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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Meeker Court Condominium Owners Association, and **Summerhill Rental Management, LLC,**

Appellants,

v.

Nicole Gonzalez, Deutsche Bank National Trust Company, and **PNC Bank National Association,**

Respondents.

Appeal from the Superior Court for Pierce County
Case No. 14-2-14366-0|
The Honorable Jack Nevin

Joint Brief of Appellants

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I. Table of Contents

Table of Authorities iii

I. Introduction 1

II. Assignment of Error 3

III. Issues Related to Assignment of Error 4

IV. Statement of the Case 4

V. Standard of Review 9

VI. Argument 9

A. The trial court abused its discretion by vacating the default judgment on the basis that it had no discretion to allow Meeker Court to amend its affidavit to comply with the long-arm statute 11

B. The trial court erred by ruling that the default judgment was void for lack of jurisdiction when it had authority, which it should have exercised, to allow Meeker Court to amend its affidavit of service. 13

C. An amendment after the fact is permissible when the affidavit reflects what actually happened and when the opposing party will not be prejudiced by the amendment. 17

1. Washington courts liberally construe pleadings to comply with the long-arm statute's affidavit requirement to preserve judgments against defendants when the defendant received personal service but could not be served in state. .. 17

2. The amended affidavit provided by Meeker Court reflects what actually happened regarding personal service upon Deutsche 20

3. Deutsche knew about the lawsuit because it had been personally served and, therefore, suffers no prejudice if Meeker Court is allowed to amend its service affidavit. 21

D. The trial court's decision to vacate was based on untenable grounds because it relied on caselaw not applicable to

the facts and cases which were decided prior to the Washington Supreme Court's ruling in Ekanger. 22

VII. Conclusion 27

TABLE OF AUTHORITIES

Cases **Page**

Barr v. Interbay Citizens Bank of Tampa, Fla.,
96 Wn.2d 692, 649 P.2d 827 (1982) 17

Barros v. Barros,
26 Wn.App. 363, 613 P.2d 547 (1980) 20

Curtis Lumber Co. v. Sortor,
83 Wn.2d 764, 522 P.2d 822 (1974) 15

Davis v. Globe Mach. Mfg. Co.,
102 Wn.2d 68, 684 P.2d 692 (1984) 9

Dobbins v. Mendoza,
88 Wn.App. 862, 947 P.2d 1229 (1997) 9

First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger,
93 Wn.2d 777, 613 P.2d 129 (1980) ..... passim

First Federal Sav. & Loan Ass'n of Walla Walla v. Ekanger,
22 Wn.App. 938, 593 P.2d 170 (1979) ..... passim

Gutierrez v. Department of Corrections,
146 Wn.App. 151, 188 P.3d 546 (2008) 24

Hatch v. Princess Louis Corp,
13 Wn.App. 378, 534 P.2d 1036 (1975) ..... passim

In re Marriage of Pratt,
99 Wn.2d 905, 665 P.2d 400 (1983). 20

Kent v. Lee,
52 Wn.App. 576, 762 P.2d 24 (1988). 20

Kleist v. Luksha,
179 Wash. App. 1021 (2014) 24, 25, 26

Morin v. Burris,
160 Wn.2d 745, 161 P.3d 956 (2007). 9

Morris v. Palouse River and Coulee City R.R., Inc.,
149 Wn.App. 366, 203 P.3d 1069 (2009) 18

Ryland v. Universal Oil Co., Goodman Division,
8 Wn.App. 43, 504 P.2d 1171 (1972).....8, 22, 23, 24

Satterlee v. Snohomish County,
115 Wn.App. 229, 62 P.3d 896 (2002).....24

Sharebuilder Sec., Corp. v. Hoang,
137 Wn.App. 330, 153 P.3d 222 (2007) ..... passim

State ex rel. Carroll v. Junker,
79 Wash.2d 12, 482 P.2d 775 (1971) 9

United Pac. Ins. Co. v. Discount Co.,
15 Wn.App. 559, 550 P.2d 699 (1976) 9

Weyerhaeuser Co. v. Commercial Union Ins. Co.,
142 Wn.2d 654, 15 P.3d 115 (2000).....9

Schell v. Tri-State Irrigation,
22 Wn.App. 788, 591 P.2d 1222 (1979) 8, 18, 22, 23

State v. Pettitt,
93 Wn.2d 288, 609 P.2d 1364 (1980) 13

Court Rules

CR 4.....12, 13, 14

Washington Statutes

RCW 4.28.100 .....12, 14

RCW 4.28.185 ..... passim

RCW 6.23.011.....1

I. INTRODUCTION

Appellant Meeker Court filed a complaint for lien foreclosure and for monies due against the judgment debtor for regular and unpaid assessments in Pierce County Superior Court Case No. 14-2-114366-0. Appellant also named Deutsche Bank National Trust Company ("Deutsche") in its complaint, and because Respondent did not maintain an office or registered agent in the state of Washington, Appellant personally served Deutsche Bank with a copy of its summons and complaint. Despite ample notice of the lawsuit, Respondent Deutsche Bank failed to appear or defend in this action, and an Order of default and, ultimately, a default Judgment was entered against it. The default judgment foreclosed the deed of trust held by Deutsche that encumbered the property foreclosed in Appellant's superior court action.

Under RCW 6.23.011, Deutsche could not have redeemed the property because it was not subject to redemption. After the sale was confirmed, the Sheriff's sale purchaser, co-Appellant, Summerhill Rental Management, LLC received a sheriff's deed. A few months later, it sold the property to the current owner.

Nearly two years after the entry of default judgment, Respondent obtained an Order Vacating the Default Judgment based on a technical service issue— RCW 4.28.185(4) provides that personal service outside the state shall be valid only after the plaintiff files an

affidavit indicating that service within the state was not possible. Although Respondent was personally served, Meeker Court did not file an affidavit regarding its inability to effect service upon Deutsche inside the state of Washington, as required by Washington's long-arm statute.

On appeal of the Order vacating the default judgment, Appellant contends that the trial court abused its discretion by vacating the default judgment when (1) there is no dispute that Meeker Court personally served the Respondent out of state because (2) Respondent had no businesses or agents in the state at the time of service; and (3) Respondent received the same notice that it would have received had Meeker Court filed a proper affidavit.

The trial court's decision to vacate the default judgment was an abuse of discretion because it had full authority, under the Washington Supreme Court's holding in *First Federal v. Ekanger*, to allow Meeker Court to amend its prejudgment pleadings, *nunc pro tunc*, to gain compliance with the long-arm statute. The trial court had authority under *Ekanger* because, like the plaintiff there, Appellant had personally served the Defendant but failed to include the affidavit required by RCW 4.28.185(4). In addition, like the defendant in *Ekanger*, Deutsche Bank was not prejudiced because it received the same notice it would have had Appellant complied with the technical requirements of the statute. Instead the trial court vacated the judgment, imposing unnecessary and unjust hardship upon

the two parties (Summerhill Rental Management, LLC and Kristie Tsuru) who purchased the subject property after the entry of judgment because the trial court believed that it did not have authority to allow Meeker Court to amend its declaration of service.

II. Assignment of Error

1. Order Vacating Judgment 01/13/2017

The trial court abused its discretion when it vacated the default judgment entered against Deutsche National Trust Bank, a defendant who chose not to appear until a year after judgment had been entered and the subject property had been sold at a Sheriff's sale despite having received personal service months prior to the entry of judgment. The trial court also committed reversible error because it believed it did not have discretion to permit the Plaintiff to amend its declaration of service.

2. Order Denying Reconsideration 02/08/2017

The trial court abused its direction when it denied Plaintiff and Summerhill's motion for reconsideration.

III. Issues Related to Assignment of Error

1. Did the Trial Court abuse its discretion in finding that the Default Judgment entered against Deutsche was void for lack of jurisdiction because the affidavit in support of out-of-state service was defective?

2. Did the Trial Court abuse its discretion by not allowing Appellant Meeker Court to amend its affidavit of service per the rule in *First Federal Savings & Loan Association of Walla Walla v. Ekanger?*

IV. Statement of the Case

On May 27, 2015, Appellant, Meeker Court Condominium Owners Association initiated a foreclosure action in Pierce County Superior Court to foreclose an assessment lien on the condominium unit owned by Nicole Gonzalez. (CP 1.) Meeker Court effected service upon Nicole Gonzalez by mail on May 27, 2015. (CP 15.) Appellant personally served the other two defendants, PNC Bank National Association and Deutsche Bank National Trust Company. With regard to Deutsche, Meeker Court personally served Julia Patten, the manager of its branch in Santa Ana, California, on March 24, 2015. (CP 9.)

After serving all of the defendants and waiting *three months* for their responses, Meeker Court filed for an entry of default judgment and decree of foreclosure against the parties on October 7, 2015. (CP 11, 126, 98–101.) "By foreclosure of the plaintiff's lien" Deutsche's Deed of Trust encumbering the Property was "adjudged inferior and subordinate to the plaintiff's [lien] and forever foreclosed." (CP 100.) In addition, per the Sheriff's Notice to Judgment Debtors, filed on or around March 30, 2016, the Property was not subject to a redemption period. (CP 137, 186.)

Ms. Gonzalez's condominium unit was sold at a sheriff's sale on May 13, 2016, to the Appellant, Summerhill Rental Management, LLC. (CP 134–135.)

Per the Sheriff's Notice to Judgment Debtors, the Property was not subject to any redemption period. (CP 177, 186.) On or around July 13, 2016, the Pierce County Sheriff's Department issued a sheriff's deed to Summerhill. (CP 177, 186, 228.) As the record owner, Appellant subsequently sold the Property by conveying a statutory warranty deed on or around October 4, 2016 to Kristie Tsuru. (CP 205.) All the parties to that transaction believed that Deutsche's Deed of Trust had been extinguished.

One year, seven months, and 30 days after it had been personally served with process—and five months after the Property had been sold at the sheriff's sale and resold to Kristin Tsuru—Deutsche

finally appeared by filing a motion to show cause as to why the default judgment against it should not be vacated. (CP 155.) There, Deutsche argued that, although it was personally served in California, "Plaintiff did not file a RCW 4.28.185(4) declaration as to why service could not be made on Deutsche in-state." (CP 155, 161–164, 172.)

An Order to Show Cause set a hearing for Deutsche's Motion for Order Vacating Judgment on January 6, 2017. (CP 159–160.)

In its Motion, Deutsche did not deny the fact that Meeker Court personally served its agent, Suzanne Patten, with a copy of the summons and complaint. Nor did Deutsche explain how, despite receiving personal service and actual notice of Appellant's foreclosure action, it had been harmed by Meeker Court's failure to file an affidavit. (CP 161–164.) Its only argument was that default judgment was void because Meeker Court failed to file an affidavit prior to the entry of judgment as required by RCW 4.28.185 (4) explaining why personal out-of-state service had been necessary.

Meeker Court and sheriff's sale purchaser, Summerhill, filed opposition briefs arguing that the default judgment should not be vacated because Meeker Court had personally served Deutsche prior to the entry of judgment and, therefore, it had actual notice of the proceedings but chose not to appear. In addition, Meeker Court filed a declaration explaining that "[a]fter performing a diligent search for offices or agents", Meeker Court's attorney concluded that

"Deutsche had no offices in Washington and that [he] could not reasonably locate any of its agents within the state"; "having no options for personal service of Deutsche within Washington, [he] hired a process server to serve Deutsche through its authorized agent and the manager of its branch in Santa Ana California, Suzanne Patten. (CP 171–172.)

Summerhill also requested that Meeker Court be given leave to file an amendment to its declaration of service, indicating that out-of-state service had been necessary because Deutsche did not have offices in state during the period from the filing of the complaint to the entry of the default judgment. (CP 179–182.)

At oral argument, counsel for Summerhill submitted *First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 613 P.2d 129 (1980), to the Court for consideration. (CP 214; VRP 7:21–8:2.)

In *Ekanger*, the Supreme Court affirmed a trial court's decision to allow a plaintiff to file a postjudgment amendment to a service-by-publication affidavit in order to bring the affidavit into statutory compliance rather than allow a defaulted defendant with actual notice to vacate a judgment because of a technicality. *Ekanger*, 93 Wn.2d at 782.

Deutsche objected to the submission as untimely because Summerhill had not cited *Ekanger* in its response brief. (VRP 3:1–10.) The Court agreed that Summerhill's submission was untimely

and, over Summerhill's objection, declined to consider *Ekanger*. (VRP 3:1–10; CP 214, 218.) The trial court then vacated the default judgment, finding that the action is void for lack of jurisdiction. (CP 214.)

Following the hearing, Meeker Court and Summerhill each filed motions for reconsideration of the trial court's decision. (CP 217, 226.) Each argued that the trial court had inappropriately relied on *Sharebuilder Sec.*, *Schell*, *Hatch*, and *Ryland* because those cases predated *Ekanger*, had less precedential value that *Ekanger*, or should have been distinguished because their holdings did not address the central issue presented. The issue here, as it was in *Ekanger*, is whether a court has authority to allow a plaintiff to amend prejudgment pleadings in a foreclosure action to bring those pleadings into compliance with RCW 4.28.185 when the defaulted defendant had been personally served with process and had actual notice yet chose not to appear until one year and three months after it had been served.

The trial court denied Meeker Court's and Summerhill's motions for reconsideration, on February 8, 2017, without oral argument. (CP 241–242.) That decision was followed by the instant appeal by joint appellants, Meeker Court and Summerhill. (CP 239–240.)

V. STANDARD OF REVIEW

Appellants seek reversal of the Order Vacating the Judgment. A trial court's decision to grant a motion to vacate is reviewed on appeal for abuse of discretion. *United Pac. Ins. Co. v. Discount Co.*, 15 Wn.App. 559, 550 P.2d 699 (1976). A trial court abuses its discretion when it is exercised on untenable grounds or for untenable reasons. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). Stated differently, discretion is abused when the "exercise of discretion is manifestly unreasonable." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984) (citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 482 P.2d 775 (1971)).

On the other hand, whether a judgment is void is a question of law that Courts review de novo. *Dobbins v. Mendoza*, 88 Wn.App. 862, 871, 947 P.2d 1229 (1997).

Appellant also seeks reversal of the Court's Order Denying Reconsidering. A trial court's ruling on a motion for reconsideration is also reviewed for abuse of discretion. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

VI. ARGUMENT

The trial court found that a default judgment as to Deutsche Bank was void for lack of personal jurisdiction over Deutsche due to improper service. The trial court granted Deutsche's motion to vacate because Meeker Court failed to technically comply with

RCW 4.28.185(4) despite the undisputed fact that Deutsche had been personally served a year and five months prior to appearing and, therefore, had actual notice of the action against it prior to the entry of judgment.

During oral argument on Deutsche's motion to vacate, the trial court acknowledged the injustice of allowing Deutsche to avoid the default judgment. (VRP 8:13–25.) In vacating the judgment, the trial court revitalized the Respondent's deed of trust, thus upsetting the status quo.[1]

Nonetheless, the Court vacated the judgment because it did not believe that it had authority to allow Meeker Court to amend its prejudgment pleadings. Indeed, regarding Summerhill's assertion that *Ekanger* granted authority to the trial court to allow a plaintiff to amend an affidavit of service, Judge Nevin stated "I wish it was within the Court's discretion, I wish it did." (VRP 11:19–25.)

The Court erred in ruling that it had no discretion. Under *Ekanger*, not only did it have authority to allow Meeker Court to amend its prejudgment proceedings but it should have done so given the facts before it. Having had actual notice, and no-instate offices, Deutsche suffered no prejudice as a result of Meeker Court's failure to technically comply with RCW 4.28.185; therefore, the entry of

[1] The issue of whether Summerhill or Ms. Tsuru are bone fide purchaser, who take the property free from Deutsche's Deed of Trust has not been adjudicated.

the default judgment had not violated its due process right to notice and the opportunity to appear.

Conversely, allowing Deutsche to avoid a default judgment after it ignored a lawful summons for one year and five months and after the foreclosed property had been sold twice, once at a sheriff's sale and then once again to a subsequent purchaser, does not comport with any reasonable person's notion of justice or fairness. Given that the trial court had clear authority to deny Deutsche's motion to vacate and should have done so given Deutsche's willful refusal to appear prior to the entry of judgment, the trial court abused its discretion by vacating the default judgment.

A. The trial court abused its discretion by vacating the default judgment on the basis that it had no discretion to allow Meeker Court to amend its affidavit to comply with the long-arm statute.

Civil Rule 4(h) and the holding in *Ekanger* give a trial court discretion to allow a party, such as Meeker Court, to amend a service document.

In *Ekanger*, the plaintiff, First Federal, filed for leave to amend the original affidavit of service after the defendant, Ekanger, moved to set the default judgment and decree of foreclosure aside based on insufficient service. *First Federal Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 22 Wn.App. 938, 942, 593 P.2d 170 (1979).

Much like Respondent here, Ekanger argued that the affidavit filed in support of service by publication was defective because it did not comply with the requirements of RCW 4.28.100. *Id.* The service affidavit did not include a statement that that First Federal had deposited a copy of the summons and complaint in the post office. *Id.* Ekanger also argued that the defective affidavit could not be cured *nunc pro tunc*. *Id.* Here, Deutsche took Ekanger's position, which was accepted by the trial court, but that position has been rejected by the Court of Appeals. *See id.*

In *Ekanger*, First Federal argued, the Appellate Court agreed, and the Supreme Court affirmed, that CR 4(h) grants authority to the Court to allow a *nunc pro tunc* amendment of service documents:

> At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. CR 4(h).

First Federal, in a motion to amend its affidavit, argued that the defect in the affidavit was one of form rather than substance, and that the affidavit merely failed to record the fact service could not be made in state. *Ekanger*, 22 Wn.App. at 942. In applying CR 4(h) to the facts in *Ekanger*, the Court of Appeals held that the amended affidavit was properly considered.

Applying the sound logic of the Appellate Court to the case at bar, CR 4(e)(3) incorporates personal service out of state: "Personal Service Out of State—Acts Submitting Person to Jurisdiction of Courts. (Reserved. *See* RCW 4.28.185.) As previously mentioned, that same civil rule, under subsection (h), allows the amendment of process, within the discretion of the court. The inference is that personal service out of state may also be amended in the trial court's discretion.

In stating that the trial court had no discretion to permit an amendment to reflect what occurred, the Court committed reversible error. (VRP 11:19–25.) Failure to exercise discretion is itself an abuse of discretion. *State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980). In the alternative, the Court's reasoning, *i.e.*, that it did not have discretion, is reversible error because its decision was based on untenable grounds.

B. The trial court erred by ruling that the default judgment was void for lack of jurisdiction when it had authority, which it should have exercised, to allow Meeker Court to amend its affidavit of service.

The trial court entered an Order Vacating Judgment based on the argument that the order of default and default judgment entered against Deutsche in this action is void for lack of jurisdiction. The question here is whether the Court could restore jurisdiction over

Deutsche when it was personally served but Meeker Court failed to formally comply with the requirements of RCW 4.28.185.

In *Ekanger*, the Washington Supreme Court held that in a foreclosure action a defect in an affidavit in support of service by publication can be cured by amendment even after a default judgment has been entered and the subject property has been sold at a sheriff's sale. 93 Wn.2d 777, 778–79, 781–82, 613 P.2d 129 (1980). The plaintiff mortgagee, First Federal Savings and Loan Association of Walla Walla, made multiple attempts to personally serve the defendant mortgagor, Ekanger, and sent a copy of the summons and foreclosure complaint to her home, before taking steps to serve her by publication under RCW 4.28.100. *Id.* at 779–80. First Federal filed an affidavit in support of service by publication but left out all of the information required to be included in the affidavit in order to support service by publication—*i.e.*, the nature of the underlying action and whether it had mailed the summons and complaint to Ekanger's place of residence. *Id.* at 780.

In other words, First Federal failed to comply with the service-by-publication statute, an alternative service statute like the long-arm statute in question here. First Federal then entered a default judgment against Ekanger and the subject property was sold at a sheriff's sale. *Id.* at 780.

Nine months later, Ekanger moved to vacate the default judgment, arguing that the trial court lacked jurisdiction over her because

First Federal's affidavit of service did not comply with the service-by-publication statute. *Ekanger*, 93 Wn.2d at 778–79, 781–82, 613 P.2d 129 (1980). In response, First Federal moved for leave to file an amended affidavit that included the information required by the statute which had been omitted from its first affidavit. *Id.* at 781–82. The trial court granted First Federal leave to file an amended affidavit and denied Ekanger's motion to vacate. *Id.* at 781. The Court of Appeals affirmed the trial court, holding that "the technical defect in the affidavit of service by publication could be cured nunc pro tunc by the amended affidavit." *Id.* at 781.

The Washington Supreme Court granted review "to determine whether a defect in an affidavit in support of service by publication is fatal to jurisdiction or may be cured by amendment." *Id.* at 778–79. Before addressing the facts, the Court warned that it had completely revised the state rules of civil procedure in 1967 to "eliminate or at least minimize technical miscarriages of justice inherent in the archaic procedural concepts once characterized by Vanderbilt as 'the sporting theory of justice.'" *Id.* at 781 (quoting *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974)). "Thus, whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form." *Id.* at 781.

The Court affirmed the trial court's decision to allow First Federal to file an amended affidavit because its failure with regard to the affidavit had been "one of form and not of substance." *Ekanger*,

93 Wn.2d at 782, 613 P.2d 129 (1980). It had mailed the summons and complaint to Ekanger's home and, so, had "disclosed that the action was one of foreclosure and, therefore, within the statute authorizing service by publication." *Id.* at 782. Ekanger, who chose not to appear despite having actual knowledge of the foreclosure action, "received exactly the same notice she would have received if the original affidavit had not been defective" *Id.* at 782.

In affirming the trial court's decision, the Supreme Court rejected the proposition that the trial court was without jurisdiction. Stated differently, the technical non-compliance with RCW 4.85.100 did not operate to derive the court of its jurisdiction over the parties.

Other than the fact that *Ekanger* involved service by publication, whereas here, it is out of state service, other than this there is no practical distinction between *Ekanger* and the facts of this case. Following *Ekanger*, this Court should reverse the order holding that the trial court did not have jurisdiction. Had the Court known of its authority under CR 4(h) it could have allowed Meeker Court to amend, and thus cure any jurisdiction issues, especially when the facts of this case support favorable discretion to amend nunc pro tunc.

C. An amendment after the fact is permissible when the affidavit reflects what actually happened and when the opposing party will not be prejudiced by the amendment.

1. Washington courts liberally construe pleadings to comply with the long-arm statute's affidavit requirement to preserve judgments against defendants when the defendant received personal service but could not be served in state.

Under Washington's long-arm statute, a court obtains personal jurisdiction "only when an affidavit is made and filed to the effect that service cannot be made within the state." RCW 4.28.185(4). Washington courts, however, have repeatedly held that only substantial compliance with the affidavit provision is required. *E.g., Sharebuilder Sec., Corp. v. Hoang*, 137 Wn.App. 330, 334–35, 153 P.3d 222 (2007). "[S]ubstantial compliance means that, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state." *Sharebuilder Sec., Corp*, 137 Wn.App. at 334–35. Moreover, "[t]here is no requirement in the statute that the affidavits must be filed by plaintiff." *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 696, 649 P.2d 827 (1982).

Deutsche correctly pointed out in its briefing to the trial court that *substantial compliance* requires either an affidavit, or that the sum of the information in the record, indicate that prior to judgment the defendant had to be served outside the state. *See e.g., Hatch v.*

Princess Louis Corp., 13 Wn.App. 378, 380, 534 P.2d 1036 (1975). But in many of the cases where courts have thrown out default judgments because of the plaintiff's failure to file an affidavit there was some question as to whether the defendant actually could have been served within the state.

In *Hatch v. Princess Louise Corp.*, there was some question as to whether the defendant could have been served in state because it was, at the time of service, storing a 300-ft hulk in Seattle. 13 Wn.App. 378, 379–80, 534 P.2d 1036 (1975). In *Schell v. Tri-State Irrigation*, the defendant probably could have been served within Washington because it had been placing advertisements in local newspapers and making direct sales of farm equipment to Washington farmers. 22 Wn.App. 788, 789–90, 591 P.2d 1222 (1979). In *Morris v. Palouse River and Coulee City R.R., Inc.*, an affidavit was necessary because the defendant, a railroad company, had multiple stations and agents within Washington. 149 Wn.App. 366, 371–72, 203 P.3d 1069 (2009). And, in *Sharebuilder Sec. Corp. v. Hoang*, the issue before the court was not so much whether the defendant could have been served in Washington as it was whether the person the plaintiff sought to enforce a judgment against had even been named as a defendant and served with process. 137 Wn.App. at 332–35.

This case is distinguishable from those cases in which courts vacated judgments because of the plaintiff's failure to file an affida-

vit as required by RCW 4.28.185(4). Here, unlike the cases discussed above, there is no question as to whether Deutsche could have been served within Washington. Deutsche did not have any locations in Washington at the time of service, in April 2013. (CP 172.)

In Deutsche's Reply on its Motion to Vacate, Deutsche asserted "its took Deutsche's counsel less than a minute to find a Seattle office by looking at the bank's website." (CP 207.) On Reconsideration, Summerhill submitted a declaration in which it followed the website addresses mentioned on Reply. "The website provided only one office branch in Washington, which was: 701 Pike Street, One Convention Place, Seattle." Summerhill contacted the landlord and property manager of One Convention Place and confirmed that Deutsche Asset Management ("DAM") is located in the building. Summerhill called DAM and an employee from DAM confirmed that DAM would not accept service on behalf of Deutsche Bank. The DAM employee further stated based on personal knowledge that Deutsche Bank could not be served within the state. CP 234–235. Therefore, the Court should reject Deutsche Bank's unsubstantiated claims that in-state service was not only possible, but that it could have been easily accomplished. Because there is no evidence on the record supporting that Respondent could have been served in state, this case is factually distinguishable from the above referenced cases dealing with RCW 4.28.185(4).

Consequently, these fact supports Appellant's contention that Deutsche received the exact notice it would have, had Meeker Court filed an affidavit with the Court.

2. *The amended affidavit provided by Meeker Court reflects what actually happened regarding personal service upon Deutsche.*

Defective affidavits may be cured nunc pro tunc, *supra*. Such amendments are permissible to "alter[ ] the record to reflect what actually happened" *Kent v. Lee*, 52 Wn.App. 576, 580, 762 P.2d 24 (1988). "A nunc pro tunc order is limited to permitting the record to reflect what actually happened, not to add new facts. *Barros v. Barros*, 26 Wn.App. 363, 613 P.2d 547 (1980). *See In* re *Marriage of Pratt*, 99 Wn.2d 905, 911, 665 P.2d 400 (1983). In *Ekanger*, the omissions concerned steps that the plaintiff took but did not describe in the original affidavit, and the subject matter of the action, obvious on the face of the pleadings, but, again, not stated in the affidavit. *Kent v. Lee*, 52 Wn.App. 576, 580–81, 762 P.2d 24, 27 (1988).

Here, just like *Ekanger*, the Declaration of Bryce Dille concerned steps that Meeker Court took, but which were not described in the original affidavit. (CP 202–203.) In addition, it provided all the necessary information required by RCW 4.28.185. Like *Ekanger*, the Court should have permitted Meeker Court to amend tis service documents, or alternatively, should have considered the

Declaration of Bryce Dille in determining if Meeker Court substantially complied with the statute. Consequently, because the affidavit reflected what actually occurred, the deficiency could have been corrected nunc pro tunc.

3. Deutsche knew about the lawsuit because it had been personally served and, therefore, suffers no prejudice if Meeker Court is allowed to amend its service affidavit.

Also of material import to the *Ekanger's* analysis in granting leave to amend the affidavit of service was the fact that Ekanger had not suffered any material prejudice because she had actual notice of the action. *Id.* at 782.

Here, the declaration of service filed prior to the entry of judgment indicates that Meeker Court caused the summons and complaint to be personally served upon an agent of Deutsche Bank. That agent/employee was aware of Plaintiff's foreclosure, and therefore, Deutsche Bank may be imputed with that same knowledge. Nevertheless, Deutsche chose not to appear despite having actual knowledge of the foreclosure action and received exactly the same notice it would have received if the original affidavit had not been defective. *Id.* at 782. As such, it would not have been prejudiced if the trial court had given Meeker Court leave to amend its affidavit so that it complies with the long-arm statute.

Like the cases in which the courts have upheld default judgments despite defective or late affidavits, Deutsche cannot show any injury as a result of Meeker Court's failure to specify that it could not serve Deutsche in one of its court filings.

There is no functional difference between the facts of this case and those addressed by the Supreme Court in *Ekanger*. Most importantly, all of the cases relied on by Deutsche and the trial court are Court of Appeals decisions which are superseded by the Washington Supreme Court's holding in *First Federal Savings & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 778–82, 613 P.2d 129 (1980).

D. The trial court's decision to vacate was based on untenable grounds because it relied on caselaw not applicable to the facts and cases which were decided prior to the Washington Supreme Court's ruling in *Ekanger*.

The trial court cited the following cases in support of its ruling: *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn.App. 330, 153 P.3d 222 (2007); *Schell v. Tri-State Irrigation*, 22 Wn.App. 788, 591 P.2d 1222 (1979); *Hatch v. Princess Louise Corp.*, 13 Wn.App. 378, 534 P.2d 1036 (1975); and *Ryland v. Universal Oil Co., Goodman Division,* 8 Wn.App. 43, 504 P.2d 1171 (1972). VRP 12-13. These *appellate* court decisions which are distinguishable from the situation here and do not conflict with the Supreme Court's ruling in *Ekanger*.

Of the four cases cited by the Court, only one of the cases, *Sharebuilder Sec., Corp. v. Hoang*, was decided after the Supreme Court issued its opinion in *Ekanger*. 137 Wn.App. 330, 153 P.3d 222 (2007). There, the Court of Appeals affirmed the vacation of a default judgment and held that the plaintiff's affidavit of service did not comply with statutory requirements because it did not indicate why the defendant could not have been served in Washington. *Id.* at 334–35. The facts, however, were materially different than those addressed in this case: The defendant moving to vacate did not have actual notice and the person served with the summons and complaint in California had been a nonparty. *Id.* at 333. More importantly, the court did not consider whether the plaintiff could have amended its original affidavit of service to comply with RCW 4.28.185. *Id.* at 334–35.

The other Court of Appeals cases relied on by the trial court predate the Supreme Court's ruling in *Ekanger* and do not address the question presented by that case—*i.e.*, whether a defect in an affidavit of service is fatal to jurisdiction or may be cured by amendment. Both *Schell v. Tri-State Irrigation* and *Hatch v. Princess Louise Corp.* held that a default judgment entered when the plaintiff failed to comply with RCW 4.28.185 are void. 22 Wn.App. 788, 791–92, 591 P.2d 1222 (1979); 13 Wn.App. 378, 379–80, 534 P.2d 1036 (1975). In addition to not addressing the question posed in *Ekanger*, those Court of Appeals opinions do not have the same

precedential value as *Ekanger*, a more recent Supreme Court opinion. *See Satterlee v. Snohomish County*, 115 Wn.App. 229, 62 P.3d 896 (2002); *Gutierrez v. Department of Corrections*, 146 Wn.App. 151, 188 P.3d 546 (2008).

The other case cited by the Court, *Ryland v. Universal Oil Co., Goodman Div.*, is only superficially related to the issue in this case: Division Two of the Court of Appeals merely held that a plaintiff who had personally served the defendant out of state, but who had failed to file an affidavit of service until a year after the statute of limitations had run, had substantially complied with RCW 4.28.185 and the statute of limitations. 8 Wn.App. 43, 45–47, 504 P.2d 1171 (1972).

The last case cited by the trial court is an unpublished opinion from Division 2, *Kleist v. Luksha*, 179 Wash. App. 1021 (2014). See VRP 12: 25- 13:1-11. The trial court cited this case as requiring that an amending party file the affidavit before the court enters a default judgment.

In *Kleist*, Cochrane and Luska, Canadian citizens appealed a trial court order denying their motion to vacate a default judgment entered against the defendants. *Kleist v. Luksha*, 179 Wash. App. 1021, at *4 (2014). There, the out-of-state defendants were initially served the summons and complaint by certified mail, prior to entry of the first default judgment. Following the second motion for default judgment, plaintiff personally served Cochrane on February

18, 2010. On May 10, 2010, plaintiff filed affidavits of service as to Cochrane, as required by RCW 4.28.185 (4). "That same day, the superior court entered a second default judgment to these defendants", including Cochrane. *Id.* at *3.

Cochrane moved to vacate the judgment, but relief was denied. On appeal, Cochrane argued that the superior court erred in denying their motion to vacate the default judgments based on lack of proper personal service (as required by Washington's long arm statute).

In an unpublished opinion, *Kleist* ruled that the affidavit "established that Cochrane was a Canadian Citizen residing in Toronto, Ontario. Thus, [plaintiff's] affidavit substantially complied with the long arm statute's requirement that the affidavit of service include a statement "to the effect cannot be made within the state' of Washington." *Id.* at *8.

Notably, *Kleist* rejected the plaintiff's argument that the affidavits were untimely because it should have been filed before the default judgment was entered. Instead of addressing this issue, which is what the trial court here cited the *Kleist* holding as, the Court declined to address the issue because the record showed that plaintiff filed the affidavit of service the same day as the court entered the second default judgment. *Id. Kleist* having declined to address the issue in this case, i.e. an affidavit filed after entry of judg-

ment confers jurisdiction, is therefore, not dispositive to the outcome of this case. Consequently, the trial court erred in relying on an unpublished unrelated appellate decision.

In sum, Meeker Court's failure here is no different than First Federal's failure in *Ekanger*. Both plaintiffs omitted the exact information required to be contained in an affidavit by the applicable substitute-service statute. And both defendants received actual notice and, most importantly, the same notice they would have had the plaintiffs filed an affidavit in compliance with the applicable substitute-service statute. But when the trial court in this case vacated the default judgment, it did so on the explicit basis that, despite the chaos and injustice likely to flow from vacating the judgment, it had no authority to allow Meeker Court to amend its prejudgment pleadings so that they complied with RCW 4.28.185. But the trial court did have that authority under *Ekanger* and it abused its discretion by refusing to exercise that authority because Deutsche had been personally served prior to judgment and received the same notice it would have had Meeker Court complied with the statute. Moreover, the trial court also abused its discretion because vacating the judgment entered against Deutsche, a defendant who had been personally served but declined to appear, to the detriment of Summerhill Management, who purchased the property at a sheriff's sale, and Kristie Tsuru, who purchased the property from Summerhill, is

grossly unjust and unwarranted considering that *Ekanger* gives the trial court authority to avoid such injustice.

VII. CONCLUSION

This Court should reverse the trial court's decision Vacating the Judgment.

RESPECTFULLY SUBMITTED this 14th day of July, 2017.

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No. 50086-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Meeker Court Condominium Owners Association, and **Summerhill Rental Management, LLC,**

Appellants,

v.

Nicole Gonzalez, Deutsche Bank National Trust Company, and **PNC Bank National Association,**

Respondents.

Appeal from the Superior Court for Pierce County
The Honorable Jack Nevin

Certificate of Service

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DECLARATION OF SERVICE

I, **Mark Perez**, hereby declare under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen, and at the time of service, I was employed by **Emissary Law Group, PLLC,** and that on today's date, July 14, 2017, I served in the manner indicated by directing delivery to the following individuals:

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