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NO. 322513-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SERVATRON, INC.,

Respondent,

v.

LAWRENCE KOVAC and "JANE DOE" KOVAC, husband and wife,
and the marital community composed thereof,

Appellants,

and

INTELLIGENT WIRELESS PRODUCTS, INC., a Washington
corporation; and CYFRE, LLC, a California limited liability company,

Defendants.

BRIEF OF RESPONDENT SERVATRON, INC.

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I. INTRODUCTION

Respondent Servatron, Inc., warned the defendants at the beginning of this case that if they did not settle to its satisfaction, Servatron would proceed with the litigation, including by moving for default. In fact, Servatron warned them three times. When the defendants nonetheless did not settle, file a notice of appearance, or file an answer, Servatron did what it said it would do, and moved for default.

On October 15, 2012, the Superior Court for Spokane County entered default judgment against the defendants, including Intelligent Wireless Products, Inc.; Cyfre, LLC; and Appellants Lawrence and “Jane Doe” Kovac (the “Kovacs”). More than a year later, on December 20, 2013, the Kovacs filed a motion to set aside the default judgment, arguing the superior court had wrongly entered default against them without notice, and that the court lacked personal jurisdiction over Mrs. Kovac because she did not have sufficient minimum contacts with the State of Washington. After a hearing on the merits, the superior court denied the Kovacs’ motion.

The superior court did not abuse its discretion in doing so. The Kovacs were not entitled to notice of Servatron’s motion for default because they never formally appeared in the case. Nor did they substantially comply with formal appearance requirements by participating in the litigation. Indeed, the Kovacs’ California-licensed lawyer – the only person they claim substantially complied with appearance requirements – was not even capable of appearing on their

behalf because he was not licensed to practice in Washington. He also never associated with a Washington-licensed lawyer; he never sought the court's permission to appear in this case *pro hac vice*; and he never even said he intended to do either of those things (let alone both of them).

Moreover, except as to Mrs. Kovac's challenge to the superior court's jurisdiction, the Kovacs' motion was time-barred by CR 60(b)'s strict one-year limit on motions brought to redress an "irregularity" in the procurement of a judgment. Mrs. Kovacs' jurisdictional challenge fails because she did not offer "clear and convincing proof" that she had insufficient contacts with Washington State. Because the superior court did not abuse its discretion, this Court should affirm its refusal to vacate the default judgment.

II. RESPONDENT'S STATEMENT OF THE CASE

On December 23, 2011, Servatron filed suit against the Kovacs and two companies that Mr. Kovac controlled. CP 10-18. Servatron alleged the corporate defendants had breached a manufacturing contract and that the superior court should pierce the corporate veils of those companies because they were empty shells that Mr. Kovac manipulated to avoid paying Servatron as he had done with other creditors; because Mr. Kovac had personally interfered with Servatron's efforts to mitigate its damages; and because the Kovacs were unjustly enriched to Servatron's detriment. *Id.*

On February 7, 2012, Servatron personally served the Kovacs with its summons and complaint.¹ CP 35.

In April 2012, California-licensed lawyer Faraz Mobassernia contacted Servatron's lawyer. CP 146, 143 (at ¶ 2); CP 214 (at ¶ 2). He stated that he represented the defendants, including the Kovacs. CP 143; CP 214 (at ¶ 2). In the email exchange that followed, Servatron's lawyer agreed to accommodate the Kovacs' California lawyer's requests to delay moving for default because Mr. Kovac's mother was ill, and so the parties could discuss the possibility of settlement.² CP 214 (at ¶ 2), 218-220.

Throughout the discussions, however, Servatron's lawyer repeatedly stated that if the parties did not settle, Servatron intended to move forward with the litigation, including by moving for default:

¹ Servatron personally served the corporate entities two weeks earlier. *See* CP 31, 33.

² To be clear, the Kovacs asked Servatron for additional time to respond to a settlement offer for the ostensible reason that Mr. Kovac's mother was ill. CP 220. Servatron agreed to accommodate their request. *Id.* It stated: "In light of Lawrence's mother's situation, we'll agree to extend the deadline as you requested until 6/15. However, we need the defendants to accept our settlement terms by then or we'll go into litigation mode – including moving for default. We're not willing to drag things out any longer than that. *Id.* Regrettably, the Kovacs attempt to twist Servatron's accommodation of their request into a complaint that Mrs. Kovacs' illness was causing impermissible delay. They state: "Servatron offered a one-week extension, but threatened that they would 'go into litigation mode' if Kovac's mother's death 'drag[s] things out any longer than that.'" Brief of Appellant at 5. The Kovacs similarly distorted Servatron's statement in their motion to vacate the default judgment. *See* CP 122. The Court should not credit these intentional misrepresentations.

- “We’re going to have to go back to the proposal Servatron last offered (in my message below). If your client is willing to talk in those terms, we can move forward on the settlement front. Otherwise, I’ve been asked to move forward on the litigation front.”
- “We need your clients’ acceptance of our basic settlement terms by Friday [June 8, 2012] or Servatron is going to move forward with the default process and/or litigation.”
- “In light of Lawrence’s mother’s situation, we’ll agree to extend the deadline as you requested until 6/15. However, we need the defendants to accept our settlement terms by then or we’ll go into litigation mode – including moving for default. We’re not willing to drag things out any longer than that.

CP 214 (at ¶ 2), 218-20.

Settlement talks ended in June 2012. CP 215 (at ¶ 3).

Despite Servatron’s warnings and accommodations, the Kovacs never appeared in the lawsuit and never answered Servatron’s complaint. CP 215 (at ¶ 4). Nor did the Kovacs’ California lawyer ever say that he intended to appear or answer on their behalf. *Id.*; CP 143-206.

On July 11, 2012, Servatron moved for an order of default. CP 26-37. In doing so, it advised the superior court about the contacts Servatron’s lawyer had had with the Kovacs’ California lawyer. CP 28 (at ¶ 8), CP 37. It did not provide the Kovacs with notice of its motion. CP 144 (at ¶ 5).

On July 19, 2012, the Court found the defendants to be in default. CP 38-39.

On October 15, 2012, Servatron moved for entry of default judgment. CP 105-12. It did not provide notice of its motion to the Kovacs. CP 144 (at ¶ 5).

The Court granted Servatron's motion the same day. CP 113-17.

More than one year later, on December 20, 2013, the Kovacs appeared in the (then-closed) litigation through a Washington-licensed lawyer, and moved to set aside the default judgment against them. CP 118; CP 120-28. In their motion, the Kovacs argued they had substantially complied with appearance requirements and, therefore, they had been entitled to notice of Servatron's motion; that they have meritorious defenses; and that the court lacked personal jurisdiction over Mrs. Kovac. CP 120-28.

On January 24, 2014, the superior court held a hearing on the merits of the motion, which both parties attended. RP 1-25. At the conclusion of the hearing, the court denied the Kovacs' motion. CP 337.

On February 4, 2014, the Kovacs filed the instant appeal. CP 341-44.

III. SUMMARY OF THE ARGUMENT

The superior court did not abuse its discretion by denying the Kovacs' motion to vacate the default judgment. The Kovacs did not enter a formal appearance in this matter and, under *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), their California lawyer's acts did not substantially comply with appearance requirements. Accordingly, the

Kovacs were not entitled to notice of Servatron’s motion for entry of default.

The Kovacs’ request for relief based on the alleged failure of notice was also time-barred. Even if Servatron had been required to provide the Kovacs with notice prior to moving for the entry of default (which it was not), any failure to do so was a procedural “irregularity” that must be attacked under CR 60(b)(1), not a defect in jurisdiction that rendered the judgment void under CR 60(b)(5). Because motions under CR 60(b)(1) must be brought within one year of the entry of judgment, and because the Kovacs waited more than one year to bring their motion, the superior court properly denied their motion as untimely.

Finally, Mrs. Kovacs’ jurisdictional argument fails because she did not provide clear and convincing proof that she lacked the requisite minimum contacts with Washington. For all of the above reasons, this Court should affirm the superior court’s order.

IV. ARGUMENT

A. Standard of Review

This Court generally reviews a trial court’s ruling on a motion to vacate a default judgment for an abuse of discretion.³ This Court also reviews a determination of whether a party has substantially complied

³ *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 403, 196 P.3d 711 (2008), quoting *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

with appearance requirements for abuse of discretion.⁴ A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds.⁵ In determining whether to grant a motion to vacate a default judgment, “[t]he trial court must balance the requirement that each party follow procedural rules with a party’s interest in a trial on the merits.”⁶ Courts “prefer to give parties their day in court and have controversies determined on their merits.”⁷ Nonetheless, courts also “value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.”⁸

In the special case of a jurisdictional challenge to a default judgment based on undisputed facts, the trial court’s decision is reviewed *de novo*.⁹ Similarly, questions of law, “including whether on undisputed

⁴ *Sacotte Const., Inc. v. Nat’l Fire & Marine Ins. Co.*, 143 Wn. App. 410, 415, 177 P.3d 1147(2008), *citing Morin v. Burriss*, 160 Wn.2d 753, 161 P.3d 956 (2007).

⁵ *Rosander*, 17 Wn. App. at 403, *citing Showalter*, 124 Wn. App. at 510.

⁶ *Id.*, *quoting Showalter*, 124 Wn. App. at 510.

⁷ *Morin*, 160 Wn.2d at 754.

⁸ *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007).

⁹ *See, e.g., Ralph’s Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 584-85, 225 P.3d 1035 (2010) (noting that “[t]he dispositive facts are undisputed” and applying *de novo* standard of review).

facts an appearance has been established as a matter of law,” are also reviewed *de novo*.¹⁰ However, if the trial court was required to pass on questions of fact prior to reaching the questions of law, this Court reviews the antecedent factual determinations for abuse of discretion.¹¹

B. The Court Should Not Disturb the Default Judgment Against the Corporate Defendants Because They Have Not Appealed.

As a threshold matter, the Court should not disturb the superior court’s entry of default judgment against the corporate defendants, since they are not parties to this appeal.¹² *See* CP 341 (identifying the appellants as “Lawrence and Jane Doe Kovac”); RP at 9:8-11. Regardless of how the Court determines the Kovacs’ appeal, therefore, its decision should not affect the default judgment that Servatron obtained against the corporate defendants.

¹⁰ *Meade v. Nelson*, 174 Wn. App. 740, 750, 300 P.3d 828 (2013).

¹¹ *See, e.g., Moe v. Wolter*, 134 Wash. 340, 343-44, 235 P. 803, *aff’d.*, 136 Wash. 696, 240 P. 565 (1925) (noting that “this court is very slow to hold that the trial court abused its discretion” when passing on matters of disputed fact).

¹² *See* RAP 5.3 (requiring the notice of appeal to “specify the party or parties seeking the review”).

C. The Kovacs Did Not Appear in the Litigation. Therefore, They Were Not Entitled to Notice When Servatron Moved for Default.

1. The Kovacs did not satisfy formal appearance requirements.

The Kovacs were personally served with the summons and complaint. CP 35. They also were represented by an attorney licensed to practice in California. CP 143 (at ¶ 2). They easily could have filed a notice of appearance in this case – either *pro se* or through a lawyer admitted to practice in Washington. They simply failed to do so. Because the Kovacs did not file a notice of appearance, they were not entitled to notice of Servatron’s motion for default.

Civil Rule 55 provides that “[a]ny party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion. . . .”¹³ Civil Rule 4 governs the form of the appearance. It provides that the appearance must “be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons.”¹⁴ The Kovacs do not claim to have filed and served a written appearance. *See* Brief of

¹³ CR 55(a)(3). *See also*, RCW 4.28.210 (“After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him or her.”).

¹⁴ CR 4(a)(3). *See also*, RCW 4.28.210 (“A defendant appears in an action when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance.”)

Appellants. Nor does the record indicate they ever did so. Under the plain text of the rule, therefore, they were not entitled to notice when Servatron moved for default.

2. The Kovacs did not substantially comply with formal appearance requirements.

Aware they failed to satisfy formal appearance requirements, the Kovacs resort to arguing that their California lawyer substantially complied with formal appearance requirements on their behalf. Their claim has no merit. As discussed below, Washington courts require parties to participate in the litigation before finding that an act amounts to substantial compliance. The Kovacs never did so. Indeed, their California lawyer was incapable of appearing in the litigation because he was not admitted to practice in Washington. Nor did he ever mention referring the case to a Washington lawyer or associating with one for purposes of appearing himself *pro hac vice*. Given these shortcomings, the Kovacs cannot establish that the superior court abused its discretion when it rejected their claim of substantial compliance.

a. The Kovacs' California lawyer never appeared in court. Therefore, he could not have substantially complied with appearance requirements.

To support their claim of substantial compliance, the Kovacs rely on *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007),¹⁵ a case that requires a party to appear in court in some way – something the Kovacs

¹⁵ See Brief of Appellant at 9.

did not do until after the superior court entered the default judgment. CP 118; CP 120-28. The *Morin* court consolidated three cases. In each, the defendants argued they were entitled to notice of the plaintiffs' motions for default because the defendants had informally complied with appearance requirements. In two of the three cases, the court reversed the superior court's order vacating default judgment against the defendants because they had not shown more than an intent to defend themselves before the litigation began.¹⁶ In the third, the court remanded the case because it found the plaintiff's attorney may have "actively concealed" the fact that a summons and complaint had been filed (something the Kovacs do not claim happened here).¹⁷ *See* Brief of Appellant.

In reaching these decisions, the court expressly rejected the "informal appearance" doctrine the defendants had advocated.¹⁸ It instead found that a defendant may substantially comply with formal appearance requirements – but only if the defendant "appears" in court by participating in the litigation. In the court's words: "Those who are served

¹⁶ *Morin*, 160 Wn.2d at 749-50.

¹⁷ *Id.* at 758.

¹⁸ *See id.* at 757. The Kovacs strangely cite *Ellison v. Process Sys. Inc. Const. Co.*, 112 Wn. App. 636, 644, 50 P.3d 658 (2002), as "extend[ing] the 'informal appearance' doctrine," as if the doctrine remains viable today. Brief of Appellant at 10-11. While that may have been true in 2002, the *Morin* court abrogated it in 2007. *Morin*, 160 Wn.2d at 757 (characterizing its holding as "[h]aving rejected the doctrine of informal appearance" as it then existed).

with a summons must do more than show intent to defend; they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences.”¹⁹

Interpreting this language, the Court of Appeals later explained that to amount to substantial compliance, a defendant must do something “in court.” This Court found: “In *Morin*, the court ruled that, for purposes of satisfying CR 55’s notice requirement, a party need not appear formally by, for instance, filing an answer, but it must appear in court in some way.”²⁰ To find otherwise, the Court found, “would permit any party to a dispute, or any claims representative to a potential dispute, to simply write a letter expressing intent to contest litigation, then ignore the summons

¹⁹ *Id.* at 749 (emphasis added).

²⁰ *Rosander*, 147 Wn. App. at 399 (italics in original; additional emphasis added; citation omitted), *citing Morin*, 160 Wn.2d at 757. Indeed, *Rosander* is instructive. In that case, the defendant’s insurer negotiated on the defendant’s behalf for two years. The Court of Appeals found that even such protracted negotiations did not substantially comply with appearance requirements because the insurer “did not file any documents with the court or appear at [a] hearing.” *Id.* at 398-400. Given these facts, the Court concluded the defendant’s insurer “made no court appearance at any time. Instead, it merely communicated with [the plaintiff] about the lawsuit. This is not an appearance.” *Id.* at 399-400 (emphasis added). Because the defendant had not made a “court appearance,” the Court held it was “not entitled to any notice before the default judgment or order.” *Id.* at 400. The Kovacs’ California lawyer similarly did not “file any documents with the court or appear at [a] hearing”; he merely “communicated with [Servatron] about the lawsuit.” *Id.* at 399-400. As the *Rosander* Court found: “This is not an appearance.” *Id.* at 400.

and complaint or other formal process and wait for the notice of default judgment before deciding whether a defense is worth pursuing.”²¹

Indeed, each of the five examples the *Morin* court cited to justify accepting substantial compliance with appearance requirements involved some form of participation in the litigation: in *State ex rel. Trickel v. Superior Court*, 52 Wash. 13, 100 P. 155 (1909), the defendant served interrogatories on the plaintiff; in *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 349 P.2d 1073 (1960), the defendant personally appeared at a hearing; in *Tiffin v. Hendricks*, 44 Wn.2d 837, 271 P.2d 683 (1954), the defendant’s attorney filed a written notice of appearance; in *Warnock v. Seattle Times Co.*, 48 Wn.2d 450, 294 P.2d 646 (1956), the defendant served a demand for security for the costs of the litigation; and in *State ex rel. LeRoy v. Superior Court*, 149 Wash. 443, 271 P. 87 (1928), the defendants moved the court to increase the amount of the bond the plaintiff was required to post.²²

The Kovacs’ California lawyer did not appear “in court” before default judgment was entered against his clients in any of these ways. He did not serve discovery requests; he did not attend a hearing; he did not file a notice of appearance; and he did not seek the court’s protection by asking for something akin to security or a bond. In fact, he did not

²¹ *Id.*, quoting *Morin*, 160 Wn.2d at 757.

²² *See Morin*, 160 Wn.2d at 756 (collecting cases).

participate in the lawsuit at all.²³ His inaction is particularly telling since he knew a lawsuit had been started against his clients and Servatron’s lawyer had repeatedly warned him that Servatron would move for default if the Kovacs did not settle to its satisfaction. CP 214-15 (at ¶ 2), CP 218-20. His failure to take any action in the litigation given these facts embodies the “wait and see” approach that appearance requirements guard against: he wrote emails to Servatron’s lawyer purportedly “expressing an intent to contest” the litigation, then he “ignore[d] the summons and complaint” and “wait[ed] for the notice of default judgment before deciding” whether his clients’ defense was “worth pursuing.”²⁴ These facts prevent the Kovacs from establishing that their California lawyer substantially complied with appearance requirements on their behalf.

The Kovacs’ brief discussion of *Meade v. Nelson*, 174 Wn. App. 740, 300 P.3d 828, *review denied*, 178 Wn. 2d 1025, 312 P.3d 652 (2013), does nothing to change this conclusion.²⁵ Indeed, *Meade* repeated *Morin*’s

²³ Indeed, far from “acknowledg[ing] the jurisdiction of the court,” the Kovacs’ California attorney seems to have believed the case had not been filed. *Compare Morin*, 160 Wn.2d at 749 with CP 143-44 (at ¶ 4) (stating he “telephoned the Spokane court and was told that the court staff did not have a record of the case being filed”). While Servatron disputes the California attorney’s claim that he communicated with the superior court, if he in fact did so and formed the mistaken impression that no case existed, he logically could not have acknowledged that the court was empowered to decide the parties’ dispute.

²⁴ See *Rosander*, 147 Wn. App. at 400, *citing Morin*, 160 Wn.2d at 757.

²⁵ See Brief of Appellant at 10.

observation that “litigation is inherently formal.”²⁶ For that reason, it similarly concluded that to substantially comply with appearance requirements, “a party must convey that it intends to defend the suit and perform some act, formal or informal, acknowledging the jurisdiction of the court after litigation has commenced.”²⁷ In *Meade*, the Court found the defendant’s lawyer satisfied these requirements through discussions with plaintiff’s lawyer because the discussions had given the plaintiff a “clear understanding” that the defendant’s lawyer “intended to defend” his client in the suit.²⁸ Thus, the Court concluded the defendant was entitled to notice when the plaintiff moved for default.²⁹

Here, the Kovacs’ California lawyer did not give Servatron a “clear understanding” that he intended to defend this suit. Far from it. As discussed below, the Kovacs’ California lawyer was incapable of defending his clients in the litigation without associating with a Washington lawyer and seeking the superior court’s permission to appear *pro hac vice*. He did neither of those things. He did not even say he intended to do so. *See* CP 143-207. Nor did perform any act that

²⁶ *Meade*, 174 Wn. App. at 751, quoting *Morin*, 160 Wn.2d at 757.

²⁷ *Id.* (emphasis in original).

²⁸ *Id.* at 742.

²⁹ *Id.* at 751-52.

acknowledged the superior court’s jurisdiction after the litigation began. *Id.* The record is entirely silent on these points.

Moreover, Servatron warned the Kovacs about its intent to move for default, which the superior court found lacking in *Meade*. In vacating the default judgment, the superior court in that case found the default easily “could have been avoided if during these conversations plaintiff’s counsel had just said, ‘Hey, where is your answer? Let’s get this thing going.’”³⁰ The plaintiff’s decision to move for default without asking the defendant to file its answer – even though the parties’ lawyers were still engaged in settlement discussions – was sneaky and unfair.³¹ As the superior court found, it amounted to an unsavory “gotcha” practice of law.³²

Servatron, by contrast, never engaged in such tactics. It told the Kovacs that if they did settle to its satisfaction, it would proceed with the litigation, including by moving for default. CP 214-15 (at ¶ 2), CP 218-20. In fact, it told the Kovacs it intended to move for default three times. *Id.* Far from sneaking into court, Servatron told the Kovacs what it would do if they did not participate in the lawsuit. When settlement discussions ended and the Kovacs did not heed its warnings, Servatron simply moved

³⁰ *Id.* at 748.

³¹ *Id.* at 747-49.

³² *Id.*

for default as it said it would. *See, e.g.*, CP 219 (“We need your clients’ acceptance of our basic settlement terms by Friday or Servatron is going to move forward with the default process and/or litigation”).³³ Given these facts, *Meade* supports the superior court’s refusal to vacate the default judgment.

b. The Kovacs’ California lawyer was not capable of appearing in the litigation. Therefore, he could not substantially comply with appearance requirements on their behalf.

The Kovacs’ California lawyer is not licensed to practice in Washington. Therefore, he could not have substantially complied with appearance requirements on his clients’ behalf. The first Admission to Practice Rule supports this basic proposition:

[A] person shall not appear as an attorney or counsel in any of the courts of the State of Washington, or practice law in this state, unless that person has passed the Washington State bar examination, has complied with the other requirements of these rules, and is an active member of the Washington State Bar Association.³⁴

³³ The Kovacs nonetheless attempt to characterize Servatron’s motion for default as a “sneak attack.” RP 7:17-18. Yet, after warning the Kovacs no less than three times that it intended to move for default, Servatron’s doing so after settlement discussions ended can hardly be considered as such.

³⁴ APR 1(c). *See Washington State Bar Ass’n v. Great W. Union Fed. Sav. & Loan Ass’n*, 91 Wn.2d 48, 56 (1978) (“Ordinarily, only those persons who are licensed to practice law in this state may do so without liability for unauthorized practice”) (citations omitted).

Thus, the only person the Kovacs claim to have substantially complied with appearance requirements on their behalf was incapable of doing so.³⁵

In *Seek Systems, Inc. v. Lincoln Moving*, 63 Wn. App. 266, 818 P.2d 618 (1991), this Court recognized that a person's ability to appear in the litigation is essential to satisfying appearance requirements. In that case, the defendant argued the superior court erred in refusing to set aside the default judgment against it because its insurer had called plaintiff's attorney, discussed the case, and offered to settle.³⁶ That call, the defendant argued, satisfied appearance requirements and, therefore, it was entitled to notice of the plaintiff's motion for default.³⁷ On appeal, this Court found that a person can satisfy appearance requirements through a phone call, as long as the caller is "one who could appear for the defendant, the caller recognizes that the case is in court, and the caller manifests an intent to defend."³⁸

The Court found the insurer's call did not meet this standard because the caller was not an attorney and "said nothing about any intent

³⁵ The Kovacs only argue they substantially complied with appearance requirements through their California lawyer. *See* Brief of Appellant at 4-5, 12-13.

³⁶ *Seek Sys., Inc.*, 63 Wn. App. at 267-68.

³⁷ *Id.*

³⁸ *Id.* at 270 (emphasis added), *citing* *Washington State Bar Association*, 91 Wn.2d at 56; *Dlouhy*, 55 Wn.2d at 721; and *Gage v. Boeing Co.*, 55 Wn. App. 157, 162, 776 P.2d 991 (1989) (additional citation omitted).

to hire Washington counsel or appear in the suit.”³⁹ “Under these circumstances,” the Court found, “the most reasonable inference is that there was no true intent to defend and no real recognition that the case was in court; and as a result, the phone call did not constitute a notice of appearance.”⁴⁰ Though the Court decided *Seek Systems* during the “informal appearance” era, the Court approvingly cited the case after *Morin*, again finding a telephone call can constitute an appearance if, among other things, “the caller is one who could appear for the defendant.”⁴¹

The Kovacs’ California lawyer stands in the same shoes as the insurer’s employee in *Seek Systems*. Both purported to speak for the defendants, and both engaged in settlement discussions with plaintiff’s counsel on the defendant’s behalf. Yet, neither was capable of appearing for the defendant in the litigation, and neither stated they intended to hire a

³⁹ *Seek Sys., Inc.*, 63 Wn. App. at 271.

⁴⁰ *Id.* (affirming denial of defendant’s motion to set aside the default judgment). The Kovacs’ California lawyer similarly could not have recognized that the case was in court when he claims he called the court and was told that no such case existed. CP 143-44 (at ¶ 4). Therefore, he could not have substantially complied with appearance requirements.

⁴¹ *Old Republic Nat. Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wn. App. 71, 75, 174 P.3d 133 (2007), quoting *Seek Systems, Inc.*, 63 Wn. App. at 270 (citations omitted in original). The Kovacs curiously claim that Servatron misrepresented the holding of this case in its briefing below. See Brief of Appellant at 12. Servatron did no such thing. It simply quoted *Old Republic*, which quoted *Seek Systems*. See CP 229.

Washington-licensed attorney to do so. Though the Kovacs' California lawyer could have appeared *pro hac vice* if he had obtained leave from the superior court and associated with properly-qualified local counsel, he does not claim to have done either of those things.⁴² See CP 143-44; Brief of Appellant. Since the Kovacs' California lawyer did not satisfy either requirement (let alone both), he remained incapable of appearing on behalf of his clients – and, consequently, he could not have substantially complied with appearance requirements on their behalf. Given these facts, the superior court did not abuse its discretion in refusing to set aside Servatron's default judgment.

D. Even if the Kovacs Were Entitled to Notice of the Motion for Default, They Waived This Objection by Waiting More Than One Year to Bring Their Motion Under CR 60(b)(1).

For the reasons stated above, the Kovacs were not entitled to notice of Servatron's motion for default. However, even if such notice had been required, the Kovacs still would not be entitled to relief because their motion to vacate the default judgment was time-barred. Simply put, a party complaining of an adversary's rule violation stands on much different footing when she raises the violation after-the-fact, as a basis for relief from a judgment, than she would if she had brought the violation to the trial court's attention in a timely manner. It is not enough, after the fact, to show that a violation occurred. To be entitled to relief under

⁴² See APR 8(b) (authorizing *pro hac vice* admission “only (i) with the permission of the court . . . and (ii) in association with an active member of the Washington State Bar Association. . .”).

CR 60(b)(1), the Kovacs would also have to have brought their motion within one year of entry of judgment, which they failed to do.

As the Kovacs acknowledge, both their motion to set aside the default judgment and this appeal from the denial of that motion rely on CR 60. *See* CP 123.⁴³ That rule provides in pertinent part as follows:

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

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

....

(5) The judgment is void;

....

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

As the rule plainly specifies, a motion under CR 60(b)(1) must be brought within one year of judgment.⁴⁴ This one-year time limit is strictly enforced, and the trial court may not extend the deadline.⁴⁵ Here, the trial

⁴³ *See also* Brief of Appellants at 3, 8, 15-16.

⁴⁴ *See, e.g., Roberts v. Johnson*, 137 Wn.2d 84, 93, 969 P.2d 446 (1999) (noting that CR 60(b)(1) motions “must be made within one year after the judgment is entered”).

⁴⁵ *See* CR 6(b) (stating that “the court . . . may not extend the time for taking any action under rule[] . . . 60(b)”). *See also Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 195-98, 312 P.3d 976 (2013) (noting that the “one year time limit is strictly enforced and the

court entered default judgment on October 15, 2012, but the Kovacs did not move to set aside default until December 20, 2013. CP 113-17; CP 120-28. To the extent their motion to vacate was based on CR 60(b)(1) – and in particular on an “irregularity in obtaining a judgment or order” – the Kovacs filed it too late.

The Kovacs attempt to avoid this conclusion by implying that the lack of notice of default entitled them to relief under CR 60(b)(5).⁴⁶ They assert without reference to any supporting authority that “a default judgment is void and must be set aside where the motion for default was not served despite a party’s informal appearance.”⁴⁷ If it were true that a default judgment were void if entered without the benefit of required notice, the Kovacs’ request for relief would come under CR 60(b)(5), and would thus escape the one-year time limit imposed on CR 60(b)(1) motions.⁴⁸

trial court may not extend the deadline,” and describing the deadline as “absolute”).

⁴⁶ The Kovacs make a separate argument that Mrs. Kovac is entitled to relief under CR 60(b)(5), on the grounds that the trial court lacked personal jurisdiction over her. *See* Brief of Appellants at 16. The Kovacs’ argument on this point is addressed and rebutted in Section F below.

⁴⁷ *Id.* at 2 (emphasis added).

⁴⁸ A motion to vacate a default judgment as void for lack of either subject matter or personal jurisdiction can be brought at any time. *See, e.g., Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323-25, 877 P.2d 724 (1994).

However, even if Servatron failed to comply with CR 55(a)(3), the default judgment would only be voidable – not void. According to the Washington Supreme Court:

A void judgment is to be distinguished from one which is merely erroneous or voidable . . . [I]t is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection with it. This is true even if there is a fundamental error of law appearing on the face of the record. Such a judgment is, under proper circumstances, voidable, but until avoided is regarded as valid.⁴⁹

“[A] court enters a void order only when it lacks personal jurisdiction or subject matter jurisdiction over the claim.”⁵⁰ Since the Kovacs do not claim the trial court lacked subject matter jurisdiction over Servatron’s claims – and restrict their argument about personal jurisdiction to Mrs. Kovac – they fail to show that the issue of missing notice of the motion for default comes under CR 60(b)(5).⁵¹

⁴⁹ *In re Marriage of Ortiz*, 108 Wn.2d 643, 649-50, 740 P.2d 843 (1987) (emphasis added, internal quotations omitted).

⁵⁰ *Marley v. Dep’t of Labor & Indus. of State*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994) (emphasis added).

⁵¹ *See, e.g.*, Karl B. Tegland, 4 Wash. Prac., Rules Practice, CR 60 (6th ed.) (noting that “[a]ttacks upon judgments that are merely voidable, rather than void, are not governed by CR 60(b)(5), must be based upon some other provision in CR 60, and are subject to any applicable time limits imposed by CR 60”).

Rather than create a void judgment that can be invalidated at any time under CR 60(b)(5), a “failure to provide notice as required by CR 55(a)(3) [is] an irregularity within the meaning of CR 60(b)(1).”⁵² Irregularities within the meaning of CR 60(b)(1) “are those relating to want of adherence to some prescribed rule or mode of proceeding.”⁵³ Such irregularities can of course be serious, can strip a court of the authority to enter an order, and even can justify setting aside a default judgment “as a matter of right.”⁵⁴ However, any attempt to vacate a default judgment based on an irregularity that does not call into question the court’s jurisdiction must be made through CR 60(b)(1), not CR 60(b)(5).⁵⁵ Hence, it must be brought “not more than 1 year after the

⁵² *Gage*, 55 Wn. App. at 165. See also 4 Wash. Prac., Rules Practice CR 60 (listing “[f]ailure to give notice of subsequent proceedings after appearance made” as an example of an “irregularity,” citing to *C.S. Barlow & Sons v. H. & B. Lumber Co.*, 153 Wash. 565, 280 P. 88 (1929)).

⁵³ *In re Adamec*, 100 Wn.2d 166, 174, 667 P.2d 1085 (1983).

⁵⁴ See *Housing Authority of Grant County v. Newbigging*, 105 Wn. App. 178, 190, 19 P.3d 1081 (2001) (citing to *Shreve v. Chamberlin*, 66 Wn. App. 728, 731, 832 P.2d 1355 (1992) for the proposition that failure to provide notice required by CR 55(a)(3) deprives a court of authority to enter a default judgment). The important distinction between a court’s “authority” and its “jurisdiction” is emphasized in *Buecking v. Buecking*, 179 Wn.2d 438, 447-48, 316 P.3d 999 (2013) (noting that “the term ‘subject matter jurisdiction’ is often confused with a court’s ‘authority’ to rule in a particular manner and this has led to improvident and inconsistent use of the term”).

⁵⁵ *Chai v. Kong*, 122 Wn. App. 247, 254-55, 93 P.3d 936 (2004) (noting that “a procedural irregularity renders a judgment voidable,” and that “[a] voidable judgment may be vacated if the motion to vacate is brought

judgment . . . was entered.”⁵⁶ Because the Kovacs waited more than one year after judgment to bring their CR 60(b)(1) motion, the superior court did not abuse its discretion by denying the motion as untimely.

Although not cited by the Kovacs, two published Court of Appeals cases at first glance appear to support a contrary conclusion.⁵⁷ However, one was overruled by *Morin*, and is arguably not good authority for that

within a reasonable time, and not more than one year from the judgment if the grounds asserted are . . . irregularity in obtaining the order”).

⁵⁶ CR 60(b). *See also Roberts*, 137 Wn.2d at 93 (noting that CR 60(b)(1) motions “must be made within one year after the judgment is entered”). As is discussed in more detail immediately below, neither *Newbigging* nor any other persuasive published case holds that the “entitle[ment] as a matter of right” to have a default judgment set aside for irregularity persists past the one year time limit set by CR 60(b). *See, e.g., Newbigging*, 105 Wn. App. at 182-83 (concerning a case where the defendant moved to vacate the default judgment 11 days after it was entered).

⁵⁷ *See Matia Investment Fund, Inc. v. City of Tacoma*, 129 Wn. App. 541, 545, 119 P.3d 391 (2005) (holding that “[a] default judgment entered without notice to an appearing party is void, and we need not consider the passage of time”); and *Colacurcio v. Burger*, 110 Wn. App. 488, 497, 41 P.3d 506 (2002) (holding that “[b]ecause Colacurcio did not provide Burger with notice, the default order and the subsequent default judgment were void. . . . Because the default order and default judgment were void, we need not decide whether Burger's motion to vacate was brought within a reasonable time . . .”). As described in *Morin*, 160 Wn.2d at 750, the unpublished Court of Appeals opinion in *Morin v. Burris*, 2005 WL 827231, also at least assumed that there was no time bar to bringing a motion to vacate based on a failure to provide required notice before moving for entry of default.

reason alone.⁵⁸ More importantly, both rest on confusion of a court’s “authority” with its “jurisdiction,” which the Supreme Court has repeatedly condemned.⁵⁹ In the lead case of *Colacurcio*, Division I fell into this trap by misreading the pre-Civil Rules case of *Tiffin v. Hendricks*, 44 Wn.2d 837, 271 P.2d 683 (1954).⁶⁰ In turn, in *Matia*, Division II relied

⁵⁸ *Morin*, 160 Wn.2d at 757-58 (reversing the Court of Appeals in both *Matia* and *Morin* because the defendant had not appeared, and not discussing the separate issue of whether the motion to vacate default had been timely). When the Supreme Court reverses the Court of Appeals, it obviously need not specify all of the grounds that could justify doing so. More generally, nothing in the Supreme Court’s *Morin* decision supports the proposition that a motion to vacate a default judgment for failure to provide notice can be brought more than one year after entry of the judgment.

⁵⁹ See, e.g., *Buecking*, 179 Wn.2d at 447-48; and *Marley*, 125 Wn.2d at 541. See also, *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011) (noting that “[b]ecause the consequences of a court acting without subject matter jurisdiction are draconian and absolute, appellate courts must use caution when asked to characterize an issue as ‘jurisdictional’ or a judgment as ‘void’”).

⁶⁰ *Colacurcio* relies on *Tiffin* at 110 Wn. App. at 497. The only other authorities *Colacurcio* cites in support of its assertion that the judgment in question was “void” are the cases of *Shreve v. Chamberlin*, 66 Wn. App. 728, 832 P.2d 1355 (1992), and *In re Marriage of Daley*, 77 Wn. App. 29, 888 P.2d 1194 (1994). *Shreve*, however, did not find the judgment there to be void, but merely found it to be entered “without authority,” thus (as explained below) properly following *Tiffin*. *Shreve*, 66 Wn. App. at 731-32. *In re Marriage of Daley* cites no relevant authority for its conclusion that the order of default at issue there was “void.” *In re Marriage of Daley*, 77 Wn. App. at 31 (citing to *In re Dependence of C.R.B.*, 62 Wn. App. 608, 616-17, 814 P.2d 1197 (1991), which holds only that the entry of default judgment when required notice was not provided was “improper”). Moreover, neither *Shreve* nor *In re Marriage of Daley* considered the effect of waiting more than a year before moving to vacate a default. In *Shreve*, the party seeking relief from the default judgment moved to vacate within six weeks of the entry of judgment. *Shreve*, 66 Wn. App. at 729-30. In *In re Marriage of Daley*, it is impossible to

exclusively on *Colacurcio*, thus building-in a dependence on *Colacurcio*'s misreading of *Tiffin*.⁶¹

The Supreme Court in *Tiffin* held that since the defendants “appeared prior to the making of respondents’ motion for an order of default, the court had no authority to grant the motion. . . .”⁶² *Tiffin* was decided under the then-existing rules, and it properly vacated a default judgment where the motion to vacate was filed less than a week after the judgment was entered.⁶³ However, for later courts to infer from *Tiffin*'s reference to a “lack of authority” to enter an order that such an order must be “void” is an “improvident and inconsistent” use of terms.⁶⁴ Neither *Tiffin* nor the later cases which rely on it properly supports the conclusion

precisely determine how much time elapsed from the entry of default judgment to the filing of the motion to vacate. *In re Marriage of Daley*, 77 Wn. App. at 31 (noting that judgment was entered on February 11, 1993, and the motion to vacate was filed “thereafter”).

⁶¹ *Matia*, 129 Wn. App. at 545. *Matia* also cites to *Khani*, 75 Wn. App. at 323-25, but that case does not involve an alleged failure to provide required notice of a motion for default, but instead defective service of original process, which truly is jurisdictional.

⁶² *Tiffin*, 44 Wn. 2d at 844 (emphasis added).

⁶³ *Id.* at 840.

⁶⁴ *Buecking*, 179 Wn.2d at 448. *See also*, *State v. Peltier*, 176 Wn. App. 732, 744, 309 P.3d 506, 512 (2013), *as corrected* (Oct. 23, 2013), *review granted*, 179 Wn. 2d 1014, 318 P.3d 279 (2014) (noting that “[t]he term ‘subject matter jurisdiction’ is often confused with a court’s ‘authority’ to rule in a particular manner. This has led to improvident and inconsistent use of the term”).

that under the current Civil Rules, a non-jurisdictional challenge to a default judgment based on an irregularity can be brought more than one year after the judgment. “[C]lassifying an error of law as a ‘jurisdictional’ issue [improperly] transforms it into one that may be raised belatedly, and thus permits its assertion by a litigant who failed to raise it at an earlier stage in the litigation.”⁶⁵ Correctly understood as a non-jurisdictional challenge based on an irregularity under CR 60(b)(1), the Kovacs’ claim that Servatron failed to comply with CR 55(a)(3) is time-barred, even if it were otherwise valid (which it is not). No persuasive authority exists to the contrary.

E. The Kovacs’ Assertions About Their Purported “Strong Defenses” Are Irrelevant.

To obtain an order vacating a default judgment, a defendant must establish a basis to vacate the judgment pursuant to CR 60(b).⁶⁶ The mere existence of potential defenses, by itself, is not an independent basis under CR 60(b) to vacate a judgment. Instead, the purported existence of a meritorious defense is a factor only when the motion to vacate is brought pursuant to CR 60(b)(1) or (11).⁶⁷

⁶⁵ *Marley*, 125 Wn.2d at 541.

⁶⁶ CR 55(c)(1); *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (stating that “[r]elief from a judgment is governed by the [principles stated in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968)], but the grounds and procedures are set forth in CR 60”).

⁶⁷ *See, e.g., Little v. King*, 160 Wn.2d 696, 703-07, 161 P.3d 345 (2007) (applying the *White* factors when motion to vacate was brought pursuant to CR 60(b)(1)); *and Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 304-

Here, the Kovacs are seeking relief under either CR 60(b)(1), CR 60(b)(5), or both.⁶⁸ They have never raised CR 60(b)(11) as a basis for relief, and any attempt for them to do so now would fail for multiple reasons.⁶⁹ It is thus straightforward to show that the Kovacs' arguments about the merits of the case are irrelevant, and should not detain this Court.⁷⁰

First, to the extent the Kovacs seek relief under CR 60(b)(1), their request is time-barred, as they waited more than one year after entry of the default judgment to bring their motion to vacate. CP 113-17; CP 120-28.⁷¹

06, 122 P.3d 922 (2005) (applying *White* factors when motion to vacate was brought pursuant to CR 60(b)(11)).

⁶⁸ The underlying motion also refers to CR 60(b)(4), but the Kovacs make no reference to either CR 60(b)(4) or fraud in their Brief of Appellant. Accordingly, they have abandoned this argument. See RAP 10.3(g) (stating that “[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto”).

⁶⁹ See, e.g., RAP 2.5(a) (stating that the “appellate court may refuse to review any claim of error that was not raised in the trial court”); RAP 10.3(g) (stating that “[t]he appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto”); and *Friebe v. Supancheck*, 98 Wn. App. 260, 267, 992 P.2d 1014 (1999) (holding that “CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1)”).

⁷⁰ Compare Brief of Appellants at 2, 13-15.

⁷¹ See CR 60(b) (stating “[t]he motion shall be made . . . for reason[] (1) . . . not more than one year after the judgment . . . was entered”). See also, *Trinity*, 176 Wn. App. at 195-98 (2013) (noting that the “one year time limit is strictly enforced and the trial court may not extend the deadline”).

Second, the Kovacs' purported defenses are also irrelevant because their CR 60(b)(1) arguments rest exclusively on an alleged procedural irregularity, rather than any sort of excusable neglect and, therefore, the *White* factors (including consideration of a meritorious defense) do not apply.⁷² Third, the existence of a meritorious defense is irrelevant to any truly jurisdictional challenge.⁷³ As a result, this Court should simply ignore the Kovacs' assertions regarding their purported meritorious defenses. They are nothing but a distraction.

F. The Default Judgment Is Not Void as to Mrs. Kovac for Lack of Personal Jurisdiction.

The Kovacs conclude their Brief of Appellant with a cursory argument that the trial court lacked personal jurisdiction over Mrs. Kovac. However, the Kovacs did not show by "clear and convincing proof" that

⁷² See *Kennewick Irrigation Dist. v. 51 Parcels of Real Prop.*, 70 Wn. App. 368, 371, 853 P.2d 488 (1993) (noting that "[a] claim of irregularity is not controlled by the four factors applicable to cases involving excusable neglect"); and *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989) (noting that "[a] claim of irregularity is not controlled by the test set out in *White*, which applies to cases involving excusable neglect or inadvertence").

⁷³ See, e.g., *Leen v. Demopolis*, 62 Wn. App. 473, 477, 815 P.2d 269 (1991) (noting that "[i]f a judgment is void for want of jurisdiction, no showing of a meritorious defense is required to vacate the judgment"). Of course, as shown in Section D above, the judgment here is not void because of any failure to comply with CR 55(a)(3). As shown in Section F below, it is also not void as to Mrs. Kovac for want of personal jurisdiction.

personal jurisdiction as to Mrs. Kovac was improper.⁷⁴ Accordingly, the trial court did not abuse its discretion by refusing to vacate the default judgment against her.⁷⁵

A Washington court may not assert personal jurisdiction over a defendant unless (1) the defendant is given adequate notice and opportunity to be heard, and (2) the defendant has the requisite minimum contacts with the state of Washington.⁷⁶ Here, the Kovacs do not and cannot challenge the first “service of process” element: Mrs. Kovac was indisputably served with original process on February 7, 2012.⁷⁷ CP 35. Instead, the Kovacs rely solely on the minimum contacts element. *See* Brief of Appellants at 16. However, they completely fail to address the

⁷⁴ *Leen*, 62 Wn. App. at 478. As discussed in detail below, although *Leen* is directly concerned with the burden of proving improper service, the same level and allocation of burden should also apply when a party attempts to vacate a default judgment for other flaws in personal jurisdiction.

⁷⁵ *See, e.g., Brennan v. City of Seattle*, 39 Wash. 640, 644, 81 P. 1092 (1905) (noting that “this court will not disturb the ruling of the trial court in granting a new trial upon the ground of newly discovered evidence, or upon any ground involving questions of fact, unless it appears very clearly to have been an abuse of discretion”) (emphasis added).

⁷⁶ *See, e.g., Karl B. Tegland*, 14 Wash. Prac., Civil Procedure § 4:1 (2d ed.).

⁷⁷ *See, e.g., Pascua v. Heil*, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005) (stating that “[f]irst and basic to personal jurisdiction is service of process”).

threshold issue of which party bears the burden of proof when jurisdiction is challenged after a judgment has been taken.

Normally, a plaintiff has the burden of proving personal jurisdiction in a case where a defendant appears and contests such jurisdiction prior to judgment.⁷⁸ However, Washington courts have held that for challenges to the service of process element of personal jurisdiction brought after the entry of judgment, “[t]he burden is upon the person attacking the service to show by clear and convincing proof that the service was improper.”⁷⁹ Although Washington courts have not addressed the closely analogous question of who has the burden of proof with regard to minimum contacts in a post-judgment challenge, “the majority of federal courts” that have addressed this issue place the burden on the party attacking jurisdiction.⁸⁰

⁷⁸ See, e.g., *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013), *review granted*, 177 Wn. 2d 1019, 304 P.3d 115 (2013).

⁷⁹ *Leen*, 62 Wn. App. at 478. See also, *Miebach v. Colasurdo*, 35 Wn. App. 803, 808, 670 P.2d 276 (1983) (holding that “[a] facially correct return of service . . . is presumed valid and, after judgment is entered, the burden is on the person attacking the service . . . to show by clear and convincing evidence that the service was irregular”).

⁸⁰ See *Ground Freight Expeditors, LLC v. Binder*, 407 S.W.3d 138, 143 (Mo. Ct. App. 2013) (noting that “the majority of federal courts follow the same rule: although the plaintiff bears the burden of proof when personal jurisdiction is challenged before judgment, the burden shifts to the defendant when the issue is not raised until a post-judgment motion to vacate (assuming that the defendant had notice of the action before judgment was entered)”).

As the United States Court of Appeals for the Second Circuit recently put it:

Normally, a plaintiff has the burden of proving personal jurisdiction in a case where a defendant appears and contests such jurisdiction. But in a collateral challenge to a default judgment under Rule 60(b)(4), the burden of establishing lack of personal jurisdiction is properly placed on a defendant who had notice of the original lawsuit. Although the defaulting defendant has the opportunity to contest personal jurisdiction long after the default judgment, a defaulting defendant with notice of the action should bear the risk of non-persuasion on this issue since it will normally have greater access to relevant evidence often difficult to assemble after the passage of time. In the analogous context of a Rule 60(b)(4) motion challenging sufficiency of service of process, we have held that the defendant bears the burden of proving that service of process was insufficient.⁸¹

The same reasons that support imposing the burden of proof on a defendant seeking to vacate a default based on improper service of process also support placing the burden of proof on a defendant attacking other purported defects in personal jurisdiction after a judgment has been entered. A “defendant who chooses not to put the plaintiff to its proof, but instead allows default judgment to be entered and waits, for whatever

⁸¹ “R” *Best Produce, Inc. v. DiSapio*, 540 F.3d 115, 126 (2d Cir. 2008) (internal citations omitted). *See also, Bally Exp. Corp. v. Balicar, Ltd.*, 804 F.2d 398, 401 (7th Cir. 1986) (holding that “the defendant must . . . shoulder the burden of proof when the defendant decides to contest jurisdiction in a postjudgment rule 60(b)(4) motion”); *Hazen Research, Inv. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974) (holding that when “judgment goes by default . . . the burden of undermining (the judgment) rests heavily upon the assailant”) (citing *Williams v. State of N.C.*, 325 U.S. 226, 233-34, 65 S. Ct. 1092, 1097, 89 L. Ed. 1577 (1945)). *See also, Arpaio v. Dupre*, 527 F. App’x 108, 113 (3rd Cir. 2013) (noting circuit split on the issue).

reason, until a later time to challenge the plaintiff's action, should have to bear the consequences of such delay.”⁸²

This Court should follow the majority of federal courts and the underlying logic of *Leen* and *Miebach*, and hold that in the context of a motion to vacate a default judgment, the party attacking the judgment has the burden of producing “clear and convincing proof” of any alleged defect in personal jurisdiction, including any defect in the required minimum contacts with Washington.⁸³ The Kovacs have not carried this burden.

In the hopes of disproving Mrs. Kovacs’ contacts with Washington, the Kovacs rely entirely on two paragraphs from the Declaration of Lawrence Kovac:

7) I married my current wife on April 4, 2011.

8) Mrs. Kovac is a California resident. She had no involvement with defendants Intelligent Wireless and Cyfre LLC, or plaintiff Servatron. She has no contacts with Washington.

CP 131 (at ¶¶ 7-8). These bare assertions fall far short of being “clear and convincing proof” that Mrs. Kovac lacks minimum contacts with the State of Washington.

⁸² *S.E.C. v. Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1166 (9th Cir. 2007).

⁸³ *Leen*, 62 Wn. App. at 478 (requiring “clear and convincing proof”) and *Miebach*, 35 Wn. App. at 808 (requiring “clear and convincing evidence”).

Of course it is striking, and probative, that Mrs. Kovac did not submit her own declaration.⁸⁴ More importantly, however, the Kovacs simply ignore the critical legal point that Mr. Kovac is Mrs. Kovac's agent, and his contacts with Washington during their marriage can be imputed to her.⁸⁵ Washington's long arm statute, RCW 4.28.185, provides in pertinent part as follows:

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[.]⁸⁶

To subject a nonresident defendant to the personal jurisdiction of this state under this provision, the following requirements must be met:

⁸⁴ Compare *Leen*, 62 Wn. App. at 480 (finding lack of "clear and convincing" proof of defective service where the defendant Demopolis "submitted a certificate signed by two persons who claimed to have been with Demopolis at a restaurant during the time that [the process server] said he had served the summons and complaint," but "Demopolis himself . . . did not attest that he was at the restaurant when [the process server] served the summons and complaint").

⁸⁵ See *Barer v. Goldberg*, 20 Wn. App. 472, 479, 582 P.2d 868 (1978) (holding, in the context of an analysis of minimum contacts, that one spouse, "as the manager of the community, was [the other spouse's] agent").

⁸⁶ RCW 4.28.185 (emphasis added).

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice. . . .⁸⁷

Here, the trial court expressly found that “IWP, Kovac, and Cyfre have interfered with Servatron’s attempts to mitigate its damages, by discouraging potential buyers of materials and products identified to the contracts, which materials and products remain in Servatron’s possession.” CP 115 (at ¶ 7).⁸⁸ Moreover, the record supports the conclusion that this interfering activity by the Kovacs continued until at least October 2, 2012, well after the April 4, 2011 date on which Mr. Kovac claims he married Mrs. Kovac. CP 74 (at ¶ 9); CP 131 (at ¶ 7). Mr. Kovac’s interfering actions, taken during the marriage, plainly had effects in Washington.⁸⁹

⁸⁷ *Shute v. Carnival Cruise Lines*, 113 Wn. 2d 763, 767, 783 P.2d 78 (1989).

⁸⁸ *See also* CP 115 (at ¶ 6) (concluding as a matter of law that “Servatron is entitled to declaratory judgment, affirming its right to sell materials and products identified to the contract without interference from IWP, Cyfre, or Kovac . . .”).

⁸⁹ *See, e.g., Amazon.com, Inc. v. Nat’l Ass’n of Coll. Stores, Inc.*, 826 F. Supp.2d 1242, 1254 (W.D. Wash. 2011) (noting that “in purposeful direction cases, it is appropriate to apply an ‘effects’ test that focuses on the forum in which the defendant’s actions were felt, whether or not the actions themselves occurred within the forum”). The effects test, which is based on the Supreme Court’s decision in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), “requires that the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011).

CP 74 (at ¶ 9), CP 43 (at ¶ 5). As a result, they are contacts with Washington and can be imputed to Mrs. Kovac.⁹⁰ In addition, Servatron’s claims against both of the Kovacs are “connected with” Mr. Kovac’s interfering actions.⁹¹ CP 15-16 (at ¶¶ 46-50). As a result, the superior court’s determination that it had personal jurisdiction over Mrs. Kovac was proper. At the very least, the Kovacs did not produce “clear and convincing proof” that Mrs. Kovac lacked the required minimum contacts. Accordingly, the trial court did not abuse its discretion by rejecting her post-judgment challenge. This Court should affirm the trial court, and uphold the default judgment against both Kovacs.

V. CONCLUSION

Servatron warned the Kovacs three times that it intended to move for default. The Kovacs nonetheless took no action in this case until the superior court entered default judgment against them – though they easily could have if they had intended to defend themselves in the case. They were not entitled to notice of Servatron’s motion for default because they did not formally appear and did not substantially comply with appearance requirements. Moreover, even if the Kovacs had appeared, their request for relief was barred by the one year limit on motions brought under

⁹⁰ See *Barer*, 20 Wn. App. at 481 (holding that “the transaction by the husband as manager of the community is all that is necessary to subject the wife to jurisdiction, particularly where she had knowledge of the transaction”). Here, Mrs. Kovac has done nothing to deny knowledge of her husband’s activities during their marriage.

⁹¹ *Shute*, 113 Wn. 2d at 767.

CR 60(b)(1). Thus, the record simply does not support a finding that the superior court abused its discretion in denying the Kovacs' motion to vacate the default judgment against them. Mrs. Kovac similarly cannot meet her burden of proving with "clear and convincing proof" that the superior court lacked personal jurisdiction over her. Therefore, this Court should affirm the superior court's decision below in all respects.

DATED this 23rd day of June, 2014.

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CERTIFICATE OF SERVICE

I certify that on June 23, 2014, I personally delivered the foregoing Brief of Respondent Servatron, Inc., to Keith Scully and Charlotte C. Kuhn, of Newman Du Wors LLP, attorneys for appellants, at the following address:

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