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67335-1
ORIGINAL

No. 67335-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC,

Plaintiff/Appellant,

v.

WELLS FARGO BANK, NA,

Garnishee Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY

APPELLANT'S BRIEF

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I. INTRODUCTION

On January 25, 2011, the trial court entered a default judgment in favor of Bellevue Square against Wells Fargo for failure to respond to a writ of garnishment properly served on December 20, 2010.

Wells Fargo had three opportunities to avoid the default judgment, but in each case Wells Fargo refused to respond. It finally filed a motion to vacate in May 2011, contesting the validity of service and alleging fraud and extraordinary circumstances justifying relief.

The only evidence Wells Fargo submitted to contest Bellevue Square's proof of valid service is a declaration from a paralegal in its Legal Order Processing Department baldly alleging that according to her examination of Wells Fargo's fee records (which were not attached), it appeared that no answer fee had been received.

If Wells Fargo's hearsay declaration can constitute clear and convincing evidence sufficient to rebut Bellevue Square's proof of service and the additional evidence it submitted, the effectiveness of all judicial process would soon be subject to attack. Judgment creditors would be left entirely at the mercy of banks or other garnishees that deemed it unnecessary or inconvenient to respond to a writ of garnishment. Because clear and convincing proof contesting service is not in the record and there

is no evidence of fraud, misconduct, misrepresentation or extraordinary circumstances justifying relief, the order vacating the default judgment should be reversed and the judgment reinstated. Bellevue Square should be awarded its fees and costs on appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by vacating the default judgment because none of the elements under CR 60(b) were shown.
2. The trial court erred by excluding e-mail correspondence on the grounds of ER 408 when the communications were not made with any offer to settle or compromise the litigation and were offered for a purpose other than establishing the validity or amount of Bellevue Square's claim.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did Wells Fargo present clear and convincing evidence contesting Bellevue Square's proof of service of the writ and answer fee, thus establishing irregularity in obtaining the judgment?
2. Did Wells Fargo establish clear and convincing evidence that the judgment was obtained by fraud, misconduct or misrepresentation?
3. Did Wells Fargo establish extraordinary circumstances justifying relief from the judgment?

4. Were the e-mails excluded by the trial court offers of compromise by Wells Fargo offered to prove the validity or amount of Bellevue Square's claim such that they were subject to ER 408?

IV. STATEMENT OF THE CASE

A. Bellevue Square Serves Wells Fargo With a Writ of Garnishment and the Required Answer Fee.

Bellevue Square obtained a judgment against Jimi Lou Steambarge ("Steambarge") on October 29, 2010. (CP 127-129.) Bellevue Square obtained two Writs of Garnishment based on the judgment, one directed to JP Morgan Chase Bank, NA¹ and another to Wells Fargo Bank, NA. (CP 18-20, 80-81.) On Thursday, December 16, 2010, Wells Fargo was served with certified copies of the Writ of Garnishment, along with a copy of the Application, four answer forms and a check for \$20. (CP 12-14.) The documents were mailed, via certified mail, return receipt requested, to Wells Fargo's designated address for service of process for garnishments in Phoenix, Arizona. (CP 12-14.) Bellevue Square's counsel maintained a copy of the documents it served, including a copy of the check, in its file. (CP 95-102.)

¹ On December 28, 2010, Bellevue Square's counsel received the Answer from the JP Morgan Chase garnishment indicating that there was \$8,873.03 in the account. Bellevue Square has since obtained a judgment on that answer and received the funds without incident. (CP 80-81.)

The Writ of Garnishment contains, in pertinent part, the following warning in all-capital type:

IF YOU FAIL TO ANSWER THIS WRIT AS COMMANDED, A JUDGMENT MAY BE ENTERED AGAINST YOU FOR THE FULL AMOUNT OF THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS WITH ACCRUING INTEREST, ATTORNEY FEES, AND COSTS WHETHER OR NOT YOU OWE ANYTHING TO THE DEFENDANTS.

(CP 18-20.)

Jodi Graham, a paralegal for Bellevue Square's attorneys, spoke with a Wells Fargo representative on December 21, 2010, who acknowledged having received the writ. (CP 95-96.) The Wells Fargo representative did not indicate that a check was missing. (CP 96.) Ms. Graham executed a Declaration of Service in accordance with CR 5(b)(2)(B) and RCW 6.27.110(3), testifying under penalty of perjury that she mailed the \$20 check to Wells Fargo Bank, along with the writ and other required documents. (CP 12-14.)

B. Wells Fargo Returns the Documents and Refuses to Answer the Writ of Garnishment.

On January 3, 2011, Bellevue Square's counsel received an envelope from Wells Fargo containing the original garnishment documents, without the check for the garnishment fee, with a cover letter dated December 21, 2010, stating that there was an "invalid payment fee

amount,” and that Wells Fargo would not process the garnishment any further. (CP 24, 81.)²

On the day that Wells Fargo’s letter was received, Bellevue Square’s attorney Thomas W. Stone telephoned Wells Fargo’s Legal Order Processing Department and spoke with “Curt.” (CP 81.) In that phone call, Mr. Stone advised Curt that a check in the correct amount of \$20 was indeed mailed with the writ and that a copy of the filing, including the check, was in the law firm’s file. (CP 81.) When questioned, Curt acknowledged that it was possible that Wells Fargo could have misplaced the check. (CP 81.) Nonetheless, Curt responded that there was nothing that could be done; that the entire procedure would have to be restarted as the garnishment was never entered in Wells Fargo’s “system.” (CP 81-82.) Of course, by this time the judgment debtor had been notified of the garnishment, making a successful second attempt to garnish her Wells Fargo bank accounts highly unlikely. Mr. Stone warned Curt that Bellevue Square would have to file a motion for default and that this was not in either party’s interest due to the expense involved. (CP 81-82.)

² This letter was incorrectly addressed to: “105 NE 8th Street.” Bellevue Square’s counsel’s street address is 10500 NE 8th Street, Ste. 930. The letter is dated December 21, 2010, but the postmark on the envelope is December 28, 2010 and it was not received until January 3, 2011. (CP 81, 88.)

Curt reiterated that there was nothing that could be done and said, in substance, that Mr. Stone should “do whatever he thought he had to do.” (CP 82.) On January 10, 2011, the deadline to answer the writ of garnishment passed without Wells Fargo having answered the Writ. (CP 82.)

C. Wells Fargo Deliberately Ignores Bellevue Square’s Warnings of a Default Judgment and a Default Judgment Is Entered.

On January 12, 2011, Bellevue Square served a copy of the Notice of Default Against Garnishee on Wells Fargo along with all of the default motion documents and filed its motion for default. (CP 104-11.) The motion and subjoined declaration informed the court of Wells Fargo’s claim that it did not receive proper payment and attached a copy of Wells Fargo’s letter dated December 21, 2010. (CP 15-29.) The subjoined declaration supporting the motion stated:

6. The garnishee returned the original writ and other documents served on it, with the exception of the check for the answer fee, to the undersigned with a letter dated December 21, 2010. The letter stated that it could not proceed with the garnishment due to “an inadequate payment fee amount.” A true and correct copy of the letter is attached hereto as **Exhibit C**.
7. However, a check for the appropriate answer fee of \$20 designated in RCW 6.27.095 was provided to Wells Fargo Bank, NA at the time it was served with the writ. A true and correct copy of the check (with account number

redacted) is attached hereto as **Exhibit D**.

(CP 16-17, emphasis in original.)

Wells Fargo admits that it *deliberately* chose not to respond to the motion for default, “in part **because it considered the First Writ to be invalid** on its face . . .” (CP 34, emphasis added.) Wells Fargo later again explained that its failure to object was due to its belief that the motion would be unsuccessful, rather than due to inadvertence or mistake (“Wells Fargo’s failure to object to the Default Motion was due in large part to its belief that default judgment was unavailable to the Plaintiff in light of the invalid service of the First Writ . . .”). (CP 37.) After Wells Fargo failed to respond, the Court entered a default judgment against Wells Fargo at a hearing on January 25, 2011 pursuant to RCW 6.27.200. (CP 30-31.)

D. Wells Fargo Fails to Move to Reduce the Judgment and Admits That Its Fee Records Were Wrong With Respect to a Second Writ of Garnishment.

On February 25, 2011, Bellevue Square served a second writ of garnishment on Wells Fargo; this one in connection with the default judgment against Wells Fargo itself. (CP 45.) Pursuant to RCW 6.27.200, Wells Fargo had an opportunity, within seven days of being served with this second writ of garnishment, to file a motion with the court to reduce the default judgment to the amount of the judgment debtor’s non-exempt funds that it held at the time of service of the first writ plus Bellevue Square’s accrued interest, attorney fees and costs. Wells Fargo declined to

do so.

Bellevue Square's counsel was first contacted about the second writ by Yvonne in Wells Fargo's Legal Order Processing Department. In a conversation between Yvonne and Bellevue Square's attorney David Nold, Yvonne at first denied that a check had been received with regard to the second writ. Then, after further discussion, she admitted that a check in the correct amount had been received. (CP 67-68.)

Bellevue Square's attorneys were then contacted by Wells Fargo attorney Heidi Anderson. (CP 67-68.) At first, Ms. Anderson again accused Bellevue Square of failing to include an answer fee, and refused to respond formally. (CP 70.) She outlined this position in an e-mail to Mr. Nold:

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.)

Ms. Anderson later back-tracked, explaining that Wells Fargo had *erroneously noted in its records* that no fee had been received:

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) (underlining appears in original; bold emphasis added).

In a later e-mail Ms. Anderson *again* confirmed that Wells Fargo's "paperwork" as to whether a check was received for the answer fee for the second writ was wrong:

With respect to the Second Writ, I was provided with incomplete information with respect to receipt of the check. **Wells Fargo has since confirmed that the required answer fee was delivered with the second writ ... while the paperwork did not indicate a check was received,** Wells Fargo's records reflect a check received with the second writ and cashed.

(CP 77, emphasis added.)

E. Wells Fargo Moves to Vacate the Default Judgment Over Three Months Later.

It was not until May 3, 2011, more than three months after the default judgment was entered, that Wells Fargo moved to vacate the judgment. (CP 32-40.) Wells Fargo sought to vacate the judgment under CR 60(b), and relied on three arguments: (1) there was an irregularity in obtaining the judgment because the writ was never validly served; (2) application of the garnishee default judgment statute to Wells Fargo resulted in a windfall for the judgment debtor and amounted to extraordinary circumstances justifying relief; and (3) Bellevue Square obtained the judgment by fraud, misrepresentation or other misconduct. (CP 32-40.)

The sole evidence that Wells Fargo submitted to the trial court to contest Bellevue Square's proof of service was a declaration by a paralegal in its Legal

Order Processing Department stating that Wells Fargo's fee records did not reflect that an answer fee had been received. (CP 44-46.)

In response, Bellevue Square produced its evidence of valid service, which included the original declaration of service, declarations by two attorneys and a paralegal in its attorneys' office describing their interactions with Wells Fargo, and a copy of the check that was served. (CP 51-62; 67-119; 102). It also produced the email correspondence described above, in which Wells Fargo acknowledged being validly served with the second writ of garnishment and having inaccurate records as to whether an answer fee was received with respect to that writ. (CP 69-79.)

The trial court granted Wells Fargo's motion to vacate, but did not specify the legal basis either in its order or its oral ruling. Instead, the trial court articulated an unspecified concern about how the appellate courts would treat the case:

What I am going to do is I am going to vacate it. Mr. Nold, I have the utmost respect for you, but I am going to make them pay for every single penny that you have put into this ridiculous situation, because this is a tortured case. You remember we had to deal with her and then we have got it here, but I know what the appellate courts are going to do with this. I've been up and down these issues, and as much as I want to deny the relief that they seek, I can't in good conscience. I think you are entitled to all your costs. If you'd give me a cost bill with your -- the way you do your billables, and you are going to get it.

(RP 10.)

The trial court never found that service was improper and no order quashing service exists. There is also no finding of fraud or misconduct, mistake, inadvertence, or extraordinary circumstances justifying relief. (CP 126.)

The trial court's order vacating the default judgment also granted Wells Fargo's motion to strike the e-mail correspondence regarding the second writ of garnishment pursuant to ER 408. (CP 126.) In its oral ruling from the bench, the trial court indicated that it did not even review the text of the e-mails to determine whether ER 408 applied:

I didn't look at the 408 stuff. As soon as I saw the 408 settlement stuff, I know I can't -- I can't look at that, and sometimes it gets in -- it's put in there sometimes for context.

(RP 10-11.)

Bellevue Square timely filed its Notice of Appeal of the Court's order granting the motions to vacate and the motion to strike on June 29, 2011. (CP 162.) Wells Fargo did not file a cross-appeal of any order, finding or conclusion of the trial court.

V. ARGUMENT

A. Standard of Review and Burden of Proof.

Wells Fargo based its motion to vacate on three grounds under CR 60(b): (1) irregularity in obtaining the judgment due to an alleged lack of service of a \$20 answer fee under CR 60(b)(1); (2) alleged fraud, misconduct or misrepresentation in obtaining the judgment under CR

60(b)(4); and (3) extraordinary circumstances justify relief under CR

60(b)(11). (CP 32-43.)

CR 60(b) provides in pertinent part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

* * *

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

* * *

(11) Any other reason justifying relief from the operation of the judgment.

(CR 60(b), emphasis in original.)

1. This Court Reviews De Novo Whether There Was Clear and Convincing Evidence That the \$20 Answer Fee Was Not Served.

Bellevue Square filed a declaration of service regular in form.

(CP 12-14.) Wells Fargo thus had the burden to establish it was not served with the answer fee by clear and convincing evidence. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). “An affidavit of service that is regular in form and substance is presumptively correct.

The burden is upon the person attacking the service to show by clear and convincing proof that the service was improper.” *Id.* (internal citations and quotation marks omitted).

The determination of whether the evidence submitted clearly and convincingly established that service was proper³ is subject to de novo review on appeal. *Ahten v. Barnes*, 158 Wn. App. 343, 349-50, 242 P.3d 35 (2010); *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). Thus, if this Court finds that the evidence in the record does not constitute clear and convincing evidence that no answer fee was received, then it must reverse the order and reinstate the judgment (absent proof of fraud or extraordinary circumstances).

2. The Court Reviews Whether There Was Clear and Convincing Evidence Establishing Fraud, Misrepresentation, Misconduct or Extraordinary Circumstances Justifying Relief for Abuse of Discretion.

Ordinarily, the appellate court’s review of a motion to vacate is for abuse of discretion. *Mitchell v. Washington State Inst. Public Policy*, 153 Wn. App. 803, 824, 225 P.3d 280 (2009). A trial court that vacates a judgment without the moving party having established an appropriate reason for doing so abuses its discretion. *Id.* Likewise, a trial court

³ Here, the trial court did not make an express finding that service was improper.

abuses its discretion if there are no tenable grounds to support its ruling. *Scheib v. Crosby*, 160 Wn. App. 345, 350, 249 P.3d 184 (2011). The trial court made no findings of fraud, misconduct, misrepresentation or extraordinary circumstances justifying relief. As is explained below, based on this record, no such findings could have been based on tenable grounds, as the evidence offered to support the motion is utterly insufficient to meet the applicable standard.

3. The Court Should Review the ER 408 Ruling De Novo.

Evidentiary rulings made with respect to motions for summary judgment are reviewed de novo. *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2009). No authority could be found delineating the proper standard of review of evidentiary rulings made in the course of a motion to vacate. However, the trial court's decision below, based solely on documentary evidence, was more akin to a summary judgment ruling than a ruling at trial, where deference is given to a trial court's consideration of live testimony that cannot be recreated in appellate review. Thus, the de novo standard is more appropriate.

To the extent the trial court's ruling was based on its interpretation of ER 408, review is de novo. *Diaz v. State*, 161 Wn. App. 500, 508, 251 P.3d 249 (2011).

B. There Was No Irregularity, Excusable Neglect or Inadvertence Under CR 60(b)(1) Because the Writ Was Properly Served and Wells Fargo Deliberately Ignored Warnings and Notice of the Impending Default Judgment.

In *Bishop v. Citizens Bank of Sultan*, 14 Wn.2d 13, 17-18, 126 P.2d 582 (1942), the Court held that it was a manifest abuse of discretion for a trial court to vacate a default judgment against a garnishee defendant. As is explained below, the circumstances in *Bishop* are strikingly similar to those in the instant case and compel a reversal of the trial court's decision.

1. There Was No Irregularity in Obtaining the Judgment Because Service Was Proper.

Wells Fargo's sole basis for asserting that there was irregularity in obtaining the judgment was an alleged lack of proper service of the writ due to an alleged failure to include a \$20 answer fee. (CP 37.) Whether clear and convincing evidence established that service was proper is reviewed by this court de novo. *Ahten*, 158 Wn. App. at 349-50; *Dobbins*, 88 Wn. App. at 871.

The garnishee defendant in *Bishop* also claimed that there was a lack of proper service of the writ because, according to the garnishee's affidavit, only the application for the writ, and not the writ itself, had been served. *Bishop*, 14 Wn.2d at 17. The *Bishop* court quickly disposed

of this claim by examining the plaintiff's proof of service, which it found to be "quite sufficient." *Id.*

a. Bellevue Square Filed a Declaration of Service Regular in Form.

"An affidavit of service that is regular in form and substance is presumptively correct. The burden is upon the person attacking the service to show by clear and convincing proof that the service was improper." *Leen*, 62 Wn. App. at 478 (internal citations and quotation marks omitted).

Service of a writ of garnishment on a financial institution is to be accompanied by four answer forms, three stamped envelopes and a check for \$20 and is to be by certified mail, return receipt requested, to the head office or the place designated by the financial institution. RCW 6.27.080; 6.27.115. In this case service was made via certified mail, return receipt requested to the place designated by Wells Fargo, its Legal Order Processing Department in Phoenix, Arizona. Under our Civil Rules, proof of service by mail may be made by affidavit⁴ of the person who mailed the papers. CR 5(b)(2)(B). RCW 6.27.110 also prescribes:

If a writ of garnishment is served by mail, the person making the

⁴ A declaration subscribed by a person under penalty of perjury under the laws of the State of Washington may substitute for an affidavit. RCW 9A.72.085.

mailing shall file an affidavit showing the time, place, and manner of mailing and that the writ was accompanied by answer forms and addressed envelopes, and check or money order if required by this section, and shall attach the return receipt to the affidavit.

RCW 6.27.110.

Bellevue Square filed a Declaration of Service regular in form and substance describing service in accordance with the garnishment statutes and specifying that the required answer fee of \$20 was served. (CP 12-14.) This declaration is presumptively correct. *Leen*, 62 Wn. App. at 478. Bellevue Square's counsel also maintained a copy of the check for the fee. (CP 96; 102.) The evidence in the record establishes that Bellevue Square served the writ and all required documents, including the \$20 answer fee on Wells Fargo. (CP 12-14; 80-94; 95-119.)

b. The Declaration of Chere Oliver Is Not Clear and Convincing Evidence Sufficient to Rebut Bellevue Square's Proof of Service.

To counter Bellevue Square's declaration of service, Wells Fargo was required under *Leen* and related authority to submit clear and convincing proof showing that the declaration was incorrect. *Leen*, 62 Wn. App. at 478.

Instead, the only evidence Wells Fargo submitted was a declaration from a paralegal in its Legal Order Processing Department, baldly alleging that according to her review of Wells Fargo's fee records

(which were not attached) it appeared that no answer fee had been received. (CP 44-48.) This court, in its de novo review of whether clear and convincing evidence established that service was valid, should exclude, or at the very least, give little weight to Ms. Oliver's declaration.

First the statements as to what Wells Fargo's "fee records" say as to whether an answer fee was received are inadmissible hearsay under ER 802. (CP 44-45.) While it appears that Ms. Oliver attempted to lay foundation for the admission of the underlying fee records under the business records exception contained in RCW Chapter 5.45, the fee records themselves were never attached. (CP 44-48.) Absent the fee records themselves, RCW 5.45 does not apply and Ms. Oliver's bald testimony as to what they say is inadmissible hearsay. *Daniels v. Ward*, 35 Wn. App. 697, 704-05, 669 P.2d 495 (1983).

Secondly, while the declaration alleges that it was made on personal knowledge, its substance makes clear that it was not. Rather, the declarant bases her conclusion that no answer fee was received on the same information that Ms. Anderson rested her erroneous conclusion concerning the fee for the second writ, i.e., a review of the Bank's "fee records." (CP 44-45.) Though her declaration alleges that her knowledge is based on her review of fee records as well as her "personal knowledge regarding this specific case," the declaration provides no foundation for

any personal knowledge as to how this particular writ of garnishment was processed. (CP 44-45.)

Rule of Evidence 602 bars testimony purportedly relating facts, when they are based only on the reports of others. *State v. Smith*, 87 Wn. App. 345, 351, 941 P.2d 725 (1997). “Personal knowledge of a fact cannot be based on the statement of another.” *Id.* (quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 657 (rev. Chadbourn 1979); 1 MCCORMICK ON EVIDENCE § 10 (John W. Strong ed., 4th ed. 1992)).

Because Ms. Oliver’s testimony is not based on personal knowledge, it should not be considered by this Court in its de novo review. *Smith*, 87 Wn. App. at 351. Because our state ER 602 mirrors the federal ER 602, we may also look to federal authority. *In re Pouncy*, 168 Wn.2d 382, 393, n. 9, 229 P.3d 678 (2010). Two local federal opinions have recently held that knowledge based only on review of records after litigation commenced is not “personal knowledge” and where the statements are not supported by documentary evidence, they will be stricken. *Butler v. Great American RV Inc.*, No. 09-5516, 2011 U.S. Dist. LEXIS 49298 at **4-5 (W.D. Wash. May 9, 2011) (Strombom, U.S.M.J.); *Bell v. Addus Healthcare, Inc.*, No. 06-5188, 2007 U.S. Dist.

LEXIS 13065 at **10-11 (W.D. Wash. Feb. 26, 2007) (Bryan, J.)⁵

Ms. Oliver's declaration does not attach any of the fee records upon which her opinion is based. No declaration was made by the person who opened the envelope containing the writ or the person that examined its contents. Ms. Oliver's declaration does not even go so far as to describe Wells Fargo's standard procedures for handling garnishments and answer fees. (CP 44-45.) The trial court thus had no basis to conclude that Wells Fargo's procedures are reliable or that its unspecified "fee records" are trustworthy.

To the contrary, the evidence strongly suggests that Wells Fargo's record-keeping is extraordinarily unreliable. Wells Fargo has already admitted that its records were inaccurate with respect to the second writ of garnishment in this very same case. (CP 70-79.) Its staff has admitted that it is possible that Wells Fargo lost the check. (CP 81.)

Wells Fargo's misaddressed form letter to Bellevue Square's counsel dated December 21, 2010 only further exhibits the hasty and sloppy manner in which it handles legal process. (CP 48.) Moreover, the notice that Wells Fargo sent to Bellevue Square's counsel (attached to

⁵ GR 14.1 allows citation to unpublished opinions from jurisdictions other than Washington state courts if the jurisdiction from which the opinion issued allows such citation and a copy of the opinion is attached. The applicable rule in the federal jurisdiction from which these opinions issued is Fed. R. App. Proc. 32.1, which allows citation to federal unpublished opinions issued on or after January 1, 2007.

Ms. Oliver's declaration) did not state that no check was included. (CP 48.) Instead, it stated that the amount of the fee was "incorrect." (CP 48.)

Distilled to its essence, Wells Fargo's response to the testimony under penalty of perjury in Bellevue Square's declaration of service that the \$20 check was mailed and the other evidence and testimony submitted by Bellevue Square, including a copy of the check that Bellevue Square's counsel kept in its file, was a paralegal's conclusion that based on her review of Wells Fargo's (demonstrably unreliable) records, it appeared as though no check had been received. (CP 44-48.)

This Court, in its de novo review for clear and convincing evidence, should give little weight to the Oliver Declaration if it is considered at all. Based on this record Wells Fargo failed to meet its burden of providing clear and convincing evidence to rebut the Declaration of Service and other evidence of proper service offered by Bellevue Square. Even if the standard of review was for abuse of discretion, it would have been an abuse of discretion to grant the motion based solely on the Oliver Declaration.

2. There Was No Excusable Neglect or Inadvertence.

In a heading on one page of its Motion to Vacate, Wells Fargo mentioned inexcusable neglect or inadvertence as a basis for its motion,

but Wells Fargo did not make any substantive argument in support of its assertion. (CP 37.) Indeed, at oral argument the Court asked whether it was possible that Wells Fargo simply misplaced the check. (RP 4-5.) In response, Wells Fargo's attorney explicitly disclaimed any reliance on such an argument and emphasized that Wells Fargo rested its motion on attacking the validity of service. (RP 4-5.) In any case, any argument based on excusable neglect or inadvertence must be rejected. *Bishop, supra*, is again on-point.

In *Bishop*, as here, after the garnishment was refused the plaintiff called the bank and spoke with a cashier, urging the bank to file an answer, but the cashier responded, "I am not interested, I told your man there was no money here." *Bishop*, 14 Wn.2d at 17. As here, the plaintiff obtained a default judgment against the garnishee for the full amount of its judgment against the defendant and proceeded to execute on it. When presented with the execution, the cashier stated, "I don't see how you could get a judgment against the bank. We refused the garnishment." *Id.* at 16.

The Supreme Court strongly rebuked the bank's attitude that its subjective opinion of the writ's validity and its refusal of the garnishment absolved it of further liability. The Court stated:

We think the evidence offered by the garnishee defendant fails to

establish either fraud or excusable neglect. On the contrary, it appears to us that the evidence conclusively establishes a willful disregard of the writ on the part of the garnishee defendant. This, the court will not tolerate.

Id. at 17. In ruling that the trial court manifestly abused its discretion by granting the motion to vacate, the Court, quoting earlier opinions, stated:

The courts will seldom relieve one who has wilfully disregarded the command of a summons duly served, and always the burden is on the party seeking the relief to show that his failure was not so negligent as to be wholly inexcusable and that he has a good defense, in whole or in substantial part.

To countenance such an attitude as the garnishee defendant in this case manifested towards the writ of garnishment, would soon seriously impair, if not destroy, the effectiveness of all judicial process. . . . A writ of garnishment is not to be trifled with, as many a layman has found, to his cost. . . .

Id. (emphasis added; internal quotation marks and citations omitted).

Bishop is in line with other Washington authority on default judgments where parties choose to ignore process duly served upon them. Where a party ignores both the summons and the notice that a default judgment is being sought and waits more than three months to vacate the judgment, there cannot be said to have been excusable neglect. *In re Stevens*, 94 Wn. App. 20, 971 P.2d 58 (1999).

Wells Fargo argued below that its disregard of Bellevue Square's warnings of the default judgment was based on its belief that it had not been properly served. (CP 37.) However, willful disregard of process

and subsequent motions based purely on a defaulting party's subjective beliefs does not constitute excusable neglect or inadvertence. *Commercial Courier Service, Inc. v. Miller*, 13 Wn. App. 98, 103, 533 P.2d 852 (1975).

Wells Fargo has demonstrated a cavalier attitude toward the writ and the judicial proceedings to enforce it. Though its own employees initially acknowledged that the check may well have been lost by the bank, Wells Fargo's attitude has been that Bellevue Square's attorney must accept its hastily-prepared form letter refusal and unspecified faulty fee records as the final word on the matter. Wells Fargo's Legal Department failed to take seriously the warnings from Bellevue Square's attorneys and the judicial process served upon it. Wells Fargo had ample time and opportunity to raise the supposed lack of a check, and any evidence that might support this allegation, by appearing at the default hearing, but Wells Fargo chose not to do so. Wells Fargo could have moved the trial court to reduce the default judgment within seven days of being served with the second writ of garnishment under RCW 6.27.200, but it failed to do so. Wells Fargo did not make any substantive argument as to excusable neglect or inadvertence, but to the extent the trial court concluded that these circumstances amounted to excusable neglect or inadvertence under CR 60(b), it was an abuse of discretion.

C. There Was No Evidence of Fraud, Misrepresentation or Misconduct in Obtaining the Default Judgment.

A party seeking to establish fraud, misrepresentation or misconduct under CR 60(b)(4) has the burden of proving the assertion by clear and convincing evidence. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989). To establish relief under this prong of CR 60(b), the defaulting party must also establish a connection between the alleged misrepresentation and the failure to respond, such as reliance by the defaulting party on some representation made by the party that obtained the judgment. *Id.* at 372.

Wells Fargo's "fraud" claim is based on the allegation that Bellevue Square did not inform the Court that as of the hearing date Bellevue Square's \$20 check had not yet cleared. (CP 39.) This argument is flawed for many reasons. First, Wells Fargo never established a nexus between this alleged omission and its failure to respond. Thus, it has failed to meet the requirements of CR 60(b)(4). *Hickey*, 55 Wn. App. at 372.

Second, in our adversarial system of justice, Wells Fargo cannot expect its opponent to raise every conceivable argument that Wells Fargo might have raised had it bothered to respond or show up to the hearing. Nonetheless, Bellevue Square's counsel went above and beyond his duty,

informing the Court of Wells Fargo's letter concerning the check and attaching it to the Motion for Default. (CP 17; 24.)

Finally, valid service does not depend on whether Wells Fargo negotiated the check. It depends on whether the check was mailed, which the evidence demonstrates was the case. RCW 6.27.080.

D. Ordinary Application of RCW 6.27.200 to Wells Fargo Does Not Amount to Extraordinary Circumstances Justifying Relief.

CR 60(b)(11) is the catch-all provision of CR 60(b). However, Washington's courts have clarified that application of CR 60(b)(11) requires "extraordinary circumstances" justifying relief. *Yearout v. Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). "The use of CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule." *Id.* (internal citations and quotation marks omitted). "Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." *Id.* "The courts have stressed the need for the presence of unusual circumstances before CR 60(b)(11) will be applied." *Id.* (internal citations and quotation marks omitted).

Wells Fargo complains that a default judgment would result in a windfall for the judgment debtor and that this amounts to an

“extraordinary situation” under CR 60(b)(11).⁶ But this is not an unusual result. It is the ordinary consequence for failing to respond to a writ of garnishment and motion for default provided for in RCW 6.27.200, which provides:

If the garnishee fails to answer the writ within the time prescribed in the writ, after the time to answer the writ has expired and after required returns or affidavits have been filed, showing service on the garnishee and service on or mailing to the defendant, it shall be lawful for the court to render judgment by default against such garnishee, after providing a notice to the garnishee by personal service or first-class mail deposited in the mail at least ten calendar days prior to entry of the judgment, for the full amount claimed by the plaintiff against the defendant, or in case the plaintiff has a judgment against the defendant, for the full amount of the plaintiff's unpaid judgment against the defendant with all accruing interest and costs as prescribed in RCW 6.27.090: PROVIDED, That upon motion by the garnishee at any time within seven days following service on, or mailing to, the garnishee of a copy of the first writ of execution or writ of garnishment under such judgment, the judgment against the garnishee shall be reduced to the amount of any nonexempt funds or property which was actually in the possession of the garnishee at the time the writ was served, plus the cumulative amount of the nonexempt earnings subject to the lien provided for in RCW 6.27.350, or the sum of one hundred dollars, whichever is more, but in no event to exceed the full amount claimed by the plaintiff or the amount of the unpaid judgment against the principal defendant plus all accruing interest and costs and attorney's fees as prescribed in RCW 6.27.090, and in addition the plaintiff shall be entitled to a reasonable attorney's fee for the plaintiff's response to the garnishee's motion to reduce said judgment against the

⁶ Other than a bald allegation in the Declaration of Chere Oliver, Wells Fargo never submitted any evidence of Steambarge's account balances, such as account statements, at the time it was served with the first writ. (CP 44-45.)

garnishee under this proviso and the court may allow additional attorney's fees for other actions taken because of the garnishee's failure to answer.

RCW 6.27.200.

The statute specifies that if a garnishee fails to respond to a writ the court may render judgment "for the full amount of the plaintiff's unpaid judgment against the defendant with all accruing interest and costs as prescribed in RCW 6.27.090." RCW 6.27.100 directs that the writ contain a warning of this precise consequence, which warning was contained (in all-capital typeface) in the writ served on Wells Fargo. (CP 18-20.) Wells Fargo's liability for the full judgment amount is not extraordinary; it is the ordinary and intended consequence of default explicitly provided for in this State's long-standing garnishment statutes for garnishee defendants who ignore writs of garnishment and notices of default. Wells Fargo was repeatedly warned of these consequences, but it chose to ignore those warnings. (CP 34.)

The statutory scheme provides yet an additional protection for garnishees in Wells Fargo's position, but Wells Fargo chose not to avail itself of this protection. RCW 6.27.200 provides that after the garnishee is served with a copy of the first writ of garnishment or execution based on the default judgment that was rendered against it, it then has seven days to make a motion with the Court to have the judgment reduced to the

amount of nonexempt funds or property which was actually in its possession at the time the original writ of garnishment was served, plus all accruing interest, attorney fees and costs. *Id.*

A copy of the second writ of garnishment (the writ based on the default judgment against Wells Fargo) was served on Wells Fargo on February 25, 2011. (CP 45.) Rather than making a motion to reduce the judgment under RCW 6.27.200, Wells Fargo's initial response was again to refuse to respond and claim that the default judgment garnishment did not contain an answer fee. (CP 70.) It later retracted this response, noting that its fee records were erroneous, but nonetheless chose to wait three months and then attack the judgment by challenging Bellevue Square's proof of service. (CP 32-43; 74; 77.)

Application of the garnishment default statute will almost always result in a defaulting garnishee defendant paying significantly more than it would have had to pay had it responded or availed itself of these statutory protections. RCW 6.27.200. Where such a defendant fails to answer the writ, fails to respond to notices of an impending default judgment and fails to move to have the judgment reduced, this result cannot be said to constitute extraordinary circumstances justifying relief.

If Wells Fargo finds that the consequences of the statute (even with the protections of which Wells Fargo chose not to avail itself) are

overly harsh to garnishee defendants, its remedy is to amend the garnishment statutes, or initiate better procedures and training in its Legal Order Processing Department; procedures that do not countenance ignoring process, attorneys and notices of default judgments.

Finally, Wells Fargo is not entirely without recourse. It likely has deposit account agreements with the judgment debtor. Wells Fargo has been in the banking business since 1852 and garnishments are hardly unusual in its line of business. (CP 90.) It would be surprising if Wells Fargo has not inserted provisions that provide for recourse against depositors in situations such as these. If not, it certainly had the ability to do so. The circumstances do not rise to the level necessary under CR 60(b)(11). To the extent the trial court so found, it abused its discretion.

E. Wells Fargo's Admissions Concerning Its Handling of the "Second Writ" Were Not Subject to ER 408 and It Was Reversible Error to Exclude the Evidence.

Bellevue Square submitted e-mails written by Wells Fargo's attorney containing admissions that Wells Fargo was served with a second writ of garnishment but that its records were inaccurate as to whether an answer fee was received with respect to the second writ of garnishment. The e-mails were relevant for two reasons: first, they demonstrate the inaccuracy of Wells Fargo's records with respect to the very issue on which it had the burden to demonstrate by clear and

convincing evidence, i.e., that the Declaration of Service was inaccurate. Second, it established that Wells Fargo had received a writ of garnishment necessary to trigger the deadline under RCW 6.27.200 to file a motion that could have reduced the judgment.

In its oral ruling from the bench, the trial court announced that it did not consider (or even review) this material.

I didn't look at the 408 stuff. As soon as I saw the 408 settlement stuff, I know I can't -- I can't look at that, and sometimes it gets in -- it's put in there sometimes for context.

(RP 10-11.)

In its order, the court granted Wells Fargo's motion to strike the material. (CP 125-26.) The trial court committed two errors in this regard. First, it apparently saw the ER 408 header and read no further, failing to even review the content of the e-mail messages to determine whether ER 408 actually applied. (RP 10-11.) While every pertinent email from Ms. Anderson contained an "ER 408" header, not every communication between counsel is a settlement discussion entitled to ER 408 protection. *Lane v. Harborview Medical Center*, 154 Wn. App. 279, 287, 227 P.3d 297 (2010) (ER 408 not applicable to statements made in attorney's letter where letter did not make offer of settlement).

ER 408 provides:

In a civil case, evidence of (1) furnishing or offering or

promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ER 408.

ER 408 is not applicable to Wells Fargo's attorney's e-mails for many reasons. First, the statements concerning the second writ are not being used to prove liability for the underlying claim or its amount. Liability on the writs was not at issue in the motion to vacate the default judgment. The statements were being used for purposes of demonstrating Wells Fargo's record keeping habits to determine whether service of the first writ occurred. They were also being used to establish that the second writ was in fact properly served on Wells Fargo, which demonstrates that Wells Fargo did not act with haste to thereafter move to reduce the judgment under RCW 6.27.200.

Second, in two of the three e-mails from Wells Fargo's counsel,

there is no settlement offer at all from Wells Fargo's counsel.⁷ The first e-mail makes clear that no response can be made to a settlement offer because Wells Fargo's representative was out of the office. (CP 70.) The second e-mail also has no settlement offer or response. (CP 74.) The third email is the only e-mail containing any offer of settlement or response to an offer of settlement. (CP 77.) However, as pointed out above, the e-mail is nonetheless admissible because it is not being admitted to prove liability or validity of the underlying claim and has an alternative purpose.

Finally, the information concerning the handling of the second writ is otherwise discoverable. *See* ER 408. Bellevue Square would no doubt be entitled in discovery to inspect the documents on which Ms. Anderson and Wells Fargo based its erroneous conclusion that no answer fee had been received with regard to the second writ. Bellevue Square also would have been entitled to inspect the documents reviewed with respect to the first writ that led Wells Fargo to a similar conclusion. These documents would have revealed the same notations referred to by Wells Fargo's attorney in the e-mails, which wrongly

⁷The only settlement offers that appear anywhere in these documents are those of Bellevue Square's counsel, contained at the bottom of the email. ER 408 does not prohibit a party from offering its own settlement offers into evidence. *Bulaich v. AT&T Information Systems*, 113 Wn.2d 254, 262, 778 P.2d 1031 (1989).

reflected that no check was received with respect to the second writ.

Because the information was otherwise discoverable, ER 408 does not forbid its consideration.

F. Bellevue Square Is Entitled to an Award of Attorney Fees and Costs on Appeal.

“Attorney fees may be awarded when authorized by a contract, statute, or recognized ground in equity.” *Scheib v. Crosby*, 160 Wn. App. 345, 353, 249 P.3d 184 (2011). If attorney fees are allowable to a party at trial, that party may recover fees on appeal if it prevails. *Id.*; RAP 18.1(a).

At trial, Bellevue Square was entitled to, and was awarded, attorney fees pursuant to RCW 6.27.200 (attorney fees reasonably incurred due to garnishee defendant’s failure to answer). It is therefore entitled to recover its fees on appeal as well.

VI. CONCLUSION

Wells Fargo failed to adequately contest Bellevue Square’s proof of service and admitted to deliberately ignoring the notice of the impending default judgment. There was no fraud or other extraordinary circumstance that supported a motion to vacate the judgment. Wells Fargo chose not to avail itself of the procedure whereby it could have reduced the judgment to the amount of non-exempt funds it held plus

accrued interest, attorney fees and costs. Under these circumstances, it was an abuse of discretion for the trial court to vacate the judgment pursuant to CR 60(b). It was also error to strike the e-mails that further demonstrated the unreliability of Wells Fargo's fee records.

The Court of Appeals should reverse the trial court's order and reinstate the default judgment entered on January 25, 2011 against Garnishee Defendant Wells Fargo Bank, NA. The Court should also award Bellevue Square its reasonable attorney fees and costs incurred under RCW 6.27.200 and RAP 18.1.

Respectfully submitted this 7th day of October, 2011.

NOLD MUCHINSKY PLLC



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Attorneys for Appellant

APPENDIX

1. ***Bell v. Addus Healthcare, Inc.,***
No. 06-5188, 2007 U.S. Dist. LEXIS 13065 (W.D. Wash. Feb. 26,
2007) (Bryan, J.)
2. ***Butler v. Great American RV Inc.,***
No. 09-5516, 2011 U.S. Dist. LEXIS 49298 (W.D. Wash. May 9,
2011 (Strombom, U.S.M.J.).

APPENDIX 1



7 of 14 DOCUMENTS

SHARONDA BELL, Plaintiff, v. ADDUS HEALTHCARE, INC., Defendant.

CASE NO. C06-5188RJB

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON**

2007 U.S. Dist. LEXIS 13065

February 26, 2007, Filed

SUBSEQUENT HISTORY: Motion denied by Bell v. Addus Healthcare, Inc., 2007 U.S. Dist. LEXIS 26915 (W.D. Wash., Apr. 4, 2007)

COUNSEL: [*1] For Sharonda Bell, individually and on behalf of all others similarly situated, Plaintiff: Gary Abbott Parks, James Dana Pinney, LEAD ATTORNEYS, BAILEY PINNEY AND ASSOCIATES LLC, VANCOUVER, WA.

For Addus Healthcare Inc, a foreign corporation, Defendant: David L. Broom, Michael B Love, PAINE HAMBLIN COFFIN BROOKE & MILLER, SPOKANE, WA; Louis Rukavina, III, SPOKANE, WA.

JUDGES: Robert J. Bryan, United States District Judge.

OPINION BY: Robert J. Bryan

OPINION

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO STRIKE

This matter comes before the Court on the defendant's Motion for Summary Judgment (Dkt. 76) and the motion to strike contained in the plaintiff's response (Dkt. 86). The Court has considered the pleadings filed in support of and in opposition to the motions and the

remainder of the file herein.

I. FACTUAL BACKGROUND

The parties contest several factual issues. The following is a recitation of the facts taken in the light most favorable to plaintiff Sharonda Bell. The Court has indicated contested factual issues as appropriate.

Ms. Bell is a former employee of defendant Addus HealthCare, Inc. ("Addus HealthCare"). [*2] The parties dispute the plaintiff's dates of employment. According to Ms. Bell, her employment began at the defendant's Oregon office as a care giver in 2001. In 2002, she was transferred to the defendant's office in Vancouver, Washington to work as an office assistant and care giver. According to Addus HealthCare, Ms. Bell's employment as a home care aid began on July 18, 2002, in the Oregon office, and she was transferred to work as a home care aid in the Vancouver office on June 21, 2003. Dkt. 76 at 3.

Ms. Bell was terminated on May 25, 2005. Dkt. 86 at 13. During the last year of Ms. Bell's employment with Addus HealthCare, she joined the Service Employees International Union ("the SEIU"). Dkt. 86 at 9. The Collective Bargaining Agreement ("the Agreement") between the SEIU and Addus HealthCare contained a grievance procedure providing a dispute resolution process that includes arbitration. Dkt. 86 at 9, Dkt. 76 at 3. Ms. Bell contacted her union steward regarding her termination but concedes that she did not exhaust this

procedure with regard to her claims in this suit. Dkt. 86 at 9.

While in the Vancouver office, Ms. Bell worked to answer phones, answer questions of people who [*3] visited the office, and make appointments. Dkt. 76 at 4, Dkt. 86 at 9, 14. Ms. Bell was also available for dispatch to handle emergency care needs. Dkt. 86 at 14. Ms. Bell sometimes took rest breaks of no more than five minutes each when her schedule permitted. Dkt. 76 at 5, Dkt. 86 at 9. She was unable to take a meal period unless another employee was present in the office because she could not leave the front desk unattended. Dkt. 76 at 5, Dkt. 86 at 10. The parties contest the frequency with which Ms. Bell took her breaks and whether she was paid for her breaks and missed meal periods. Dkt. 76 at 5, Dkt. 86 at 10.

Ms. Bell also worked in the field as a home care aid. Her duties included cooking, running errands, and providing personal care. Dkt. 76 at 6. Ms. Bell was required to record when she arrived at and left each client's home and to complete a checklist to indicate which tasks she performed. Dkt. 86 at 10. The time sheets were then signed by Ms. Bell's supervisor. *Id.* at 11. Ms. Bell contends that these time sheets were altered. *Id.* Ms. Bell's work hours varied. Dkt. 76 at 7. She would sometimes work fewer than eight hours and would work up to twelve hours at other [*4] times. *Id.* According to Ms. Bell, she was not allowed to leave clients alone and was therefore unable to take meal and rest periods while working in the field. Dkt. 86 at 12.

Although Addus HealthCare's practice is to reimburse employees for their mileage between clients' homes, Ms. Bell contends that she was not fully reimbursed for her mileage. Dkt. 86 at 11. Addus HealthCare contends that she was reimbursed. Dkt. 32-1 at 5. The parties dispute whether Ms. Bell earned more than minimum wage for time spent driving in connection with her work as a home care aid. Dkt. 76 at 7, 86 at 11.

II. PROCEDURAL BACKGROUND

On April 14, 2006, Ms. Bell filed a complaint in federal court, alleging that Addus HealthCare violated Washington and Oregon law by failing to provide rest breaks and meal periods, failing to pay overtime wages, failing to pay all wages when due upon termination, and breaching the duty of good faith and fair dealing. Dkt. 1. Ms. Bell seeks damages and a permanent injunction on behalf of herself and a class that has not yet been

certified. *Id.* at 13, 25.

On October 17, 2006, defendant Addus HealthCare, Inc. ("Addus HealthCare") filed a Motion for Summary [*5] Judgment (Dkt. 30) that is substantially similar to the instant motion. The Court held that the motion appeared to be "an attempt to address jurisdictional and class representative issues in accord with paragraphs (1) and (8) of the court's scheduling and discovery order (Dkt. 18)" and ordered that the motion be stricken as premature. Dkt. 69 at 2, 3. The Court hoped that the parties would confer and resolve jurisdictional issues, including whether the Court lacks subject matter jurisdiction by virtue of the plaintiff's alleged failure to exhaust contractual remedies, without the need for motion practice. On February 7, 2007, the parties filed their Second Amended Joint Status Report, in which Addus HealthCare states that "no issue as to jurisdiction remains before the court." Dkt. 88 (Joint Status Report) at 3. Unfortunately, the parties appear unwilling or unable to address jurisdictional issues on their own, and the Court will therefore proceed on the defendant's motion. The Court notes that while the motion professes to address all of the plaintiff's claims, it offers arguments relating only to Ms. Bell's claims that she was denied meal and rest periods in violation of Washington [*6] and Oregon law. *See* Dkt. 76 at 2.

III. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a

material fact exists if there is sufficient evidence supporting the claimed [*7] factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial -- e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, *supra*). Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be presumed. [*8] *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

B. MOTION TO STRIKE

Ms. Bell moves to strike the declaration of Tess Cannon (Dkt. 32-1) pursuant to Local Rule CR 7(g). Dkt. 86 at 2. Ms. Bell moves to strike paragraphs three through six and eight through eleven of Tess Cannon's declaration on the grounds that the declaration is not based on personal knowledge as required by Federal Rule of Civil Procedure 56(e), lacks foundation, contains inadmissible hearsay, and violates the Best Evidence Rule. Dkt. 86 at 2, 4. With the exception of the last statement of the third paragraph and the first sentence of the fourth paragraph, the plaintiff fails to specifically identify what portions of the declaration she seeks to strike. This omission has made it difficult to apply the plaintiff's arguments to Ms. Cannon's declaration.

Plaintiff's counsel notified the Clerk's Office that a surreply would be filed regarding the Motion for Summary Judgment. On February 15, 2007, Plaintiff's counsel filed Plaintiff's Reply in Support of Motion to Strike Portions of the Declaration of Tess Cannon (Dkt. 92), which was intended to be a reply on the plaintiff's motion [*9] to strike. In the interest of fairness to both

parties, the Court has reviewed the surreply and considered only those arguments made in strict reply to the defendant's response to the motion to strike.

1. Personal Knowledge

Federal Rule of Civil Procedure 56 provides that affidavits must be made on personal knowledge: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Federal Rule of Evidence 602 also requires that witnesses have personal knowledge:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

Fed. R. Evid. 602.

Ms. Bell contends that because Tess Cannon was not employed with Addus HealthCare until July of 2004, she lacks personal knowledge of many [*10] aspects of Ms. Bell's employment. Dkt. 86 at 4. Ms. Bell contends that Ms. Cannon lacks personal knowledge as to when Ms. Bell was hired to work in the Vancouver office, whether and when she joined the SEIU, whether the plaintiff took breaks or meal periods, and whether the plaintiff was paid accurately and above minimum wage. Dkt. 86 at 2, 4.

In the declaration, Ms. Cannon concedes that her statements are largely based upon her review of "Ms. Bell's wage and hour records." *See, e.g.* Dkt. 32-1 at 2. According to Ms. Cannon's third declaration (Dkt. 90-1), Ms. Cannon accessed documentation pertaining to Ms. Bells's date of hire, date of termination, union start date, hours worked and compensation earned, and the Collective Bargaining Agreement in force and effect at the time of Ms. Bell's employment with Addus HealthCare. Dkt. 90-1 at 2. Ms. Cannon does not describe these documents or offer copies for the Court's review. The Court is therefore unable to discern whether such documents constitute evidence sufficient to support a

finding that Tess Cannon has the requisite personal knowledge as provided in Federal Rule of Evidence 602. Statements based upon personal knowledge gleaned [*11] only from Ms. Bell's wage and hour records must therefore be stricken.

Ms. Cannon does offer an exhibit evidencing the dates on which Ms. Bell was hired, was terminated, and joined the SEIU. Dkt. 90-2. The declaration identifies the exhibit solely as "the document confirming items 1-3" of the declaration. Dkt. 90-1 at 2. The defendant fails to provide any information as to what this document is or how it was obtained. The defendant therefore fails to demonstrate that the document or the facts it contains would be admissible in evidence. The Court should therefore exclude statements in Ms. Cannon's declaration based solely upon her review of this document.

a. Fifth Paragraph of Cannon Declaration

In the fifth paragraph of her declaration, Ms. Cannon declares as follows:

When Ms. Bell worked in the office, she was provided the opportunity to take rest breaks regardless of whether she was working alone or with another office worker. The decision on whether to take a rest break or not would have been Ms. Bell's decision. Ms. Bell's shift in the Vancouver office was normally 6 hours or less in duration. Based upon my review of the wage and hour records for Addus, Ms. Bell [*12] was paid for each and every rest break while she worked in the office of Addus in Vancouver, Washington.

Dkt. 32-1 at 5. Ms. Cannon does not demonstrate that she has personal knowledge of whether Ms. Bell had the opportunity to take rest breaks. She does not demonstrate that she worked with Ms. Bell or otherwise has a basis for knowing that it was Ms. Bell's decision whether to take breaks. Her knowledge of Ms. Bell's compensation is based solely on her review of documents not identified or provided to the Court. Paragraph five of Ms. Cannon's declaration should therefore be stricken as not based on personal knowledge.

b. Sixth Paragraph of Cannon Declaration

In the sixth paragraph of her declaration, Ms.

Cannon declares as follows:

With regard to meal periods, Ms. Bell would have been completely relieved from duty during this time and therefore should have been able to obtain a meal period or engage in personal pursuits. Based upon my review of the wage and hour records for Addus, Ms. Bell was paid for all missed meal periods.

Dkt. 32-1 at 5. Ms. Cannon offers no basis for knowing whether Ms. Bell was relieved from duty and able to take a meal period, [*13] and her knowledge of Ms. Bell's compensation is based solely on her review of documents not identified or provided to the Court. Paragraph six of Ms. Cannon's declaration should therefore be stricken as not based on personal knowledge.

c. Eighth and Ninth Paragraphs of Cannon Declaration

The eighth and ninth paragraphs of Ms. Cannon's declaration concern mileage reimbursement and Ms. Bell's hourly wage. These paragraphs appear to be based solely upon Ms. Cannon's review of wage and hour records and should be stricken.

d. Tenth Paragraph of Cannon Declaration

In the tenth paragraph of her declaration, Ms. Cannon declares as follows:

When Ms. Bell worked for Addus, in particular as a homecare aide out in the field . . . by definition Ms. Bell's activities were not supervised and her rest breaks were not scheduled. Nevertheless, the nature of the work should have allowed Ms. Bell to obtain intermittent rest breaks every three (3) hours of at least 15 minutes per Addus' policy for which Ms. Bell was paid. Further, Ms. Bell never complained to anyone associated with Addus that she was not being provided appropriate rest breaks. If Ms. Bell decided not to take a rest [*14] break that would have been her choice freely made. Addus certainly does not prohibit or compromise the ability of one of our nonexempt employees to obtain relief from work or exertion as required

under the applicable law. Based upon my review of the wage and hour records, whether Ms. Bell decided to take a rest break or not, she was paid for this time.

Dkt. 32-1 at 6. The fact that Ms. Cannon is the Agency Director for Addus HealthCare's Vancouver office is evidence sufficient to support a finding that Ms. Cannon has personal knowledge of the definition of Ms. Bell's job, the nature of her work, and the company's policies. Ms. Cannon does not establish that she has knowledge of whether and to whom employee complaints are made, whether Ms. Bell missed rest breaks by choice, and whether Ms. Bell was paid for her rest breaks. The third, fourth, and sixth sentences of the tenth paragraph should therefore be stricken as not based on personal knowledge.

c. Eleventh Paragraph of Cannon Declaration

In the eleventh paragraph, Ms. Cannon declares as follows:

While working as a homecare aid out in the field performing domestic and companionship services for our clients [*15] in their homes, Ms. Bell would have been able to obtain a meal period between the second and fifth hour of her shift either in the client's home or during travel time between various client's homes. Based upon my review of the wage and hour records, whether Ms. Bell decided to take a meal period or not, she was paid for this time.

Dkt. 32-1 at 6. Ms. Cannon offers no basis for knowing if and when Ms. Bell was able to take a break from her shift and whether she was paid for missed meal periods. This paragraph should be stricken.

2. Hearsay

Hearsay is defined as a "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Ms. Bell contends that Ms. Cannon's statements about the contents of Addus HealthCare's records are inadmissible hearsay. The defendant contends that "payroll and personnel files" are Records of Regularly Conducted Activity under Federal Rule of Evidence 803(6). In Ms. Cannon's third

declaration, Ms. Cannon states that the documentation she references "was generated in the ordinary course of business on or about the dates appearing [*16] thereon, according to practices and procedures of the company, all of which I am familiar with." Dkt. 90-1 at 2. Unfortunately, Ms. Bell does not identify the explicit statements she seeks to exclude. The plaintiff therefore fails to demonstrate that any of Ms. Cannon's declaration constitutes hearsay. The Court should decline to strike statements from Ms. Cannon's declaration on this basis.

3. Best Evidence Rule

Federal Rule of Evidence 1002, the Best Evidence Rule, provides as follows: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." Fed. R. Evid. 1002. Ms. Bell contends that Ms. Cannon's declaration violates the Best Evidence Rule. Ms. Cannon's testimony, while based on certain Addus HealthCare records, does not appear to be an attempt to prove the contents of those records. The Court should decline to strike the declaration on this basis.

C. EXHAUSTION OF CONTRACTUAL REMEDIES

Ms. Bell admits that she did not exhaust the grievance procedure provided by the Collective Bargaining Agreement before commencing suit against Addus [*17] HealthCare but contends that the procedure does not govern her claims because they are non-negotiable, state-law based, and independent from the Agreement. Dkt. 86 at 15. Generally, employees must exhaust the grievance procedure provided by a binding collective bargaining agreement before seeking judicial relief. *Ervin v. Columbia Distributing, Inc.*, 84 Wn.App. 882, 887, 930 P.2d 947 (1997); *Gilstrap v. Mitchell Bros. Truck Lines*, 270 Or. 599, 606, 529 P.2d 370 (1974). An employee may avoid this exhaustion requirement if she demonstrates that the union has breached its duty of fair representation or that use of the grievance procedure would be futile. *Ervin*, 84 Wn.App. at 887. The exhaustion requirement applies only to employees "who allege violation of a labor contract." *See id.; Wilson v. City of Monroe*, 88 Wn.App. 113, 115, 943 P.2d 1134 (1997) ("When an employee brings a claim against an employer based on nonnegotiable, substantive rights that are not dependent on a collective bargaining agreement (CBA), the employee is not first required to exhaust the

remedies provided by a CBA arbitration clause.").

The defendant cites *Moran v. Stowell*, 45 Wn.App. 70, 76, 724 P.2d 396 (1986), [*18] and *Gilstrap*, 270 Or. at 606, for the proposition that all employee claims must proceed through collective bargaining agreement procedures. In *Moran*, the court stated the general rule as follows: "Before an action to obtain the benefits of a collective bargaining contract can be maintained, the plaintiff must exhaust his contractual remedies through the grievance procedure provided for in the contract." *Id.* at 75 (emphasis added). The *Moran* plaintiffs were suing for reimbursement of accrued, unused sick leave. *Id.* at 71. The relief they sought was governed by, not independent from, collective bargaining agreements. *Id.* at 72 ("sick leave benefits were governed by a series of collective bargaining agreements"), 76 ("relief sought regarding sick leave benefits available pursuant to the appellants' employment terms and conditions"), 81 ("denial of compensation for the appellants' unused sick leave was based upon the provisions of the collective bargaining agreement and the applicable county ordinance"). Similarly, the plaintiffs in *Gilstrap* were "asserting rights based on the lease, the collective bargaining agreement, and oral promises. [*19] " *Gilstrap*, 270 Or. at 604.

The Collective Bargaining Agreement in this case is explicitly limited to rights provided by the employee handbook and the Agreement itself. Article 18 of the Agreement provides a grievance procedure and defines grievances:

A grievance is hereby defined as a claim against, or dispute with, the Employer by an employee or the Union representative **involving an alleged violation by the Employer of the terms of this Agreement and/or the Employee Handbook.** An individual employee or group of employees shall have the right to present grievances and to have such grievances adjusted without involvement of the Union, as long as the adjustment is not inconsistent with the terms of this Agreement and/or the Employee Handbook and the appropriate Union representative has been given the opportunity to present at such adjustment.

Dkt. 77-2 at 15 (emphasis added). Addus HealthCare has failed to demonstrate which, if any, of the plaintiff's claims arise from rights created by the Collective Bargaining Agreement or the employee handbook and therefore constitute grievances as defined by the Agreement such that the plaintiff was required [*20] to exhaust the Agreement's grievance procedure. The Court should therefore decline to enter summary judgment on this basis.

D. DOMESTIC SERVICE EXEMPTION

Under Oregon law, certain employees are exempt from Oregon laws establishing minimum employment conditions:

ORS 653.010 to 653.261 do not apply to any of the following employees:

...

(14) An individual employed in domestic service employment in or about a family home to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves.

Or. Rev. Stat. § 653.020(14). Addus HealthCare contends that Ms. Bell is precluded by Or. Rev. Stat. § 653.020 from asserting certain claims under Oregon law because she fits this exemption. Dkt. 76 at 14. Ms. Bell contends that this exemption applies only where the employee works in the home of her employer; because she was employed by Addus HealthCare, Ms. Bell contends that she does not fit within this exemption. Dkt. 86 at 18.

"Domestic service" is defined by regulation:

As used in ORS 653.010 to 653.261 and these rules, unless the context requires otherwise:

...

(13) "Domestic service" [*21] means services of a household nature performed by an employee in or about a family home (permanent or temporary) **of the person by whom the employee is employed.** The term includes, but is not limited to,

employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, gardeners, and companions to the elderly and infirm.

Or. Admin. R. 839-020-0004(13) (emphasis added). The parties do not dispute that Ms. Bell was employed by Addus HealthCare, and the defendant offers no evidence that Ms. Bell worked in the family home of the person by whom she was employed. The Court should therefore decline to grant summary judgment on this basis.

E. MEAL AND REST PERIODS UNDER WASHINGTON LAW

Addus HealthCare contends that summary judgment is warranted because Ms. Bell was compensated for all meal and rest periods. Dkt. 76 at 14.

1. Meal Periods

Addus HealthCare contends that summary judgment is appropriate in this case because Ms. Bell was paid for all missed meal periods and that Ms. Bell missed meal periods only because she voluntarily waived such meal periods. Dkt. 76 at 21.

By regulation, Washington employees are entitled [*22] to a meal period:

(1) Employees shall be allowed a meal period of at least 30 minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

WAC 296-126-092. As interpreted by the Washington State Department of Labor and Industries, the meal period must be paid if the employee is on the premises or at the work site and required to act in the interests of the employer during the meal period. Wash. State Dep't of Labor and Indus., No. ES.C.6, *Meal and Rest Periods for Nonagricultural Workers Age 18 and Over 3* (2002),

<http://www.lni.wa.gov/WorkplaceRights/files/policies/esc6.pdf>.¹ The employer may not prevent employees from taking a meal period but is under no affirmative duty to schedule a meal period for a specific time. *White v. Salvation Army*, 118 Wn.App. 272, 279, 75 P.3d 990 (2003). In addition, the employer need not reduce employees' [*23] duties during the meal period. *See id.* at 278. The meal period may be interrupted so long as the employee receives thirty total minutes of mealtime. Wash. State Dep't of Labor and Indus., No. ES.C.6, *Meal and Rest Periods for Nonagricultural Workers Age 18 and Over 3-4*.

¹ Both parties cite Washington Department of Labor and Industries Administrative Policy ES.C.6 (2002) but have not provided the Court with a copy of this document. The Court was able to locate the policy online.

Ms. Bell testified in her depositions that she did not know whether she had been paid for missed meal periods. *See, e.g.*, Dkt. 87, Exh.1 at 38, 64, 73. Ms. Cannon's statement that Ms. Bell was paid for all missed meal periods was stricken as not based on personal knowledge. Dkt. 32-1 at 5. There is a genuine issue of material fact as to whether Ms. Bell's missed meal periods were paid, and the plaintiff has yet to establish what damages she suffered.

Ms. Bell alleges that even if her meal periods were paid, she [*24] was not always allowed a meal period. *See* Dkt. 87, Exh. 1 at 63-64 (not able to eat lunch while alone at the office), 72 (not able to eat lunch while working in the field). She contends that she was required by the employee handbook to seek supervisor approval of meal periods, citing page four of the handbook. Dkt. 86 at 10, 21. The handbook does not appear to explicitly impose any such requirement. Ms. Bell further contends that her work in the field was such that she was required to arrive at clients' homes at a particular time, leaving no time for her to take a meal period. Dkt. 87, Exh. 1 at 93. While Addus HealthCare contends that Ms. Bell's failure to take a meal period constitutes a waiver, there are genuine issues of material fact as to whether Ms. Bell was actually allowed to take meal periods while working in the Vancouver office and in the field. The Court should therefore decline to enter summary judgment on these claims.

2. Rest Periods

Washington employees are entitled to a ten minute rest period, on the employer's time, for every four hours of work. WAC 296-126-092(4). Such rest periods need not be scheduled if the employee is permitted to take intermittent [*25] rest periods equivalent to ten minutes. WAC 296-126-092(5).

In her deposition, Ms. Bell testified that she was able to take five minute rest breaks while working in the Vancouver office and that she took more than two in an eight hour shift. Dkt. 87, Exh. 1 at 39. She testified that she was not always able to get the requisite number of rest periods. *Id.* at 50. With regard to her work in the field, Ms. Bell testified that she was never truly allowed a rest period because she was required to keep clients in her sight at all times. *Id.* at 53, 61, 76. In her declaration, Ms. Cannon states that Ms. Bell should have been able to take rest breaks in light of the nature of her work. Dkt. 32-1 at 6. These sworn allegations are sufficient to create a genuine issue of material fact on the claim for missed rest periods. The motion should therefore be denied in this respect.

**F. ADEQUACY UNDER FEDERAL RULE
23(a)(4)**

Ms. Bell contends that she will "fairly and adequately protect the interests of the class" as required under Federal Rule 23(a)(4). Dkt. 86 at 22. The plaintiff has not yet moved to certify a class, and the Court should decline to rule on whether the plaintiff satisfies [*26] one or more of the elements required for class certification.

IV. ORDER

Therefore, it is hereby

ORDERED that the defendant's Motion for Summary Judgment (Dkt. 76) is **DENIED**. The plaintiff's Motion to Strike (Dkt. 86) is **GRANTED in part** and **DENIED in part** as provided herein.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Robert J. Bryan

United States District Judge

APPENDIX 2



3 of 14 DOCUMENTS

CHARLES and L ANN BUTLER, husband and wife, and the marital community composed thereof, Plaintiffs, v. GREAT AMERICAN RV INC., a Washington Corporation; and AMERICAN STATES INSURANCE COMPANY, a Surety Company; and GE MONEY BANK aka GENERAL ELECTRIC COMPANY; and AMERICAN GUARDIAN WARRANTY SERVICES, INC., an Illinois Corporation, Defendants.

CASE NO. C09-5516 KLS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2011 U.S. Dist. LEXIS 49298

May 9, 2011, Decided

May 9, 2011, Filed

PRIOR HISTORY: Charles v. Great Am. RV, Inc., 2011 U.S. Dist. LEXIS 1781 (W.D. Wash., Jan. 5, 2011)

COUNSEL: [*1] For Charles Butler, husband, and the marital community composed thereof, L Ann Butler, wife, and the marital community composed thereof, Plaintiffs: Robert W. Mitchell, LEAD ATTORNEY, ROBERT MITCHELL, ATTORNEY AT LAW, SPOKANE, WA.

For American States Insurance Company, a Surety Company, Defendant: Thomas K Windus, LIVENGOOD FITZGERALD & ALSKOG, KIRKLAND, WA.

For GE Money Bank, also known as General Electric Company, Defendant: C Matthew Andersen, Courtney Renee Beaudoin, LEAD ATTORNEYS, WINSTON & CASHATT, SPOKANE, WA; William E Pierson, Jr, THE PIONEER BUILDING, SEATTLE, WA.

For Eric H. Lind, Deborah A. Lind, ThirdParty Defendants: Mario D Parisio, HARLOWE & FALK, TACOMA, WA.

For Richard D. Garchow, Ardyth K. Garchow,

ThirdParty Defendants: Brian Lowell Budsberg, BUDSBERG LAW GROUP PLLC, OLYMPIA, WA.

For Richard D. Garchow, ThirdParty Defendant: Brian Lowell Budsberg, BUDSBERG LAW GROUP, PLLC, OLYMPIA, WA.

For GE Money Bank, Cross Claimant: C Matthew Andersen, Courtney Renee Beaudoin, LEAD ATTORNEYS, WINSTON & CASHATT, SPOKANE, WA; William E Pierson, Jr, THE PIONEER BUILDING, SEATTLE, WA.

For GE Money Bank, Counter Claimant: C Matthew Andersen, Courtney Renee Beaudoin, LEAD ATTORNEYS, WINSTON [*2] & CASHATT, SPOKANE, WA; William E Pierson, Jr, THE PIONEER BUILDING, SEATTLE, WA.

For Charles Butler, husband, and the marital community composed thereof, L Ann Butler, wife, and the marital community composed thereof, Counter Defendants: Robert W. Mitchell, LEAD ATTORNEY, ROBERT MITCHELL, ATTORNEY AT LAW, SPOKANE, WA.

For American States Insurance Company, a Surety Company, ThirdParty Plaintiff: Thomas K Windus, LIVENGOOD FITZGERALD & ALSKOG, KIRKLAND, WA.

For American States Insurance Company, a Surety Company, Cross Claimant: Thomas K Windus, LIVENGOOD FITZGERALD & ALSKOG, KIRKLAND, WA.

JUDGES: Karen L. Strombom, United States Magistrate Judge.

OPINION BY: Karen L. Strombom

OPINION

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF REVOCATION OF ACCEPTANCE AND FOR REIMBURSEMENT

Charles and L. Ann Butler filed a Motion for Partial Summary Judgment requesting this Court find, as a matter of law, that the motorhome, which is the subject of this litigation, was defective when they purchased it and that they should be granted the remedy of rescission of the purchase and sale and finance agreements. They also seek relief under the Magnuson Moss Warranty Act. ECF No. 92. The Court notes that under [*3] the Uniform Commercial Code, the proper term for use with regard to the Plaintiffs' motion is "revocation of acceptance" rather than "rescission". R.C.W. 62A.2-601. In support of their motion, the Plaintiffs rely on the deposition testimony of Mr. Butler with attached exhibits (ECF No. 65-2) and Coach Repair History which documents were produced by the Defendants in response to a Request for Production of Documents (ECF No. 65-4). In addition, the Plaintiffs filed a companion motion requesting reimbursement should the Court order revocation of acceptance. ECF No. 93.

Defendant GE Money Bank opposes the Plaintiffs' motion on several grounds. First it asserts that the Court's denial of its prior motion requires denial of the Plaintiffs' motion. Second they take the position that the Plaintiffs have failed to show that the defects in the RV substantially impaired the value of the motorhome to the Butlers. Finally, they assert that the revocation of acceptance was not done in a reasonable period of time.

SUMMARY JUDGMENT -- ADMISSIBLE EVIDENCE

Fed. R. Civ. P. 56(c)(4) **requires** that an affidavit or declaration used to support or oppose a motion "must be made on personal knowledge, set out [*4] facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

In their opposition to the Plaintiffs' motion the defendants submitted the Declaration of Christina Zimmerman. ECF No. 100. Ms. Zimmerman is the Collections Leader for GEMB Lending, Inc. and in that capacity is responsible for overseeing the repossession, resale and debt collection efforts of defendant, GE Money Bank. She goes on to state that the information in her affidavit is based on personal knowledge. That conclusory statement however, is not borne out. Rather, her information appears to be solely based on her review of records which were prepared prior to her involvement in this litigation and which were not prepared by her or under her direction.

In addition, Ms. Zimmerman attached to her declaration portions of the Coach Repair History (the entire History is found at ECF No. 65-4) and then, without showing the basis for any personal knowledge, makes statements as to how long it took for a repair to be completed. Her statements are belied by the very information that is specifically included in the Coach Repair History or the testimony of Mr. Butler. [*5] The Court, therefore, will not consider any of her statements regarding how long it took to make a window repair and will rather rely on the information on the Coach Repair History or other admissible evidence. For example, Ms. Zimmerman makes the statement that the windshield repair on January 31, 2006 was "less than an hour." There is nothing obvious on Exhibit E to her declaration that supports that statement and she has shown no personal knowledge as to how long the repair took. The document itself shows it was completed in one day and that is what the Court considers, for purposes of this motion, to be the time required. Also, Ms. Zimmerman asserts that the windshield repair that occurred in December 2008 took two days. However, the document she relies on (Exhibit G to her deposition) shows that the repair for the windshield started on December 9, 2008 and ended December 24, 2008 and further shows that the motorhome was turned in to the repair facility on December 3, 2008 and repairs were not completed until

January 9, 2009. Ms. Zimmerman has shown no basis for any personal knowledge to conclude that the repair took two days and the Court will not consider that statement.

Finally, [*6] Ms. Zimmerman also attaches to her Declaration a report dated August 26, 2010 which is entitled "Disclosure of Expert Testimony by Defendant, GE Money Bank." ECF No. 100. This Disclosure is not in declaration or affidavit form and Ms. Zimmerman is not an expert such that she can rely on an unsworn document to reach conclusions regarding what was or was not done to the motorhome. Therefore, the Court will not consider the Disclosure or its contents nor will it consider any statement of Ms. Zimmerman in Paragraph 4 of her Declaration beyond the first sentence.

In addition, the Court will not consider any statement of Ms. Zimmerman which purports to offer an opinion as to why the windshield had to be replaced. She clearly has no personal knowledge of that and her information is only based on her review of records which were prepared by others and, in some instances, it is not even clear to the Court what she bases her information on. For instance, in Paragraph 10 she states that the repair of the windshield in December 2008 was "due to the fourth windshield being improperly installed back in the summer of 2006." Nothing on Exhibit G makes that statement and clearly Ms. Zimmerman was not [*7] present in 2008 when the repair was done nor has she provided any facts to support a conclusion that she has personal knowledge to support that statement. For purposes of this motion, the Court concludes that Ms. Zimmerman does not have admissible personal knowledge regarding the reason why a windshield had to be replaced.

Finally, Ms. Zimmerman appears to have become involved in this case sometime after the motorhome was returned to Great American RV. She makes the assertion that "at no time prior to July 1, 2009 was GEMB ever informed by anyone, including the plaintiffs themselves, of any complaint plaintiffs had with the condition of the RV, any defect associated with the RV or the need to address any item of routine maintenance associated with the RV." She provides no details as to how she has firsthand knowledge regarding the truth of what she asserts and the Court will not consider that statement.

In summary, the Declaration of Christina Zimmerman provides little new information for the Court to consider.

The Court also notes that the Plaintiffs relied on allegations in their Complaint. ECF No. 48. This Complaint is actually an amended complaint but it is not so designated on the [*8] pleadings. This amended Complaint is signed only by Plaintiffs' counsel, Robert Mitchell, and it is thus not a verified complaint and cannot be relied on to support facts in support of the Plaintiffs motion. To the extent the Plaintiffs rely on allegations in the amended Complaint, those allegations will not be considered by this Court for purposes of this motion.

LEGAL STANDARD

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See FDIC v. O'Melveny & Myers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary [*9] judgment. *See California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

Genuine factual issues are those for which the evidence is such that "a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. Material facts are those which might affect the outcome of the suit under governing law. *Id.* In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994)(citing *O'Melveny & Myers*, 969 F.2d at 747). Furthermore, conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 345 (9th Cir. 1995). Similarly, hearsay evidence may not be considered in deciding whether material facts are at issue in summary judgment motions.

Id. at 345; *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980).

UNDISPUTED RELEVANT FACTS

The Plaintiffs purchased a 2005 Monaco RV for \$290,999.59 from the defendant, Great American RV, [*10] Inc., on May 21, 2005. The Plaintiffs intended to use the RV for extensive travel and to live in it as their home but, for purposes of this motion, there is no admissible evidence before the Court to support the conclusion that this purpose was stated to the seller. The evidence does show that the Plaintiffs lived full time in the motorhome for several years. They stopped making monthly payments on the RV as of July 1, 2009. At the time the motorhome was returned, it has less than 25,000 miles on it. Between June 2005 and July 2009 the plaintiffs made forty-six monthly payments of \$2,029.11 for a total payment of \$93,339.06 and, in addition, they put additional money down when the motorhome was purchased.

The windshield was first replaced by Great American RV between June 3 -- 21, 2005, shortly after the Butlers purchased the motorhome. The second windshield replacement occurred on August 10, 2005 and this replacement was necessitated by a rock chip in the windshield. Sometime after the second time the windshield was replaced it developed another crack/stress fracture. The Butlers took the motorhome to a dealer in Wildwood, Florida and they spent 23 days there while the dealer attempted [*11] to replace the windshield. This attempt was unsuccessful as one replacement windshield arrived broken, a second was broken by the dealer and a third was broken when the dealer attempted to install it in the motorhome. The Butlers left the dealership with their original cracked windshield. As a consequence of the crack in the windshield, the motorhome also sustained water damage which was then later repaired. This cracked windshield was then replaced on July 14, 2006. The windshield again developed a crack/stress fracture and it was repaired between December 9, 2008 and December 24, 2008 at a dealership in Harrisburg, Oregon. When the motorhome was delivered back to the Butlers and while parked at their home, the windshield developed another crack/stress fracture. The Butlers then delivered the motorhome to Great American RV in July 2009 and advised that they would not pick it up again. According to Mr. Butler's testimony, replacement of each windshield cost in excess of \$2,000 although he did not

have to pay for the replacements as they were either replaced under warranty or based on the promise of the manufacturer to "repair the windshield for the life of the coach because it was [*12] a design error." ECF No. 66-1, p. 26.

On two occasions, in addition to replacing the windshield, major repairs were done to the "front cap, major alterations from the original design. . . they did a fiberglass layup all the way up across the front with the windshield out and they had to retrim the shape, the size of the cutout in the front cap that the windshield nested in. New seal designs, wider seal design. I think they honestly tried to fix the problem but they didn't." ECF No. 65-2, p. 49 (Deposition of Charles Butler). It is not clear, however, from Mr. Butler's testimony when these two major repair attempts actually occurred. In addition, numerous repairs were made to the motorhome regarding other issues. All the work performed is documented in the Coach History (ECF NO. 65-4).

The Coach History documents that the motorhome was unavailable for use by the Plaintiffs for a total of 128 days during which time the repair facility was working on replacing the windshield as well as making other repairs. Of the 128 days, it is probable that more than 56 days were related to the replacement of the windshield. The Coach History shows that the windshield was replaced, at the Wildwood, [*13] Florida facility, in just one day but the testimony reflects a number of attempts to replace the windshield, all of which failed, and which clearly took more than one day. The exact number of days the motorhome was in the Florida repair facility related to attempts to replace the windshield is not known at this time.

The Coach History documents other days in which the motorhome was not available to the Plaintiffs for their use in addition to the 128 days identified by the Court. In one document Mr. Butler identifies a total of 149 days (ECF No. 65-3) and in his deposition Mr. Butler testified that the motorhome was in for repair a total of 156 days. (ECF No. 65-2. p. 32).

The Plaintiffs' Motion for Partial Summary Judgment contains references to work done on the motorhome which work is not documented in the Coach History. To the extent such references occur, they are not based on admissible evidence and will not be considered by the Court. An example of such reference is found at Paragraphs J and K (ECF No. 92, p. 6) which relate to

work done in Kenly, North Carolina but these references then rely on the amended Complaint which, as noted above, is not verified. In addition, there is [*14] no admissible evidence before the Court regarding these two instances of repair.

The Court also notes that while the Plaintiffs assert that the Defendants "made multiple and repeated assurances to Plaintiffs that Defendants could and would repair the vehicle" (ECF No. 92, p. 7), this statement is not supported by admissible evidence. The assertions appear, once again, to rely only on claims set forth in an unverified Complaint.

The Court also notes that the argument by the Defendant, that the second, fourth and fifth window replacements were not due to a defect in the windshield is also not supported by any competent evidence.

REVOCACTION OF ACCEPTANCE

R.C.W. 62A.2-608 Revocation of acceptance in whole or in part

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; . . .

...

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by [*15] their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

One of the issues before the Court is whether there are facts sufficient for the Court to find, as a matter of

law, that a design defect in the motorhome caused the windshields to crack which then necessitated the replacement or attempted replacement of the windshield five times over a period of four years (including the fact that the windshield was cracked again when the motorhome was returned to Great America RV) substantially impaired the value of the motorhome to the Butlers.¹

1 The Court is not including the replacement of the windshield due to the rock chip as that was not due to a defect.

While the Court believes the evidence strongly supports a conclusion in favor of the Butlers, there is no testimony, cited to the Court, which discusses or references how the required replacements affected the Butlers. The Court could only guess in that regard and that would not be appropriate in the context of a summary judgment motion. For instance, the Court could imagine that the Butlers were [*16] extremely frustrated with what to them was an on-going problem with a cracked windshield and they felt that this greatly compromised their confidence in the integrity of the motorhome. However, there is no testimony to that effect that has been placed before the Court.

The facts presented to the Court, for purposes of this motion, do support a conclusion that a design defect caused the problems with the windshield, that numerous good faith attempts were made to repair that defect and that such attempts were unsuccessful. That, however, is not sufficient for the Court to find, as a matter of law, that the Butlers were entitled to revoke acceptance. The Court must also find that this substantially impaired the value of the motorhome to the Butlers and the facts to support that conclusion are absent.

While the issue of "substantially impaired the value" as to Butlers does not necessarily focus on money, the Court notes that the cost to repair each windshield was in excess of \$2,000 and that in several instances the time needed to replace the windshield was excessive. In their opposition to the motion, the Defendant asserts that the "value" should only be a dollar value and they assert [*17] that they have submitted evidence that the "value of the RV was impaired by less than 2% of the original purchase price of the RV." ECF No. 99, p. 7. This reference is based on the report attached to the Declaration of Christina Zimmerman. ECF No. 100. However, that report is not admissible in evidence as it is

not presented in the form of an affidavit or declaration, is not under penalty of perjury and is not being considered by the Court. In addition, the Court notes that the report references an Exhibit A which is not attached. It also seems to focus on "any deficiencies in need of correction before this recreational vehicle could be re-sold." Mr. Butler testified that the main problem with the motorhome when he was turned it in was the windshield cracking again. It appears that the deficiencies noted by the Defendant's expert are not relevant to the issue for determination by this Court as it does not address whether the defect in the windshield design "substantially impaired the value of the motorhome to the Butlers."

The Court concludes that there remain factual issues for determination at the time of trial. The Court expects, however, that all facts in support of as well as in [*18] opposition to the claim for revocation of acceptance will be presented at the time of trial by both parties.

TIMELINESS OF REVOCATION OF ACCEPTANCE

The next issue for resolution with regard to revocation of acceptance is whether the Butler's revocation of acceptance occurred within a reasonable time after the Butler's discovered the grounds for the revocation of acceptance. R.C.W. 62A.2-608.

The Court concludes that this presents a factual question for determination at the time of trial. While it may be that the Butlers were entitled to give every opportunity to repair the defect and that the timeliness of the revocation should be made in relation to those efforts, the Court believes that additional facts should be presented in that regard particularly in light of the fact that it appeared, for approximately two years, that the

windshield problem had been resolved.

MAGNUSON MOSS WARRANTY ACT

For many of the reasons stated above, the Court also concludes that there are factual questions regarding the applicability of the Magnuson Moss Warranty Act. Testimony needs to be presented to support the meaning of "merchantability" as it relates to the motorhome as well as whether there was an implied [*19] warranty of fitness for a particular purpose.

CONCLUSION

For the above stated reasons, the Plaintiffs Motion for Partial Summary Judgment on the Issue of Rescission is DENIED. ECF No. 92.

In light of the fact that the Motion for Rescission has been denied, the Plaintiffs' Motion for Partial Summary Judgment on the Issue of Reimbursement (ECF No. 93) is also DENIED.

The Court is also denying the Defendant's request for sanctions for the mere bringing of the motion. The fact that the Court denied the Defendant's motion does not, in and of itself, mean that the Plaintiff's motion was not warranted.

DATED this 9th May, 2011.

/s/ Karen L. Strombom

Karen L. Strombom

United States Magistrate Judge

ORIGINAL

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 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 October 7, 2011 in the manner indicated below:

1. Appellant's Brief;
2. Verbatim Report of Proceedings; and
3. Declaration of Service.

4. The above documents were served on the following:

Heidi Anderson
Lane Powell PC

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT -7 PM 3:37

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 7th day of October, 2011.



Jodi Graham

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