

No. 62396-6-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

UNIFUND CCR, Assignee for Key Classic,

Respondent,

v.

ABDUL G. MALIK,

Appellant.

AMENDED APPELLANT'S BRIEF

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I. INTRODUCTION

Abdul G. Malik appeals the denial of his motion to vacate a default judgment and garnishment orders entered in Unifund CCR's action to collect on an alleged credit card debt. Unifund was awarded a default judgment and subsequently garnished Mr. Malik's wages even though Unifund failed to serve Mr. Malik with the summons and complaint and provided no evidence demonstrating that the alleged credit card account belongs to Mr. Malik. Representing himself pro se, Mr. Malik moved to vacate the default judgment and garnishment orders, and the King County Superior Court erroneously denied his motion.

II. ASSIGNMENT OF ERRORS

Mr. Malik has three primary bases for appeal.

- First, the trial court erred in denying as untimely his CR 60(b)(5) motion to vacate the judgment as void. CR 60(b)(5) motions can be brought at *any* time, and the court erred in denying the motion because Mr. Malik brought it two years after entry of the default judgment. This was an error of law and is reviewed de novo.
- Second, the trial court erred in denying as untimely Mr. Malik's CR 60(b)(4) motion to vacate the judgment for fraud and misrepresentation. CR 60(b)(4) motions can be brought at any *reasonable*

time, and the court erred in failing to apply this standard in determining the motion's timeliness. This was an error of law and is reviewed de novo.

- Finally, the trial court erred in holding that Mr. Malik could not prevail on his motion unless the creditor admitted the debt did not belong to Mr. Malik. Washington courts favor deciding cases on the merits and liberally vacate default judgments. The trial court erred in applying the incorrect standard of review to Mr. Malik's CR 60 motions. This was also an error of law and is reviewed de novo.

For these reasons, Mr. Malik respectfully seeks reversal of the trial court's order and remand for a trial on the merits.

III. STATEMENT OF THE CASE

A. THE PARTIES

Abdul G. Malik (the "Appellant") is 67 years old. Clerk's Paper ("CP") at 134. He was born in Pakistan and emigrated to the United States. CP at 172. He speaks English as a second language and was previously employed by the Seattle Housing Authority. *Id.* Working as a security guard, the Appellant earned approximately \$26,644.80 in 2008—his biweekly gross income multiplied by twenty-six. CP at 182.

Unifund CCR, Assignee for Key Classic (the "Respondent") is a debt collector located in Cincinnati, Ohio. CP at 24, 31.

B. FACTUAL BACKGROUND LEADING TO SUPERIOR COURT ORDER DENYING MOTION TO VACATE

1. June 7, 2006—Unifund sues someone named Abdul Malik to collect on a \$6,171.78 credit card debt.

On June 7, 2006, the Respondent filed its summons and complaint against someone named Abdul Malik. CP at 1. The complaint alleged that the defendant owes the Respondent \$6,171.78 and that \$200.00 was a reasonable sum for the Respondent's attorney fees "in the event of default judgment." CP at 4. The complaint does not provide an address, social security number, telephone number, or any other information identifying the defendant. CP at 1-5.

The Presiding Judge of King County Superior Court issued a case schedule that same day. CP at 6-10. The case schedule states that the Respondent "**must** serve this *Order Setting Civil Case Schedule* and attachment on all other parties." CP at 8. There is no evidence in the record that the Respondent ever served the case schedule on anyone, and there has never been a finding by the Superior Court that there was proper service of process on the Appellant.

2. June 30, 2006—A King County Superior Court Commissioner grants a default judgment against someone named Abdul Malik.

On June 30, 2006, the Respondent filed its affidavit of service and motion for default judgment. CP at 17, 20. The affidavit of service

alleged that on May 11, 2006—three weeks before the complaint was filed—the Respondent delivered the summons and complaint to Natalya Buleyeva in Federal Way, Washington. CP at 17. The Appellant has consistently denied that the debt is his, has refuted the affidavit of service, and has denied that he was ever served. CP at 172.

The Respondent's motion and declaration for default judgment allege that the defendant owes the Respondent a sum certain of \$4,869.00 plus interest at 5%, and that \$200.00 is reasonable for attorney fees. CP at 22. The motion included an "Affidavit of Indebtedness" from Kim Kenney, the Media Supervisor of Unifund CCR Partners, alleging that someone named Abdul Malik owed \$6,128.51 for a Key Classic account assigned to the Respondent by Citibank (South Dakota) N.A. CP at 24. The affidavit did not provide any information identifying which Abdul Malik was responsible for the debt. *Id.*

The motion also included the terms of a credit card contract. CP at 25-30. The contract does not name the Appellant as a party and does not include his signature or the signature of anyone other than Ken Stork, President & CEO of Citibank (South Dakota), N.A. *Id.*

The Respondent also attached a document titled "Unifund Statement" that identifies "Abdul G Malik" at "PO Box 77193, Seattle WA," as the holder of the Key Classic account. CP at 31. There is no

evidence in the record that the Appellant has ever owned this P.O. Box, and he denies that it was ever his. CP at 172.

On June 30, 2006, the King County Superior Court Commissioner entered default judgment against the defendant. CP at 18.

3. July 14, 2006—Unifund obtains a garnishment order, the Appellant challenges the taking of his wages, and the garnishment stops.

On July 14, 2006, the Respondent filed its declaration for garnishment identifying Cendant Corporation at 9 W. 57th St., New York, NY 10019 as the garnishee. CP at 78. Cendant's answer to the Respondent's writ of garnishment was filed on August 10, 2006. CP at 80. It stated that the Appellant earned a gross income of \$1,059.26 every two weeks for an annual salary of approximately \$27,540.76. CP at 81. Of the Appellant's biweekly net income of \$948.37, Cendant garnished \$237.09 for the Respondent for 60 days. CP at 81, 82. There is no evidence in the record that the Respondent served the Appellant with the writ of garnishment or filed an affidavit of service as required by RCW 6.27.130.

The Appellant first learned of the Respondent's lawsuit and the garnishment order around mid-August 2006, when his wages were garnished. He immediately contacted Suttell & Associates, the Respondent's counsel, to correct the mistake. CP at 172. He was told that the Respondent, through its attorney, would contact him regarding the

lawsuit. *Id.* The Respondent never did contact the Appellant, and the garnishment immediately stopped. *Id.* Unfamiliar with the law, the Appellant simply believed the Respondent realized the mistake and had decided not to pursue the matter any further. CP at 105. On December 18, 2006, the Respondent filed the second answer to the writ of garnishment providing that \$975.32 had been taken from the Appellant's wages for the Respondent. CP at 83.

4. July 17, 2007—One year later the Respondent resumes garnishment of the Appellant's wages and refuses to discuss the basis for the default judgment.

On July 17, 2007, approximately one year after the default judgment and after the deadline for certain CR 60 motions had expired, the Respondent filed its second declaration for garnishment. CP at 86. It provided that the Appellant owes \$7,745.71—approximately \$1,000 more than the complaint had originally alleged. *Id.* There is no evidence in the record that the Respondent served the Appellant with the writ of garnishment or filed an affidavit of service as required by RCW 6.27.130.

On September 11, 2007, the answer to the writ of garnishment was filed. CP at 88. The answer provided that the Appellant earned a biweekly gross income of \$1,120.00 and that for sixty days, \$249.25 was to be garnished from each paycheck. CP at 89-90. The second judgment and order to pay filed on December 20, 2007, stated that under the second

garnishment, \$716.64 was removed from the Appellant's wages for the Respondent. CP at 43.

When the Appellant learned of the second garnishment, he again contacted Suttell & Associates and was told to call back on September 25, 2007. CP at 176. The Appellant then filed a notarized answer to the Respondent's complaint stating he was not responsible for the alleged debt and not the proper defendant in the case. The Appellant also requested that the Respondent provide any documents proving the debt was his. CP at 12. There is no evidence in the record that the Respondent produced any responsive documents.

The Appellant then contacted Lynda Fattom, a credit counselor who helps people correct errors in their credit history. On September 25, 2007, the Appellant and Ms. Fattom called Suttell & Associates. CP at 172, 176. They were transferred to five different Suttell representatives, but no one would discuss the Appellant's case with them. CP at 176. Finally, Suttell & Associates hung up on the Appellant and Ms. Fattom. *Id.*

Ms. Fattom wrote numerous letters to the Respondent on behalf of the Appellant but still received no response. *Id.*

5. February 11, 2008—The Respondent files its third writ of garnishment despite the Appellant's effort to correct the error and find an attorney.

On February 11, 2008, the Respondent filed its third declaration for garnishment. CP at 94. The declaration stated that the Appellant owed the Respondent \$7,774.01 as of January 29, 2008—approximately the same amount alleged to be owing in the second declaration for garnishment. *Id.* The judgment and order to pay filed on July 11, 2008, provided that an additional \$1,217.02 had been garnished from the Appellant's wages for the Respondent. CP at 57.

The Appellant sought legal assistance. CP at 172, 176. He and Ms. Fattom first met with an attorney in Kent, Washington. CP at 172, 176. The Appellant and Ms. Fattom explained the facts to the Kent attorney and showed him relevant documents. CP at 172, 176. The Kent attorney agreed to represent the Appellant but required a \$1,500 retainer. CP at 172, 176. The Appellant did not have \$1,500 and offered to pay in installments, but the Kent attorney refused. CP at 172, 176.

The Appellant then attended a neighborhood legal clinic and spoke with an attorney named Brian. CP at 172, 176. Brian recommended that the Appellant file a claim in small claims court against Suttell & Associates. CP at 172, 176-177. Following Brian's advice, the Appellant

filed a claim on April 11, 2008 against Suttell & Associates and Isaac Hammer, a Suttell attorney. CP at 172, 177.

On March 9, 2008, the Appellant also wrote a letter to Suttell & Associates, the King County Superior Court, and the Washington State Bar Association ("WSBA") describing Suttell's refusal to answer his questions and requesting that the default judgment be vacated. CP at 105.

On March 24, 2008, the Appellant received his first response from the Respondent—approximately 18 months after first contacting it. CP at 107. The Respondent provided a copy of the judgment and stated that it was sufficient proof that the Appellant was responsible for the debt. CP at 107. The Respondent provided no additional evidence demonstrating that the Key Classic account belongs to the Appellant.

The Appellant completed the WSBA grievance form against Isaac Hammer and submitted it. CP at 109. In response to the WSBA's subsequent request, Isaac Hammer responded on April 28, 2008. CP at 111. He explained that he had little to do with the case and provided a brief description of its posture. *Id.* Again, the Respondent provided no additional evidence that the Key Classic account belongs to the Appellant.

6. June 17, 2008—The Appellant files a pro se motion to vacate the default judgment.

On June 17, 2008, the Appellant filed his motion to vacate the default judgment. CP at 96. He argued that the judgment was void under CR 60(b)(5) because he never received the summons and complaint and provided a declaration stating this under penalty of perjury. CP at 97, 100. The Appellant also argued that the alleged Key Classic debt is not his and that the Respondent's failure to provide the Appellant with notice of proceedings, refusal to provide evidence showing that the debt is his, and insistence that the judgment be enforced demonstrate that the judgment is a result of fraud and misrepresentation. CP at 97, 102, 105, 108. The Appellant's motion included his own declaration and a declaration from Lynda Fattom. CP at 171-178. The Appellant also included copies of his credit reports showing both that he is frequently mistaken for others with the same name and that none of his credit reports ever mention the alleged Key Classic account. CP at 134-170.

On July 3, 2008, the Respondent filed its response to the Appellant's motion to vacate. CP at 54. The Respondent argued that the motion was untimely because it was not made within one year of the default judgment and concluded that the Appellant "has only himself to blame." CP at 54-56. Again, the Respondent provided no evidence

demonstrating that the alleged Key Classic account belongs to the Appellant.

7. August 13, 2008—The Respondent files its fourth writ of garnishment despite having evidence that it was garnishing the wrong person and while the motion to vacate is pending.

On August 13, 2008, the Respondent filed its fourth declaration for garnishment stating that the Appellant owed \$7,134.77. CP at 179. The answer to the writ of garnishment was filed on August 28, 2008, and stated that the Appellant's biweekly gross income was \$1,024.80 and that \$212.00 would be garnished for the Respondent biweekly for sixty days. CP at 182-183.

Before the fourth writ of garnishment, the Respondent had garnished \$2,908.98 from the Appellant and claimed that the Appellant still owed \$7,134.77—approximately \$1,000 more than the debt alleged in the original complaint. CP at 43, 57, 83. The Respondent's fourth garnishment requested that \$212.00 be removed from the Appellant's biweekly income for 60 days. CP at 182-183. This would result in the garnishment of an additional \$848.00 and increase the total garnished to \$3,756.98.

C. THE DISPUTED TRIAL COURT ORDER DENYING THE APPELLANT'S MOTION TO VACATE AND APPOINTMENT OF PRO BONO COUNSEL FOR APPELLANT

1. August 26, 2008—The trial court denied the Appellant's motion to vacate.

The King County Superior Court heard the Appellant's motion on August 12 and August 26, 2008. Verbatim Report of Proceedings of August 12, 2008 Hearing ("RP 8/12/2008") at 1 and Verbatim Report of Proceedings of August 26, 2008 Hearing ("RP 8/26/2008") at 1. In the August 12 hearing, the Appellant, through Ms. Fattom, started his argument by recounting that after meeting with a Key Bank employee, Key Bank confirmed the Key Classic account alleged in the complaint did not belong to the Appellant. RP 8/12/2008 at 4. The trial court's first conclusion of law was that this evidence was inadmissible hearsay. RP 8/12/2008 at 6.

The trial court then ordered that the hearing be rescheduled for August 26, 2008, and that the Appellant provide a declaration from Key Bank stating that he was not responsible for the alleged account. RP 8/12/2008 at 12, 13. The court stated "I need a declaration from Key Bank saying wrong person" and again "I need something from Key Bank saying this is the wrong person, never had this account, and should never have been sued or garnished." RP 8/12/2008 at 13-15.

The trial court based its order on one finding of fact and one conclusion of law. First, the court found, as a matter of fact, that the Appellant brought his motion approximately two years after entry of the default judgment. RP 8/12/2008 at 16, 19. The court then concluded, as a matter of law, that the motion was untimely unless the original creditor admitted the debt did not belong to the Appellant. RP 8/12/2008 at 16. The trial court stated that "we are two years later. So there is a judgment. For me to grant any relief, I need to be persuaded that this was all a big mistake." RP 8/12/2008 at 16. The trial court restated its conclusion of law by explaining that "at this point, two years later, it's up to [the Appellant] to persuade me that this was a mistake and that Key Bank screwed up" and that "to wait two years, the answer is no. You need to go to Key Bank. If [the Appellant] had answered and appeared and said this isn't me, then we would have had a process two years ago." RP 8/12/2008 at 16, 18, 19.

In response to the Appellant's argument that he had not been served with the original summons and complaint, the Respondent's counsel misleadingly stated "that's not alleged . . . It's never been alleged up to this point." RP 8/12/2008 at 19. The Appellant, however, had checked the box for CR 60(b)(5) "The Judgment is void" on his form motion to vacate and alleged in the first sentences of his motion that he

never received notice of the lawsuit. CP at 97, 100. Nevertheless, the trial court concluded "that's a different question" and made no findings regarding the Appellant's CR 60(b)(5) claim that the judgment is void for lack of notice and failure of due process.

On August 26, 2008, the hearing reconvened, and the Appellant presented a letter from Key Bank. RP 8/26/2008 at 2. The court concluded that the letter was not a declaration, not admissible and reiterated its holding that because the Appellant "wait[ed] two years, . . . I needed a declaration." RP 8/26/2008 at 6. The court denied the Appellant's motion to vacate and signed the proposed order prepared by the Respondent providing that "this matter having come on regularly before the undersigned Judge of the above-entitled Court, and the Court having reviewed the records and files herein, and otherwise fully advised of the premises, NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendant's Motion to Vacate Default Judgment is denied." CP at 75-76. The court made no additional findings regarding service of process, the reasonableness of the two-year delay in filing the motion to vacate, or any other grounds for vacating the default judgment.

The Appellant filed his notice of appeal on September 25, 2008, seeking review of the "Order Denying Defendant's (Abdul Malik) Motion to Vacate Default Judgment entered on August 26, 2008." CP at 184.

2. September 2, 2009—Pro bono counsel is assigned for the Appellant by the Court of Appeals Commissioner

On August 18, 2009, the Court of Appeals Commissioner requested that pro bono counsel assist the Appellant with his case. Perkins Coie agreed to the request, and on September 2, 2009, the Commissioner appointed James F. Williams of Perkins Coie as pro bono counsel of record for the Appellant.

IV. ARGUMENT

A. STANDARD OF REVIEW

Washington does not favor default judgments and prefers that disputes be decided on the merits. *Morin v. Burris*, 160 Wn.2d 745, 754 (2007). "For more than a century, it has been the policy . . . to set aside default judgments liberally." *Id.* While trial court decisions on motions to vacate default judgments are reviewed for an abuse of discretion, *Little v. King*, 160 Wn.2d 696, 703 (2007), questions of law are reviewed de novo, *Morin*, 160 Wn.2d at 753.

B. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S CR 60(b)(5) MOTION TO VACATE THE DEFAULT JUDGMENT

1. The trial court's denial of the Appellant's CR 60(b)(5) motion as untimely is an error of law and should be vacated.

There is no time limit to challenge a judgment as void. *See Roberts v. Johnson*, 137 Wn.2d 84, 92 (1999). A motion to vacate under CR 60(b)(5) may, therefore, be brought at any time after entry of judgment. *See Lindgren v. Lindgren*, 58 Wn. App. 588, 596 (1990).

A judgment is void if entered by a court that did not have jurisdiction. *See In re Marriage of Ortiz*, 108 Wn.2d 643, 649 (1987). A court does not have jurisdiction over a defendant if he did not receive proper service of the summons and complaint. *See Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wn. App. 366, 372 (2009) *review denied*, No. 82116-5 (Wash. Sept. 29, 2009); *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36 (1988). Therefore, a default judgment entered without proper service of the summons and complaint is void. *See id.*

The first reason given by the Appellant for vacating the default judgment was that he "never received notice of any lawsuit." CP at 97. Again, in completing his form motion to vacate, the Appellant checked the box for CR 60(b)(5) indicating that he made his motion in part because the

default judgment is void. CP at 100. And again, the second sentence of the Appellant's declaration in support of his motion to vacate states that he was never "served any notice of a lawsuit." CP at 172.

In response to the Appellant's repeated insistence that the Respondent never served him with the summons and complaint, the trial court ruled that his motion was untimely as a matter of law. The court stated "we are two years later. So there is a judgment. For me to grant any relief, I need to be persuaded that this was all a big mistake." RP 8/12/2008 at 16. The court concluded as a matter of law that the motion was untimely unless the original creditor admitted the alleged debt did not belong to the Appellant. *Id.*

The court made no exception for a CR 60(b)(5) motion. When the Appellant argued that "he was never served," the Respondent's counsel misleadingly stated that this was "not alleged" and had "never been alleged." RP 8/12/2008 at 19. The trial court then simply stated "that's a different question" and dismissed it without making any relevant findings. *Id.* In doing so, the court erroneously concluded that the Appellant's CR 60(b)(5) motion to vacate was brought two years after the default judgment and was, therefore, untimely.

This ruling is incorrect as a matter of law. Washington caselaw makes it clear that a party can bring a CR 60(b)(5) motion at any time.

For example, in *Allstate Insurance Co. v. Khani*, 75 Wn. App. 317 (1994), the trial court entered a default judgment against Mr. Khani, a Syrian immigrant, in 1988. Five years later, in 1993, Allstate garnished Mr. Khani's wages, and Mr. Khani filed a motion to vacate the default judgment. *Id.* at 319-22. Despite a facially valid affidavit of service, Mr. Khani claimed that he had never been served. *Id.* Although the Superior Court found that Mr. Khani provided convincing evidence that he had never been served, it concluded Mr. Khani's motion was untimely. *Id.* at 322. The Court of Appeals disagreed and held that a CR 60(b)(5) motion can be brought at any time. *Id.* at 323. As a result, the trial court was reversed and the case was remanded to vacate the default judgment. *Id.*

Like Mr. Khani, the Appellant has challenged the default judgment as void. He has provided convincing evidence that he was not served. And, like the trial court in *Khani*, the trial court here dismissed the Appellant's motion as untimely. This Court should follow its prior holding in *Khani*, reverse the trial court and remand it for the vacation of the default judgment.

2. The trial court's failure to make the necessary findings of fact regarding service of process is an error of law and requires remand for entry of the necessary findings.

Trial courts have an obligation to make findings on all material issues in order to inform the appellate court as to "what questions were decided by the trial court, and the manner in which they were decided." *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn.2d 413, 422 (1994) (internal quotation marks and citations omitted). Trial courts are not required to make findings of fact on all matters but must make "findings which establish the existence or non-existence of determinative factual matters." *Maehren v. City of Seattle*, 92 Wn.2d 480, 487-88 (1979).

The trial court made only one finding of fact regarding the Appellant's CR 60(b)(5) motion: it was filed two years after the default judgment. RP 8/12/2008 at 16, 18. The trial court made no finding of fact regarding the Appellant's service of process, and the trial court's failure to make this finding is an error of law.

This error is particularly troubling because the Appellant's motion to vacate was his first opportunity to challenge the court's jurisdiction. Proper service of process is one of the constitutional guarantees of due process and the fundamental right to be heard. *See Wichert v. Cardwell*, 117 Wn.2d 148, 151 (1991). Moreover, Washington courts hold that

"default proceedings . . . must be carefully scrutinized for potential due process violations." *Boyd v. Kulcyk*, 115 Wn. App. 411, 415 (2003).

3. The record is filled with constitutional and statutory notice violations by the Respondent that were not properly weighed by the trial court.

This Court should remand for the trial court to enter the necessary findings of fact and scrutinize the default judgment for due process violations because the record provides ample evidence that the Appellant was not served. In his declaration, the Appellant states under penalty of perjury that he has "not been given a fair opportunity to present [his] case" and that he had "never been served any notice of a lawsuit." CP at 172.

The Appellant also swears that he never received a bill relating to the alleged Key Classic account or any notice of any attempts to collect on the account prior to his garnishment. CP at 172. His credit reports, moreover, make no mention of the alleged Key Classic account or collection action. CP at 134-170, 172. At the very least, this evidence demonstrates that the Respondent did not attempt to contact the Appellant or make him aware of the debt or impending action.

The record also demonstrates that the law required the Respondent to serve the Appellant with other papers but the Respondent failed to do so. The case schedule issued by the Presiding Judge of King County Superior Court states that "the party filing this action **must** serve this

Order Setting Civil Case Schedule . . . on all parties." CP at 8. The Appellant provides evidence in the form of a declaration that he received no notice of the lawsuit prior to the garnishment, and there is no evidence in the record that the Respondent ever served the Appellant with the case schedule. CP at 172.

In addition, before a judgment creditor can garnish a judgment debtor's wages, the creditor must provide the debtor notice of the writ of garnishment. *See* RCW 6.27.130(1). Whether service is made by mail or in person, the person serving the writ must file an affidavit of service with the court. *See* RCW 6.27.130(3). If service is made by mail, the affidavit must include the address to which notice was mailed and proof of return receipt. *See id.* Despite the statutory requirement that the Respondent file an affidavit of service for a writ of garnishment, the Respondent failed on numerous occasions to serve the Appellant with the required notice or file the required affidavit of service.

The record, by contrast, is replete with evidence that the Appellant conscientiously responded to the lawsuit as soon as he discovered it and attempted to fight the action as best he could on his own. The Appellant's declaration demonstrates that he first learned of the suit when the Respondent garnished his paycheck in August 2006 and that, upon this discovery, the Appellant immediately contacted the Respondent. CP

at 97, 172. The Appellant called the Respondent to explain that he never had the Key Classic account and that the garnishment was improper. CP at 105, 172. It was the Respondent, not the Appellant, who refused to discuss the matter. CP at 105, 172.

Once the Respondent resumed the garnishment in 2007, the Appellant immediately contacted the Respondent again to discuss the matter and was told to call them back on September 25, 2007. CP at 176. The Appellant then sought assistance from Lynda Fattom, a credit counselor. CP at 172. Together they called the Respondent, but the Respondent hung up on them. CP at 176. Ms. Fattom wrote numerous letters to the Respondent on the Appellant's behalf and received no response to any of them. *Id.*

The Appellant also sought legal counsel to assist with the Respondent's suit. CP at 172, 176. The Appellant and Ms. Fattom met with an attorney in Kent, Washington, who wanted an initial \$1,500 payment to represent the Appellant. CP at 172, 176. The Appellant did not have \$1,500 and the Kent attorney refused payment in installments. CP at 172, 176. The Appellant then met with Brian at a neighborhood legal clinic, and Brian advised the Appellant to file a claim against Suttell & Associates, the Respondent's attorney, in small claims court. CP at 172, 176.

Following Brian's advice, the Appellant sued Suttell & Associates in small claims court. CP at 172, 177. The Appellant also filed a WSBA complaint against Isaac Hammer, a Suttell attorney. CP at 109. Finally, the Appellant filed his motion to vacate the default judgment. CP at 96.

The evidence in the record supports the finding that the Appellant was never served. He has sworn he was not served with the summons and complaint. On numerous occasions, the Respondent failed to serve the Appellant despite being required by law to do so. Finally, the Appellant has proven himself to be a conscientious litigant and has shown that had he been served with the summons and complaint, he would have responded. Despite this evidence, the trial court failed to make any finding that the Appellant was or was not given proper service of process.

It is true that the Respondent filed an affidavit of service that the Appellant had been served, CP at 17, and that an affidavit of service, showing on its face that service was properly effected, is prima facie evidence of proper service. *See Witt v. Port of Olympia*, 126 Wn. App. 752, 757 (2005). But a filed affidavit of service is not irrefutable proof that service was properly effected. *See, Khani*, 75 Wn. App. at 322-23. Furthermore, the Appellant has provided ample evidence that he was not served.

The issue here is whether the trial court failed to weigh the evidence and make any findings of fact that service of process was or was not effected. The record demonstrates that the trial court failed to do just that, and this failure is an error of law.

C. THE TRIAL COURT ERRED WHEN IT FAILED TO DETERMINE WHETHER THE APPELLANT HAD GOOD REASON TO FILE HIS MOTION TO VACATE THE DEFAULT JUDGMENT TWO YEARS AFTER THE JUDGMENT WAS ENTERED

- 1. The trial court's failure to apply the "reasonable time" standard to determine the timeliness of the Appellant's CR 60(b)(4) motion is an error of law requiring that the order be vacated.**

A CR 60(b)(4) motion to vacate due to fraud, misrepresentation, or other misconduct of an adverse party must be made within a reasonable time after judgment. *See* CR 60(b). What constitutes a reasonable time depends on the facts of the case, and the "mere passage of time between the entry of the judgment and the motion to set it aside is not controlling." *See In re Marriage of Thurston*, 92 Wn. App. 494, 500 (1998). The primary considerations in determining timeliness are (1) "whether the nonmoving party is prejudiced," and (2) "whether the moving party has a good reason for failing to take action sooner." *Id.*

The Appellant's motion repeatedly seeks vacation of the judgment due to the Respondent's fraud and misrepresentation. In a sworn and notarized statement made on September 18, 2007, the Appellant states that

he has "been fraudulently accused of a debt that is not [his]." CP at 102. He again states that the Respondent "fraudulently garnished" his wages and that the Respondent is "fraudulently scamming [him] to collect a debt that does not belong to [him]." CP at 105, 108. Again, in the hearing, the Appellant argued that the Respondent's fraud justifies vacation of the default judgment. RP 8/12/2008 at 10. Though the Appellant did not check the box indicating he made his motion pursuant to CR 60(b)(4), his motion, evidence, and arguments demonstrate that he has consistently argued and sought to prove that the default judgment should be vacated due to the Respondent's fraud. The Appellant, therefore, also brought his motion under CR 60(b)(4).

The trial court concluded that, as a matter of law, the Appellant's claims, including his CR 60(b)(4) claim of fraud, were untimely if brought two years after entry of the default judgment. RP 8/12/2008 at 16. This conclusion is an error of law. CR 60(b)(4) does not require that motions to vacate based on fraud be brought within two years after default judgment. Rather, they must be brought within a reasonable time after the default judgment. *See Thurston*, 92 Wn. App. at 500. Thus, the trial court applied the wrong legal standard when it held that the Appellant's CR 60(b)(4) motion was untimely, and this Court should reverse the trial court's error of law.

2. The trial court's failure to make the necessary findings of fact regarding the timeliness of the Appellant's CR 60(b)(4) motion is an error of law and requires remand for entry of the necessary findings

Trial courts must make findings of fact as to all "determinative factual matters." *Maehren*, 92 Wn.2d at 487-88. In this case, the determinative facts for the timeliness of a CR 60(b)(4) motion are (1) "whether the nonmoving party is prejudiced," and (2) "whether the moving party has a good reason for failing to take action sooner." *See Thurston*, 92 Wn. App. at 500.

The trial court, however, made no findings of fact regarding the Respondent's prejudice, if any, by the timing of the Appellant's motion or the Appellant's reason for not taking action sooner. The trial court's failure to make these findings is an error of law, and this Court should remand to the trial court for additional hearings and entry of the appropriate findings of fact.

3. If the trial court had made findings, the record demonstrates that the Respondent suffered no prejudice and that the Appellant had good reason for bringing his action when he did.

A remand would be fruitful in this case because the record provides ample support for findings that the Respondent was not prejudiced by the timing of the motion, and the Appellant had good reason for filing his motion when he did.

First, on remand, the Respondent – which currently holds the Appellant's wages – would have the opportunity to provide evidence demonstrating that the Appellant did not file his motion in a reasonable time. Moreover, the Respondent has provided no evidence showing it was prejudiced by the timing of the CR 60(b)(4) motion and even continued to garnish the Appellant's wages while the motion to vacate was pending. CP at 179.

Second, the record demonstrates that the Appellant had good reason to file his motion when he did. As soon as the Appellant learned of the lawsuit, he contacted the Respondent. CP at 172. The Respondent refused to speak with him, but shortly after the Appellant's telephone call the garnishment stopped. CP at 172. The Respondent's silence and lack of action convinced the Appellant that the Respondent agreed the debt did not belong to him.

As soon as the Appellant learned of the second garnishment, he again sought to discuss the matter with the Respondent. CP at 176. Again, the Respondent refused to discuss the matter. *Id.*

This Court has previously held, under similar facts, that there was good reason for bringing a motion to vacate a default judgment almost 17 months after entry of the default judgment. In *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 304 (1993), the trial court granted

Suburban a default judgment. Shortly thereafter, Clarke, unaware of the default judgment, sent Suburban an appearance, answer, and cover letter asking Suburban of its intentions. *Id.* Suburban did not respond. *Id.* A few months later, Clarke sent Suburban another letter asking if Suburban had decided to drop its claim. *Id.* Again, Suburban did not respond. *Id.* Approximately 17 months after the default judgment, Clarke received an order directing it to appear for a related examination. *Id.* Clarke moved to vacate, and the trial court granted its motion. The Court of Appeals affirmed the trial court's ruling and held that, in light of Suburban's post-judgment conduct, Clarke had good reason for bringing its motion 17 months after judgment. *Id.* at 13.

Like Suburban, the Respondent refused to communicate with the Appellant, waited until the Appellant could not bring a CR 60(b)(1) motion, commenced collection, and then challenged the CR 60 motion as untimely. The Appellant, therefore, has good cause for the delay in bringing his motion to vacate.¹

¹ Another good cause for the Appellant's delay was his unsuccessful efforts to secure legal counsel. CP at 172, 176. The Appellant first contacted Ms. Fattom, a credit counselor who helped the Appellant review his credit history. CP at 172, 176. The Appellant then met with an attorney from Kent who required an initial \$1,500 payment the Appellant could not afford. CP at 172, 176. Next, the Appellant met with an attorney at a neighborhood clinic who advised the Appellant to file a claim against Suttell & Associates in small claims court. CP at 172, 176. The Appellant followed this advice. CP at 172,

4. The Respondent's fraud and deception also provide a good reason for the delayed motion to vacate.

The *Suburban* decision also demonstrates that, following a finding that the Appellant's motion to vacate was timely, the Appellant would likely prevail on the merits of his CR 60(b)(4) motion. After finding Clarke's motion was timely, the court in *Suburban* held that "Suburban's counsel deliberately did not answer the letters, intending or hoping that silence would lull Clarke into assuming that the matter was at an end. By waiting 1 year to preclude relief under [CR 60(b)(1)], he would be able to enforce his default judgment and not be called upon to prove his client's case to the court." 72 Wn. App. at 310. The court concluded that this conduct alone "justifies relief under CR 60(b)(4)." *Id.* at 311.

Here, the Respondent refused to discuss the case with the Appellant when he called to discuss it in 2006. CP at 172, 176. The Respondent then waited one year before restarting garnishment "to preclude relief under" CR 60(b)(1) and ensure that it "would be able to enforce [its] default judgment and not be called upon to prove [its] case to the court." *Suburban*, 72 Wn. App. at 310.

177. He also filed a complaint against Isaac Hammer, a Suttell attorney, with the WSBA. CP at 109. The Appellant attempted to fight the default judgment however he could. At the very least, his delay was caused by the language barrier, his unfamiliarity with the law as a pro se litigant, and his unsuccessful attempt to secure legal counsel.

There is also considerable evidence in the record that the Respondent received the default judgment through fraud and misrepresentation. The Respondent's motion for default judgment includes no information identifying the Appellant as the Abdul G. Malik responsible for the alleged Key Classic account. The motion includes an affidavit stating that an Abdul Malik is responsible for the Key Classic account and a document titled "Unifund Statement" indicating that the debt belongs to an "Abdul G Malik" at "PO Box 77193, Seattle WA." CP at 24, 31. Neither of these documents provides any evidence showing that the Appellant is the Abdul Malik responsible for the alleged Key Classic account.

The Respondent's motion also includes a credit card contract but includes no information identifying the Appellant as the individual responsible for the alleged Key Classic account. CP at 25-30. The contract does not name Abdul Malik as a party and does not include the Appellant's or any other Abdul Malik's signature. *Id.* The Appellant has also unsuccessfully made numerous requests that Respondent provide any evidence demonstrating that the alleged Key Classic account belongs to the Appellant. *See* CP at 11-13, 105, 108, 172, 176.

Even though the record contains no evidence identifying the Appellant as the individual responsible for the alleged Key Classic

account, and the Respondent has still not revealed anything to prove it has the right person, the Respondent has continuously and deceptively taken from the Appellant's meager wages that he and his family need to survive.² Based on these facts, the Appellant would likely prevail on his CR 60(b)(4) motion on remand. In sum, this Court should remand to allow the trial court to apply the "reasonable time" standard and make the necessary findings of fact.

D. THE TRIAL COURT ERRED WHEN IT REQUIRED THAT THE APPELLANT PROVIDE AN ADMISSION OF NO DEBT FROM THE CREDITOR TO PREVAIL ON HIS MOTION

Washington courts favor resolving cases on the merits and have long held that courts should "set aside default judgments liberally." *Morin v. Burris*, 160 Wn.2d 745, 754 (2007).

The trial court did not apply this legal standard when reviewing the Appellant's motion to vacate. The trial court concluded that the Appellant's motion was untimely unless the original creditor admitted that the debt did not belong to the Appellant. RP 8/12/2008 at 16, 19. This

² For this reason, the Appellant exercised his right under CR 60(c) to pursue "other remedies" by filing a King County Superior Court case alleging, among other things, violation by Unifund and Suttell of the Consumer Protection Act. Unifund has since removed that case to the U.S. District Court and has a motion pending to dismiss the Appellant's claims as being barred by res judicata or as untimely. The case is assigned to Judge Pechman and briefing of the motions is underway.

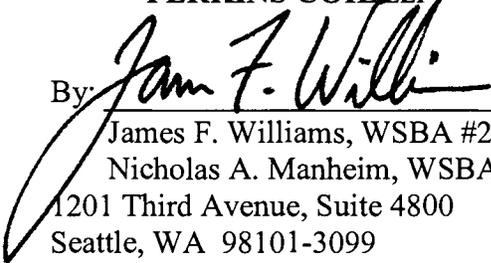
standard required that the assignor of the alleged debt stipulate to the motion to vacate over the wishes of the assignee in order for the Appellant to prevail. This standard is virtually impossible to meet and far exceeds what Washington courts require for vacating default judgments.

V. CONCLUSION

After failing to serve the Appellant with the summons and complaint and other legally required notices, the Respondent received a default judgment against the Appellant and began garnishing his wages. Representing himself *pro se*, the Appellant moved to vacate the default judgment on the grounds that the Respondent failed to serve him and that the Respondent's default judgment was the result of fraud and misrepresentation. In denying the motion to vacate, the trial court erred by applying the wrong legal standards, in finding the motion untimely, and failing to make critical findings of fact. As a result, the Appellant asks this Court to reverse the Superior Court's order, vacate the order denying Appellant's Motion to Vacate the Default Judgment, and remand the case for a trial on the merits.

RESPECTFULLY SUBMITTED this 30th day of October, 2009.

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

CAROL KNESS states as follows:

1. I am a secretary at the law firm of PERKINS COIE LLP, attorneys of record for Appellant, have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. On the 30th day of October, 2009, I made arrangements for the original and one copy of the foregoing Amended Appellant Brief to be filed with this Court.

1. On the same day, I made arrangements for copies of the same documents to be hand delivered to counsel for Respondent as follows:

Patrick James Layman, WSBA #5707
Tyler Joseph Moore, WSBA #39598
Suttell & Associates P.S.
1450 – 114th Avenue SE, Suite 240
Bellevue, WA 98004

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington this 30th day of October, 2009 by
JILL McCLUSKEY.


Jill McCluskey

APPENDIX

RULE 60
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

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

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

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

RCW 6.27.130

Mailing of writ and judgment or affidavit to judgment debtor — Mailing of notice and claim form if judgment debtor is an individual — Service — Return.

(1) When a writ is issued under a judgment, on or before the date of service of the writ on the garnishee, the judgment creditor shall mail or cause to be mailed to the judgment debtor, by certified mail, addressed to the last known post office address of the judgment debtor, (a) a copy of the writ and a copy of the judgment creditor's affidavit submitted in application for the writ, and (b) if the judgment debtor is an individual, the notice and claim form prescribed in RCW 6.27.140. In the alternative, on or before the day of the service of the writ on the garnishee or within two days thereafter, the stated documents shall be served on the judgment debtor in the same manner as is required for personal service of summons upon a party to an action.

(2) The requirements of this section shall not be jurisdictional, but (a) no disbursement order or judgment against the garnishee defendant shall be entered unless there is on file the return or affidavit of service or mailing required by subsection (3) of this section, and (b) if the copies of the writ and judgment or affidavit, and the notice and claim form if the defendant is an individual, are not mailed or served as herein provided, or if any irregularity appears with respect to the mailing or service, the court, in its discretion, on motion of the judgment debtor promptly made and supported by affidavit showing that the judgment debtor has suffered substantial injury from the plaintiff's failure to mail or otherwise to serve such copies, may set aside the garnishment and award to the judgment debtor an amount equal to the damages suffered because of such failure.

(3) If the service on the judgment debtor is made by a sheriff, the sheriff shall file with the clerk of the court that issued the writ a signed return showing the time, place, and manner of service and that the copy of the writ was accompanied by a copy of a judgment or affidavit, and by a notice and claim form if required by this section, and shall note thereon fees for making such service. If service is made by any person other than a sheriff, such person shall file an affidavit including the same information and showing qualifications to make such service. If service on the judgment debtor is made by mail, the person making the mailing shall file an affidavit including the same information as required for return on service and, in addition, showing the address of the mailing and attaching the return receipt or the mailing should it be returned to the sender as undeliverable.

[2003 c 222 § 5; 1988 c 231 § 27; 1987 c 442 § 1013; 1969 ex.s. c 264 § 32. Formerly RCW 7.33.320.]

Notes:

Severability — 1988 c 231: See note following RCW 6.01.050.