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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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EGP INVESTMENTS, LLC, RESPONDENT,

vs.

MARVIN R. FREAR JR and JANE DOE FREAR, APPELLANTS.

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APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

In the ruling at issue on appeal, the trial court held that, regardless of whether legally valid service was performed, it can always exercise its equitable powers in deciding whether to vacate a void judgment. In so ruling, the trial court failed to provide any analysis of the proper standard, or even mention, CR 60(b)(5) when it denied the Frears' motion to vacate the judgment for lack of personal jurisdiction. As set forth in the Appellants' Brief, and contrary to the trial court's analysis, a court has a nondiscretionary duty to vacate a judgment that is void for lack of personal or subject matter jurisdiction. There is no admissible evidence in the record on which the trial court could base a finding that valid service occurred via either personal or abode service on the Frears. The trial court therefore erred both in its analysis of the applicable legal standard when confronted with a void judgment, and in finding that service occurred, where there is no admissible evidence to support such a finding.

## II. ARGUMENT

### a. There is No Evidence that Mr. Frear was Ever Served

The majority of EGP's response is premised on a false assertion that the trial court exercised discretion and found that Mr. Frear was personally served. Contrary to EGP's assertion at pg. 18 of its response brief, the trial

court never “noted EGP obtained good service on Mr. Frear.” The trial court made no such finding. In fact, nothing in the record indicates or concludes that the trial court ever made a finding with respect to anything that would constitute legally valid service. At the conclusion of the hearing on the Frears’ motion to vacate the default judgment, defense counsel attempted to clarify this very point with the trial court, but to no avail.

MR. MILLER: Okay. And is the Court making any finding of fact about who was served, if anyone?

THE COURT: No. I’ll make a finding that there was service. I’m satisfied of that, and there wasn’t any response in opposition to that.<sup>1</sup> So, I’m going to make a finding that service was completed.

MR. MILLER: And, I mean, it belabors the point, but the declaration says it was Mr. Nolan. Are you thinking Mr. Nolan was served or somebody else or are you --

THE COURT: I don’t need to go there, Counsel.

MR. MILLER: Okay.

Judge’s Ruling Transcript at 12:9 – 19, November 6, 2017.

On the contrary, as laid out in the Appellant’s Brief, the trial court’s ruling was based on the erroneous legal conclusion that the fact of valid service is

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<sup>1</sup> Appellants cannot testify that that pleadings for their case were not given to someone by the process server because such a claim is not within their personal knowledge. They do, however unequivocally testify they were not served through valid personal or abode service. The entire basis of the Frear’s CR 60(b)(5) motion is the fact that no legally valid service occurred.

unimportant, that equitable principles apply to vacating a void judgment, and that the passage of time precluded the Frears from raising a challenge to service, even if they were not properly served.

After service was challenged, the process server, along with EGP, were forced to concede that the original declaration of service was wrong. (CP 81, 35.) The parties all agree that Mr. Nolan was not served. (CP 11, 81.) It is undisputed that he does not match the description of the person served, as supplied by Mr. Rhodes, the process server. (CP 23.) Even if the documents had been handed to Mr. Nolan, he was not a resident in the Frears' abode. (CP 10 – 27.) This fact is also not contested. EGP must therefore concede that, in light of the process server recanting who was served, the declaration of service on which the judgment was based cannot be a facially valid declaration of service that shifts the burden to the Frears to disprove. There is no supplemental declaration which purports to include personal knowledge regarding who, if anyone, was served. EGP and its process server simply speculate regarding what they believe may have happened, and their speculation is flatly contradicted by testimony from the Frears and Mr. Nolan.

The entire basis for Mr. Rhodes' belief<sup>2</sup> that Mr. Frear lied to him is that Mr. Frear "bears a very strong resemblance to the gentleman described in the aforesaid Declaration of Service". (CP 81:1 – 3.) To be clear, Mr. Rhodes' second declaration is an admission that the first declaration is incorrect. *Id.* Abode service did not occur by serving Mr. Nolan. *Id.* Abode service through Mr. Nolan is impossible anyway because he was not a resident at the Frears' abode – a fact which has not been challenged. More importantly, Mr. Rhodes' **belief** about what occurred is not premised on his recollection of the service but, rather, a review of a general description of a person. He does not claim that he recognized Mr. Frear nor does he testify that he personally handed the summons and complaint to Mr. Frear. "One may well plead a fact upon information and belief, because thus the fact would be pleaded upon which an issue might be made, but the belief of the pleader in the existence of a fact gives no cause of action, **nor does the assertion of such a belief call for any answer or denial.**" *Barber v. Grand Summit Min. Co.*, 11 Wn.2d 114, 125, 118 P.2d 773, 778 (1941)(emphasis added). To date, there is no admissible evidence in the record showing that Mr. Frear was personally served, or that service occurred in any other manner that conferred personal jurisdiction.

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<sup>2</sup> Again, there is no sworn assertion based on anything other than Mr. Rhodes' subjective belief.

In contrast to Mr. Rhodes' belated belief about service, Mr. Frear filed un rebutted declarations, swearing to facts within his personal knowledge and testifying that he was never served. (CP 88 – 90, 26 – 27.)

Mr. Frear testified in his second sworn declaration the following:

2. I live at 3214 E. 23rd, Spokane, Washington.
3. I was never served in this action.
4. I have been served with other lawsuits and have never previously contested service.
5. I have no criminal history and I am an honest person.
6. I served in the 82nd airborne [*sic*] infantry division and received an honorable discharge in 1999.
7. Mr. Rhodes's allegation that I lied to him is false, offensive, and defamatory. Mr. Rhodes never served me. I look forward to addressing Mr. Rhodes directly about his slanderous declaration if he comes to court. If anyone is being dishonest, it is Mr. Rhodes.
8. Mr. Rhodes could not truthfully testify that I was the person he served because it simply did not happen.
9. I cannot testify as to whether Mr. Rhodes gave legal pleadings to Mr. Nolan but Mr. Nolan was not my roommate and did not live in my house. Mr. Nolan occasionally visited my house, as my friend, but he did not live with me.
10. Mr. Nolan never gave me any legal pleadings for this matter or any other.

CP 88 – 89.

Unlike Mr. Rhodes' second declaration, Mr. Frear does not swear that he "believes" he was not served. He states unequivocally that he was not. The trial court did not find that Mr. Frear was untruthful, nor did the

trial court find that Mr. Frear was served. There is simply no evidence in the file to support such a conclusion. To date, there is no sworn affidavit of service in this case establishing that Mr. Frear was served. Even if the trial court found that Mr. Frear was served, based on the lack of evidence to support such a conclusion, and in the face of an absolute denial by Mr. Frear, such a conclusion would be an abuse of discretion. Mr. Frear's declaration is not based on his belief but, rather, on his personal knowledge that he was never served.

It also makes no legal sense why Mr. Frear would claim to be Mr. Nolan and a roommate. Serving a roommate who is "a person of suitable age and discretion then resident therein", as Mr. Rhodes alleges, would be perfectly valid service. (CP 79.) If Mr. Nolan's credibility was at issue, the trial court could have found that the general description was close enough to Mr. Nolan's true description to conclude that he was served (been given a summons and complaint) on behalf of the Frears. Such a finding would still not evidence legally valid service, however, since it is undisputed that Mr. Nolan did not live with the Frears. (CP 10 – 27) EGP and Mr. Rhodes have nothing but hypothesized scenarios that, if true, would salvage their facially defective recitation of how they initially alleged service occurred. The Frears have no obligation to respond to such speculation. *Barber, supra.*

- b. *Collection Grp., LLC v. Cook* is not precedent and is factually distinguishable

The trial court and EGP make much of the Court's unpublished opinion in *Collection Grp., LLC v. Cook*, 186 Wn. App. 1048 (2015) (unpublished and without any precedential value). This is largely for the purpose of setting up a straw man and is easily distinguishable from the case at bar. In *Cook*, the defendant alleged that he did not live at the place where service was alleged to have occurred but failed to identify the address where he was actually living. The process server provided additional details in a supplemental declaration, which Cook failed to rebut with information on where he was living. Unlike in *Cook*, the Frears do not claim they were living at an address other than where service is alleged to have occurred by serving Mr. Nolan. The *Cook* court stated:

“When a defendant challenging service fails to identify his “true” place of abode, an adverse inference is reasonably drawn.” *Id.* “An address would ordinarily be simple to provide and would demonstrate Mr. Cook's confidence that his claim as to his “true” place of abode would withstand investigation by TCG.” A bald allegation as to a defendant's true place of abode is unlikely to be sufficient when weighed against a conflicting allegation that is backed by at least some substantiation. *Cf. Gooley*, 196 Wash. at 368 (rejecting process server's unsubstantiated allegation by amended return that hotel was defendants' usual place of abode in light of the conflicting, substantiated allegations of defendants).

*Collection Grp., LLC v. Cook*, 186 Wn. App. 1048 (2015)

In equating this case with *Cook*, EGP seemingly proposes a rule that the Frears should be obligated to make sense of Mr. Rhodes' conflicting declarations and prove what actually happened with respect to the alleged service. In other words, EGP urges a holding that the burden lies on the defendant to prove a negative proposition – that service did not occur even when there is no facially valid declaration of service on file. If EGP's suggested interpretation was adopted, it would flip procedural due process on its head. On the contrary, Washington law is clear that the burden does not, and logically cannot, shift to the defendant to disprove service unless there is a facially valid declaration of service on file. "It is the **fact** of service which confers jurisdiction, and not the return, and the latter may be amended to speak the truth." *John Hancock Mutual Life Insurance Co. v. Gooley*, 196 Wash. 357, 363, 83 P.2d 221 (1938)(emphasis added). In this case, the declaration of service was incorrect, service never occurred, and no amendment can be filed which would remedy the absence of actual service on the Frears.

The parties all agree that the description in the declaration of service does not match Mr. Nolan. (CP 11, 81.) This is not a battle of credibility. The only viable declaration of service in this case is admittedly incorrect.

(CP 80 – 81.) Other than file their sworn declarations and appear in court, which they did, there is nothing more that the Frears can do to prove that service did not happen. The parties already agree that it did not happen as Mr. Rhodes originally alleged in his declaration of service. *Id.*

c. The Judgment is Void and Must be Vacated

Washington courts have long held that based on the very concept of voidness, a party can move to set aside a void judgment at any time. *E.g.*, *In re Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989); *Servatron, Inc. v. Intelligent Wireless Prod., Inc.*, 186 Wn. App. 666, 679, 346 P.3d 831 (2015) (“There is no time limit to bring a motion to vacate a void judgment.”); *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323–24, 877 P.2d 724 (1994); *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989) (“motions to vacate under CR 60(b)(5) are not barred by the ‘reasonable time’ or the 1–year requirement of CR 60(b)” (footnote omitted)). Courts have a nondiscretionary duty to vacate void judgments. *In re Marriage of Markowski*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988). “[A] party to the record, adversely affected by a void judgment, may have the judgment vacated as a matter of right—and this without a showing of a meritorious defense.” *Ballard Sav. & Loan Ass'n v. Linden*, 188 Wash. 490, 492, 62 P.2d 1364, 1365 (1936) (citing: *Hole v. Page*, 20 Wash. 208, 54 P. 1123; *Batchelor v. Palmer*, 129 Wash. 150, 224 P. 685.

The trial court wholly failed to recognize this tenet of Washington law, or analyze its application in the context of this case. Instead, the trial court held that vacating a judgment is always equitable and within a court's discretion. While equity may be applicable in some attempts to vacate a judgment, it is not applicable where the underlying judgment is void for lack of jurisdiction.

Most recently, this Court reaffirmed a number of prior Washington appellate rulings in *Castellon v. Rodriguez*, 418 P.3d 804 (Wash. Ct. App. 2018). In that case, the Court recognized that “[i]f service of process was improper, then the trial court would have failed to gain personal jurisdiction over [the defendant].” *Id.* at 808. As in *Castellon*, prior to filing their motion to vacate the judgment, the Frears “never took any action inconsistent with his personal jurisdiction defense, such as making a request for affirmative relief”. *Id.* Because they were never legally served, the trial court erred in denying the Frear’s motion to vacate.

d. RCW 19.16.450 Precludes an Award of Attorney’s Fees and Costs to EGP

EGP was required at all times to be licensed as a collection agency. Contrary to EGP’s assertion, the Washington Supreme Court in *Gray v. Suttell & Associates*, 181 Wn.2d 329, 334 P.3d 14 (2014) was exceedingly clear that the 2013 amendment to the WCAA definition of “collection

agency” was a clarification of the law, not a change. EGP does not contest the fact that, under the WCAA, every collection agency must be licensed to operate legally in Washington. EGP also does not dispute that a collection agency that fails to become properly licensed violates RCW 19.16.250(1) and is subject to the additional penalty found at RCW 19.16.450. Washington courts “construe consumer protection statutes . . . liberally in favor of the consumers they aim to protect.” *Jametsky v. Olsen*, 179 Wn.2d 756, 765, 317 P.3d 1003 (2014). The Washington Supreme Court has confirmed that “[t]he business of debt collection affects the public interest” and explained that “collection agencies are subject to strict regulation to ensure they deal fairly and honestly with alleged debtors.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 54, 204 P.3d 885 (2009).

The plain language of RCW 19.16.450 does not require a judicial or agency finding before the remedy is imposed. Nor does the statute contemplate waiver of the issue if it is not raised prior to entry of the initial judgment. Instead, it firmly mandates that if a violation occurs then no one “shall ever be allowed to recover” anything above the principle amount. RCW 19.16.450 (emphasis added). The Frears cannot be barred from raising the a WCAA defense to a new award of attorney’s fees in any event, but especially where the original fee judgment was entered without notice and opportunity to be heard.

e. Appellants Are Entitled to an Award of Attorney's Fees

EGP claims that, because the Frears never made an offer to settle, they are therefore not entitled to an award of fees under RCW 4.84. This is another misstatement of clear Washington law. In any action under \$10,000.00, the defendant is entitled to reasonable attorney's fees if the defendant is the prevailing party. *See Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 321 P.3d 1215 (2014). No offer of judgment is required of the defendant, since the plaintiff, "as master of its claim" knows the amount in controversy and that the statute may apply. *Id.*

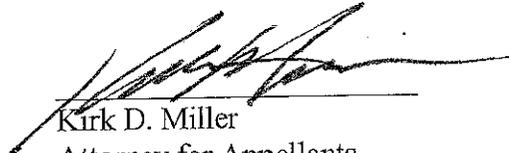
EGP acknowledges that, if successful on appeal, the Frears are entitled to an award of fees under RCW 4.84.330. (Respondent's Brief 31.) The Frears are also entitled to an award of fees under RCW 6.27.230. Although this appeal does not directly address the issuance of the writ of garnishment, if the underlying judgment is vacated as void, then the writ must also be quashed. *Allstate Ins. Co. v. Khani*, 75 Wn.App. 317, 877 P.2d 724 (1994). Quashing writ of garnishment is a form of controversion and entitles the defendant to a mandatory award of fees. *Id.*

### III. CONCLUSION

For the reasons set forth herein, Appellants request that this Court REVERSE the trial court's denial of their motion to vacate the default

judgment and remand with instructions to vacate the judgment, quash the garnishment, and dismiss the case with prejudice.

Respectfully submitted this 15<sup>th</sup> day of August, 2018.



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CERTIFICATE OF SERVICE

I certify that on the 15<sup>th</sup> day of August, 2018, I caused a true and correct copy of this Appellants' Reply Brief to be served on the following in the manner indicated below:

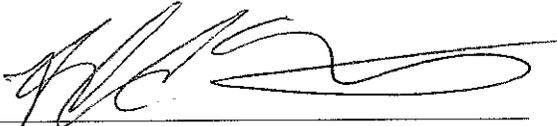
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