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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

CONCORD CONCRETE PUMPS, INC.,

Appellant/Defendant,

v.

RALPH'S CONCRETE PUMPING, INC.,

Respondent/Plaintiff.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE PALMER ROBINSON
King County Superior Court No. 08-2-02714-7 SEA

BRIEF OF RESPONDENT/PLAINTIFF
RALPH'S CONCRETE PUMPING, INC.

THE DINCES LAW FIRM

Geoffrey P. Knudsen, WSBA #1324
Franklin G. Dinces, WSBA #13473
316 Occidental Avenue South, Suite 500
Seattle, WA 98104
Telephone: 206-464-7335

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I. INTRODUCTION

Plaintiff Ralph's Concrete Pumping, Inc. ("Ralph's") commenced this action against Defendant Concord Concrete Pumping Inc. ("Concord") by filing its complaint on January 11, 2008. The complaint alleged that Concord is a foreign corporation doing business in Washington, although not qualified to do so. Personal jurisdiction over a party is a function of the party's activities within or directed at the forum state. Concord had the requisite "minimum contacts" so that the assumption of jurisdiction over it does not offend traditional notions of fair play and substantial justice.

Service of process is the method by which a defendant otherwise subject to the court's jurisdiction receives notice that an action has been instituted against it. Concord is a foreign corporation not found within Washington. It is therefore not subject to service of process within Washington. Under RCW 2.04.190, the Supreme Court has the power "to prescribe the mode and manner ... of giving notice and serving writs and process of all kinds...." The Supreme Court exercised that power by adopting CR 4(i) with respect to "service upon a party not inhabitant or found within the state" and "to be effected upon the party in a foreign country...."

Concord was served with the summons and complaint in British Columbia, Canada as provided in CR 4(i). Concord had actual notice of the

action against it. Rather than respond to the complaint and defend the action, Concord chose to ignore it. As Ralph's proceeded through the steps of moving for entry of Concord's default and then moving for entry of judgment against Concord, Concord was provided with additional notice and opportunities to respond to the action. Concord chose to ignore them all. It is respectfully submitted that there is no basis for this Court to set aside the trial court's judgment.

II. STATEMENT OF ISSUES

1. Whether the service of process on Concord was sufficient?

Subsidiary to said issue are the following:

- a. Whether the record reflects a prima facie showing that Concord was subject to the jurisdiction of the State of Washington through doing business in the State of Washington in a substantial and continuous manner and/or purposefully availing itself of the State of Washington with respect to its solicitation, sale and delivery of a concrete pump to Ralph's?

- b. Whether the manners of service set forth in CR 4(i)(1) are valid methods of service on a party not an inhabitant of or found within the state when service is to be effected in a foreign country?

c. Whether service was effected on Concord as provided in CR 4(i)(1)?

2. Whether attorneys' fees are recoverable when service is pursuant to CR 4(i)?

III. STATEMENT OF THE CASE

A. The Transaction Underlying Ralph's Claim

This matter arises out of Concord's agreement to sell a 2007 32 meter Concord concrete pump, Model 3CCP-32Z5-170 on a 2007 Mack truck, Model MR 688S to Ralph's. The agreement was the result of Don Carlson, Concord's sales representative for Washington, soliciting the purchase at Ralph's. CP at 135 and 138-139. Unfortunately, rather than the 2007 32 meter Concord concrete pump on a 2007 Mack truck specified in the agreement, Concord delivered a 2006 32 meter Concord concrete pump on a 2006 Mack truck instead. CP at 139. This pump and truck were a year older and worth significantly less than the 2007 models ordered by Ralph's and for which it paid. CP at 136. This action ensued.

B. Service Of Concord

Concord is a foreign corporation, does not have offices, has not designated a registered agent to accept service and is not found in Washington. CP at 39-40. Concord was served with the summons and complaint for the action on February 13, 2008 as provided in CR 4(i)(1) by

mail requiring a signed receipt addressed to Concord at its business address in British Columbia. Proof of this mailing was on file in the trial court in the form of the Declaration of Geoffrey P. Knudsen dated May 7, 2008 and Exhibit A thereto.¹ CP at 9 and 10-12. A representative of Concord acknowledged actual receipt of the summons and complaint by signing the U.S. Postal Global Express International delivery receipt.² CP at 11.

C. Motion For Default

Concord did not respond to the complaint and did not file any responsive pleading. On May 7, 2008, twelve weeks after Concord was served, Ralph's moved for an Order of Default (CP at 7-12). Although Concord was served with the Motion for Order of Default (CP at 5-6), Concord did not file any response to the motion. The Court entered its Order Granting Motion for Default on May 21, 2008. CP at 13-15. On June 18, 2008, after the Order Granting Motion for Default was entered, counsel

¹ Exhibit A is a true and correct copy of the U.S. Postal Global Express International Delivery Federal Express mailing information and signed receipt establishing that the summons and complaint and other documents were received by defendant Concord Concrete Pumps Inc. on February 13, 2008.

² Concord also acknowledged Ralph's claim by a letter dated March 6, 2008 entitled "Without Prejudice" faxed to Ralph's counsel on March 7, 2008. CP at 130. Ralph's counsel treated this letter as an appearance that would require notice to Concord if Ralph's moved for entry of an order of default. Finally, Mr. Flores acknowledged actual receipt by attaching a copy of the cover letter for the summons and complaint as Exhibit A to his declaration in support of the motion to vacate the judgment and set aside the default. CP at 40 and 42-43. He could not have done so without Concord actually having received the letter.

for Ralph's advised Concord by fax that the Court had entered an Order Granting Motion for Default with a copy attached and that Ralph's would be seeking entry of a default judgment for its damages. CP at 130-133. Concord did nothing in response to the fax notice.

D. Motion For Default Judgment

On August 21, 2008, more than two months after Concord was advised that the Court entered its Order Granting Motion for Default, Ralph's filed its Motion for Default Judgment. CP at 16-19. The Court entered a Default Judgment against Concord and in favor of Ralph's on October 2, 2008. CP at 24-26.

E. Concord's Motion To Vacate Judgment

Finally, on February 10, 2009, after Ralph's took steps to enforce its rights under the Court's judgment by filing an action to enforce the judgment and attaching some of Concord's property located in Nevada, Concord decided that it should no longer ignore the action and moved to vacate the judgment and set aside its default. CP at 27-38. The trial court denied Concord's motion by Order dated March 31, 2009. CP at 154-156. Concord filed its Notice of Appeal on April 7, 2009. CP at 157-162.

F. Concord's Activities In Washington

At the time of the transaction at issue herein and for several years

prior, Concord has been directing its sale activities toward Washington through both its employees and agents it compensates. This has resulted in estimated sales for Concord of approximately \$ 4,000,000. CP at 77. Concord has its employees regularly make sales calls in Washington, maintains a regular and continuous relationship with Western Concrete Pumping (another Washington customer of Concord's??) and has ongoing business relationships with other Washington customers who purchased Concord pumps based on what Concord currently describes as its "industry leading One-Five Year warranty." CP at 77. Moreover, Concord actually had its employees show the pump that Ralph's traded in as part of the underlying sale transaction with Concord for sale while it was stored in the State of Washington. CP at 78.

IV. STANDARD OF REVIEW

The facts related to service of the summons and complaint are not in dispute and therefore this Court reviews the adequacy of service *de novo* as a question of law. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992). The facts providing the basis for personal jurisdiction over Concord are in dispute. The record for purposes of the trial court's consideration of whether Washington had a basis to assert personal jurisdiction over Concord included the allegations in the complaint and the declarations of Vance Gribble and Don Carlson. Only a prima facie showing of jurisdiction is

required and the allegations in the complaint must be taken as correct for purposes of appeal. *Lewis* at 670; *MBM Fisheries v. Bollinger Shipyard*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991).

V. ARGUMENT

A. Summary of Argument

Ralph's complaint alleged that Concord was doing business in the State of Washington, although not qualified to do so. CP at 2. The declarations of Don Carlson (CP 22-23 and 75-79) and Vance Gribble (CP 20-21 and 141-144) establish that Concord solicited business generally in the State of Washington on a regular and continuous basis and specifically with respect to the sale and delivery to Ralph's of the concrete pump at issue in the action. Ralph's met its burden of making a prima facie showing that Concord was subject to personal jurisdiction in Washington.

At bottom, Concord's argument is that the service that was effected upon Concord in accordance with CR 4(i) is invalid because there is no affidavit on file pursuant to RCW 4.28.185(4).³ Concord's entire argument that such an affidavit was required simply ignores the language of RCW 4.28.185(6) that specifically provides that personal service is permissive, not mandatory, and that "[n]othing herein contained limits or

³ None of the cases cited by Concord address the issue of whether the affidavit requirement of RCW 4.28.185(4) must be met if service is effected pursuant to CR 4(i).

affects the right to serve any process in any other manner now or hereafter provided by law.” CR 4(i) which provides for an alternative method of service on a party not an inhabitant or found within the state to be effected in a foreign country does not require the filing of an affidavit. RCW 4.28.185(5) is irrelevant by its own terms in that it only applies to personal service.⁴

B. Concord Has Requisite “Minimum Contacts” With Washington And The Assumption Of Jurisdiction Over It Does Not Offend Notions Of Fair Play And Substantial Justice

1. General Jurisdiction Under RCW 4.28.180

Concord was alleged in the complaint to be doing business in the State of Washington and Concord was in fact doing business in the State of Washington. That simple fact, which provides a constitutional basis for Washington to assert jurisdiction over Concord (*see*, RCW 4.28.080(10)), was not denied by Isidro Flores, Concord’s President/Owner and CEO.⁵ Nor could it be. From approximately March 2003 to November 2007, Don Carlson whom Mr. Flores identified as an “independent concrete pump broker” who solicited the sale, sold and delivered the concrete pump to Ralph’s that is in issue herein (CP at 41), regularly solicited business on

⁴ It is also irrelevant because the Court Rules are given precedence in the event of a conflict with a statute by RCW 2.04.200.

⁵ The Flores Declaration carefully recites that Concord is not registered to do business in the State of Washington, that it has no registered agent for service of process in Washington and that it does not maintain any permanent presence within Washington. CP at 40. While these statements serve to establish that Concord cannot be served in Washington, they do not establish that Concord is not doing business within Washington.

behalf of Concord with other Washington residents. *See*, CP at 76-77. Moreover, Concord's employees solicited business and met potential customers and Concord stored property in the State of Washington. *See*, CP 77-78.⁶

2. Jurisdiction Under RCW 4.28.185

Under the long-arm statute, a Washington court may exercise personal jurisdiction over a foreign entity, either for transaction of business in this state or commission of a tortious act in this state when: (1) the non-resident defendant purposefully commits some action or consummates some transaction in the forum state; (2) the cause of action arises from, or is connected with such act or transaction; and (3) the assumption of jurisdiction by the forum state does not offend traditional notions of fair play and substantial justice. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78 (1989).

a. Concord Has Purposely Availed Itself Of The State Of Washington

Purposeful availment may be established by a defendant's act of doing business in Washington. RCW 4.28.185(1)(a); *Burger King v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S.Ct. 2174 (1985). When out of

⁶ The physical presence of employees soliciting sales is a sufficient physical presence to constitute the "substantial nexus" required under the Commerce Clause to tax an out-of-state business as well as the "minimum contacts" necessary for in personam jurisdiction under the Due Process Clause. The Commerce Clause nexus standard for taxation purposes is higher than the Due Process Clause requirements for service of process. *See* generally *Quill Corp. v. North Dakota*, 504 U.S. 298, 307-309 112 S.Ct. 1904 (1992). Here, Concord's physical presence, even if temporary, is sufficient contact by itself to subject Concord to the State's jurisdiction for all purposes.

state defendants deliberately and purposefully seek contact with Washington residents for the purpose of increasing sales and profits, exploiting the state's potential market, or establishing an ongoing business relationship and thereby derived financial benefits from the market, the out of state defendant has satisfied the minimum contact requirement and purposefully availed itself to Washington State. *See, State v. Reader's Digest Ass'n.*, 81 Wn.2d 259, 501 P.2d 290 (1972); *Raymond v. Robinson*, 104 Wn. App. 627, 15 P.3d 697 (2001); *Bryon Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wn. App. 462 975 P.2d 555, review denied, 138 Wn.2d 1024, 989 P.2d 1136 (1999); *Handley v. Franchise Mktg. Serv. Inc.*, 9 Wn. App. 40, 510 P.2d 673 (1973).

This is exactly what Concord has done. *See*, CP at 76-78. Concord admits that Don Carlson solicited Ralph's business in connection with its agreement to purchase a Concord manufactured pump for \$350,000. *See*, CP at 41. The fact that Carlson was not an employee of Concord is of no consequence. First, Concord has had its employees physically present in the State of Washington. CP at 77-78. Second, the "independent contractor" label does not insulate Concord from personal jurisdiction.⁷

⁷ The "independent contractor" distinction relied upon by Concord has been explicitly rejected by the Washington Supreme Court in the context of determining due process "nexus" for taxing a foreign corporation (a due process requirement that arguably is more stringent than the due process requirement for exercising long-arm jurisdiction). In addressing the argument of Tyler Pipe Industries that its in-state sales representatives were independent contractors and therefore their activities should not be considered as due process "nexus," the Court cited the United States Supreme Court:

In *Crose v. Volkswagenwerk*, 88 Wn.2d 50, 558 P.2d 764 (1970), the Washington Supreme Court concluded that a foreign corporation which does not sell its products directly in the State is nevertheless “doing business” for purpose of personal jurisdiction when it competes in and derives income from the local market through distribution channels subject to its control. In reaching that conclusion, the Court adopted the reasoning of the California Supreme Court in *Buckeye Boiler Co. v. Superior Court*, 71 Cal.2d 893, 458 P.2d 57 (1969):

A manufacturer’s economic relationship with a state does not necessarily differ in substance, nor should its amenability to jurisdiction necessarily differ, depending upon whether it deals directly or indirectly with residents of the state....

A manufacturer whose products pass through the hands of one or more middlemen before reaching their ultimate users cannot disclaim responsibility for the total distribution pattern of the products. If the manufacturer sells its products in circumstances such that it knows or should reasonably anticipate that they will ultimately be resold in a particular state, it should be held to have purposefully availed itself of the market for its products in that state.

71 Cal.2d at 902.

The United States Supreme Court has indicated the characterization of an in-state sales representative as an “independent contractor” is without constitutional significance with regard to the nexus issue. *Scripto, Inc. v. Carson*, 362 U.S. 207, 4 L.Ed.2d 660, 80 S.Ct. 619 (1960).

Tyler Pipe v. Department of Revenue, 105 Wn.2d 318, 324, 715 P.2d 123 (1986).

⁹ The Court in *Raymond*, *supra*, held that the non-resident corporation created an ongoing business relationship by issuing a one year limited warranty because a warranty is an ongoing obligation. *Raymond*, 104 Wn. App. at 639. Concord created similar

According to Don Carlson, he initiated contact with Ralph's at Concord's specific suggestion. *See*, CP at 77-78. However, even if Ralph's initiated the transaction, it would not matter. A party who does not initiate the business contact is still subject to personal jurisdiction of Washington courts if a business relationship subsequently arises. *Sorb Oil Corp. v. Batalla Corp.*, 32 Wn. App. 296, 299, 647 P.2d 514 (1982). Although the party who initiated the initial contact has relevance to the issue of personal jurisdiction, it is not determinative: who first contacted who is less important than the resulting commercial connection. *Byron Nelson Co.*, 95 Wn. App. at 466. The court in *Sorb Oil Corp.* found that there were sufficient minimum contacts to assert personal jurisdiction over Batalla Corp., a Texas corporation, because (1) a business relationship arose between the parties,⁹ (2) the transaction was not de minimis, and (3) the protection of the legal interests of Washington residents is a legitimate state interest. *Id.* at 301. These same factors apply to the sale of Concord's \$350,000 pump to Ralph's.

b. Ralph's Claim Against Concord Would Not Exist But For Concord's Purposeful Conduct of Business in Washington With Ralph's

ongoing business relationships by its warranty to its Washington customers, including Ralph's. *See*, CP at 77.

Washington courts apply the “but for” test to determine whether a claim against a nonresident business arises from, or is connected with, its solicitation of business or purposeful conduct within the state. *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 719, 82 P.2d 1243 (1996). This factor is established if the events giving rise to the claim would not have occurred “but for” the purposeful conduct within this state. *Id.* If Concord did not (1) solicit in Washington Ralph’s business for the purchase of a 2007 pump, (2) enter into a sales contract in Washington for such a pump and thereafter (3) deliver in Washington a 2006 pump or (4) warrant the pump while in Washington, there would be no claim.

3. The Court’s Assumption of Jurisdiction Over Concord Does Not Offend Traditional Notions of Fair Play And Substantial Justice

When an out of state defendant purposefully seeks out Washington’s residents for business purposes and derives a financial gain from such activities, the exercise of personal jurisdiction over the out of state defendant comports with traditional notions of fair play and substantial justice. *See, Raymond*, 104 Wn. App. at 642-43; *Byron Nelson Co.*, 95 Wn. App. at 468; *Handley*, 9 Wn. App. at 49. Concord deliberately sought Ralph’s business by instructing Don Carlson to solicit Ralph’s business. Don Carlson’s solicitation resulted in an agreement by Ralph’s to purchase a concrete pump for \$350,000 from Concord. *See, CP* at 77-78. Having agreed to sell a 2007 model Concord pump and Mack

truck, Concord delivered a 2006 model Concord pump and Mack truck. Asserting personal jurisdiction over Concord for Ralph's claim comports with traditional notions of fair play and substantial justice because it is in the interests of the State to protect its resident from such unfair practices. *State v. Reader's Digest Ass'n Inc.*, 81 Wn. 2d at 278.

C. RCW 4.28.185 Contemplates That Other Methods Of Service Are Permissible

Concord's argument is premised on the assumption that the only method of service on a defendant that is not found within the state, but is subject to jurisdiction for acts enumerated in RCW 4.28.185, is personal service. The language of the statute itself demonstrates the fallacy of that assumption. First, reference in the statute to personal service is permissive, not mandatory -- service of process "may be made by personally serving the defendant outside this state." RCW 4.28.185(2)(emphasis supplied). Second, RCW 4.28.185(6) specifically provides that "[n]othing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."

D. The Supreme Court Has The Authority And Inherent Power To Prescribe The Mode And Manner Of Serving Process

Court Rules are made both pursuant to statute and as part of the Supreme Court's inherent rule-making powers as an integral part of the

judicial process. *State v. Fitzsimmons*, 94 Wn.2d 858, 858, 527 P.2d 620 (1980). The Superior Court Civil Rules were promulgated by the Supreme Court pursuant its inherent rule-making power and RCW 2.04.190 which provides in pertinent part as follows:

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds....

RCW 2.04.190.

Moreover, RCW 2.04.200 provides that it is the rules promulgated by the Supreme Court that are paramount in the event of a conflict with a statute. *In re Messmer*, 52 Wn.2d 510, 512, 326 P.2d 1004 (1958). The constitutionality of RCW 2.04.190 and RCW 2.04.200 is not open to question. *Id.*

E. CR 4(i) Creates An Alternative Method For Service Of Process When It Is To Be Effected Upon A Party In A Foreign Country

CR 4(i) specifying "Alternative Provisions for Service in a Foreign Country" provides in relevant part as follows:

When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: ...(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general

jurisdiction; ... or (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served....”

Concord has argued that Ralph’s could not serve Concord using the provisions of CR 4(i) because the long-arm statute RCW 4.28.185 requires only personal service. As is discussed under Section V. C, *supra* at 14 , Concord is wrong that RCW 4.28.185 requires personal service.¹⁰ However, even if RCW 4.28.185 is construed to permit only personal service, that does not preclude the use of the CR 4(i).

RCW 4.28.185 is a statute that “authorizes service upon a party not an inhabitant of or found within the state.” The purpose of CR 4(i) is to provide alternative methods of service when such a statute exists and the service is to be effected in a foreign country as was the case with Concord. As CR 4(i) explicitly provides, “it is also sufficient if service of the summons and complaint is made...” as thereafter detailed in subparagraphs (A) through (G). Emphasis supplied. In interpreting a court rule, a court looks to the plain language of the rule and if the

¹⁰ RCW 4.28.185 provides that certain acts of a person, whether or not a citizen or resident of the state, will subject the person to jurisdiction of the Washington courts. Jurisdiction is acquired through the service of a summons and complaint but there is no provision in the statute that explicitly requires personal service. The only reference in the statute to personal service are the references in RCW 4.28.185(2) and (4) providing that service of process “may be made by personally serving the defendant outside this state” and providing that such personal service shall be valid when an affidavit to the effect that service cannot be made within the state is filed.

meaning is unambiguous a court does not need to look further. *Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006); *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 249, 103 P.3d 792 (2004). “A rule of court must be construed so that no word, clause or sentence is superfluous, void or insignificant.” *State v. Durham*, 13 Wn.App. 675, 678, 537 P.2d 816 (1975) citing *Jordan v. O’Brien*, 79 Wn.2d 406, 410, 486 P.2d 290 (1971). See, also, *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992) (holding that words in a statute should be given meaning and rejecting the argument that the word “and” meant “or.”) “Also” has to be construed to mean in addition to the means of service authorized by the statute, not only by the means authorized by the statute, which is what Concord argues.

Moreover, that is exactly how Division Three of this Court explained the relationship between CR 4(i) and RCW 4.28.185 in the case *Marriage of Tsarbopoulos*, 125 Wn. App. 273, 104 P.3d 692 (2004).¹¹ At issue in that case was whether service in Greece by delivery to a colleague of the defendant at his place of work was sufficient service of process. After first stating that “[t]ypically, the statute [RCW 4.28.185 long-arm

¹¹ The court in *Marriage of Tsarbopoulos* was considering service of a complaint for dissolution of a marriage commenced under RCW 26.09, but contrary to Concord’s argument, the Court discussion of CR 4(i) related to RCW 4.28.185. Ralph’s has not located any other decisions that address the effect of CR 4(i).

statute] provides service of process may be made upon any person who is subject to the jurisdiction of a court of this state by personally serving that person outside the state...,” the Court went on to conclude that the service of process was sufficient because “statutory requirements for effective service of an out-of-state resident are impacted by CR 4(i) which provides for a number of alternative methods for service in a foreign country.” 125 Wn. App. at 285.

F. No Affidavit As Provided In RCW 4.28.185(4) Was Required

Because Ralph’s was not attempting to personally serve Concord in British Columbia pursuant to RCW 4.28.185(2) no affidavit as provided in RCW 4.28.185(4) was needed. There is no requirement in CR 4(i) for the filing of an affidavit.

G. There Is No Conflict Between RCW 4.28.185 And CR 4(i) That Needs To Be Harmonized

Ralph’s agrees with Concord that court rules and statutes should be interpreted so as to avoid apparent conflicts and harmonized if possible. *See, State v. Thomas*, 121 Wn.2d 504, 511, 851 P.2d 673 (1993); *see, also, Jones v. Stebbins*, 122 Wn.2d 471,478,860 P.2d 1009 (1993). There is, however, no conflict between RCW 4.28.185 and CR 4(i).¹² RCW 4.28.185 lays out procedures for how personal service may be accomplished. CR 4(i)(1) lays out methods of alternative service. RCW

¹² If there were a conflict, the rule would supercede the statute. *See* RCW 2.04.200.

4.28.185 explicitly states that it does not limit or affect the right to serve process in any other manner. There is no conflict. It is Concord's proposed harmonization that creates the conflict because it is premised on Concord's reading of the statute as requiring in all instances personal service. In effect, Concord would have the rule read as if it stated "that the alternative service provided for herein shall be deemed personal service." That simply is not what the rule says.

H. The Service On Concord Pursuant to CR 4(i) Was Sufficient

Ralph's served Concord pursuant to CR 4(i) and Ralph's explicitly cited CR 4(i)(1) when it moved for entry of Concord's default:

CR 4(i)(1)(D), providing that '[w]hen a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made:... (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served....'

CP at 8.

Concord makes no argument that Ralph's did not comply with the provisions of CR 4(i)(1)(D).¹³ Concord does not contend that it did not receive the summons and complaint. Nor could it. Service was accomplished in compliance with the provisions of CR 4(i)(1)(D). That

¹³ Concord has noted that the address used by Ralph's was erroneous because it omitted the word "Port" in the address, but this did not result in the address being incorrect for purposes of mailing or a defect that would make the service invalid in light of Concord's actual receipt of the documents through use of the United States Global Express mail.

fact was made to appear in Ralph's motion for entry of default (CP at 7-12) and that is what the trial court necessarily concluded when it entered its Order of Default and denied Concord's motion to vacate.

Service by mail with a signed receipt as was done in this matter also was sufficient under CR 4(i)(1)(A) because it conforms to the manner prescribed by the laws of British Columbia for sufficient service in an action in its courts of general jurisdiction. *See*, Declaration of Gordon Phillips, CP at 82-86. *See*, also, *Marriage of Tsarbopoulos*, 125 Wn. App. 273, 104 P.3d 692 (2004) (court concluded that if service requirements of Greece were met by the method of service, the provisions of CR 4(i)(1)(A) could be used as an alternative method of service).

I. Concord's Request For Attorneys' Fees Should Be Denied

Concord has requested the award of attorneys' fees pursuant to RCW 4.28.185(5). Concord's request should be denied. By its terms, RCW 4.28.185(5) is limited to circumstances where the defendant is "personally served outside the state."¹⁴ Concord was not personally

¹⁴ Moreover, any award of attorneys' fees pursuant to RCW 4.28.185(5) is discretionary. *Lundberg ex rel. Orient Foundation v. Coleman*, 115 Wn. App. 172, 180-181, 60 P.3d 595 (2002), *review denied*, 150 Wn.2d 1010, 79 P.3d 446 (2003) (citing *Park Hill Corp. v. Sharp*, 60 Wn. App. 283, 288-289, 803 P.2d 326 (1991). Concord chose not to respond to Ralph's motion for default in May 2008 when it could have raised the issues that are now before this Court. As a result, the trial court and Ralph's proceeded to the entry of judgment. By waiting until after judgment was entered and collection efforts were commenced to make the challenge, Concord wasted judicial resources and caused consideration of the issues to become considerably more costly.

served pursuant to RCW 4.28.185. Concord was served under CR 4(i).

That rule does not provide for an award of attorneys' fees.

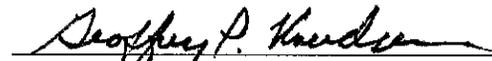
VI. CONCLUSION

The default of Concord was entered herein, not because Concord did not receive notice of Ralph's claim and an opportunity to defend the claim, but because Concord chose to ignore the proceeding. Ralph's respectfully submits that (1) the trial court correctly concluded that the service of process on Concord was proper and sufficient under CR 4(i) when it entered its Order Granting Motion for Default on May 21, 2008, (2) Ralph's judgment against Concord is not void for lack of jurisdiction and should not be vacated, and (3) Concord's default should not be set aside. Concord's appeal should be denied in all respects.

DATED this 21st day of August, 2009.

Respectfully Submitted,

THE DINCES LAW FIRM



Geoffrey P. Knudsen, WSBA #1324

Franklin G. Dinces, WSBA #13473

Attorneys for Respondent/Plaintiff

Ralph's Concrete Pumping, Inc.