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No. 67824-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GLOBAL EDUCATION SERVICES, INC., on behalf of itself and all
others similarly situated,

Respondent/Appellees

vs.

MOBAL COMMUNICATIONS, INC.,

Petitioner/Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Respondent Global Education Services, Inc. (“Global”) filed a class action complaint on October 27, 2005, against Appellant Mobal Communications, Inc. (“Mobal”). Global’s complaint was based on a single, allegedly unsolicited fax received more than two years earlier. Global was a Washington corporation with its principal place of business in Seattle.¹ Mobal is a New York corporation without offices or employees in Washington.

This appeal challenges the superior court’s denial of Mobal’s motion to vacate a default judgment that Global obtained after not only failing to serve Mobal properly, but also failing to file the affidavit required by Washington’s long-arm statute. In November 2005, Global dispatched a process server to the New York offices of Segal, Tesser & Ryan, LLP (“Segal Law Firm”), a law firm that had previously represented Mobal.² Global identified the Segal Law Firm as the target

¹ According to the website of Washington’s Secretary of State, Corporations Division, Global’s corporate registration lapsed on October 30, 2006, and Global became inactive (i.e., was administratively dissolved) effective February 1, 2010. *See* Corporations Division – Registration Data search, at http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601817819. Accordingly, it is not clear that Global can continue to prosecute this matter. *See* RCW 23B.14.050. Mobal asks that the Court take judicial notice of Global’s status as an inactive corporation. *See* ER 201.

² The Segal Law Firm is now known as Tesser, Ryan and Rochman, LLP. For the sake of clarity and brevity, the Segal Law Firm will be referred to throughout Mobal’s briefing by its former name.

for its service attempt based on information on the website of the New York Secretary of State's Department of Corporations ("Secretary of State"). That website indicated that Mobal had no registered agent, but identified the Segal Law Firm as where the *Secretary of State* would *mail* a copy of the summons and complaint *if* the Secretary of State was properly served with process for Mobal.

When Global's process server arrived at the Segal Law Firm's offices, that firm's managing partner informed him that the Segal Law Firm was not Mobal's registered agent, that the Segal Law Firm had no authority to accept original service of process for Mobal, and that delivery of a summons and complaint to the Segal Law Firm would not constitute valid service on Mobal. Despite being so informed, Global's process server left the summons and complaint with the Segal Law Firm's offices. An employee of the Segal Law Firm later claimed that he mailed the summons and complaint to Mobal, but the contemporaneous documentary evidence refutes this. In fact, the evidence shows that Mobal did not receive copies of the summons and complaint until *after* a default judgment had been entered.

Global made no further attempts to serve Mobal. Although Global's delivery of the summons and complaint took place in the State of New York, Global never filed the statutorily-required affidavit pursuant to

RCW 4.28.185(4), stating that Mobal could not be served within the State of Washington.

Nearly a year after its delivery of the summons and complaint to Mobal's former counsel, Global obtained a default judgment against Mobal. In granting the default judgment, the trial court also certified a class of still-to-be-identified plaintiffs.

In late December 2006, Global sent a dunning letter to Mobal, addressed again through the Segal Law Firm, attempting to collect on that judgment. Mobal received this correspondence from the Segal Law Firm in mid-January 2007, and informed its insurance carrier that it had just learned of both the lawsuit and the default judgment. Mobal and Global's counsel then communicated in an effort to resolve the matter, but they were unsuccessful.

In late 2009, Global propounded post-judgment discovery on Mobal. Mobal thereafter moved to vacate the default judgment as void because, absent effective service, the trial court lacked jurisdiction over Mobal. On December 21, 2009, the trial court concluded that there was a dispute regarding whether service had been effective, and deferred ruling on Mobal's motion to vacate. The trial court directed the parties to set an evidentiary hearing to resolve this factual dispute. Over Mobal's

objections, the parties then conducted discovery, including deposing representatives of the Segal Law Firm.

In August 2011, the trial court issued a show cause order directing Mobal to explain why its motion to vacate should not be denied. Mobal submitted responsive briefing, including exhibits. Global responded as well, *sua sponte*.

On September 20, 2011, the trial court entered an order on its order to show cause. The trial court held that the delivery of the summons and complaint to the Segal Law Firm substantially complied with Washington's service requirements. However, the trial court also directed Global to address whether Global had failed to comply with Washington's long-arm statute by filing an RCW 4.28.185(4) affidavit. Mobal was specifically instructed that it need not respond to Global's briefing.

On September 30, 2011, Global responded, arguing again that it had "substantially complied," this time with the affidavit requirement. Global also argued for the first time that the trial court had "doing business" jurisdiction over Mobal, *even if* Global had not complied with Washington's long-arm statute. Mobal sought leave to respond to this new argument, but the trial court entered a final order without affording Mobal the opportunity to do so.

In its final order on Mobal's motion to vacate, the trial court held that Global had failed to file the affidavit required for valid long-arm service on Mobal. Despite this failure, the trial court ruled that it still had "doing business" jurisdiction over Mobal. On that basis, the trial court denied Mobal's motion to vacate and allowed Global's default judgment to stand.

The trial court's rulings were erroneous for two separate and independent reasons. First, the absence of the affidavit required under RCW 4.28.185(4) is fatal to personal jurisdiction, and Global's default judgment is therefore a nullity. Second, the default judgment is void because the mere delivery of the summons and complaint to the Segal Law Firm was not valid service on Mobal. In declining to vacate the void default judgment, the trial court disregarded controlling Washington authority in favor of foreign *dicta*, improperly considered arguments to which Mobal was denied the opportunity to respond, and erred factually, as well. This Court should reverse the trial court's erroneous rulings and vacate the void default judgment entered against Mobal. The Court should also permit Mobal to recover its reasonable attorney fees associated with this matter.

II. ASSIGNMENTS OF ERROR

1. **Lack of personal jurisdiction: ineffective extraterritorial service of process.** Valid service of process is required for the exercise of jurisdiction over an entity. Service of process outside of Washington is in derogation of the common law, and must be made in compliance with Washington's long-arm statute. Failure to file an affidavit pursuant to RCW 4.28.185(4) prior to the entry of judgment is fatal to personal jurisdiction. This Court should reverse the trial court's denial of Mobal's motion to vacate when Global's only service attempt failed to comply with the long-arm statute.

2. **Lack of personal jurisdiction: lack of agency for acceptance of service.** Personal service on a foreign corporation requires delivery of the summons and complaint to an agent authorized to accept service. To be such agents, attorneys must have authority in writing to accept service for their clients. Service on the purported agent of a foreign corporation is sufficient only if authority to accept service may be reasonably and justly implied. This Court should reverse the trial court's order finding substantial compliance when it was unreasonable and unjust to imply that, absent authority in writing from Mobal, the Segal Law Firm had the authority to accept original service of process on behalf of Mobal, its former client.

3. **Ruling based upon newly asserted argument.** Substantial justice requires that a party be permitted to respond to an argument before that argument becomes the basis for a dispositive ruling. This Court should reverse the trial court's denial of Mobal's motion to vacate where Mobal was not permitted to respond to Global's new and incorrect jurisdictional argument based upon RCW 4.28.080(10).

4. **Recovery of fees.** RCW 4.28.185(5) enables a party who prevails in an action involving long-arm service to recover its reasonable attorney fees. Civil Rules 55 and 60 similarly provide for the recovery of attorney fees when a default judgment is vacated. Mobal should be permitted to recover its reasonable attorney fees when this Court reverses the trial court's denial of Mobal's motion to vacate.

III. STATEMENT OF THE CASE

A. History prior to entry of default judgment

Global filed its lawsuit against Mobal on October 27, 2005, seeking injunctive relief and incidental damages against Mobal for sending allegedly unsolicited faxes. CP 1-15. Global also sought certification of a class of similarly situated, but as yet unidentified, persons. *See id.* The only evidence Global submitted in support of its claims and its request for class certification was a single fax, which Global had received more than two years earlier and asserted was unsolicited. *See id.*

Global was a Washington corporation with its principal place of business in Seattle. CP 4; *see also* n. 1. Mobal is a New York corporation with a principal place of business in New York, and no employees or offices in Washington. CP 4. In its complaint, Global boldly alleged that the trial court had jurisdiction over Mobal because Mobal allegedly “transacted business within the State of Washington...and committed tortious acts within the State of Washington,” but it cited no statute for those propositions.³ CP 4-5.

³ Analogs of the jurisdictional language invoked in Global’s complaint are found in Washington’s long-arm statute. *See* RCW 4.28.185. There is no equivalent language in RCW 4.28.080, which is titled “Summons, How Served.” *See* RCW 4.28.080.

To attempt service of process on Mobal, Global dispatched a process server, Harry Torres (“Torres”), to the offices of the Segal Law Firm in New York City. CP 492-93. Global obtained the address for the Segal Law Firm from the website of the New York Secretary of State’s Department of Corporations. CP 82, 103. The New York Secretary of State’s webpage indicated that the Segal Law Firm was the address for “DOS Process,” that is, the “[a]ddress to which *DOS* will *mail* process *if accepted on behalf of the entity.*” CP 103. (emphasis added). The webpage also stated in all-capital letters under the heading “Registered Agent,” the word “NONE.” *Id.* Accordingly, there was no suggestion on the New York Secretary of State’s webpage that a plaintiff could effect service of process upon Mobal by delivering a summons and complaint to the Segal Law Firm, let alone that the Segal Law Firm had authority to accept service of legal process for Mobal. *See id.*

When Torres, the process server, arrived at the Segal Law Firm’s offices on November 14, 2005, that law firm had been terminated as Mobal’s legal counsel months earlier and no longer represented Mobal in any capacity, other than possibly as a “mail drop” for the New York Secretary of State. CP 296-97. Moreover, when Torres attempted to serve the summons and complaint on the Segal Law Firm, the Segal Law Firm’s managing partner, Greg Ryan (“Ryan”), informed Torres that: 1) the

Segal Law Firm was not Mobal's registered agent; 2) the Segal Law Firm had no authority to accept original service of process for Mobal; and 3) delivery of a summons and complaint to the Segal Law Firm would not constitute valid service upon Mobal. CP 297, 557. Testimony from Omar Evans ("Evans"), now a paralegal (then a legal secretary) in the Segal Law Firm, confirms that Ryan so informed Torres. CP 322. Global has no evidence to refute Ryan's and Evans's sworn testimony on these issues. Indeed, Torres has stated under penalty of perjury that he recalls *nothing* about his encounter with the Segal Law Firm. CP 492.

Despite being informed about the Segal Law Firm's lack of agency and lack of any authority to accept service for Mobal, Torres left the summons and complaint in that firm's offices. CP 297, 322-33.

Although the address for Mobal's New York City office, just blocks from the Segal Law Firm's offices, was available on Mobal's website at the time, Global never attempted to serve Mobal directly. CP 180, 183-84, 287. Nor did Global attempt substituted service on Mobal through the Secretary of State, as the webpage Global downloaded indicated that it could. CP 286.

Years later, in late 2010, Evans, the Segal Law Firm paralegal, claimed that the summons and complaint Torres delivered were mailed to Mobal. CP 323. The Segal Law Firm's managing partner, Ryan, testified

that he had no first-hand knowledge of whether the summons and complaint were forwarded to Mobal. CP 298. Moreover, Evans and Ryan both testified that no cover letter was prepared to accompany the alleged mailing of the summons and complaint. CP 297-98, 323.

Indeed, there is absolutely no contemporaneous documentary evidence to suggest that the summons and complaint were ever sent to—much less received by—Mobal prior to the entry of the default judgment. Even Global’s counsel have expressed their disbelief that this mailing actually took place, asserting that “[i]t is inconceivable that a competent law firm would receive process for a current or former client and cavalierly sent it on without a cover letter or making sure it was received.” CP 331.

The trial court entered a default judgment against Mobal on October 5, 2006. CP 58-60. Although Global’s service attempt through the Segal Law Firm was made in New York, beyond the territorial jurisdiction of a Washington court, Global failed to file an affidavit pursuant to RCW 4.28.185(4) indicating that service could not have been made on Mobal within Washington. CP 344-45, 560-61.

The face value of Global’s default judgment is \$3,840.00, of which \$2,340.00 represents a combination of attorney fees and asserted legal

costs. CP 58-60. The balance of the judgment appears to be a trebling of the statutory penalty for a single unsolicited fax. *See id.*

On December 28, 2006, well after the 30-day period to appeal the default judgment had run, Global mailed a dunning letter to Mobal, again to the address of the Segal Law Firm. CP 111. The evidence shows that this time, the Segal Law Firm transmitted Global's letter to Mobal, along with the summons, complaint, and default judgment. CP 336-342. The packet from the Segal Law Firm transmitting these documents included a cover letter, and the firm's billing records reflect that the firm followed up with Mobal regarding the default judgment. CP 316-317, 336. Notably, there is no entry on the same billing record regarding Torres's delivery of the summons and complaint in November 2005, nor of any action by the Segal Law Firm related to that delivery. CP 316.

Contemporaneous documents indicate that Mobal saw Global's summons and complaint for the first time in January of 2007.⁴ For example, a January 18, 2007 email between Mobal and Global's counsel contains the following statement: "[t]he first Mobal heard about the judgment was when we received the letter from yourselves... Why weren't we contacted directly by Williamson & Williams prior to the default

⁴ Moreover, Mobal has expressly denied receiving any copy of the summons and complaint until after the default judgment had been entered against it. CP 416, Response to Request for Admission No. 6.

judgment?”⁵ CP 115. Moreover, a February 12, 2007 communication from Mobal to Chubb, its insurer, also shows that Mobal had no knowledge whatsoever about Global’s lawsuit until after the default judgment was entered. CP 333-34. Mobal told Chubb:

The first correspondence was sent from Williamson & Williams to our lawyers (Segal, Tesser & Ryan) on 11/14/05. Mobal finished with [the Segal Law Firm] in August 2005 & we didn’t receive anything from them again until we received the letter attached dated 01/09/07. By this time Williamson & William’s [*sic*] had already been granted judgment on 10/05/06.

We are now unsure how to proceed & would like to know if we are covered by our insurance.

CP 333-34. Further communications between Mobal and Global did not resolve the matter.

In October 2009, Global propounded post-judgment discovery on Mobal that was designed—in part—to identify members of the certified “class.” CP 85, 135-53. In response, Mobal moved to vacate Global’s default judgment on the ground that, absent valid service of process, the trial court lacked jurisdiction to enter the default judgment. CP 63-68. Global opposed Mobal’s motion to vacate, arguing that delivery of the

⁵ Mobal’s email was in response to an email from Global’s counsel that contained, *inter alia*, the statement that “[w]e filed our class action complaint on 10/27/05, [and] *served Mobal’s registered agent* on 11/14/05.” CP 307 (emphasis added); 288. In fact, Global’s counsel was mistaken because the Segal Law Firm was never Mobal’s registered agent. CP 302.

summons and complaint to the Segal Law Firm substantially complied with its service obligations. CP 159-69. Global also asserted that, if the trial court did vacate the default judgment, terms, including Global's attorney fees, should be imposed on Mobal. CP 167-8.

B. Procedural history of motion to vacate default judgment

On December 21, 2009, the Court entered a Hearing Order, deferring a ruling on Mobal's motion to vacate until an evidentiary hearing was conducted regarding whether Global had validly served Mobal. CP 202-03. The Hearing Order stated in pertinent part that:

The ruling on the motion is DEFERRED pending the outcome of an evidentiary hearing as noted below.

Based upon the declaration of Mr. Ryan, and the declaration of the process server, there is a dispute of fact regarding whether service was accomplished. The parties shall contact the Court to for [*sic*] an evidentiary hearing on this issue.

Id. Written and deposition discovery then ensued, including the depositions of both Ryan, the Segal Law Firm's managing partner, and Evans, the Segal Law Firm's legal secretary and paralegal. CP 295-303, 319-24.

On August 30, 2011, after Mobal tried to schedule the ordered evidentiary hearing, the trial court entered an order to show cause directing Mobal to explain why its motion to vacate Global's default

judgment should not be denied. CP 252, 275. Although not prompted to do so by the trial court, Global responded *sua sponte* with a Memorandum Supporting Court's Suggestion that Motion to Vacate Default Judgment be Denied ("Memorandum"). CP 253-55.

Mobal had previously brought Global's failure to file an affidavit pursuant to RCW 4.28.185(4) to Global's attention, but Global completely ignored this key issue in its Memorandum. CP 253-55, 465. Instead, Global focused on what it argued was "substantial compliance" with RCW 4.28.080(10), i.e., the argument that Global's mere delivery of the summons and complaint to the Segal Law Firm constituted service on an appropriate agent for Mobal. CP 253-55. Global also repeatedly asserted, without *any* evidentiary support, that Mobal had actually *received* the summons and complaint prior to the entry of the default judgment. CP 253-55.

Mobal responded to the trial court's show cause order by: 1) reiterating its authority and argument about the mandatory vacation of void default judgments; 2) noting that the Segal Law Firm had no authority—apparent or otherwise—to accept original service of process and had so informed Global's process server; and 3) pointing out that Global failed to file the pre-judgment affidavit required by RCW 4.28.185(4) so that the trial court lacked personal jurisdiction when it

entered the default judgment. CP 257-69. Mobal also requested its attorney fees in the event it prevailed on its motion to vacate, as it had previously indicated to Global that it would. CP 269, 462.⁶

On September 20, 2011, the trial court entered an order on its order to show cause. CP 528-30. The trial court held that Global's process server had been informed that the Segal Law Firm "was *not authorized to accept papers* on behalf of Mobal *and* [that] they *were not Mobal's agent.*" (emphasis added). CP 529. Despite so holding, the trial court nevertheless held that Global had substantially complied with Washington's service requirements because "*we would be in the same place*" if Global had made valid service on Mobal through the New York Secretary of State. CP 529-30 (emphasis added).

Although it concluded that service through the Segal Law Firm was sufficient, the trial court directed Global to address its failure to comply with RCW 4.28.185(4). CP 530. The trial court stated:

Global failed to respond to Mobal's second argument under RCW 4.28.185...Mobal need not respond—the argument and the statute is a simple one.

Id. Global responded to the "simple" issue of the missing affidavit with a twelve page brief. CP 531-43. In its brief, Global did not point to a single

⁶ Global did not address Mobal's arguments regarding Mobal's entitlement to recover fees in its subsequent briefing before the trial court.

affidavit filed prior to the entry of the default judgment that it argued complied with RCW 4.28.185(4). *See id.* Rather, Global implored the trial court to consider the entire record, including documents filed *after* the default judgment was entered, as constituting substantial compliance with the statutory provision requiring a *pre-judgment* affidavit filing. *See id.* Global also argued that Mobal had waived the affidavit issue by not asserting it in its initial challenge to the trial court's personal jurisdiction. CP 540-1.

Finally, Global argued for the first time that, *even if* Global failed to comply with Washington's long-arm statute, the trial court still had jurisdiction over Mobal pursuant to RCW 4.28.080(10). CP 531, 539-40. The sole basis for Global's novel jurisdictional argument was *dicta* from a 1984 opinion issued by a federal court in Mississippi.⁷ CP 539. Although Global had never previously argued that RCW 4.28.080(10) provided an independent basis for jurisdiction, rather than simply identifying *who* could be served to bind a foreign corporation, Global asserted that "Mobal has never argued it was not doing business in Washington or that the Court has no jurisdiction under RCW 4.28.080(10)." CP 540.

⁷ Tellingly, Global did not cite, nor rely directly upon, the Washington State Supreme Court opinion underlying the Mississippi federal court's opinion. CP 539-40.

Mobal requested leave to respond to Global's novel arguments, but the trial court ruled on October 6, 2011, without affording Mobal the opportunity to do so. CP 544-45, 547-48.

The trial court held that Global's failure to file an affidavit pursuant to RCW 4.28.185(4) prior to the entry of the default judgment deprived the trial court of jurisdiction under that statute, and that Mobal had not waived the right to point out Global's failure to comply with the law. CP 547-48. However, despite holding that Global failed to comply with the *actual* long-arm statute, the trial court went on to hold that it had jurisdiction over Mobal under what it called the "doing business" section of the long-arm statute, RCW 4.28.080(10), as alleged in the complaint." *See id.* Although Global had never previously so argued, the trial court further held that Global's argument that RCW 4.28.080(10) provides an independent basis for jurisdiction had "not been disputed in the Motion to Vacate." CP 547-48. The trial court then denied Mobal's motion to vacate on that basis. *See id.*

Mobal timely filed its Notice of Appeal of the trial court's foregoing orders on October 17, 2011. CP 549-61.

IV. ARGUMENT

A. Standard of review.

This Court reviews “de novo a trial court’s denial of a motion to vacate a default judgment for lack of jurisdiction.”⁸ *Ralph’s Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.* (“*Ralph’s*”), 154 Wn. App. 581, 585, 225 P.3d 1035 (2010) (vacating default judgment because plaintiff’s failure to comply with RCW 4.28.185(4)’s affidavit requirement was “fatal” to personal jurisdiction); *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 335, 153 P.3d 222 (2007) (vacating default judgment because filed affidavit did not lead to the logical conclusion that service could not be made within Washington).

This court also reviews de novo questions of statutory interpretation. *See Ralph’s*, 154 Wn. App. at 585, 225 P.3d. In discerning the meaning of a statute, a court must give effect to all the language used, and may not interpret any part of the statute to be

⁸ Even if the abuse of discretion standard for the review of orders on motions to vacate non-void default judgments applied, which it does not, Mobal would prevail. This Court has held that “[a] trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.” *Council House v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006). A court errs when it fails to follow directly controlling authority. *See 1000 Virginia Limited P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006); *Green v. Normandy Park*, 137 Wn. App. 665, 692, 151 P.3d 1038 (2007), *as amended on reconsideration in part*. As discussed *infra*, the trial court erred when it disregarded controlling authority and held that it had personal jurisdiction to enter a default judgment against Mobal *despite* Global’s failure to comply with Washington’s long-arm statute.

meaningless or superfluous. *See City of Seattle v. Winebrenner*, 167 Wn.2d 451, 464, 219 P.3d 686 (2009).

Lower courts err when they fail to follow directly controlling authority. *See 1000 Virginia Limited Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006); *Green v. Normandy Park*, 137 Wn. App. 665, 692, 151 P.3d 1038 (2007), *as amended on reconsideration in part*.

Statements of a court not necessary to the decision of a case are *dicta*. *See, e.g., Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960). “Dictum carries little precedential weight when it originates in Washington courts. ... It carries even less weight when it comes from a foreign court construing a different statute.” *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 873, 93 P.3d 108 (2004) (en banc) (internal citations omitted).

Here, the de novo standard of review applies because Mobal moved to have Global’s default judgment vacated based on the trial court’s lack of jurisdiction. The de novo standard also applies because interpretation of Washington’s service statutes is required. Under the de novo standard, Mobal should prevail and the trial court’s refusal to vacate the void default judgment against Mobal should be reversed.

B. Standard for vacation of void default judgments.

Washington courts have express authority to vacate default judgments. *See* 5(c)(1), 60(b). Civil Rule 60(b) specifically addresses the vacation of void judgments.

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:

* * * * *

(5) The judgment is void[.]

CR 60(b)(5).

This Court has unequivocally held that, “[p]roper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without personal jurisdiction is void.” *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 324, 877 P.2d 724 (1994); *see also Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271 (2005); *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 177-78, 744 P.2d 1032 (1987); *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988). This is because “[p]roper service of process is basic to personal jurisdiction.” *See Ralph’s*, 154 Wn. App. at 585, 225 P.3d. A “judgment entered without valid personal jurisdiction over the defendant violates due process.” *See Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 791, 591 P.2d 1222 (Div. 3 1979)

(reversing denial of motion to vacate default judgment entered without RCW 4.28.185(4) affidavit being filed); *see also* Const. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law”); U.S. Const. amend. 5, 14.

It is well established in Washington that “a court has a nondiscretionary duty to vacate a void judgment.” *See Khani*, 75 Wn. App. at 323, 877 P.2d 724; *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269; *Markowski*, 50 Wn. App. at 635, 749 P.2d 754; *Brickum Inv. Co. v. Vernham Corp.*, 46 Wn. App. 517, 520, 731 P.2d 533 (1987).

The passage of time between the entry of a default judgment void for lack of service and an attempt to have it vacated is irrelevant. *See Khani*, 75 Wn. App. at 323, 877 P.2d 724; *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989). The doctrines of waiver and laches do not apply to efforts to vacate void default judgments, and even actual notice that a default judgment has been entered is irrelevant. *See Khani*, 75 Wn. App. at 321, 324, and 326-27, 877 P.2d 724. Whether the statute of limitations has run on a plaintiff’s claims is also irrelevant. *See id.* at 327. Nor does the standard four-part test for vacation of default judgments apply. *See, e.g., Markowski*, 50 Wn. App. at 633-38, 749 P.2d 754; *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 486, 674 P.2d 1271 (1984) (“[t]he customary CR 60

meritorious defense requirement is immaterial where the court entering an *in personam* judgment had no jurisdiction of the defendants in the first place”); 4 Tegland, WASH. PRAC. RULES PRACTICE: CR 55 § 24 (2006). A void judgment cannot be resuscitated after the fact. *See e.g., Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 380, 534 P.2d 1036 (1975) (addressing judgment void for lack of pre-judgment affidavit pursuant to RCW 4.28.185(4)).

Here, Global’s sole attempt to serve process on Mobal was ineffective for two independent and equally fatal reasons: Global’s failures to file the required affidavit and to serve an actual agent for Mobal. *See infra* at IV.C and D. Absent valid service of process, the trial court lacked personal jurisdiction over Mobal, and the default judgment it entered against Mobal is void as a matter of Washington law. *See Khani*, 75 Wn. App. at 324, 877 P.2d 724. Applying the de novo standard of review, this Court should remedy the trial court’s erroneous rulings, and should vacate the void default judgment improperly entered against Mobal.

C. Global’s failure to comply with Washington’s long-arm statute was fatal to personal jurisdiction and rendered the default judgment against Mobal void.

1. Failure to file the affidavit required by RCW 4.28.185(4) is fatal to personal jurisdiction.

Global’s failure to comply with Washington law regarding extraterritorial service of process was fatal to personal jurisdiction, and rendered the default judgment entered against Mobal void.⁹ This Court has held that a “Washington court may assert personal jurisdiction over an out-of-state defendant *if* the long-arm statute is satisfied *and if* the assumption of jurisdiction meets the requirements of due process by comporting with traditional notions of fair play and substantial justice.” *See Ralph’s*, 154 Wn. App. at 584-85, 225 P.3d 1035 (identifying RCW 4.28.185 as “Washington’s long-arm statute”) (emphasis added); *see also Schell*, 22 Wn. App. at 790, 591 P.2d 1222 (noting that Washington’s long arm statute “is also limited by the due process clause”). Further, “[b]ecause statutes authorizing service on out-of-state parties are in

⁹ Global may argue that Mobal waived its right to point out Global’s failure to file an RCW 4.28.185(4) affidavit. That argument failed below, and should fail here. CP 548. A default judgment entered without proper service is utterly void from the inception, *not* merely voidable. *See Khani*, 75 Wn. App. at 324, 877 P.2d 724. As such, the doctrines of waiver and laches do not apply. *See id.* at 321, 324, and 326-27. Global’s reliance on inapplicable CR 12 case law to suggest otherwise is both baffling and unavailing. CP 540-1. Moreover, Mobal’s challenge to the validity of the default judgment has always been to the trial court’s lack of personal jurisdiction caused by Global’s ineffective service attempt. CP 63-7. Further, Global was afforded the opportunity to address its failure to file the RCW 4.28.185(4) affidavit, and attempted to do so. CP 530, 531-43. Finally, there is no possible prejudice to Global when its own failure to follow Washington law rendered the default judgment void from the inception.

derogation of common law personal service requirements, they must be strictly construed.” See *Ralph’s*, 154 Wn. App. at 584-85, 225 P.3d 1035; see also *Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wn. App. 366, 371-72, 203 P.3d 1069 (Div. 3 2009) (“Jurisdiction over a person ‘by service outside the state is of purely statutory creation and is in derogation of the common law.’”); RCW 4.28.180, .185.¹⁰ Moreover, this Court has

¹⁰ For the Court’s convenience, the relevant portions of RCW 4.28.180 and 4.28.185 are set forth below.

RCW 4.28.180 Personal service out-of-state.

Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state.

RCW 4.28.185 Personal service out-of-state — Acts submitting person to jurisdiction of courts — Saving.

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

held that when the long-arm statute applies, as it does for *all* out-of-state service attempts, CR 4 *does not* provide for an effective alternative means of service.¹¹ See *Ralph's*, 154 Wn. App. at 587, 590-91, 225 P.3d 1035 (“CR 4(e)(1) expressly conditions service on a foreign party under the provisions of the rule on the absence of any ‘provision prescribing the manner of service’ in the relevant statute providing for out-of-state service.”).

Washington’s long-arm statute identifies the commission of a tortious act and/or the transaction of business within this state, *inter alia*,

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

¹¹ **CR 4 Process:**

(e) Other Service.

(1) Generally. Whenever a statute or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or not found within the state, service may be made under the circumstances and in the manner prescribed by the statute or order, or if there is no provision prescribing the manner of service, in a manner prescribed by this rule.

(2) Personal Service Out of State--Generally. Although rule 4 does not generally apply to personal service out of state, the prescribed form of summons may, with the modifications required by statute, be used for that purpose. See RCW 4.28.180.

(3) Personal Service Out of State--Acts Submitting Person to Jurisdiction of Courts. (Reserved. See RCW 4.28.185.)

(4) Nonresident Motorists. (Reserved. See RCW 46.64.040.)

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state, and when a statute or these rules so provide beyond the territorial limits of the state. A subpoena may be served within the territorial limits as provided in rule 45 and RCW 5.56.010.

as predicate acts for the exercise of jurisdiction over a person.¹² See RCW 4.28.185(1)(a)-(b). Extraterritorial service on persons who have performed the predicate acts for the exercise of jurisdiction is authorized under the statute, but there must be personal service. See *Ralph's*, 154 Wn. App. at 587, 225 P.3d 1035; *Morris*, 149 Wn. App. at 371-72, 203 P.3d 1069; RCW 4.28.185(2). Critically, the long-arm statute states that “[p]ersonal service outside the state shall be valid **only** when an affidavit is made and filed to the effect that service cannot be made within the state.” RCW 4.28.185(4) (emphasis added). A court may not disregard such a specific statutory prerequisite. See *City of Seattle*, 167 Wn.2d at 464, 219 P.3d 686; see also *Schell*, 22 Wn. App. at 791, 591 P.2d 1222 (reversing denial of motion to vacate default judgment and stating that “[a]ny other holding would eliminate the statutory requirement of the [RCW 4.28.185(4)] affidavit”).

Substantial rather than strict compliance with RCW 4.28.185(4)’s affidavit requirement is permitted. See *Ralph's*, 154 Wn. App. at 590-1, 225 P.3d 1035. This Court has recently ruled that “substantial compliance” in the context of RCW 4.28.185(4) “means that, viewing **all**

¹² Mobal does not concede, and expressly denies, that either of these predicate acts even applies to it. However, Global has asserted, and obtained a default judgment on the basis, that Mobal transacted business in the State of Washington. As previously noted, though, analogs of the jurisdictional language invoked in Global’s complaint are found in RCW 4.28.185, but **not** in RCW 4.28.080.

affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state.” *See id.* (emphasis added) (no statutory compliance because plaintiff failed to file an affidavit); *see also Sharebuilder*, 137 Wn. App. at 335 (plaintiff’s affidavit was insufficient because it did “not lead to the logical conclusion that [individual] could not be served within the state. She might also have a residence in Washington, or frequent Washington for business purposes”). Simply put, if “there is no compliance with the affidavit requirement of RCW 4.28.185(4), *personal service does not attach* to the defendant *and the judgment is void.*” *See Ralph’s*, 154 Wn. App. at 591, 225 P.3d 1035 (emphasis added); *see also Sharebuilder*, 137 Wn. App. at 335; *Schell*, 22 Wn. App. at 791, 591 P.2d 1222. Even more simply put, “[t]he lack of the affidavit required by the long-arm statute is fatal to personal jurisdiction.” *See Ralph’s*, 154 Wn. App. at 591, 225 P.3d 1035 (emphasis added); *see also Schell*, 22 Wn. App. at 791, 591 P.2d 1222 (“A judgment entered without valid personal jurisdiction over the defendant violates due process.”).

2. Global failed to file the affidavit required by RCW 4.28.185(4).

Based on the explicit language of RCW 4.28.185(4), and the foregoing case law, the absence of a filed *pre-judgment* RCW 4.28.185(4)

affidavit is dispositive here and fatal to Global's default judgment. Here, Global failed to file *any* affidavit—or even a group of affidavits—that complied with RCW 4.28.185(4) prior to the entry of the default judgment. As the trial court noted, “the statute and the argument is a simple one.” CP 530. Despite the simplicity of the law and the brevity of the pre-judgment record, it took Global several pages to argue even its alleged “substantial compliance” with RCW 4.28.185(4). CP 531-43. Yet Global never pointed to a single *pre-judgment* affidavit (or even a set of pre-judgment affidavits taken together) that Global argued could meet its absolute statutory burden. *See id.* Had there been such a *pre-judgment* affidavit, Global would undoubtedly have so indicated in its Response.

In fact, Global implicitly conceded its failure to comply with Washington law when it: 1) implored the trial court to consider the entire record—including the *post-judgment* record—rather than just Global's *pre-judgment* affidavits, as required by law; 2) attempted to rely upon a *post-judgment* declaration filed years after judgment, on September 6, 2011, in response to the trial court's affidavit order; and 3) resorted to secondary sources and decades-old, non-Washington *dicta* in an attempt to distinguish this Court's recent controlling authority directly on point. CP 531-43.

Here, based on the same record that was before the trial court, this Court should hold that Global failed to file the required affidavit pursuant to RCW 4.28.185(4). The necessary consequence of Global's failure under this Court's controlling authority is vacation of the void default judgment entered against Mobal in its entirety. *See Ralph's*, 154 Wn. App. at 591, 225 P.3d 1035. The trial court disregarded controlling authority when it erroneously held to the contrary. This Court should remedy that error and hold that the absence of a pre-judgment RCW 4.28.185(4) affidavit was fatal to the trial court's jurisdiction over Mobal.

3. The trial court disregarded controlling statutory and case authority in concluding that it had personal jurisdiction over Mobal.

Even if an abuse of discretion standard applied, Mobal should still prevail because the trial court disregarded controlling authority from this Court in *Ralph's* when it held that it had jurisdiction over Mobal. *See 1000 Virginia Limited Partnership*, 158 Wn.2d at 578, 146 P.3d 423 (lower court errs when it fails to follow directly controlling authority). Global's argument that the trial court had "doing business" jurisdiction over Mobal pursuant to RCW 4.28.080(10), *regardless of Global's failure to comply with Washington's long-arm statute*, was based solely on *dicta* drawn from the 1984 opinion of a federal court in the Southern District of Mississippi, and lacks any basis in Washington law. CP 539-40.

Unlike the instant situation, the Mississippi case involved a filed affidavit, and the federal district court held that the affidavit substantially complied with RCW 4.28.185(4), such that extra-territorial service was effective. In so holding, the Mississippi federal court also opined that “[i]n addition to this basis, it is very likely that the courts of the State of Washington would uphold the service under the ‘doing business’ section of their statutory scheme.” *See Mu-Petco Shipping Co. v. Divesco, Inc.*, 101 F.R.D. 753, 756-57 (S.D. Miss. 1984) (citing RCW 4.28.080(10) and Orland, *Washington’s Second Long-Arm?*, 17 Gonz. L. Rev. 905 (1982)). As a basis for its interpretation of Washington law, the Mississippi federal court asserted that, in a 1982 case, Washington’s Supreme Court had “upheld personal jurisdiction on a foreign corporation where service of process was accomplished under the ‘doing business’ statute RCW 4.28.080(10), **rather than the long-arm statute, RCW 4.28.185.**” *See id.* (emphasis added) (citing *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn.2d 544, 647 P.2d 30 (1982)).

As a threshold matter, authority from foreign courts is not binding on Washington courts. *See, e.g., Matter of Estate of Burns*, 131 Wn.2d 104, 119, 928 P.2d 1094 (1997) (“decisions from other jurisdictions are not binding”). Accordingly, the trial court erred in deferring to the Mississippi federal court’s opinion in the face of controlling Washington

authority to the contrary. *See id.*; *1000 Virginia Limited Partnership*, 158 Wn.2d at 578, 146 P.3d 423. Moreover, in opining about “doing business” jurisdiction, the Mississippi federal court acknowledged that it “*need not decide* whether service on a foreign corporation is appropriate in this instance under the ‘doing business’ statute [RCW 4.28.080(10)] *rather than the long-arm*[.]” *See Mu-Petco*, 101 F.R.D. at 756-57 (emphasis added). As such, the Mississippi federal court’s statements regarding its view that RCW 4.28.080(10) provides a means to bypass valid RCW 4.28.185 long-arm service were *dicta*. *See Pedersen*, 56 Wn.2d at 313, 352 P.2d 1025. In fact, because compliance with RCW 4.28.185(4) decided the case, the Mississippi federal court’s statements were *foreign dicta* interpreting the effect *of a different statute*, which is afforded even less precedential value than other *dicta*. *See Hisle*, 151 Wn.2d 853, 873, 93 P.3d 108. Notably, no Washington court has followed the Mississippi federal court’s interpretation of *Kennedy*—likely because the Mississippi federal court was wrong, as this Court’s decision in *Ralph’s* shows.¹³

¹³ The *Kennedy* Court *did not* hold—nor did it even suggest—that a court could exercise “doing business” jurisdiction over a foreign company located outside of Washington absent valid long-arm service. *See Kennedy*, 97 Wn.2d 544, 647 P.2d 30. In fact, long-arm statute compliance was not even at issue in *Kennedy*. The issue there was whether the individual who actually received the long-arm service had authority to do so. *See id.* at 546, 647 P.2d 30 (“The question is whether the person upon whom the papers were served was an agent in fact. [Defendant] does not deny service could have been made at the Chesapeake plant; it denies only that service was made on a person authorized to

In holding that it had personal jurisdiction over Mobal based on the Mississippi court's decades-old *dicta* interpreting a different statute, **despite** Global's failure to comply with the actual long-arm statute, the trial court disregarded: 1) the plain language of Washington's long-arm statute, *see* RCW 4.28.185(4) (“[P]ersonal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.”); and 2) this Court's controlling authority on point, *see Ralph's*, 154 Wn. App. at 591, 225 P.3d 1035 (“[T]he lack of the affidavit required by the long-arm statute is fatal to personal jurisdiction.”).

While allegedly “doing business” in Washington may be **necessary** to create a nexus for personal jurisdiction, it is **not sufficient** to make the **exercise** of jurisdiction proper. *See Ralph's*, 154 Wn. App. at 591, 225 P.3d 1035 (personal jurisdiction does not attach without valid service); RCW 4.28.185(1)(a), (4). As such, the trial court's holding that it had jurisdiction over Mobal **absent** valid long-arm service was legally untenable. *See, e.g., 1000 Virginia Limited Partnership*, 158 Wn.2d at 578, 146 P.3d 423. This Court should remedy the trial court's disregard of

receive it”). Tellingly, Global chose not to cite the *Kennedy* case directly as support for its argument, but relied instead upon the Mississippi court's misinterpretation of controlling Washington authority. CP 539-40.

controlling Washington law by reversing the trial court's denial of Mobal's motion to vacate.

D. The Trial Court erred when it held that the mere delivery of the summons and complaint to the Segal Law Firm substantially complied with Global's service obligations.

1. Valid service of process on an agent requires that the agent have authority to accept such service.

Even if Global's failure to comply with Washington's long-arm statute did not already render Global's default judgment void, which it does, that judgment would still be void because delivery of the summons and complaint to the Segal Law Firm could not bind Mobal. As Global correctly stated in its early briefing below, RCW 4.28.080(10) determines *upon whom* service may be made to bind a foreign corporation. *See, e.g.*, CP 162-4; *see also Fox v. Sunmaster Products, Inc.*, 63 Wn. App. 561, 565-56, 821 P.2d 502 (1991); *Kennedy*, 97 Wn.2d at 545-46, 647 P.2d 30.

That statute provides in pertinent part that:

Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:

(10) If against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

RCW 4.28.080(10).¹⁴ The test for effective service through an agent requires that the entity be the defendant's actual agent, with representative capacity and derivative authority, rather than merely a person whose duties are limited to a particular purpose. *See Fox*, 63 Wn. App. at 566, 821 P.2d 502. As this Court has held, the requirement set by the Washington Supreme Court is that:

Service of process on an agent of a foreign corporation...must be on an agent representing the corporation **with respect to such business**. It must be made on an **authorized agent** of the corporation *rather than a mere servant or employee*, or a person whose **authorities and duties are limited to a particular transaction**. The agent must be an agent in fact...and must be one having in fact *representative capacity and derivative authority*.

See id. (quoting *Cröse v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 58, 558 P.2d 764 (1977) (italics in original; bold added). Absent agency to receive service, delivery of a summons and complaint to a third party is not effective to bind a foreign corporation. *See id.*

¹⁴ Despite Global's novel and belated argument to the contrary, and the trial court's corresponding error, RCW 4.28.080(10) provides no listing of predicate acts for jurisdiction over a foreign entity located outside of Washington. That information is found instead in the *actual* long-arm statute, RCW 4.28.185.

2. Under Washington law, attorneys cannot accept service of process for their clients without authority in writing to do so.

Under Washington law it has been well-established for over a century that, absent special authority *in writing* from their clients, attorneys and their law firms are *not* the agents of their clients for service of process. *See Ashcraft v. Powers*, 22 Wash. 440, 443, 61 P. 161 (1900); *Scott v. Goldman*, 82 Wn. App. 1, 7, 917 P.2d 131 (1996) (citing *Ashcraft* for the proposition that an “attorney-at-law cannot accept service of process without special authority from his client set forth in a power of attorney”); *see also* CR 4 (authorizing service on counsel only of documents *subsequent to the original complaint*).

Here, delivery of the summons and complaint to the Segal Law Firm could not bind Mobal because the Segal Law Firm did not have written authority from Mobal to accept service on Mobal’s behalf. *See, e.g., Ashcraft*, 22 Wash. at 443, 61 P. 161. The Segal Law Firm was not—and had never been—Mobal’s registered agent. CP 302. In fact, when Torres left the summons and complaint in its offices, the Segal Law Firm was no longer even Mobal’s counsel, and had no authority to act on its behalf, except as a “mail drop” for the New York Secretary of State. *Id.*

In its orders, the trial court focused on the fact that the Segal Law Firm was listed as the address to which the Secretary of State would mail

process for Mobal *after* the Secretary had been validly served. CP 528-30. But authority to receive mail from the Secretary of State *after* valid service has been accomplished is self-evidently not the same as *written authority* to accept original service of process. Moreover, under Washington law, even if the Segal Law Firm had had an office in Seattle, delivery of the summons and complaint there would not have bound Mobal. *See Ashcraft*, 22 Wash. at 443, 61 P. 161 (without special written authority to do so, counsel may not accept service of process for a client).

This Court should not set a lower bar for service through a law firm in another state than it would be required by law to apply for service in this state. Accordingly, this Court should find that the delivery of the summons and complaint to the Segal Law Firm, which lacked written authority to accept service for Mobal, did not constitute effective service on Mobal.

3. Substantial compliance requires that authority to accept service be reasonably and justly implied.

For service attempts on purported agents *other than* attorneys or law firms, Washington courts look to the surrounding facts to determine whether authority to accept service of process on behalf of an entity may be “reasonably and justly implied.” *See Fox*, 63 Wn. App. at 563, 821 P.2d 502. Apparent authority of an agent may be inferred *only* from the

acts of the principal, **not** from the acts of the purported agent. *See, e.g., Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 363-64, 818 P.2d 1127 (1991); *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 178, 588 P.2d 729 (1978); *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 627, 374 P.2d 677 (1962); *Mauch v. Kissling*, 56 Wn. App. 312, 783 P.2d 601 (1989). A principal's actions will support a finding of apparent authority only if those actions make it both subjectively and objectively reasonable to believe that the purported agent had the authority in question. *See, e.g., Smith*, 63 Wn. App. 355, 364, 818 P.2d 1127. Among other factors in assessing reasonableness, courts look to whether a service attempt was made **after** it was disclosed that the entity was **not** authorized to accept service for another. *See, e.g., Fox*, 63 Wn. App. at 564-65, 821 P.2d 502.

Here, even if the Segal Law Firm's lack of written authority to accept service for Mobal were not dispositive, it still would be unreasonable and unjust under the circumstances to imply that that firm had the authority to accept service for Mobal. As the trial court found, Global's process server was expressly told that the Segal Law Firm had no such authority. CP 297, 322, 529.

First, the Secretary of State's website indicated that Mobal had no registered agent and listed the Segal Law Firm only as an address to which

the Secretary of State would send mail after effective service had been accomplished. CP 103. Despite this, Global's statements demonstrate that Global misread the Secretary of State's website, and assumed incorrectly that the Segal Law Firm was Mobal's registered agent. CP 307. But Mobal had nothing to do with its opponent's error in reading the New York Secretary of State's website; Global alone is responsible for that error. Global should not be permitted to leverage its own reading error to create authority for the Segal Law Firm that Mobal's own actions did not. *See, e.g., Smith*, 63 Wn. App. 355, 363-64, 818 P.2d 1127.

Second, Torres, Global's agent for attempting service, was specifically told by Ryan that the Segal Law Firm had no authority to accept service for Mobal. CP 297, 529. Evans confirms this. CP 322-3. Torres has "no independent recall" of his encounter with the Segal Law Firm and so cannot refute the foregoing testimony. CP 326-7. Given its own agent's knowledge, Global had no reasonable or just basis to assume that the Segal Law Firm could accept service of process for Mobal. *See, e.g., Fox*, 63 Wn. App. at 564-65, 821 P.2d 502.

Third, justice does not demand that service through the Segal Law Firm be found binding on Mobal. Global knew or should have known it had other means to serve Mobal with process, but it chose not to exercise them. After Torres, Global's agent, was informed that the Segal Law Firm

could not accept service for Mobal, Global could have attempted service on the New York Secretary of State or on Mobal directly at its own offices just blocks away. But Global did nothing. CP 286-7.

Given the foregoing, even if the Segal Law Firm's lack of written authority did not preclude that firm from accepting service for Mobal, it still would be neither reasonable nor just to imply that the Segal Law Firm had authority to accept service of process for Mobal. This Court should decline Global's invitation to imply that the Segal Law Firm had authority to accept service for Mobal.

4. Mere receipt of a summons and complaint does not cure ineffective service.

Finally, even if Mobal had timely received copies of the summons and complaint by mail from the Segal Law Firm, and the evidence is that it did not, that would not have cured Global's ineffective service attempt. "Mere receipt of process and actual notice alone do not establish valid service of process." *Ralph's*, 154 Wn. App. at 585, 225 P.3d 1035 (citing *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 177, 744 P.2d 1032 (1987)).

There is no contemporaneous evidence that the Segal Law Firm mailed the summons and complaint to Mobal prior to the entry of the

default judgment. The only evidence of an alleged mailing was testimony by Evans years after the fact. CP 113, 115, 316-17, 333-34, 336-342.

Moreover, although Washington recognizes a presumption that what is mailed is received, it was established long ago that evidence of *non-receipt* trumps testimony to the contrary. *See, e.g., Gibson v. Rouse*, 81 Wash. 102, 109, 142 P. 464 (1914); *Collins v. Collins*, 151 Wash. 201, 210, 275 P. 571 (1929); *Ault v. Interstate Sav. & Loan Ass'n.*, 15 Wash. 627, 634-35, P. 13, 15 (1896).

Here, the *contemporaneous* documents confirm that Mobal *did not receive* the summons and complaint—much less have any knowledge of Global’s lawsuit—until months after the default judgment was entered (and the period to appeal it had run). CP 113, 115, 316-17, 333-34, 336-342. Moreover, Mobal has categorically denied that it received any copies of the summons and complaint before the default judgment was entered against it. CP 416. Thus, even if actual receipt could cure defective service, and it cannot, the evidence is that Mobal did not receive the summons and complaint until it was too late to act. *See Collins*, 151 Wash. at 210, 275 P. 571 (evidence of non-receipt offsets presumption created by alleged mailing); *see also Ralph’s*, 154 Wn. App. at 585, 225 P.3d 1035 (mere receipt does not constitute valid service).

Mobal was denied any opportunity to respond to Global's allegations against it on their merits because it did not receive the summons and complaint until after a default judgment had been entered. Accordingly, Mobal's only avenue was to seek vacation of the default judgment. This Court should not hold that a non-agent law firm's alleged mailing—which was never even received by Mobal—could somehow cure Global's defective service attempt and allow the default judgment to survive.

E. The trial court erred by entering a dispositive order based upon an argument to which Mobal was not allowed to respond.

Even if a Washington court could exercise “doing business” jurisdiction absent valid long-arm service—and there is no legal basis for that proposition—the trial court erred by entering its dispositive order without permitting Mobal to respond to Global's arguments. *See, e.g., R.D. Merrill Co. v. State Pollution Control Hearings Board*, 137 Wn.2d 118, 139, 969 P.2d 458 (1999) (partial summary judgment improper when plaintiff had no fair opportunity to respond to arguments); *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991)

(reversing grant of summary judgment and noting that consideration of arguments to which party had no opportunity to respond was improper).¹⁵

Here, prior to its Response to Order to Show Cause Re: Defendant's New Affidavit of Service Argument ("Response"), Global never asserted that RCW 4.28.080(10) did anything other than identify *who* could be served with process to bind a foreign corporation. *Compare* CP 3-13 and 163-65 *with* 531-43. However, for the first time in its Response, Global came forth with the new (and legally baseless) argument that RCW 4.28.080(10) provides a basis for exercising extra-territorial jurisdiction *without requiring valid long-arm service*. CP 539-40.

Astonishingly, Global asserted unequivocally that it had always taken this position. CP 537, 539. In particular, Global stated that "[t]he Complaint...alleges that Mobal was doing business in Washington *under RCW 4.28.080(10)*." CP 537. This statement is demonstrably false. There is no citation to RCW 4.28.080(10) in the Complaint. CP 3-15. Moreover, the jurisdictional language Global attempts to rely upon in its Response is not even found in that statute; it comes from Washington's long-arm statute. *Compare* RCW 4.28.080 and 4.28.185.

¹⁵ Although these cases involve remands, Mobal does not believe that such an outcome is necessary, since this Court can resolve the issue here as a matter of law.

Had Global asserted its novel jurisdictional argument in a brief to which Mobal had a chance to respond, Mobal would have pointed out, as it has herein, that Global's argument lacks any basis in Washington law. *See supra* at IV.C.3. Indeed, as Mobal has shown, Global's new jurisdictional argument conflicts directly with Washington case and statutory law. *See id.* However, Global made its new argument in a brief to which Mobal had been instructed specifically that it was not expected to respond. CP 530-43. Mobal petitioned for leave to respond, but the trial court ruled without ever granting it that opportunity. CP 544-45, 547-48. Unfortunately, the trial court erroneously adopted Global's baseless new argument about "doing business" jurisdiction as the central basis for declining to vacate Global's default judgment. CP 547-48.

Setting aside the fact that Global's novel "doing business" jurisdiction argument conflicts directly with controlling Washington law, the trial court erred fatally in adopting Global's belated argument without giving Mobal a chance to refute it. *See R.D. Merrill Co.*, 137 Wn.2d at 139, 969 P.2d 458. Thus, even if Global's default judgment could somehow survive Global's failure to file the required affidavit *and* Global's failure to serve an appropriate agent for Mobal, this Court should still reverse the trial court on that basis and vacate Global's void default judgment.

F. Mobal should be awarded its reasonable attorney fees when it prevails.

Under Washington law, a party who prevails in an action initiated by long-arm service may recover its reasonable attorney fees associated with the defense of the action. In particular, RCW 4.28.185(5) provides:

In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

Fee recovery is also permitted by Washington law when a default judgment is vacated. *See Housing Auth. of Grant City v. Newbigging*, 105 Wn. App. 178, 192, 19 P.3d 1081 (2001) (a trial court “may award terms...when considering a motion to set aside a default judgment”); *Pamelin Indus., Inc. v. Sheen-USA, Inc.*, 95 Wn.2d 398, 403, 622 P.2d 1270 (1981); CR 55(c)(1) (“For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).”); 60(b) (“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.”). Litigants are presumed to know and comply with the written laws of Washington. *See State ex rel. Lyle v. Superior Court*, 3 Wn.2d 702, 705, 102 P.2d 246 (1940); *Barson v. Dep’t.*

of Soc. & Health Services of State, 58 Wn. App. 616, 618, 794 P.2d 538, 540 (1990).

Here, the action leading to Global's default judgment could only have been properly commenced by long-arm service, and Global attempted and failed to make such service. Global sought terms, including its attorney fees, when Mobal moved to have the default judgment vacated. CP 168. Moreover, following Global's prolonged discovery efforts, Mobal informed Global that Mobal, too, would seek to recover its attorney fees and costs if it prevailed. CP 462. Global cannot claim surprise now regarding Mobal's efforts to recover its fees when: 1) Global sought to recover its own fees from the outset, CP 167-68; 2) Global is charged with knowledge of the law, *see State ex rel. Lyle v. Superior Court*, 3 Wn.2d at 705, 102 P.2d 246; and 3) Mobal informed Global that it would seek its fees and costs, and then did so, CP 269, 462.

Mobal has been fighting for more than two years to have a default judgment that is void as a matter of law vacated. In reversing the trial court and holding that Global's default judgment was void from the inception, this Court should also permit Mobal to seek recovery of its reasonable attorney fees.

V. CONCLUSION

Valid service of process is a necessary predicate to the exercise of personal jurisdiction over an entity. Failure to accomplish valid service is fatal to jurisdiction, and a judgment entered without jurisdiction is void from the inception. Here, Global failed to obtain valid service of process on Mobal because it failed to comply with the requirements of Washington's long-arm statute and because it failed to serve an agent with authority (actual or apparent) to accept service of process for Mobal. Either of these defects on its own is fatal to personal jurisdiction and requires that the void default judgment entered against Mobal be vacated.

In denying Mobal's motion to vacate, the trial court disregarded controlling Washington case and statutory authority in favor of a foreign court's *dicta* to which Mobal was denied the opportunity to respond. On reviewing the record de novo, this Court should determine that the trial court lacked personal jurisdiction over Mobal and that the default judgment the trial court entered is therefore void in its entirety. Accordingly, this Court should reverse the trial court's denial of Mobal's motion to vacate the default judgment. This Court should also permit Mobal to recover its reasonable attorney fees and costs associated with this action.

Respectfully submitted this 3rd day of January, 2012.

BRACEWELL & GIULIANI LLP

A handwritten signature in black ink, appearing to read "Curt Roy Hine", written over a horizontal line.

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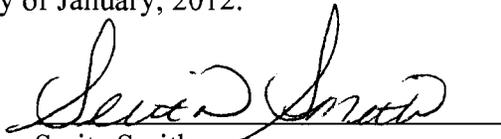
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