did not respond to Default Motion [sic], in part because it considered the First Writ to be invalid on its face due to the omission of the Required Payment." (CP 34.) Its conscious choice not to respond was willful.

Wells could have avoided this litigation by accepting a replacement \$20 check or by filing its answer once it read Bellevue Square's motion claiming that the \$20 fee had been served. At most it would have had to forgo the \$20, hold Steambarge's \$206, and pay Bellevue Square the \$551.00 in attorney fees it spent filing the motion for default. (CP 144.) Instead it chose to take the more expensive, risky, and challenging path of seeking to vacate a default judgment by attacking service.

Wells asserts that its loss of the check constitutes excusable neglect. (Respondent's Brief, 12-13.) However, Wells's loss of the check and

choice not to answer the motion for default are two distinct issues, neither of which constitute excusable neglect. With respect to the former issue, the law is contrary to Wells's belief that its mixup constitutes excusable neglect. "Judicial decisions have repeatedly held that if a company's failure to respond . . . was due to a breakdown of internal office procedure, the failure was not excusable." *TMT Bear Creek Shopping Center*, 140 Wn. App. at 212-13. *See also Rosander*, 147 Wn. App. at 407 (failure to respond due to communication breakdown not excusable neglect).

The cases Wells cites are not analogous to these facts. In *Boss Logger, Inc. v. Aetna Casualty & Surety Co.*, 93 Wn. App. 682, 689, 970 P.2d 755 (1998), the defendant submitted evidence, including its litigation policy manual, which showed that it had a reliable system in place to ensure that litigation was responded to in a timely manner. Here, Wells submitted no evidence whatsoever to establish that its procedures for handling writs of garnishment and answer fees are reliable or trustworthy. To the contrary, here the evidence shows a systemic pattern of disregard for judicial process.

Showalter v. Wild Oats, 124 Wn. App. 506, 101 P.3d 867 (2004) is also of no help to Wells. In *Showalter*, defense witnesses submitted declarations describing the usual procedure for handling and processing lawsuits. *Id.* at 514. *Showalter* also distinguished situations where there

was an intentional failure to respond, as there was here. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 836, 14 P.3d 837 (2000) is of little guidance, because there, the excusable neglect factor was “not seriously in dispute.” Thus, the *Pfaff* court did not analyze the factors.

What distinguishes this case from the facts of all the cases relied upon by Wells is that in those cases the parties’ failure to respond was due to a mistake. Here, even if loss of the check could be deemed a mistake, supervening events notified Wells that Bellevue Square was going to argue to the trial court that the check was served. Even though Wells knew that Bellevue Square challenged Wells’s claim of invalid service and was given an opportunity to respond, Wells made a conscious decision to not respond based on a belief that the motion would be unsuccessful. A defendant’s failure to respond based on its own opinion of the merits of the plaintiff’s case can never be deemed mistake, inadvertence or excusable neglect, so as to excuse it from responding to a motion for default. *Bishop v. Citizens Bank of Sultan*, 14 Wn.2d 13, 126 P.2d 582 (1942); *Commercial Courier Service, Inc. v. Miller*, 13 Wn. App. 98, 103, 533 P.2d 852 (1975).

3. Wells Did Not Act With Due Diligence After It Was Given Notice of the Default.

The third factor in the four-part test is “that the moving party acted with due diligence after notice of entry of the default judgment.” Wells

was given notice of the hearing on the default judgment as early as January 2011, and it was certainly aware of the judgment on February 25, 2011 when the second garnishment was served on it. (CP 34.) Wells acknowledges that it had the option to have the judgment reduced to the amount actually in Steambarge's accounts by filing a motion to that effect within seven days of service of this second writ. RCW 6.27.200.⁴ Once again, however, Wells chose not to avail itself of this opportunity because it preferred an attack on the judgment by contesting service. (Respondent's Brief, p. 19, n. 7.) Yet, its motion to vacate was not filed until May 3, 2011. A delay of over two months after receiving notice of the default judgment, and three months after it had notice that the judgment would be entered, should not be considered "due diligence." *In re Stevens*, 94 Wn. App. 20, 971 P.2d 58 (1999).

C. There Is No Equitable Ground to Vacate; Bellevue Square Is Owed the Amount Claimed and It Does Not Seek a Double Recovery.

Wells persistently claims that a judgment in Bellevue Square's favor will constitute a "windfall." Wells no longer bases its "windfall" argument on the "extraordinary circumstances justifying relief" prong of CR 60(b). Instead, Wells argues that the trial court rested its decision on

⁴ Wells' option to reduce the judgment pursuant to this statute vitiates Wells' equitable arguments regarding all of its actions related to both the first and second writ.

“equitable” grounds. In so doing, Wells accuses Bellevue Square of “inequitable” conduct due to its failure to accede to Wells’s garnishment clerk’s insistence that the garnishment action be started anew. Wells argues that based on these circumstances, CR 60(b) “gave the trial court equitable discretion to vacate the Default Judgment to ameliorate the statute’s harsh effect.” (Respondent’s Brief, pp. 15-17.)

The trial court’s ruling belies any assertion that it was resting its decision on equitable grounds. The trial court voiced its disapproval of Wells’s conduct at the default hearing, stating, “I am going to make them pay for every single penny that you have put into this ridiculous situation.” (RP 10.) It admonished Wells that it would pay Bellevue Square’s fees “from the moment [Mr. Nold] got up in the morning . . .” (*Id.*) In fact, the trial court felt constrained by unarticulated legal, not equitable, grounds. “I know what the appellate courts are going to do with this.” (RP 10.)

The trial court was not swayed by the equities to relieve Wells of the “harsh” consequences of the garnishment statutes; it apparently believed that it lacked discretion to enforce the default judgment.

Bellevue Square does not seek a “windfall.” It is owed over \$70,000 on its judgment and it is simply utilizing the statutory procedure of garnishment to enforce that judgment and recover the fees incurred in doing

so. There is no danger that Bellevue Square will be paid twice. Wells likely has remedies against Ms. Steamburg should it be ordered to pay the judgment. Wells had several opportunities to pay a nominal sum and be done with this matter, but on each occasion *chose* not to do so. Wells *chose* not to file an answer despite its acknowledgment that the \$20 check may have been lost; it *chose* not to respond to the motion for default; and it *chose* not to have the judgment reduced under RCW 6.27.200.

Equity does not justify Wells's relief from the garnishment statute's "harsh effect." "Once a judgment is final, a court may reopen it only when specifically authorized by statute or court rule. . . . CR 60 sets forth the general conditions under which a party may seek relief from judgment." *In re Shoemaker*, 128 Wn.2d 116, 120-21, 904 P.2d 1150 (1995). While a trial court does have certain equitable powers, it does not have unfettered discretion, and its equitable power "can only be exercised within the framework of established equitable principles." *Id.*

No established equitable principle allows a court to overturn a judgment for the sole reason that a statute has a "harsh" effect. If it is the "statute's harsh effect" with which Wells takes issue, its remedy lies with the Legislature, as courts do not have equitable powers to disregard a statute. *See, e.g., Guntle v. Barnett*, 73 Wn. App. 825, 833, 871 P.2d 627

(1994).

Bellevue Square's insistence that a garnishee defendant respect the authority of Washington courts and respond to a duly served writ is not inequitable conduct. In fact, Bellevue Square attempted to ameliorate any negative impact on Wells that may have been caused by its loss of the check. It is undisputed that Bellevue Square offered to simply submit another check if Wells would continue processing the original writ. Wells refused. It insisted that Bellevue Square start the process over. (CP 81.) While Wells argues intently that Bellevue Square was unreasonable not to accept this option, the reality is to the contrary.

The offer to "start over" was not really an offer at all. It would have both been inefficient and substantively prejudicial. Because RCW 6.27.130 requires the judgment creditor to give notice to the judgment debtor at the time of (or before) service of the writ of garnishment, Ms. Steambarge knew that her accounts were being garnished when Wells claimed it was not properly served. (CP 174-76.) As one would expect, Ms. Steambarge promptly withdrew all of her funds after receiving notice of the garnishment. (See CP 45: "As of February 25, 2011, the Accounts were overdrawn.") Thus, "starting over" would have involved Bellevue Square paying more money to garnish nothing.

While Wells now claims that only \$206.01 of Ms. Steambarge's money was in Wells's possession, Bellevue Square did not know that at the time. Its garnishment of Steambarge's Chase accounts netted nearly \$9,000. (CP 172-73.) Bellevue Square was not told that there was only \$206 in the account until March 15, 2011. (CP 71.) Prior to that time Bellevue Square had every reason to think that Wells's loss of the check and insistence on "starting over" could cost it a substantial amount of money.

By proceeding on the original writ, Bellevue Square preserved its right to recover whatever amount was in Steambarge's account as of the date of service, December 20, 2010. Wells had the opportunity to oppose the motion for default, or to reduce the judgment to the amount in the account as of the date of service of the writ within seven days of service of the second writ on Wells, but it chose not to avail itself of either opportunity. (Respondent's Brief, p. 19, n. 7 ("For the reasons explained above, Wells did not seek to have the amount of the Default Judgment reduced, it sought to have the judgment vacated . . .").)

Finally, it should also be pointed out that Bellevue Square was never awarded the \$206.01 that Wells claimed was in Steambarge's account at the time the writ was served.

D. Admissions as to the Second Writ Did Not Relate to a Settlement Offer and Their Exclusion Under ER 408 Was an Abuse of Discretion.

Bellevue Square presented evidence that with regard to the second writ, Wells again disputed that it was served with a check along with the other documents. In later e-mails Wells admitted receiving the check, citing misinformation and erroneous “notations” in its records as the cause of the mistake. (CP 74.) Without reading the emails, the trial court excluded them pursuant to ER 408. This was an abuse of discretion.

While reversal is appropriate without reviewing these e-mails, this Court should consider the e-mails as part of its *de novo* review of whether service was proper and whether Wells acted diligently. At a minimum, even if this Court is inclined to rule that the trial court has the discretion to vacate the default judgment on equitable grounds, the Court should remand to the trial court to consider the e-mails in determining whether vacation of the default judgment is appropriate on those grounds.

The statements contained in Wells’s e-mails concerning the second writ had nothing to do with any settlement offer and were not related to Wells’s liability on the first writ. The statements at issue consisted solely of an assertion that the second writ had not been served with the requisite

answer fee, a request to submit the \$20 fee and a later admission that the fee had in fact been received, but that Wells's records erroneously reflected that it had not. (CP 70, 74.) Even if the Court determines that the e-mails contain "settlement" negotiations concerning Wells's liability and payment on the first writ, the discussion regarding the second writ was independent of those statements, and the trial court should have considered them.

In its response brief, Wells selectively quotes from Ms. Anderson's e-mails, attempting to show that the e-mails reflect only that the attorney had received "incomplete" information from the client. However, when the e-mail is viewed in its entirety, it is clear that the attorney had received not incomplete, but *incorrect*, information from her client. Ms. Anderson comments on erroneous "notations" made on Wells documents and clarifies that it was her client that informed her that no check was received:

With respect to the second writ of garnishment delivered to Wells Fargo Bank on February 25, 2011 (the "Second Writ"), **I have been informed by our client** that, once again, your office did not enclose a check for the required \$20 answer fee. Accordingly, Wells Fargo does not intend to formally respond to the second Writ, in that service was not valid under Washington law, unless it receives the requisite answer fee.

(CP 70, emphasis added.)

And in a follow-up e-mail:

It has been confirmed to me that Wells Fargo's electronic records reflect a received check contemporaneous with the second writ, in

contrast with a **notation on the second writ that no check was enclosed** (which informed my original comments).

(CP 74, emphasis added.)

Ms. Anderson's e-mails reveal that someone at Wells made an erroneous notation on the second writ that no check was enclosed and that someone at Wells told Ms. Anderson that no check had been received with regard to the second writ. These statements in the e-mails concerning the second writ have nothing to do with Wells's liability, or the settlement discussions, as to the first writ. They should not have been excluded by the trial court, and they are relevant as to both whether service of the first writ was valid (despite the Oliver declaration) and as to any equitable arguments for vacating the judgment offered by Wells.

Wells failed to respond to Bellevue Square's argument that the information contained in Ms. Anderson's admissions would be otherwise discoverable. Wells evidently does not contest this point, which alone makes the statements admissible under the plain text of ER 408.

III. CONCLUSION

Bellevue Square reasonably and appropriately attempted to collect on its judgment for breach of a lease. All the actions that Bellevue Square took were expressly authorized by statute and the remedies it sought

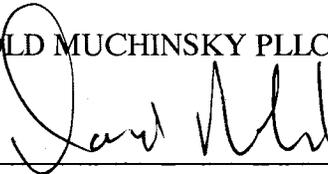
expressly provided by statute.

Wells, on the other hand, chose at every step of the way not to avail itself of the opportunities to limit its liability in this matter. From the beginning, it took the firm position that it did not receive a check; and did not waiver from that position until its response to the instant appeal. On these facts, there were no grounds for vacating the default judgment. This Court should reverse the order vacating the default judgment, reinstate the judgment, and award Bellevue Square its fees. Otherwise, it will reward Wells's intransigence and encourage garnishee defendants to disregard garnishment writs with impunity.

By reinstating the default judgment, the Court will reaffirm, as the Supreme Court did in *Bishop v. Citizens Bank of Sultan*, 14 Wn.2d 13, 126 P.2d 582 (1942), that the garnishment statutes and legal process are not to be ignored, and assure that Bellevue Square obtains recovery for an amount that is justly due.

Respectfully submitted this 30th day of November, 2011.

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Attorneys for Appellant

2011 NOV 30 PM 3: 23

No.67335-1-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC,

Appellant/Plaintiff,

v.

WELLS FARGO BANK, NA,

Garnishee Defendant/Respondent.

NO. 63515-6-I

DECLARATION OF SERVICE
OF APPELLANT'S REPLY
BRIEF

I, Jodi Graham, declare as follows:

1. I am not a party to the above-captioned action and am over the age of 18.

2. I am competent to testify to the matters herein and do so based upon my personal knowledge.

3. I cause the following documents to be served on November 30, 2011 in the manner indicated below:

1. Appellant's Brief; and

2. Declaration of Service.

4. The above documents were served on the following:

Court of Appeals
600 University Street
One Union Square
Seattle, WA 98101 **Via Legal Messenger**

Heidi Anderson
Lane Powell PC
1420 Fifth Avenue, Ste. 4100
Seattle, WA 98101 **Via Legal Messenger**

Jimi Lou Steambarge
921 SW 152nd Street
Burien, WA 98166 **Via E-Mail and US First Class Mail**

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

Signed at Bellevue, Washington this 30th day of November, 2011.

A handwritten signature in black ink, appearing to read "Jodi Graham", written over a horizontal line.

Jodi Graham

10500 NE 8th Street, Suite 930
Bellevue, Washington, 98004
Telephone: (425) 289-5555
Facsimile: (425) 289-6666