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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 357341
No. 358496

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

EGP INVESTMENTS, LLC, RESPONDENT,

vs.

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

APPELLANTS' BRIEF

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I. INTRODUCTION

Marvin and Laurie Frear appeal the trial court's denial of their CR 60(b)(5) motion to vacate the default judgment against them. A default judgment must be set aside as a matter of right when it is obtained without proper service of the Summons and Complaint. EGP Investments, LLC never served the Frears. Contrary to well-established Washington laws, the trial court applied an equitable theory to deny the Frears' motion to vacate a void judgment due to the passage of time between entry of the judgment and their motion to vacate. The trial court then awarded attorney's fees to EGP, in violation of RCW 19.16.450, where, in violation of the Washington Collection Agency Act, EGP obtained the judgment while operating as an unlicensed collection agency in Washington. This Court should reverse the trial court's orders and vacate the default judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the Frears' motion to vacate default judgment where the Frears were never served with the summons and complaint.

2. The trial court erred in holding that the Frears' motion is barred by the one-year limitation applicable to CR 60(b)(1) – (3) and by the doctrine of laches.

3. The trial court erred in awarding attorney's fees to EGP where EGP obtained the judgment when operating illegally in Washington as an unlicensed collection agency, which is prohibited by RCW 19.16.250(1) and carries an additional penalty under RCW 19.16.450 prohibiting EGP from ever collecting any amount in addition to principal.

Issues Pertaining to Assignments of Error

In his oral rulings, Judge Price made the following legal conclusions to which the Frears assign error:

1. "there doesn't seem to be a dispute that someone was served on May 29, 2011, at an address of 3214 East 23rd

Avenue in Spokane, Washington.” (Judge’s Ruling Transcript at 4:1 – 5, November 6, 2017.) On the contrary, the Frears never conceded that “someone was served” and specifically rebutted the declaration of service. Additionally, the process server filed a supplemental declaration of service, admitting that his 2011 declaration of service was incorrect.

2. “Central to CR 60 is the requirement these motions be brought within one year after judgment was taken.” (Judge’s Ruling Tr. at 6:18 – 19.) “The rule contemplates one year, and we’re at least six years past that here.” (*Id* at 11:4 – 5.) The trial court misstated the law and wholly ignored the fact that the Frears’ basis for vacating the judgment was exclusively under CR 60(b)(5) and related cases. (CP 5.) Nowhere in its oral or written decision does the Court ever mention CR 60(b)(5) or provide any analysis of the proper standard for vacating a void judgment.

3. “[T]he burden...is on the party seeking vacation of the judgment. That burden is clear and convincing.” (Judge’s

Ruling Tr. at 7:3 – 5.) This would be true only if the affidavit of service is facially valid. Here, the process server admitted his original declaration was incorrect and only speculates regarding who he may have served. (CP 80 – 81.) The burden does not shift to the Frears to disprove an admittedly erroneous declaration of service. *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 292 P.3d 128 (2012).

4. “[T]he Court can consider equity, and that’s just inherent in CR 60...” (Judge’s Ruling Tr. at 7:21 – 22.) On the contrary, Washington law is abundantly clear that “[t]o grant such relief without notice and an opportunity to be heard denies procedural due process.” *Matter of Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013, 1017 (1989). “[V]oid judgments may be vacated irrespective of the lapse of time.” *Id.*

5. “I don’t agree with counsel’s suggestion that it’s no big deal, that anybody can become a registered process server. They just pay the fee, and that’s all there is to it...” (Judge’s Ruling Tr. at 9:2 – 4.) The trial judge made this finding in order

to bolster the inherent credibility of Washington process servers. However, Spokane County will register any Washington resident, over the age of 18, who pays the \$10.00 fee. RCW 18.180.010. There are no other restrictions on obtaining a process server registration. *Id.* Even felony convictions for crimes of dishonesty would not impede registration. *Id.*

6. “[O]nce you become aware that you have an issue, that there’s a judgment that may have been taken against you, or a collection action that’s being pursued, you have a duty to mitigate and go forward with your action before the Court.” (Judge’s Ruling Tr. at 10:20 – 23.) This comment was an extension of the judge’s opinion that the equitable theory of laches bars the Frears from vacating the void judgment. The court’s analysis ignores basic civil procedure, due process and an overwhelming body of Washington appellate authority.

7. Regarding Defendants’ argument that EGP cannot recover attorney’s fees after violating the Washington Collection Agency Act (RCW 19.16.250, 450), the court held “that entire

argument isn't properly before the Court.” (Hearing Transcript at 34:25 – 35:1.) “It was never asserted as a counterclaim...or in a separate lawsuit that this Court is aware of.” (Hr’g Tr. at 35:4-6.). A claim under RCW 19.16.450 can be raised at any time a collection agency seeks unlawful fees.

III. STATEMENT OF THE CASE

On May 20, 2011, this action was commenced in the Spokane County District Court. (CP 1.) At the time the action was commenced, EGP was operating as a collection agency in Washington without having obtained a collection agency license. (CP 219 – 232.)

A process server initially alleged that on May 29, 2011, he effected abode service of the summons and complaint on the Frears by handing a copy of the pleadings to “Dave Nolan, roommate, a person of reasonable age and discretion, then resident therein.” (CP 79.) The Frears were completely unaware that an action had been commenced against them, so they did not appear or contact EGP. (CP 10 – 11, 24 – 27.) On July 25, 2011,

an Order of Default and Default Judgment was entered against the Frears in the Spokane County District Court action. (CP 3 – 4.) On September 27, 2011, EGP filed a transcript of judgment in Spokane County Superior Court. (CP 1 – 2.) In August 2013, EGP obtained a Washington Collection Agency License for the first time.

On October 10, 2017, after learning that a default judgment had been entered several years prior, the Frears sought to vacate the judgment¹. (CP 5 – 6.) Prior to filing their motion to vacate, the only notice of the lawsuit provided to the Frears was one certified letter regarding an attempted garnishment. (CP 91 – 92.) However, when the mailing was received, the Frears were dealing with other civil legal issues, as well as family and medical issues. *Id.* Ms. Frear testified that she believed the correspondence was related to another legal matter she already knew about, and that it was being handled. (CP 92:1 – 3.) Ms.

¹ The motion was initially filed in the Spokane County District Court in July 2017. When it was learned that a transcript of judgment had been filed in Superior Court, the motion was re-filed in Superior Court.

Frear testified that it did not occur to her that she could be receiving correspondence related to a lawsuit she knew nothing about. *Id.* Mr. Frear finally discovered the judgment when he was attempting to refinance his home and found a lien was on the property. (CP 89:13 – 17.)

To date, the Frears have never been served with a summons and complaint in the action. (CP 25:2, 27:2.)

Mr. Nolan is friends with the Frears, however, he denies that he was ever served with legal pleadings for them. (CP 11:3 – 9.) Furthermore, the record is wholly uncontested that Mr. Nolan did not live with the Frears in 2011. (CP 10 – 23.) Mr. Nolan was not a “roommate” or, more precisely, a resident at the Frears’ abode. *Id.* Mr. Nolan filed an uncontroverted declaration stating that he regularly visited the Frears but did not live with them, and that he was never served with any pleadings for the Frears. *Id.* In support of his declaration testimony, Mr. Nolan submitted copies of official Washington State and IRS tax documents and correspondence, all corroborating his testimony

that his address in and around 2011 was not at the Frear's residence. *Id.*

Mr. Nolan also submitted a copy of his Washington State identification that was issued in 2013. (CP 23.) Tellingly, while the declaration of service claims that the person served is 5'9", Mr. Nolan's declaration, corroborated by his state identification, shows that he is 6'4". *Id.*

On October 10, 2017, the Frears obtained an order to show cause why default judgment should not be vacated. (CP 32 – 33.) The Frears also filed a motion to vacate the default judgment, along with supporting declarations and a memorandum of law. (CP 5 – 27.) The Frears and Mr. Nolan appeared at the hearing on the Frear's Motion to Vacate Default Judgment so that the Court could observe the discrepancy in the physical description.

After Defendants filed their motion to vacate the default judgment due to the lack of service of the summons and complaint, and more than six years after the service was originally alleged to have occurred, Stanley Rhodes, the process

server, filed a supplemental declaration. (CP 80 – 81.) In his opposition declaration, he retracts the allegation in his original declaration that he served Dave Nolan. *Id.* Instead, he suggests that he “believe[s] I did in fact serve Mr. Frear himself”. (CP 81:1 – 5.) His belief, however, is not based on any memory of serving Mr. Frear but on a comparison of the very general description contained in his original declaration of service with a recent observation of Mr. Frear. *Id.* Mr. Rhodes only testified as to his belief, stopping short of offering any sworn testimony that Mr. Frear was in fact served. *Id.* Mr. Rhodes did not claim any recollection or personal knowledge that he, in fact served Mr. Frear with process. *Id.* Nothing contained in Mr. Rhodes’ supplemental declaration cures the defect in the original declaration that he did not serve Mr. Nolan. *Id.*

After reviewing Mr. Rhodes’ speculative declaration, Mr. Frear filed a second sworn declaration reiterating that he was not personally served and, to the extent that Mr. Rhodes is attempting to swear that he served Mr. Frear, that testimony is false. (CP

88:19 – 89:3 – 8.) Mr. Frear’s declaration directly refutes Mr. Rhodes’ six-and-a-half-year delayed guess about who he served, if he served anyone. *Id.* Mr. Frear’s credibility is unimpeachable. *Id.*

On November 6, 2017, the court held oral argument on the motion to vacate, and Judge Price made oral finding and conclusions. (Judge’s Ruling Tr.) The Court denied the Frears’ motion to vacate. (CP 113.) EGP then moved for an award of attorney’s fees pursuant to a contract. (CP 119 – 123.) The Frears argued that EGP was not entitled to an award of fees and costs because it obtained the judgment while operating illegally as an unlicensed collection agency in Washington, in violation of RCW 19.16.250, which carries additional penalties under RCW 19.16.450. (CP 220:2 – 222:3.) The court entered judgment in favor of EGP for all requested attorney’s fees. (CP 371 – 373.) Defendants timely appealed both rulings. (CP 115 – 118.)

IV. ARGUMENT

A. Standard of Review

“First and basic to any litigation is jurisdiction, and first and basic to jurisdiction is service of process.” *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229, 1233 (1997) citing: *Scott v. Goldman*, 82 Wash.App. 1, 6, 917 P.2d 131, review denied, 130 Wash.2d 1004, 925 P.2d 989 (1996). “When a court lacks in personum jurisdiction over a party, any judgment entered against that party is void.” *Id* citing *Scott* at 6, 917 P.2d 131. “Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo.” *Id.* citing *Scott* at 6, 917 P.2d 131; *Allstate Ins. Co. v. Khani*, 75 Wash.App. 317, 323, 877 P.2d 724 (1994); *Brickum Inv. Co. v. Vernham Corp.*, 46 Wash.App. 517, 520, 731 P.2d 533 (1987). *See also: Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 585 (2010).

“Whether service of process was proper is a question of law that this court reviews de novo.” *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408,412, 236 P.3d 986 (2010); *accord Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014); *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007) (“This court reviews de novo the trial court's denial of a motion to vacate a final order for lack of jurisdiction.”). Here, this Court applies the de novo standard when analyzing whether the trial court erred in failing to vacate the default judgment where EGP failed to serve the Frears with a summons and complaint.

B. The trial court erred in applying equitable principles in its decision to deny vacating a void judgment.

The trial court erroneously ruled that the Frears’ motion to vacate was untimely because it was not “brought within one year after judgment was taken[]” (Judge’s Ruling Tr. at 6:18 – 19, 11:4 – 5.) and by further relying on the doctrine of laches to support its refusal to vacate the judgment.

Where a court lacks personal jurisdiction, a default judgment must be set aside. CR 60(b)(5); *Leen v. Demopolis*, 62 Wn. App. 473, 478 (1991.); *Matter of Marriage of Leslie*, 112 Wn.2d 612, 620, 772 P.2d 1013, 1017 (1989) (“Respondent[‘s] laches claim is without merit in this case because the void portion of the original decree can be attacked at any time.”) *Matter of Marriage of Leslie*, 112 Wn.2d 612, 619, 772 P.2d 1013, 1017 (1989) (“Petitioner Leslie has not waived his right to challenge the default dissolution decree merely because of time lapse or because he may have complied with other of its provisions which were inconsistent with the relief originally sought.”)

A motion to vacate under CR 60(b)(5) “may be brought at any time” after entry of judgment.² *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323 – 24, 877 P.2d 724, 727 – 28 (1994) (*citing*:

² It seems likely that the trial court confused the standard for vacating a void judgment with a motion to vacate for reasons unrelated to jurisdiction. Equity and application of the test set forth in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968) would be appropriate for the court to consider if there was jurisdiction to enter the judgment. Since it seems that no published Washington appellate case has distinguished *White* from cases where personal or subject matter jurisdiction are invoked, Appellants urge this Court to take this opportunity to do so.

Lindgren v. Lindgren, 58 Wash.App. 588, 596, 794 P.2d 526 (1990), *review denied*, 116 Wash.2d 1009, 805 P.2d 813 (1991); *see also Brenner v. Port of Bellingham*, 53 Wash.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)”). “Void judgments may be vacated regardless of the lapse of time.” *Id* (citing: *In re Marriage of Leslie*, 112 Wash.2d 612, 618–19, 772 P.2d 1013 (1989)). “Consequently, **not even the doctrine of laches bars a party from attacking a void judgment.**” *Id* (citing: *Leslie*, 112 Wash.2d at 619–20, 772 P.2d 1013.) (emphasis added) When a court lacks jurisdiction over a defendant, any judgment it enters is entirely null and void, and must be vacated by the court when the lack of jurisdiction comes to light. *Allied Fid. Ins. Co. v. Ruth*, 57 Wn. App. 783, 790, 790 P.2d 206 (1990). As the Washington Supreme Court has explained:

A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has not jurisdiction. If it does

not have jurisdiction, any judgment entered is void ab initio and is, in legal effect, no judgment at all. Jurisdiction should not be sustained upon the doctrine of estoppel....

Wesley v. Schneckloth, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959).

Similarly, Division II has explained that “a void judgment is always subject to collateral attack” and is **not subject to a plaintiff’s equitable defenses** to vacating the judgment. *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 449, 874 P.2d 182 (1994) (emphasis added). As the court in that case further explained:

A judgment is considered void as opposed to merely erroneous when “the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved”. A void judgment must be vacated whenever the lack of jurisdiction comes to light.

In addition to erroneously holding that the Frears were required to file their motion to vacate within one year, in direct conflict with the holding of *Leslie*, 112 Wn.2d 612, the trial court

also specifically relied on the equitable principal of Laches in denying the motion. (Judge’s Ruling Tr. at 8:1 – 2.) The court even went so far as to imply that it is a defendant’s obligation to routinely check their credit reports to find out if a judgment has been entered against them illegally and without notice. (*Id* at 8:9 – 17.) Because the judgment is void, Washington law is abundantly clear that it must be vacated, regardless of the passage of time.

C. The Frears were not served.

In denying the Frear’s motion, the trial court found that it was the Frear’s burden to prove, based on the standard of clear and convincing evidence, that they had not been properly served. (Judge’s Ruling Tr. at 7:3 – 9.) The court's finding that the Frear’s evidence was insufficient is contrary to the evidence in the record.

The review of the trial court's finding with regard to service of process is whether the record shows “clear and convincing” evidence of improper service. *Leen v. Demopolis*,

62 Wn. App. 473, 478, 815 P.2d 269 (1991). Clear and convincing means that the truth of the facts asserted is “highly probable.” *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 126-27, 615 P.2d 1279 (1980); *In re Dependency of P.A.D.*, 58 Wn. App. 18, 25, 792 P.2d 159 (1990).

“**Proper** service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void.” *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988) (emphasis added). Proper service requires either service upon the defendant personally or substitute service, which involves “leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.” RCW 4.28.080(16), *quoted in Scanlan*, 181 Wn.2d at 847; *see also Lepeska v. Farley*, 67 Wn. App. 548, 551, 833 P.2d 437 (1992) (“In personum jurisdiction over resident individuals is obtained either by serving the defendant personally or by substitute service....”).

The record shows clear and convincing evidence that no summons and complaint were delivered to the Frears personally, or by substitute service on a resident of their abode. The record is supported with indisputable evidence that Mr. Nolan was not served, that he did not reside with the Frears, and that the Frears never received the summons and complaint before default judgment was entered.

EGP's summons and complaint were not left with Mr. or Mrs. Frear. (CP 79.) The proof of service provided by EGP states that the process server served the documents "[b]y then and there, at the residence and usual place of abode of said person, delivering 2 true and correct copies thereof, into the hands of, and leaving the same with, Dave Nolan, roommate, a person of reasonable age and discretion, then resident therein." *Id.* That is, according to the process server's own declaration, the process server did not personally serve either of the Frears, but instead served a man named Dave Nolan, whom the process server assumed was the Frears' "roommate". *Id.*

Delivery of the documents to Mr. Nolan is problematic for two reasons. First and foremost, it simply did not happen. Mr. Nolan filed a sworn declaration stating that “[he] was never served with any papers.” (CP 11:8 – 9.) “Because I never received any papers, as is alleged in the Declaration of Service, I did not give any documents to the Defendants.” (CP 11:10 – 11.) Also, the description of the person who was allegedly served does not match Mr. Nolan’s description. (CP 23.) Mr. Nolan is six-foot-four, while the description of the person served is a height of five-foot-nine. (*Id.*, CP 11:12 – 14.) Second, even if Mr. Nolan had been served with the pleadings, service would not be effective because he was not a resident therein. (CP 10 – 23.)

In addition to his sworn testimony that he did not live with the Frears at the time of service, Mr. Nolan provided copies of his 2010 and 2011 state unemployment filings, a 2010 IRS letter, 2010 and 2011 W-2 tax forms, his 2010 tuition statement form, and his Washington State ID, all of which show his residence at the time of alleged service was not at the Frears’ residence.

(CP10 – 23.) His declaration further establishes the location of his actual residence at the time of service. *Id.* The record is wholly uncontroverted that Mr. Nolan was not a resident at the Frears' home. *Id.*

The Frears each submitted two declarations stating they never received the documents from Mr. Nolan or anyone else, prior to entry of the default judgment. (CP 24 – 27, 88 – 92.) The Frears also swore that Mr. Nolan was not their roommate. *Id.* There is absolutely no evidence in the record that contradicts the Frear's assertion that they were not served, and there is absolutely no evidence in the record that Mr. Nolan was a resident in the Frears' abode.

It is interesting to note that the declaration of service does not state how the process server arrived at the conclusion that Mr. Nolan was the Frears' roommate. (CP 79.) Mr. Rhodes' declaration does not claim that Mr. Nolan told Mr. Rhodes that he was a roommate or that he independently verified the information. *Id.* In his supplemental declaration, the process

server speculates that Mr. Frear may have been served, but he does not claim that he recalls serving Mr. Frear or state definitively that he did so. (CP 80 – 81.) It is clear from his declaration, however, that the process server now realizes and admits that his original declaration of service is incorrect. *Id.*

“A plaintiff has the initial burden to produce an affidavit of service that on its face shows that service was properly carried out.” *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 672, 292 P.3d 128, 131 (2012). “If the plaintiff makes this showing, the burden then shifts to the defendant to prove by clear and convincing evidence that service was improper.” *Id.* In this case, EGP’s otherwise facially valid affidavit of service is undermined by the fact that the process server admits that it is not correct. (CP 80 – 81). It defies logic that the trial court would consider an affidavit of service to be facially valid when the process server himself recants the veracity of the affidavit. *Id.* Even ignoring the clear evidence that the Frears were not served, once the process server admitted that he now believes the

affidavit of service is incorrect, the burden is surely back on the plaintiff to prove that service was properly carried out. EGP did not and cannot do so.

Nevertheless, the trial court, in considering the facts pertaining to the question of proper service, held “that the defendants have failed to demonstrate, by clear and convincing evidence, that service of process, approximately six and a half years ago, was defective, or that there is otherwise a basis pursuant to CR 60 to set aside this judgment.” (Judge’s Ruling Tr. at 11:15 – 19.) At the end of the hearing on Defendants’ motion to vacate, Defendant’s counsel attempted to clarify what facts related to service the court relied on as its basis to deny the motion to vacate:

Mr. Miller: . . . [I]s the Court making any finding of fact about who was served, if anyone?

(Judge’s Ruling Tr. at 12:9 – 10.)

Court: No. I’ll make a finding that there was service.

(*Id* at 11-12.)

Mr. Miller: Are you thinking Mr. Nolan was served or somebody else or are you...[cut off by the court]

(*Id* at 16-17.)

Court: I don't need to go there, Counsel.

(*Id* at 18.)

While Mr. Rhodes may have given a summons and complaint to someone, that fact alone is not sufficient to confer personal jurisdiction. See RCW 4.28.080. Proper (legally effective) service in Washington requires specific notice to specific individuals. *Id.* Although the burden is on EGP to establish that valid service of process on the Frears occurred in 2011, the record is beyond clear and convincing that Mr. Nolan was not served, Mr. Nolan was not a resident in the Frears' abode, and the Frears were never personally served with the summons and complaint. (CP 10 – 23, 24 – 27, 88 – 90.)

D. The trial court's determination as to proper service was inconsistent with Washington case law.

There is a great deal of Washington case law on proper service generally and the “usual abode” standard specifically.

The trial court's determination was completely inconsistent with this authority. Simply finding that “there was service” is not adequate. (Judge’s Ruling Tr. at 12:11 – 12.) Indeed, there are a remarkable number of cases directly on point, in which this Division of the Court of Appeals reversed an order denying a motion to vacate or dismiss based on improper service under circumstances comparable to or more dubitable than the Frears’ situation. *e.g.*, *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 674 P.2d 1271 (1984); *Lepeska v. Farley*, 67 Wn. App. 548, 833 P.2d 437 (1992); *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010).

The plaintiff in *Mid-City Materials* sued operators of a family business, including a married couple and their son and daughter-in-law. *Mid-City Materials*, 36 Wn. App. at 482. The couple moved to vacate based on lack of personal jurisdiction, as they had been served by substitute service on their son, at the son's address. *Id.* at 482, 484. The evidence consisted of an

affidavit of the father and an affidavit of the daughter-in-law, attesting that the parents were never served and had no notice of the action. *Id.* at 482-83. The trial court denied the motion. *Id.* at 483. Division I overturned the denial, explaining that although the “plaintiff apparently thought it had obtained jurisdiction over the parents” by means of “residence service on the parents at their son's residence in Federal Way,” the record showed that “at all times herein the parents did not reside with their son in Federal Way but resided in Kent.” *Id.* at 484. The court concluded that the “attempted service on the parents was, therefore, invalid for any purpose.” *Id.* Like the parents in *Mid-City Materials*, the Frears did not reside at the same address as Mr. Nolan on the date of service. Unlike *Mid-City Materials*, Mr. Nolan denies that he was ever served with the pleadings.

The plaintiff in *Lepeska* served a summons and complaint on the defendant's mother at her residence, which was the residence address that the defendant had provided to a police officer investigating the matter. 67 Wn. App. at 549. The trial

court denied a motion to vacate based on improper service. *Id.* at 550. Division I reversed, finding that the defendant was not living with his mother at the time of service (and that it did not matter whether he had lived there previously). *Id.* at 551, 554. The court's finding was based entirely on the defendant's affidavit, which stated that “he did not live with his parents, but maintained his own household in Burien.” *Id.* at 551. Here, as in *Lepeska*, the Frears, plus Mr. Nolan, attested with supporting documentation that Mr. Nolan was not living at the Frears’ residence.

In *Streeter-Dybdahl*, the plaintiff made service on the defendant's former residence. 157 Wn. App. at 410-11. Although the defendant's brother lived at the house and even gathered mail there to pass along to the defendant, this Division ruled that it was not her usual abode and that the trial court had erred in denying her motion to dismiss. *Id.* at 412-15. It did so based on the statements of the defendant and her brother, as well as property records showing she had bought her new home before

the date of service. *Id.* at 411-12. As in *Streeter-Dybdahl*, the Frears and Mr. Nolan provided declarations and supporting documents showing that Mr. Nolan was not a resident at the Frears' abode on the date of service.

In its oral ruling on Plaintiff's motion for fees, the trial court brought up an appeal from a case previously heard by the trial court judge. (Judge's Ruling Tr. at 37:14 – 23.) The trial court equated the facts in the unpublished case of *Collection Grp., LLC v. Cook*, 186 Wn. App. 1048 (2015)³ with the facts in this case. In *Cook*, however, the defendant's primary claim was that the affidavit of service was defective because it failed to state that the service address was the defendant's usual abode. *Id.* The process server shored up the deficiency with a supplemental affidavit. *Id.* Additionally, the defendant failed to produce any documentary evidence of his claimed residence at the time of service and "the factual discrepancies in Ms. Mortensen's and

³ This case is not being cited for its authority or persuasive value. Rather it is mentioned only because the trial court improperly equated the facts in that case with the case at bar and relied on this Court's ruling in that case as a foundation for denying the Frears' motion and awarding fees to EGP.

Mr. Cook's declarations that Mr. Deissner [their attorney] was required to concede reflect negatively on both witnesses' credibility." *Id.*

Unlike in *Cook*, in this case, the witnesses' declarations are well supported, Mr. Nolan provided his actual address at the time of service, and the process server recanted and cannot competently testify regarding who was served, if anyone. In short, the facts of this case are substantially and materially different than *Cook*.

These are only a few examples, but Washington jurisprudence is replete with cases finding ineffective service, under similar circumstances. *e.g.*, *Vukich v. Anderson*, 97 Wn. App. 684, 985 P.2d 952 (1999) (reversing trial court's denial of motion to vacate default judgment, where service was made to defendant's tenant, at a home defendant owned but did not live in); *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439 (1997) (upholding dismissal when service was made to defendant's son-in-law, at a house that defendant owned and that

was defendant's address of voter registration and tax registration, but where defendant no longer lived); *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938) (finding default decree void where plaintiff served defendants' daughter-in-law in defendants' hotel room, because hotel room was not defendants' usual abode); *Wilbert v. Day*, 83 Wash. 390, 145 P. 446 (1915) (reversing default judgment because plaintiff served defendant's wife at a house where she was temporarily living while their child received medical treatment, but where defendant did not live).

In contrast, cases in which courts have found substitute service proper have invariably relied on special circumstances not present here. For example, in *Scanlan v. Townsend*, 181 Wn.2d 838, 840, 336 P.3d 1155, 1156 (2014), the defendant received summons via “secondhand” service through his father. In *State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60, 65-66, 7 P.3d 818 (2011), the state proved that the defendant regularly sent and received mail at the address of service and used it as his

primary address. In *Sheldon v. Fetting*, 129 Wn.2d 601, 604, 919 P.2d 1209 (1996), where the defendant registered her vehicle, registered to vote, and had her mail delivered all to her parent's house, as well as spending considerable time there, the court found that the parents' home constituted a second place of abode. The Washington Supreme Court has noted that *Sheldon* marks "the outer boundaries" of RCW 4.28.080(16), suggesting that a defendant with less connection to the place of service than the one in *Sheldon* cannot be found to have his abode there. *Salts v. Estes*, 133 Wn.2d 160, 166, 943 P.2d 275 (1997).

Even assuming for purposes of argument that Mr. Nolan was given copies of the Frears' summons and complaint, service on a visiting non-resident who has his own distinct abode cannot constitute legal service of process. (CP 10-11), RCW 4.28.080. Holding otherwise in this case would drastically and impermissibly expand the "outer boundary" of the term "then resident therein". *Salts* at 278, 166. Based on prevailing Washington case law and the record, the trial court's finding that

the Frears did not provide clear and convincing evidence of improper service, and to the extent that the court would hold that substitute service was effected by serving Mr. Nolan, was clear error. The trial court did not have personal jurisdiction over the Frears when it entered a default judgment against them on July 25, 2011. Thus, the judgment is void and must be vacated.

E. RCW 19.16.450 precludes EGP from collecting any attorney's fees or costs.

EGP cannot dispute that it is a collection agency, which is regulated by the Washington Collection Agency Act ("WCAA" (RCW 19.16, et seq.). EGP has been licensed by the state of Washington as a collection agency since August 2013. (CP 219.) The term "collection agency" is broadly defined and includes "Debt Buyers who purchase delinquent or charged off debt for collection purposes." RCW 19.16.100(4)(a); *See also: Gray v. Suttell and Assocs.*, 181 Wn.2d 329, 334, 334 P.3d 14 (2014) (clarifying that debt buyers such as EGP have always been "collection agencies" as defined by 19.16.100(4)(a), even prior

to the statutory amendment which specifically included them). Accordingly, debt buyers such as EGP are collection agencies, and must be licensed to collect claims in Washington State. RCW 19.16.110.

The collection action against the Frears was commenced by EGP in 2011, more than two years prior to the date that it obtained its collection agency license. It is a violation of the WCAA's prohibited practices section (RCW 19.16.250(1)) for any collection agency to "[d]irectly or indirectly aid or abet any unlicensed person to engage in business as a collection agency in this state or receive compensation from such unlicensed person". RCW 19.16.250(1). Since EGP operated as a collection agency without a license violates the WCAA when attempting to collect from the Frears, it clearly violated RCW 19.16.250(1).

Once a violation of RCW 19.16.250 occurs, the WCAA automatically imposes an additional penalty:

If an act or practice in violation of RCW 19.16.250 is committed by a licensee or an employee of a licensee in the collection of a

claim, neither the licensee, the customer of the licensee, nor any other person who may thereafter legally seek to collect on such claim shall ever be allowed to recover any interest, service charge, attorneys' fees, collection costs, delinquency charge, or any other fees or charges otherwise legally chargeable to the debtor on such claim . . .

RCW 19.16.450.

Giving the statute its plain meaning, the RCW 19.16.450 penalty takes effect as soon as the violation “is committed”. “If a statute's meaning is plain on its face, we must give effect to that plain meaning as an expression of legislative intent.” *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 627, 278 P.3d 173, 177 (2012) (internal quotations omitted). Therefore, because EGP violated the WCAA, EGP was not and is not entitled to any award of fees and costs, nor may it ever attempt to collect any amount above the principal amount of the claim.

EGP argued, and the trial court agreed, that the WCAA penalty “is not properly before the Court”. (CP 234:12 –235:7; Hr’g Tr. 35:4.) This is so, they say, because “Defendants never

asserted a WCAA claim in this case as a counterclaim, nor have the Defendants asserted any such claim against the Plaintiff in a separate lawsuit”. (CP 234:17 – 19.) This reasoning flies in the face of the statute’s plain meaning and the WCAA’s purpose of protecting consumers.

"Section .450 does not explicitly require a judicial or agency finding and may apply automatically or be raised as an affirmative defense in a collection action." *Washington Consumer Protection Deskbook* 48 (1st ed. 2017). In this case, the RCW 19.16.450 penalty applied as soon as the unlicensed EGP undertook to collect a claim from the Frears. 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). There is nothing in the WCAA providing that RCW 19.16.450 no longer applies to a collection agency if there is a judgment

against the consumer. Moreover, nothing in the WCAA prevents a party from asserting the existence of a WCAA violation when the collection agency seeks additional unlawful fees.

There is only one published Washington appellate case that mentions RCW 19.16.450. In *Streng v. Clarke*, 89 Wn.2d 23, 56 P.2d 60 (1977)(En Banc), “[d]uring the trial it developed that the respondent had indeed violated certain provisions of the Collection Agency Act”. *Id* at 25. “[A]cting pursuant to RCW 19.16.450, the court properly refused to award respondent any sum for court costs, collection costs, attorney's fees, or other costs, or interest.” *Id* at 25. Although it is unclear exactly how the WCAA violation “developed”, there is no indication that the violation was raised by way of counterclaim. It was not raised in a separate lawsuit. The Washington Supreme Court’s interpretation of RCW 19.16.450 in the *Streng* decision therefore contradicts the trial court’s and EGP’s assertion that the violation must be raised as a counterclaim or in a separate lawsuit. The plain language of the statute and the only published

Washington case analyzing it mandate that a WCAA violation and application of the additional penalty can be raised at any time, even in the context of a supplemental fee petition. The trial court erred in awarding attorney's fees and costs to EGP.

Appellants' Attorney's Fees and Costs

A request for appellate attorney fees requires a party to include a separate section in his or her brief devoted to the request. RAP 18.1(b). This requirement is mandatory. *Phillips Bldg. Co. v. An*, 81 Wash.App. 696, 705, 915 P.2d 1146 (1996). This rule requires "more than a bald request for attorney fees on appeal." *Thweatt v. Homme*, 67 Wash.App. 135, 148, 834 P.2d 1058 (1992).

Appellants Frear request attorney's fees and costs pursuant to RCW 4.84.290, that allows for fee on appeal pursuant to RCW 4.84.250, .270 (actions under \$10,000). *Kingston Lumber Supply Co. v. High Tech Dev. Inc.*, 52 Wash. App. 864, 868, 765 P.2d 27,29-30 (1988).

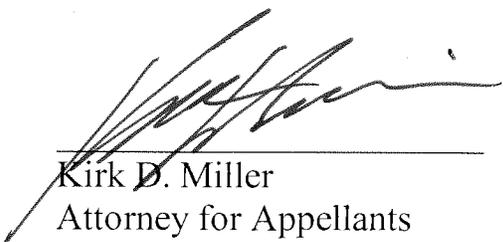
Additionally, Defendants are entitled to an award of fees and costs for pursuant to RCW 4.84.330. A contractual attorney fee clause will support an award of attorney fees to the prevailing party on appeal in an action on the contract. *Transpac Development, Inc. v. Oh*, 132 Wn.App. 212 (2006). The contract advanced by EGP as binding on the parties included an attorney fee clause, which is bilateral under Washington law.

Finally, the Frears are entitled to an award of reasonable fees and costs pursuant to RCW 6.27.230. “Where the answer is controverted, the costs of the proceeding, including a reasonable compensation for attorney's fees, shall be awarded to the prevailing party: PROVIDED, That no costs or attorney's fees in such contest shall be taxable to the defendant in the event of a controversion by the plaintiff.” *Id.* A Court of Appeals has power to award attorney fees in controversion appeals. *Caplan v. Sullivan*, 37 Wn. App. 289, 295, 679 P.2d 949, 953 (1984).

V. CONCLUSION

EGP failed to serve the Frears with a summons and complaint in the state-court action. The default judgment against them is therefore void and must be vacated. The Frears now pray for this Court to (1) set aside and vacate the default judgment as void for lack of jurisdiction, (2) quash the defective service of process, (3) quash all writs of garnishment entered pursuant to the void judgment, and (4) vacate the award of attorney's fees and costs to EGP, and (5) award the Frears their attorney fees and costs incurred in the trial court and on appeal.

Respectfully submitted this 4th day of May, 2018.



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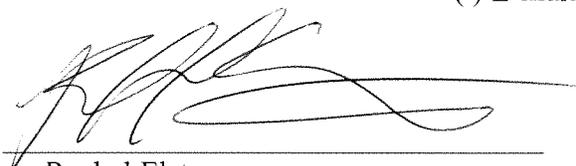
CERTIFICATE OF SERVICE

I certify that on the 4th day of May, 2018, I caused a true and correct copy of this Appellants' Brief to be served on the following in the manner indicated below:

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