

FILED
Court of Appeals
Division II
State of Washington
9/24/2020 8:00 AM

No. 53763-0-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

Appeal of Pierce County Superior Court Summary Judgment
(Case Number 16-2-13145-5)

KENNETH AND VICTORIA ZIMMERMAN (husband and wife)

Plaintiffs / Appellants

V.

**WILMINGTON SAVINGS FUND SOCIETY FSB, AS TRUSTEE FOR
STANWICH MORTGAGE LOAN TRUST A,**

Defendants.

APPELLANTS' RESPONSE BRIEF

REVISED

Victoria L. Zimmerman, Pro Se.
16619 – 139th Ave. E.
Puyallup, Washington 98374
Phone: (360) 893-5816

Table of Contents

TABLE OF CASES	III
STATUTES	IV
OTHER AUTHORITIES	IV
I. INTRODUCTION	1
II. ARGUMENT	1
1. Respondent’s Reliance on Misconstrued Facts and Misrepresentation	1
2. Respondent Tries to Shift the Burden of Proof	3
3. The Actual Burden of Proof on the Appellants	8
4. Respondent Muddies the Waters with “Injury”	10
5. Self-inflicted Injury Does not Cause Equity	14
V. CONCLUSION	21

TABLE OF CASES

Baker v. Pennymac Loan Services , LLC, No 47395-0-II,
May 10. 2016, unpublished opinion. 3

Barr v. Interbay Citizens Bank of Tampa, Flo., 96 Wash.2d
692, 649 P.2d 827 (1982)..... 3

Edmundson v. Bank of America, N.A., 194 Wash.App 920,
378 P.3d 272 (2016).....10

Ellison v. Process Systems Inc. Const. Co., 112 Wash. App.
636, 50 P.3d 658 (Div. 3 2002) 7

Griggs v. Averbeck Reality, Inc., 92 Wash.2d 576, 599 P.2d
1289 (1979). 8, 10, 17

In Re Marriage of Brown, 98 Wn. 2d 46, 49, 653 P.2d 602
(1982). 8, 10, 17

Morin v. Burris, 16 Wn.2d 745, 753, 161 P.3d 956 (2007)...14

Orsi v. Aetna Ins. Co., 41 Wn. App. 233, 703 P.2d 1053
(1985).....14

Sharebuilder See Corp. V. Hoang, 137 Wash App 788 , 591
P.2d 1222 (1979). 14

Sherbeck v. Estate of Lyman, 15 Wash.App 866, 652 P.2d
1076 (Div. II 1976).14

STATUTES RULES AND OTHER AUTHORITIES

STATUTES,

RCW 4.28.185 6-9, 11

RCW 7.28.300 1, 4, 16

COURT RULES:

CR 60..... 1, 6, 9-14, 16

I. INTRODUCTION

The problem with Respondent's argument is that it is built upon misconstruing and misrepresenting the outcome of the Superior Court's ruling. The Respondent uses this misrepresentation to alter the burden of proof and submit conclusory arguments that are inconsistent with applicable case law. Simply put, Respondent is trying to rewrite facts around one issue, so it can circumvent the law concerning all other issues, most notably, the court's long-standing position on the doctrine of finality. The meritless and improper nature of this tactic is explained throughout this brief.

II. ARGUMENT

1. Reliance on Misconstrued Facts and Misrepresentation

Respondent provides a single umbrella statement as the foundation for its entire argument.

The Trial Court Correctly Vacated the Default and Default Judgment Against Wilmington Because Zimmerman Had Failed to Comply with the Requirements of Washington's Long-arm Statute, RCW 4.28.185(4) (Respondent's Brief, page II and page 9.)

This statement contains two false claims: 1) It is false to claim the initial default order was vacated, and 2) it is false to claim that the court determined Zimmerman did not comply with RCW 4.28.185.

In order to argue a court's findings, the claimant must produce the actual findings made by that court. If the claimant cannot produce such findings, then the matter must be held in favor of the other party.

“[a]bsent an express finding upon a material fact, it is deemed to have been found against the party having the burden of proof.” *Sherbeck v. Estate of Lyman*, 15 Wash.App 866, 652 P.2d 1076 (Div. II 1976).

In the current case, the August 2019 court order does not directly find that the order of default was vacated.

Furthermore, the court transcript makes it clear that the court did **not** agree to vacate the actual order of default. The judge stated “not the default,” when addressing this issue. (Verbatim Report, August 2, 2019, page 16 line 10.) Simply put, Respondent's claim that the court vacated the default order is an outright falsehood and misrepresentation.

As for the Respondent's second claim, that Zimmerman allegedly failed to comply with RCW 4.28.185(4), this is also false. The court's finding contained in the August 2019 order reads as follows (CP 186 - 187):

The Plaintiffs substantially complied with RCW 4.28.105 and service was valid on the defendants in Delaware.¹

This finding is not ambiguous. The Respondent has not asked or argued for this court to reverse that finding. The court clearly found that the service was valid; Respondent claims the opposite to this court, which demonstrates that its entire foundation is based on false representation.

2. Respondent's Misrepresentation Shifts the Burden of Proof:

Respondent's misrepresentation of the facts wrongfully shifts the burden of proof. This is not a "de novo" review; both parties agree that the review herein is based on abuse discretion.

A trial court abuses its discretion only when it bases its order on untenable grounds or untenable reasons. *Morin v. Burris*, 16 Wn.2d

¹ These findings were not challenged in the later clarification order.

745, 753, 161 P.3d 956 (2007) as quoted by Respondent.

By falsely claiming the court found Zimmermans' service did not substantially comply with RCW 4.28.185, Respondent is trying to shift that extra burden of proof off of itself, and onto the Appellants. That is to say, the Respondent is trying to argue that the Appellants have the duty to prove the court's invalidation of the service was "untenable." This is wrong because the court clearly found "[t]he Plaintiffs substantially complied with RCW 4.28.105 and service was valid on the defendants in Delaware." Plaintiff's do not have to prove anything to verify that service was valid – the court already made that finding. As such, if the Respondent wanted to challenge this finding, then it had to list it as an assignment of error, and provide the evidence that meets the "abuse of discretion" burden of proof. The Respondent has not only failed to meet these requirements, it has failed to attempt them.

Respondent's brief simply contains the same case law and arguments it made before the Superior Court (such as Barr and Sharebuilder). By merely recycling its original

arguments, Respondent fails to show how the court abused its discretion when it disagreed with those arguments. The Appellants provided the Superior Court with an affidavit explaining how Wilmington's service agent told Zimmerman's processor that service on Wilmington "**must**" be made at their Trust Division at the 501 Carr Road address in Delaware. Based on this singular stated address, directed by Wilmington's service agent, the court had ample discretion to determine that the proper service address was indeed in Delaware and not Washington.

Respondent now tries to argue that Wilmington's statement was made by a mere receptionist, and it is "unknown" as to what knowledge she actually had. This is a red herring. The person worked for Wilmington's dedicated service agent, therefore she had the apparent authority to speak on Wilmington's behalf regarding service. Respondent is also now claiming that her statement is hearsay. This too is wrong; not only it is being used for alternate purposes, the statement was made by the agent against Wilmington's own interests – thus it is an exception to hearsay. Simply put,

suggesting that Wilmington's service agent shouldn't be taken at her word is a baseless argument – especially when Wilmington does not deny that she was correct.

In addition to the above arguments, Respondent suggests that Appellants' situation is no different than the faulty service in Sharebuilder See Corp. V. Hoang, 137 Wash App 788, 591 P.2d 1222 (1979). This is another falsehood. Sharebuilder only filed a single declaration of service noting that the service was made in California. It made no claims to show why California was the proper place, and no other affidavits were filed. In the present case, there is the pair of service affidavits that jointly satisfy RCW 4.28.185 (CP 13 – 16). It is the additional Affidavit of Failed Service that details how Zimmerman was directed to perform the second service at the Delaware address.

Respondent finally argues that the affidavit is insufficient unless it expressly explains why service was not be attempted in Washington. This is another misconception. In Barr v. Interbay Citizens Bank of Tampa, Flo., 96 Wash.2d 692, 649 P.2d 827 (1982), (the case cited by Respondents)

there was no declaration detailing any efforts of service in Washington. To the contrary, the declaration that satisfied this requirement had nothing to do with service at all; instead, it was made pursuant to an argument on punitive damages, whereby the served party (Interbay) wrote that it had no officers, agents, or employees in Washington. The court found that this concession (regardless of its initial intent and purpose) still satisfied the statute. According to Barr, because the court could logically conclude from the language of the declaration that service could not have been made in Washington, substantial compliance was accomplished. Barr at 696, 697.

Lastly, it is important to again note that these arguments were made and rejected by the Superior court. The judge after viewing all affidavits filed prior to judgment, after making her own inquiries into the service, and after hearing the additional arguments from the Respondent's counsel, still came to the same "logical conclusion that service could not be made within the state." Accordingly, the judge exercised her discretion and ultimately concluded that

Zimmerman substantially complied with RCW 4.28.185. There is no abuse, or “untenable” reasoning in this determination. Respondent, by doing nothing more than recycling its original arguments, does not meet the threshold of showing how the judge abused her discretion under the facts of this case. Thus, this court should uphold the Superior Court’s determination that “Plaintiffs substantially complied with RCW 4.28.105 and service was valid on the defendants in Delaware.”

3. The Actual Burden of Proof on the Appellants:

The actual burden of proof that falls upon the Appellants concerns whether the court had the right to modify a portion of the prior final order when it found no grounds under CR 60 to vacate that original final order.

Respondent only alleged one basis to vacate the court’s final order. Respondent solely claimed the original order was void due to the service violating RCW 4.28.105(4). The court did not accept this argument. Instead, the court found that the default order was not to be vacated and the service

in Delaware substantially complied with the statute. Thus, the sole ground for vacating the original orders was denied. Because of this denial, the court then had no basis upon which it could set aside or modify the original final order – especially since there was no request to modify that order. (See again Appellants Opening Brief: Second Assignment of Error, starting at pg. 9.) The purpose of CR 60, as adopted by the state Supreme Court, is to establish when and how a final court order can be set aside. A final order cannot be collaterally attacked unless there are sufficient grounds to set that order aside. Conversely, when there are no CR 60 grounds, the finality of that order must remain intact. Also, courts may not consider grounds that are not stated in the motion. Orsi v. Aetna Ins. Co., 41 Wn. App. 233, 703 P.2d 1053 (1985). Modifying part of the final order after denying all alleged grounds to set it aside violates the fundamental principle of the finality of orders. It is an untenable outcome based upon untenable grounds.

4. Respondent Muddies the Water with “Injury.”

The respondent argued before the Superior Court (and now before this court), that substantial compliance with RCW 4.28.185 cannot be established if the defendant suffers any injury. To put this another way, the Respondent is suggesting that if a party does not fully prevail in the outcome of the case, then substantial compliance cannot be used to establish service on that party at the inception of the case (thus the ends can rewrite the entire means). This argument is counter-logical and false. The outcome of the final relief does not determine whether the original service was valid. This argument should not have been followed by the Superior Court, and it should not be followed here.

In making its argument, Respondent cites Barr as the basis for its “no injury” precedent. Respondent paraphrases (but does not quote) Barr as follows:

[Barr] recognized a two-part test for substantial compliance; one, the affidavits must provide facts in the language of the statute, “to the effect that service cannot be made within the state;” and two, no injury to the defendant. (Respondent’s brief, page 13, lines 2-5.)

The problem with Respondent's paraphrasing is that it once again intentionally misconstrues the factual context as stated in Barr. The Supreme Court's actual wording is quoted as follows: (Barr at 696 – Bold emphasis added)

We have held that "substantial and not strict compliance is sufficient where a proper affidavit is filed, although late, **where it appears that no injury was done the defendant as a result of the late filing.**" Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 472, 403 P.2d 351 (1965); Whitney v. Knowlton, 33 Wash. 319, 74 P. 469 (1903). No injury is claimed here nor is there a showing the long-arm statute was being used to burden or harass defendant.

[3] The logical conclusion from the language in the affidavits is that there were no authorized personnel in Washington for plaintiff to serve. The affidavits are thus, in the language of the statute, "to the effect that service cannot be made within the state." As they were filed before judgment, the affidavits were timely. Schell v. Tri-State Irrigation, 22 Wn. App. 788, 591 P.2d 1222 (1979). There is no requirement in the statute that the affidavits must be filed by plaintiff. There has been substantial compliance with RCW 4.28.185(4).

The point here is simple, apart from the Respondent's improper paraphrasing, the Barr court clearly establishes that the "injury" requirement must have causation to an aspect of the service – as in regards to a late filing of the

affidavit. Clearly, the Barr decision **did not** intend for any injury based on the eventual posture of the case outcome to be sufficient. Also, in Barr, the Supreme Court's ruling caused a financial deficit to the served party by denying it punitive damages; yet the Court did not claim such financial losses rendered substantial compliance ineffective. Thus ironically, the facts of the Barr case actually contradict the outcome that the Respondent subscribes to it.

Another way to look at this issue is to understand that service establishes personal jurisdiction over the Respondent. Personal jurisdiction is either established over a party, or it is not. There is no cited case law that says personal jurisdiction is established only if that party ultimately wins, but it then becomes dis-established if or when that party loses. This is the error made by the Superior Court. The court accepted the Respondent's (false) argument that if the Defendant experiences a potential monetary loss, personal service could not be established based on substantial compliance. As a result, the court ultimately ruled that personal jurisdiction **was** properly

attached for one part of the order (including the order of default), but that such jurisdiction could not remain attached for other parts of the order – any part that could be tied to a financial loss perceived by the Respondent. This ruling basically bifurcated the attachment of personal jurisdiction and claimed that such jurisdiction both attached and didn't attach at the same time . . . that the court only had jurisdiction to decide matters neutral with the Respondent's position, but not those in disfavor with the Respondent's position. Such bifurcation contradicts the well-established laws on service and disrupts the entire meaning of judicial fairness. It also opposes the separation between personal jurisdiction and subject matter jurisdiction, which has otherwise always been held separate. For example, if the Respondent actually appeared in the prior action and prevailed, there would be no question that service fully attached (the court already ruled that service complied with RCW 4.28.185). But because the Respondent slept on its rights for nearly two years, it now argues that its failure to appear means service cannot stay attached for any

losses that may have been caused due to the Respondent's absence. This is unjustified. Validity of service is not dependent upon the negligence or attentiveness of the party being served. Because the Respondent makes no claim that it was injured due to the nature of the service, including the timely filing of any affidavits, the court's action in bifurcating the attachment of personal jurisdiction, based on the false injury argument, constitutes an abuse of discretion. There are no legal grounds for the court to make that determination.

5. Self-Inflicted Injury Does not Create Equity

Respondent dedicates numerous pages of its brief towards laying out a foundation for why the court should reverse the original order that outlawed the entirety of the debt. In making its claims, Respondent relies heavily on finger-pointing at the Appellants – claiming that the Appellants misled the court. This is an improper attack. Although today, *Edmundson v. Bank of America* is relatively familiar, at the time Appellants filed their complaint, they were

unaware whether Edmundson was publicly published, or if it was quoted in any Division II case. Simply put, Appellants openly laid out the factual framework for their relief based on what they understood the law to be. The Respondent was free to challenge the averments, and/or the challenge law if it interpreted such matters differently. It did not do so. As a result, the court ultimately reviewed all of the Appellants' pleadings and then granted their requested relief. The court noted its full review on the record:

Okay. And I researched this case, since I found it odd that one of the banks hadn't moved to vacate the default or done anything like that, but all of the service and everything in the file appears appropriate, so I'm happy to sign your order. (Verbatim Report of March 3, 2017 proceedings, Page 3, Lines 12-17).

The Respondent's insinuation that Appellants acted with anything but honest intentions is improper. Furthermore, if the Respondent truly believed the Appellants wrongfully misled the court, then Respondent had an obligation to plead such grounds as part of its motion to vacate (CR 60(b)(4)), which it did not do. Attacking the Appellants now (without justification), and wrongfully claiming their alleged

misconduct caused the injury, is utterly wrong. Appellants cannot be blamed for the Respondent's failure to exercise its own legal rights and duties.

Respondent's entire position is one of deflection. Being that Respondent does not deny receiving service, the truth remains that after having full notice of the pleadings, Respondent chose not to contest the court action. Furthermore, after the final orders were entered, the Respondent filed a 2017 IRS form 1099C (see CP 162-164). Per this filing, the Respondent wrote off the entirety of the debt from its own taxes, and forced the Appellants to recognize the debt-relief as income on their own 2017 taxes. This complete disposition of the debt was a material omission that the Respondent initially hid from the Superior Court.² These actions verify that not only did the Respondent choose to not challenge the original court action, it also chose to accept the outcome, because it proactively acted in a fashion that mitigated its financial losses. Then,

² After Appellants brought the 1099C issue to the court's attention, Respondent amended their original 1099 to only discharge part of the debt.

nearly two years later, the Respondent decided that in the wake of updated case law (like Edmundson), it wanted a do over . . . it wanted to have its original omissions ignored so it could take a belated second-bite at the apple.

The main miscarriage with the Respondent's position is that it seeks to camouflage its own dirty hands. As noted in the Respondent's brief, vacating a final order is an equitable action. As such, to seek equity, Respondent must have clean hands. However, in this case the Respondent does not. It is the Respondent who slept on its rights for nearly two years. It is also the Respondent that accepted the dismissal of the full debt and then immediately took action to shift some of that financial burden back on the Appellants (which potentially causes a collateral estoppel argument). And lastly, it is the Respondent who refused to offer any explanation to justify its untimeliness. The end result is clear, causation for the Respondent's current position solely falls on the Respondent. Such self-imposed injury cannot be used as a basis for equity – no matter how many times the Respondent wrongfully claims it was the Appellants' fault.

In addition to the equitable problems, there is also a substantive problem with the Respondent's injury claim. At its core, the Respondent is attempting to re-argue the material facts of this case after being defaulted, and after the case was committed to a final order. For the Respondent to have a second-bite at a defense, it first has to properly vacate the default and final order, which it has not done. (See Appellants opening brief, Third Assignment of Error, starting on page 11). Simply put, the Respondent is bootstrapping its material defense to its flawed procedural claim of improper service. Despite losing on the service argument, Respondent still asserts that its material defense should be deemed valid and upheld. This is untrue. Losing on its sole procedural argument does not grant the Respondent the right to re-litigate the facts of a finalized case. According to the Respondent's logic, a party doesn't need to win its CR 60 motion, but rather it only needs to spew out any losing argument it can; because that still opens the door and relitigate a final ruling. This type of bootstrapping is backwards. CR 60 cannot be rendered

meaningless; it must be followed and satisfied before the underlying finalized case can be re-examined on the merits.

In a nutshell Respondent's injury claim deals with the question of "finality over validity." Respondent claims that the court's original order should be declared inaccurate in light of Edmundson, and therefore, automatically be overturned in Respondent's favor. Edmundson, however is not based on a change in statute, but rather an advancement in legal interpretation. Respondent was available to argue an Edmundson-based defense during the pendency of the original court action, or potentially up to one year thereafter per CR 60(b)(1). The Respondent, however, elected not to do so. (As such, res judicata is an additional equitable doctrine that bars Respondent from arguing it at this time.)

Respondent is thus implying that accuracy must trump finality and there is essentially no other procedural or substantive consideration that needs to be made. This however, is a false argument; there is not quoted case law to support such a position.

Respondent in its brief is quick to note that default judgments are not favored. However, Respondent refuses to acknowledge that there is a second-half of this equation; that such a default

needs to be balanced against the necessity of having a responsive and responsible system which mandates compliance with the judicial summons. Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 599 P.2d 1289 (1979).

In the State of Washington, default judgments are supported by the policy that an orderly system of justice requires compliance with judicial process and finality to judicial proceedings. Ellison v. Process Systems Inc. Const. Co., 112 Wash. App. 636, 50 P.3d 658 (Div. 3 2002) quoting Griggs It is also clear in Washington that finality of court orders is favored over accuracy.

It is clear that “updated case law” is not a justifying issue that the Supreme Court adopted into the CR 60. It is also clear that “in the conflict between the principles of finality in judgment and the validity of judgments, modern judicial development has been to favor finality rather than validity.”

In Re Marriage of Brown, 98 Wn. 2d 46, 49, 653 P.2d 602 (1982). Respondent is fully aware of the doctrine of finality.

So instead of challenging the doctrine head-on, the

Respondent alters its factual narrative, distorts the “injury”

prong noted in Barr, and blames the Appellants for its own self-caused injury. In the end these acts do not make the Respondent's claim more justified; to the contrary, they simply make Respondent's hands dirtier than before.

III. Conclusion

A final helpful way to view this matter is to hypothetically reverse the positions. If a debtor of an outlawed note fails to raise the statute of limitations defense, the law is clear that the debtor bears the burden of its own legal omission. It does not matter that the statute clearly states the creditor can only commence the action within the specified limitation time,

RCW 4.16.005, Commencement of actions.

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

The courts have made it clear that the debtor still has the affirmative obligation to appear in court and make a timely assertion of its defense. If the final order included outlawed

portions of the judgment, then that full judgment remains solid. The Debtor cannot come back later and say, “I now understand that I could have argued the statute of limitations . . . therefore I want to start over from the beginning because my own failure caused me injury.”

The above scenario makes it clear that when the positions are reversed, when the bank is the entity that slept on its rights and failed to assert its own defense, the Respondent believes the bank (but never the debtor) is entitled to a complete do-over. So, basically, the bank is arguing that the law provides for a split-justice system where the outcome is always in favor of the bank and never the debtor. That however, is not equity . . . nor is it the law. Finality of judgments is not to be applied one-sided; it is applied consistently whenever the court finds there is no legal ground to set that final order aside.

Allowing the Respondent to recover from its own self-caused failure, and allowing it to partially vacate the original court order without meeting any CR 60 grounds, re-writes the entire foundation to the doctrine of finality. It also

marginalizes how the court upholds the obligation to appear and assert one's own defense. Such a departure should not be allowed in this case. This is especially true in Division II where the court has recently stated

We believe the doctrine of finality of judgments is of great importance, and must be considered in any analysis of the retroactive application to final decrees. We emphasize the importance of finality and the limited nature of our deviation from the doctrine. Baker v. Pennymac Loan Services, LLC, No 47395-0-II, May 10, 2016, unpublished opinion.

Appellants therefore, request this court to reverse the partial modification of the original order, and reinstate the court's original order in full, as executed on March 3, 2017.

Respectfully submitted this 23rd day of September, 2020.

Victoria Zimmerman
Victoria Zimmerman, Pro Se
On behalf of Appellants

VICKI ZIMMERMAN - FILING PRO SE

September 23, 2020 - 6:37 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53763-0
Appellate Court Case Title: Kenneth Zimmerman, Jr., et al, v. Wilmington Savings Fund Society FSB,
Respondent
Superior Court Case Number: 16-2-13145-5

The following documents have been uploaded:

- 537630_Other_20200923183258D2687631_1244.pdf
This File Contains:
Other - revised appellant response brief
The Original File Name was app resp revised.pdf

A copy of the uploaded files will be sent to:

- SteveLinkon@msn.com
- kkhamidullina@wrightlegal.net
- kstephan@rcolegal.com

Comments:

Sender Name: Vicki Zimmerman - Email: 2weenies@comcast.net
Address:
16619 139th Ave E
Puyallup, WA, 98374
Phone: (360) 893-5816

Note: The Filing Id is 20200923183258D2687631