

67335-1

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No. 67335-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BELLEVUE SQUARE, LLC,

Plaintiff/Appellant

v.

JIMI LOU STEAMARGE, d/b/a ALLUSIA,

Defendant/Judgment Debtor

and

WELLS FARGO BANK, NA,

Garnishee Defendant/Respondent.

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STATE OF WASHINGTON
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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Julie Spector)

BRIEF OF RESPONDENT WELLS FARGO BANK

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. COUNTERSTATEMENT OF THE ISSUES.....	2
III. COUNTERSTATEMENT OF THE FACTS	3
IV. ARGUMENT.....	7
A. The Trial Court Did Not Abuse Its Discretion In Granting Wells Fargo’s Motion To Vacate The Default Judgment	7
B. The Trial Court Did Not Err When It Granted Wells Fargo’s Motion To Strike ER 408 Documents	17
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Ahten v. Barnes</i> , 158 Wn. App. 343, 242 P.3d 35 (2010);	11
<i>Bishop v. Illman</i> , 14 Wn.2d 13, 126 P.2d 582 (1942).....	14, 15
<i>Boss Logger, Inc., v. Aetna Casualty & Surety Co.</i> , 93 Wn. App. 682, 970 P.2d 755 (1998).....	13
<i>Commercial Courier Serv., Inc. v. Miller</i> , 13 Wn. App. 98, 533 P.2d 852 (1975).....	15
<i>Discover Bank v. Bridges</i> , 154 Wn. App. 722, 226 P.3d 191 (2010).....	12
<i>Dobbins v. Mendoza</i> , 88 Wn. App. 862, 947 P.2d 1229 (1997).....	11
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	7
<i>Lamon v. McDonnell Douglas Corp.</i> , 91 Wn.2d 345, 588 P.2d 1346 (1979).	11
<i>Lee v. Western Processing Co., Inc.</i> , 35 Wn. App. 466, 667 P.2d 638 (1983).....	10, 11
<i>Leen v. Demopolis</i> , 62 Wn. App. 473, 815 P.2d 269 (1991).....	10
<i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 794 P.2d 526 (1990).....	11, 13
<i>Little v. King</i> , 160 Wn.2d 696, 161 P.3d 345 (2007).....	7

CASES (Continued)

	<u>PAGE</u>
<i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	16, 17
<i>Mosbrucker v. Greenfield Implement, Inc.</i> , 54 Wn. App. 647, 774 P.2d 1267 (1989).....	8
<i>Northington v. Sivo</i> , 102 Wn. App. 545, 8 P.3d 1067 (2000).....	18
<i>Pfaff v. State Farm Mut. Auto. Ins. Co.</i> , 103 Wn. App. 829, 836, 14 P.3d 837 (2000).....	13
<i>Showalter v. Wild Oats</i> , 124 Wn. App. 506, 101 P.3d 867 (2004).....	13, 16
<i>Shreve v. Chamberlin</i> , 66 Wn. App. 728, 832 P.2d 1355 (1992).....	8
<i>State v. N.M.K.</i> , 129 Wn. App. 155, 118 P.3d 368 (2005).....	12
<i>Summers v. Dep't of Revenue</i> , 104 Wn. App. 87, 15 P.3d 902 (2001).....	8
<i>Watkins v. Peterson Enter., Inc.</i> , 137 Wn.2d 632, 973 P.2d 1037 (1999).....	8
<i>Woodruff v. Spence</i> , 76 Wn. App. 207, 883 P.2d 936 (1994).....	10

STATUTES, REGULATIONS AND COURT RULES

RCW 6.27.110(1).....	3, 5, 9
RCW 6.27.200	1, 4, 16, 19
RAP 2.5(a)	13, 19

STATUTES, REGULATIONS AND COURT RULES – CONTINUED

	<u>PAGE</u>
CR 60(b).....	2, 5, 7, 17
CR 60(b)(1).....	7, 8, 12
ER 408	<i>passim</i>
ER 803(a)(7)	12

MISCELLANEOUS

4 Orland & Tegland, Wash. Prac.: Rules Prac. 717 (4th ed. 1992)	8
Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, 406 (2005).....	12

I. INTRODUCTION

This appeal is about a missing check, a windfall default judgment and the abuse of discretion standard. Appellant Bellevue Square, LLC (“Bellevue Square”) obtained a summary judgment against a former tenant, Jimi Lou Steambarge. In an effort to collect on that judgment, Bellevue Square sent a writ of garnishment to Respondent Wells Fargo Bank, NA (“Wells Fargo”). Under the garnishment statutes, to be valid, a writ must be served with a check for \$20.00. It was disputed whether Bellevue Square actually sent that check with the writ. Bellevue Square says it put the check in the mail. Wells Fargo’s records show that no such check was ever received. It is undisputed, however, that Wells Fargo immediately notified Bellevue Square that the writ was invalid and invited it to re-issue the writ with another check. Bellevue Square refused.

Instead, Bellevue Square sought and obtained a default judgment against Wells Fargo. Indeed, Bellevue Square *wanted* a default judgment because it rightfully assumed it would be far more lucrative than the writ of garnishment. Under the garnishment statutes, if a garnishee fails to answer a valid writ, the judgment creditor may obtain a default judgment against the garnishee for the full amount of the underlying judgment. RCW 6.27.200. In this case, that meant that a default judgment against Wells Fargo was worth over \$72,000 (the amount Steambarge owed

Bellevue Square), rather than the mere \$200 that Steambarge maintained in her Wells Fargo bank accounts. And that is the same reason Bellevue Square fights so hard to revive the default judgment on appeal.

The trial court granted Wells Fargo's CR 60(b) motion to vacate because it could not "in good conscience" allow that windfall. It is well-established that the trial court's ruling is reviewed for abuse of discretion only. The trial court was well within its discretion in vacating the default judgment because the writ was invalid in the absence of the statutorily required answer fee or, in the alternative, because Wells Fargo's failure to process the fee was a mistake or excusable neglect. Either way, Bellevue Square cannot plausibly argue that justice was not served, which is the primary consideration when considering a motion to vacate. The trial court required Wells Fargo to pay all of Bellevue Square's attorney's fees and costs, which Wells Fargo did. Bellevue Square was made whole. This Court should affirm, and deny Bellevue Square the windfall it seeks.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly exercise its discretion in granting Wells Fargo's motion to vacate the default judgment when (a) evidence showed that Bellevue Square's writ of garnishment was invalid or, at a minimum, that Wells Fargo's failure to answer the writ was due to

mistake or excusable neglect, and (b) equity was served because Wells Fargo paid all of Bellevue Square's attorneys fees and costs? **Yes.**

2. Did the trial court properly grant Well Fargo's motion to strike Bellevue Square's improper use of documents containing ER 408 settlement discussions? **Yes.**

III. COUNTERSTATEMENT OF THE FACTS

In late October 2010, Bellevue Square obtained a judgment against Judgment Debtor Jimi Lou Steambarge, d/b/a Allusia ("Steambarge") in the amount of \$69,357.90, plus interest. CP 127-129. On December 14, 2010, Bellevue Square obtained writs of garnishment against various banks who it believed had possession or control of Steambarge's accounts, including Wells Fargo. CP 6-7; CP 18-20. At the time the writ was served, and thereafter, Steambarge had three accounts with Wells Fargo in the total amount of \$206.01. CP 45 (Oliver Decl., ¶ 5).

On December 16, 2010, Bellevue Square's attorneys served the writ on Wells Fargo by mail. CP 12-14. Wells Fargo received the writ on December 20, 2010. *Id.* To be valid, a writ of garnishment must be accompanied by a check or money order in the amount of \$20.00 (the "Answer Fee"). RCW 6.27.110(1). The writ papers were forwarded to Wells Fargo's legal order processing department where it was discovered that they did not include the requisite Answer Fee. CP 44-45 (Oliver

Decl.), ¶¶ 1-2. Wells Fargo therefore considered the writ invalid on its face. *Id.*, ¶ 6. By letter dated December 21, 2011, Wells Fargo objected to the writ because there was an “Invalid Payment Fee Amount,” and it returned the original writ papers to Bellevue Square’s attorneys. CP 48.

Bellevue Square did not thereafter remit the Answer Fee to Wells Fargo. CP 45 (Oliver Decl.), ¶ 4. Rather, on January 3, 2011, Bellevue Square’s attorney telephoned Wells Fargo. CP 81-82 (Stone Decl.), ¶ 5. During that conversation, a Wells Fargo employee confirmed that there was no record of Wells Fargo having received the Answer Fee, but he purportedly stated “in substance” that it was “possible that Wells Fargo had lost the check.” *Id.* When asked how the issue could be resolved, the employee recommended that Bellevue Square simply re-issue a valid writ of garnishment with an Answer Fee. *Id.* Bellevue Square ignored the suggestion. The next day, January 4, 2011, Bellevue Square’s attorneys filed a declaration of service in which they claimed to have sent an Answer Fee to Wells Fargo with the December 16 writ papers. CP 12-14.¹

On January 12, 2011, Bellevue Square moved for a default judgment pursuant to RCW 6.27.200, seeking judgment against Wells

¹ Although Wells Fargo’s objection letter was dated December 21, 2010, it was not mailed until December 28, 2010 and not received by Bellevue Square’s attorneys until January 3, 2011. CP 81 (Stone Decl.), ¶ 4. The declaration of service was filed on January 4, 2011. CP 12-14.

Fargo for \$72,749.18—the amount of the Steambarge judgment plus accrued interest. CP 15-27. In an effort to show that it had served the Answer Fee, Bellevue Square’s motion papers attached a photocopy of an *unendorsed* check made out to Wells Fargo in the amount of \$20.00 dated December 16, 2010. CP 25. Curiously, the Wells Fargo address listed on the check (P.O. Box 29728) was different than the Wells Fargo address listed on the writ and declaration of service (P.O. Box 29779). *Id.* Wells Fargo did not respond to the motion and, so, on January 25, 2011, a trial court commissioner entered a default order and judgment against Wells Fargo in the amount of \$72,749.18 (the “Default Judgment”). CP 30-31.

Wells Fargo moved under CR 60(b) to have the Default Judgment vacated on the grounds that Bellevue Square failed to serve the Answer Fee with its writ, as required by RCW 6.27.110(1) and, therefore, the judgment against it was void. CP 32-43. Wells Fargo also argued that it would be inequitable, and an unjustified windfall, for Bellevue Square to obtain a judgment against Wells Fargo for more than \$72,000 when the amount it sought to garnish—the funds in Steambarge’s bank accounts—was only around \$200. *Id.* Bellevue Square opposed the motion. CP 51-66. To support its argument that the Answer Fee had been served on Wells Fargo, Bellevue Square submitted several post-Default Judgment emails between counsel—all of which bore the legend: “Subject to ER

408” and “For Settlement Discussion Purposes Only.” CP 70-79. Wells Fargo moved to strike all references to these emails. CP 123-124.²

Wells Fargo’s motion to vacate was heard by the trial court on May 31, 2011. The court ruled that it could not deny Wells Fargo relief “in good conscience,” but would vacate the Default Judgment on the condition that Wells Fargo pay “every single penny” of Bellevue Square’s attorneys fees and costs. RP (5/31/11) at 10. The court further stated that it did not consider any of the emails containing settlement discussions. *Id.* at 11. That same day, the court entered an order granting Wells Fargo’s motion to vacate and to strike the ER 408 materials. CP 125-126. Thereafter, Bellevue Square requested an award of attorney’s fees and costs in the amount of \$16,317.21. CP 135-148. Although Wells Fargo believed the fee request to be implausible and excessive, it did not oppose the motion. CP 149-152. The court entered an order awarding Bellevue Square all of the requested fees and costs. CP 158-161. Even though Bellevue Square had been made completely whole by the award, it appealed the order vacating the Default Judgment. CP 162.

² Bellevue Square repeats its improper use of these documents on appeal, referring to the stricken email—ER 408 communications between counsel regarding Bellevue Square’s efforts to collect on the Default Judgment (CP 70-79)—in its statement of the facts. *See* Appellant’s Br. at 8-10. As noted, the trial court did not consider these documents. In any event, for the reasons explained below, even if the email were considered by the trial court or this Court, it would not change the result.

IV. ARGUMENT

A. **The Trial Court Did Not Abuse Its Discretion In Granting Wells Fargo's Motion To Vacate The Default Judgment.**

Default judgments are not favored in Washington because of a strong policy that parties resolve disputes on the merits. *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). This Court reviews an order vacating a default judgment under CR 60(b) for abuse of discretion only. *Id.* at 702-703. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Id.* Because courts disfavor defaults, this Court is less likely to find an abuse of discretion when a trial court vacates a default judgment than when it does not. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). The overriding concern in reviewing an order vacating a default judgment is whether justice has been done. *Id.* “What is just and proper must be determined by the facts of each case, not by a hard and fast rule.” *Id.* (internal quotes and citation omitted). For the reasons explained below, the trial court did not abuse its discretion in vacating the Default Judgment and, because Bellevue Square has been made whole, the result was just and equitable.

Procedural Irregularity. There were more than ample grounds for the trial court to vacate the Default Judgment because of irregularities in the way it was obtained. CR 60(b)(1) (relief may be granted if there was “irregularity in obtaining a judgment or order”). “Irregularities” within

the meaning of CR 60(b)(1) “concern departures from prescribed rules or regulations” and involve “procedural defects unrelated to the merits.” *Summers v. Dep’t of Revenue*, 104 Wn. App. 87, 93, 15 P.3d 902 (2001) (citing 4 Orland & Tegland, Wash. Prac.: Rules Prac. 717 (4th ed. 1992)); *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989). Indeed, where a creditor obtains a default judgment in violation of the procedures set forth in the garnishment statutes, the garnishee is entitled to have the judgment vacated as a matter of law. See *Shreve v. Chamberlin*, 66 Wn. App. 728, 832 P.2d 1355 (1992).

The trial court had discretion to vacate the Default Judgment because there was evidence that Bellevue Square’s writ—and, therefore, its Default Judgment—was invalid. Garnishment requires strict adherence to statutory procedures. *Watkins v. Peterson Enter., Inc.*, 137 Wn.2d 632, 640, 973 P.2d 1037 (1999). “Since garnishment is an extraordinarily harsh remedy, with specific procedures relating to filing, notice, and enforcement, the party seeking the remedy must follow those exclusive methods provided in the statute.” *Id.* at 646. For this reason, the garnishment statutes must be “strictly construed against the party seeking the remedy.” *Id.* This is particularly so where a judgment creditor seeks a default judgment, since the remedy in that event is nothing less than

punitive. As described below, if the garnishee defaults, it is liable for the entire amount of the underlying judgment against the debtor.

Under Washington law, “the writ of garnishment on the garnishee is *invalid* unless the writ is served together with ... (c) [a] check or money order made payable to the garnishee in the amount of twenty dollars for the answer fee[.]” RCW 6.27.110(1) (emphasis added). The evidence shows that Wells Fargo never received this Answer Fee. The Wells Fargo paralegal familiar with the process by which Wells Fargo “receives, tracks and responds to writs of garnishment,” testified based on her own personal review of Wells Fargo’s records that the “documents served upon Wells Fargo did not include a check for the answer fee of \$20, as required by RCW 6.27.110[.]” CP 44-45 (Oliver Decl.), ¶¶ 1-2. That testimony is confirmed by the fact that, the day after Wells Fargo received the invalid writ documents, it sent a letter to Bellevue Square’s attorneys rejecting the writ on that basis: “Invalid Payment Fee Amount.” *Id.*, ¶ 6; CP 48. Of course, since no check was received, no check was ever cashed.

Bellevue Square argues that the trial court was required to reject this evidence because transmittal of the Answer Fee was presumptively shown by Bellevue Square’s declaration of service. Appellant’s Br. at 12-21. Bellevue Square is wrong for two reasons. *First*, there is no presumption here. The presumption applies where the issue is whether the

defendant received service of process as a jurisdictional prerequisite to entry of a default judgment. *See Woodruff v. Spence*, 76 Wn. App. 207, 883 P.2d 936 (1994); *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991); *Lee v. Western Processing Co., Inc.*, 35 Wn. App. 466, 667 P.2d 638 (1983). The issue here is not lack of jurisdiction; it is undisputed that Bellevue Square served the writ and that Wells Fargo received it. CP 23-24. The issue is whether the writ was *invalid* because it was served without an Answer Fee. Proof of service cannot answer that question.³

Second, even if the declaration of service created a presumption that Bellevue Square sent an Answer Fee, the trial court had discretion to find Wells Fargo's evidence sufficiently "clear and convincing" to defeat the presumption. In *Lee*, the court affirmed the trial court's order granting the defendant's motion to vacate a default judgment. The court found that the plaintiff's affidavit of service was "presumptively correct," but was "subject to attack and may be discredited by competent evidence." 35 Wn. App. at 640. The defendant filed affidavits denying service. This Court

³ Even if the rule were relevant here, a declaration of service is presumptively true only if it is regular in form and substance. *Lee*, 35 Wn. App. at 469. Bellevue Square's declaration purports to have been signed on December 27, 2010, but it was not filed until January 4, 2011 (CP 12-14)—the day *after* Bellevue Square's attorneys learned that Wells Fargo disputed the validity of the writ for lack of an Answer Fee. CP 48; CP 81 (Stone Decl.), ¶¶ 4-5. Although perhaps a coincidence, such a discrepancy may be sufficient to overcome the presumption. *Lee*, 35 Wn. App. at 641.

found that the “trial judge could find these affidavits persuasive” and that they, with other evidence, “created a substantial basis” for the trial court’s order to vacate. *Id.* at 640-41. All the same is true here.⁴

Finally, this Court can reject Bellevue Square’s argument that the declaration of Wells Fargo’s representative, Ms. Oliver, is inadmissible. Appellant’s Br. at 17-21. Bellevue Square failed to move the trial court to strike the declaration on hearsay or personal knowledge grounds and, thus, its evidentiary objections are waived. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979). Regardless, the declaration was admissible. Ms. Oliver’s declaration states that she is a paralegal in Wells Fargo’s Legal Order Processing Department, which was responsible for receiving, tracking and responding to Bellevue Square’s writ. She made her declaration based on personal knowledge and review of records kept in the ordinary course of Wells Fargo’s business. CP 44-

⁴ Bellevue Square’s claim that this Court may review the evidence *de novo* is wrong. As Bellevue Square’s own cases show, this Court applies a *de novo* standard only when it reviews an order on a motion to vacate a default judgment for “want of jurisdiction,” because trial courts have a nondiscretionary duty to grant relief from default judgments that are entered in the absence of personal jurisdiction. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010); *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). Where, however, a trial court vacates a default judgment for other reasons, its consideration the parties’ documentary evidence is subject to the traditional abuse of discretion standard of review “because reasonable minds can sometimes differ.” *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

45. Washington courts have repeatedly rejected hearsay challenges to nearly identical declarations (*see Discover Bank v. Bridges*, 154 Wn. App. 722, 725-26, 226 P.3d 191 (2010)), and this Court should do the same.

Bellevue Square's criticism of Ms. Oliver's declaration, including the complaint that it "does not attach any of the fee records," is even more unfounded since Ms. Oliver's testimony relates to the *absence* of an item in Wells Fargo's records—that is, an entry reflecting receipt of an Answer Fee. CP 45 (Oliver Decl.), ¶ 2. The hearsay rule contains an exception for such testimony. *See* ER 803(a)(7). This rule "allows the admission of evidence that an event or matter was not recorded to show that it did not occur or did not exist." *State v. N.M.K.*, 129 Wn. App. 155, 162, 118 P.3d 368 (2005) (*quoting* Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, 406 (2005)). That is why Wells Fargo offered the declaration and why the trial court could find that Wells Fargo never received the Answer Fee. There was no abuse of discretion.

Mistake, Inadvertence or Excusable Neglect. Even if the trial court accepted Bellevue Square's theory that it served the Answer Fee, but that Wells Fargo lost it through some type of "mailroom mix-up," it had discretion to vacate the Default Judgment on the grounds of mistake, inadvertence or excusable neglect. *See* CR 60(b)(1) (relief may be granted if there was "[m]istakes, inadvertence, ... [or] excusable neglect").

Washington cases show that where there is no willful intent to ignore a duty to respond to legal process, and the failure to do so is due to an inadvertent break-down of internal process rather than a systematic one, a trial court has ample discretion to vacate a default judgment.⁵

For example, in *Boss Logger, Inc., v. Aetna Casualty & Surety Co.*, 93 Wn. App. 682, 689, 970 P.2d 755 (1998), this Court affirmed the trial court's order vacating a default judgment on the grounds of mistake where the defendant had a system in place to ensure the proper handling of legal process, but that "someone in the process lost the papers." Similarly, in *Showalter v. Wild Oats*, 124 Wn. App. 506, 514, 101 P.3d 867 (2004), the court vacated a default judgment where an internal miscommunication resulted in a failure by the defendant's employee to forward the complaint to a claims manager. And in *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 831, 836, 14 P.3d 837 (2000), the court vacated a default judgment where the defendant's employee faxed the complaint to a wrong number and it never reached the person responsible for processing it.

⁵ Bellevue Square suggests that Wells Fargo did not raise this issue below. Appellant's Br. at 22. But Wells Fargo did cite "inadvertence[] and excusable neglect" in its motion (CP 37) and, as Bellevue Square notes, the trial court raised and considered the issue at the hearing. RP (5/31/11) at 10 ("Isn't it true, though, that there was a \$20 check sent; it just was misplaced by Wells Fargo."). It does not matter anyway. This Court may affirm an order vacating a default judgment on any grounds developed in the record. *Lindgren*, 58 Wn. App. at 598 n. 2; RAP 2.5(a).

If, as Bellevue Square claims, the Answer Fee was served with the writ, Wells Fargo's failure to answer was caused by a similar one-time mistake, not a systematic problem or a willful intent to ignore the writ. Wells Fargo has a legal department responsible for receiving, tracking and responding to writs. CP 44 (Oliver Decl.), ¶ 2. Indeed, when Wells Fargo received Bellevue Square's writ, it immediately processed the writ and confirmed receipt. CP 96 (Graham Decl.), ¶ 3; CP 100. That same day, Wells Fargo sent a letter informing Bellevue Square's attorneys that it objected to the writ because it lacked the requisite Answer Fee. CP 48. When Bellevue Square's attorneys called to complain, a Wells Fargo employee told them exactly what they could do to resolve the discrepancy over the missing Answer Fee: re-send the writ with another \$20 check. CP 81-82 (Stone Decl.), ¶ 5. It was Bellevue Square, not Wells Fargo, who ignored that solution and pressed forward with the Default Judgment.

These facts distinguish this case from *Bishop v. Illman*, 14 Wn.2d 13, 126 P.2d 582 (1942), which Bellevue Square heavily relies upon. Appellant's Br. at 22-23. There, unlike here, the garnishee did not fail to answer the writ because of mistake or inadvertence. Rather, the garnishee flatly "refused the garnishment," and "did not see any necessity to" answering it. 14 Wn.2d at 16. The court reversed the order vacating the default judgment "because the evidence conclusively establishes a *willful*

disregard of the writ.” *Id.* at 17 (emphasis added). The other case cited by Bellevue Square is to the same effect. *See Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 106, 533 P.2d 852 (1975) (“This court will not relieve a defendant from a judgment taken against him due to his *willful disregard* of process.”) (emphasis added).

There was no willful disregard here. Wells Fargo has a legal order processing department and internal process to accurately respond to writs of garnishment, not a policy to ignore them. Given the consequences, Wells Fargo has every incentive to follow that process and respond to valid writs. The evidence shows that Wells Fargo did not answer Bellevue Square’s writ or the default notice because it believed that the writ was invalid. Whether that belief was correct (because the Answer Fee was not served) or mistaken (because the Answer Fee was lost), there is no evidence that Wells Fargo deliberately evaded or “refused” its responsibilities under the garnishment law. On the contrary, it promptly and expressly raised the issue with Bellevue Square with the expectation that Bellevue Square would simply re-issue the writ. Either way, the trial court did not abuse of discretion in vacating the Default Judgment.

The Trial Court’s Order Was Just And Equitable. Ultimately, “[a] proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in

accordance with equitable principles and terms.” *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). This Court’s “primary concern is that a trial court’s decision on a motion to vacate a default judgment is just and equitable.” *Showalter*, 124 Wn. App. at 510. The result below was just and equitable. As the trial court correctly recognized, it could not “in good conscience” let the Default Judgment stand. RP (5/31/11) at 10. There was no abuse of discretion in that finding either.

The order vacating the Default Judgment spared Wells Fargo from a punitive remedy, denied Bellevue Square a windfall, and ensured that Bellevue Square was made whole. At the time Bellevue Square issued the writ, Steambarge had only around \$200.00 in her Wells Fargo accounts. CP 45 (Oliver Decl.), ¶ 5. Ordinarily, that is all that would have been due on the writ. RCW 6.27.080(3) (“writ naming the financial institution as the garnishee defendant shall be effective only to attach deposits of the defendant”). If the garnishee defaults, however, the garnishee becomes separately liable “for the full amount of the plaintiff’s unpaid judgment against the defendant with all accruing interest and costs.” RCW 6.27.200. In this case, due to the significant judgment Bellevue Square obtained against Steambarge, that amount was \$72,749.18. CP 30-31.

While that is what RCW 6.27.200 provides, given Wells Fargo’s strong showing of irregularity or, at the very least, mistake and excusable

neglect, CR 60(b) plainly gave the trial court equitable discretion to vacate the Default Judgment to ameliorate the statute's harsh effect. Indeed, any other result would effectively reward Bellevue Square for purposely ignoring Wells Fargo's request to simply re-issue the writ—a simple task that would have avoided the Default Judgment altogether. *See Morin*, 160 Wn.2d at 755 (“a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable”). The trial court, of course, went one step further to achieve an equitable result. It required Wells Fargo to pay all of Bellevue Square's attorney's fees and costs in the garnishment and default proceedings. CP 125-126.

Simply put, Bellevue Square has no cause to complain. As a result of the trial court's order, Bellevue Square and its attorneys have recovered far more than they would have, had there been no default in the first place. And, at the same time, Wells Fargo has been relieved from paying a judgment that far exceeds any culpability it has in this matter. This Court should affirm the decision below and maintain that equitable result.

B. The Trial Court Did Not Err When It Granted Wells Fargo's Motion To Strike ER 408 Documents.

Bellevue Square's challenge to the trial court's evidentiary ruling is baseless and, in the end, pointless. The trial court granted Wells Fargo's motion to strike, and did not consider, three emails filed in connection with Bellevue Square's opposition to the motion to vacate. CP 125-126;

RP (5/31/11) at 10-11. The emails are communications between counsel after Bellevue Square obtained the Default Judgment, but before Wells Fargo filed its motion to vacate. CP 70-79. Each email bears the legend “Subject to ER 408” and “For Settlement Discussion Purposes Only.” *Id.* Each email discusses the validity of the Default Judgment and the grounds for Wells Fargo’s contemplated motion to vacate. *Id.* Each email contains offers and communications regarding settlement of the dispute. *Id.*⁶

Even if reviewed *de novo*, it is clear that the trial court properly excluded all three emails. ER 408 excludes statements made in settlement negotiations when offered on the issue of liability. Courts may, however, admit such statements if offered for other purposes. *Northington v. Sivo*, 102 Wn. App. 545, 549, 8 P.3d 1067 (2000). Bellevue Square argues that the emails are admissible because they were “not being used to prove liability for the underlying claim.” Appellant’s Br. at 32. Nonsense. As described above, for purposes of the motion to vacate, Wells Fargo’s liability turned, at least in part, on whether Bellevue Square actually

⁶ Bellevue Square points out that some of the emails contain no settlement offers by Wells Fargo, and that ER 408 does not prevent it from offering its own settlement offers into evidence. *See* Appellant’s Br. at 32-33 & n. 7. But what Bellevue Square fails to point out, is that those same emails contain Wells Fargo’s substantive *responses* to Bellevue Square’s offers, which include discussion of the merits of Bellevue Square’s theory of liability. Contrary to Bellevue Square’s suggestion, ER 408 includes “[e]vidence of ... statements made in compromise negotiations,” not just statements containing settlement offers.

served the Answer Fee with the writ. Bellevue Square admits that it sought to use the emails to prove just that fact. *Id.* (“The statements were being used for purposes of demonstrating ... whether service of the first writ occurred.”). By Bellevue Square’s own admission, ER 408 applied.⁷

Even had the trial court considered the emails, it would not have changed the result. Bellevue Square argues that the emails “demonstrate the inaccuracy of Wells Fargo’s records.” Appellant’s Br. at 30. Not quite. After obtaining the Judgment Default, Bellevue Square served a second writ of garnishment on Wells Fargo, ostensibly as a means of collecting on the judgment. CP 45 (Oliver Decl.), ¶ 7. The emails contain discussion of that second writ. In the first email, Wells Fargo’s attorney reports that she understood that it too was served without an answer fee. CP 70. In the next email, she corrected her earlier report because “Wells Fargo’s electronic records reflect a received check contemporaneous with the second writ.” CP 74. In the last email, Wells Fargo’s attorney

⁷ Bellevue Square also claims that the emails were relevant to whether Wells Fargo could have availed itself of the procedure set forth in RCW 6.27.200 to have the amount of the default judgment reduced. Appellant’s Br. at 32. Bellevue Square never raised that issue below, and it is therefore waived on appeal. RAP 2.5(a). The issue is irrelevant in any event. For the reasons explained above, Wells Fargo did not seek to have the amount of the Default Judgment reduced, it sought to have the judgment vacated, because it believed the writ to be invalid.

explains that her first report had been incorrect because, “I was provided with incomplete information with respect to receipt of the check.” CP 77.

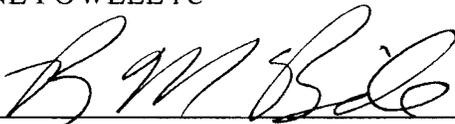
The emails show only that Wells Fargo’s attorney initially received incomplete information from Wells Fargo, not that Wells Fargo’s record system was flawed. Indeed, the emails confirm that, when Wells Fargo receives a writ, it systematically processes and records all statutorily required fees. That occurred with the second writ, but not with the first. If anything, then, the emails are further proof that Bellevue Square never sent, and Wells Fargo never received, the Answer Fee with the first writ—rendering the writ and the Default Judgment defective. Even under Bellevue Square’s theory, the emails confirm that that there was no willful disregard of the writ; at worst, there was some mistake that prevented Wells Fargo from properly recording the first Answer Fee. Again, either way, the trial court had discretion to vacate the Default Judgment.

V. CONCLUSION

The trial court properly exercised its discretion when it vacated the Default Judgment to achieve a just and equitable result.

RESPECTFULLY SUBMITTED this 31st day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2011, I caused to be served a copy of the foregoing Brief of Respondent on the following person(s) in the manner indicated below at the following address(es):

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- by **Electronic Mail**
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