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COURT OF APPEALS  
DIVISION ONE

APR 29 2013

COURT OF APPEALS,

DIVISION I

OF THE STATE OF WASHINGTON

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Boris Petrenko, Appellant

v.

DISCOVER BANK, Respondent

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BRIEF OF APPELLANT PETRENKO

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2013 APR 29 PM 12:47  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

**Assignments of Error**

1. The trial court erred in finding that service of process was properly affected on defendant Boris Petrenko by substitute service at his usual place of abode, on Jane Doe, later identified as Lena Petrenko, on January 7, 2012. CR 4. RCW 4.28.080 (15). CP 85-86; CP 1;
2. The trial court erred in finding that Jane Doe “stated she resided at the defendant/respondent’s usual place of abode” listed in the Affidavit of Service. CR 4. RCW 4.28.080 (15). CP 85-86; CP 73-74.
3. The trial court erred in finding that Jane Doe, later identified as Lena Petrenko, was a resident at the Boris Petrenko’s place of abode. CR 4. RCW 4.28.080 (15). CP 85-86; CP 73-74.
4. The trial court erred in finding that the term “resident” as used in this circumstance does not require any particular length of stay. CR 4. RCW 4.28.080(15). CP 85-86.
5. The trial court erred in finding that Boris Petrenko received actual notice of the Plaintiff’s legal action. CR 4. RCW 4.28.80.(15). CP 85-86; CP 1; CP 69-70; CP 73-74.

6. The trial court erred in finding that Boris Petrenko failed to present clear and convincing evidence to rebut the presumption of valid service. CR 4. RCW 4.28.080.(15). CP 85-86; CP 1; CP 73-74; CP 69-70.
7. The trial court erred in denying Boris Petrenko's CR 60 Motion to Vacate Judgment/Order for lack of personal jurisdiction over defendant. CR 4. RCW 4.28.080.(15). CP 85-86.

**Issues Pertaining to Assignments of Error**

1. The question before this Honorable Court is whether the judgment is void for want of jurisdiction.

(Assignments of Error 1 through 6).

**B. STATEMENT OF THE CASE:**

1. The Parties

Boris Petrenko, appellant herein, is a resident in Bellevue, King County, Washington.

Discover Bank, respondent herein, is a corporation and a major credit card issuer. Discover Bank is registered to operate in the State of Washington.

2. Brief Factual Background

This case arises out of an allegation that Petrenko had defaulted on an open-end credit card account with Discover Bank. In its complaint

Discover Bank claimed breach of contract pursuant to the terms of its Cardmember Agreement.

3. Procedural Background

On January 7, 2012, Ken Vandyke, not a party to this case, delivered respondent's Summons and Complaint to Petrenko's residence and left it with Jane Doe, identified in later proceeding as Lena Petrenko. CP 1.

On January 30, 2011, Petrenko contacted Bishop, White, Marshall notifying of his appearance in response to Summons and Complaint.

On February 27, 2012, Discover Bank filed its action against Petrenko in King County Superior Court under Cause No. 12-2-07029-6.

On February 29, 2012, Petrenko filed Notice of Appearance as pro se defendant. Petrenko noted in his Notice of Appearance that he did not waive proper process of service of Summons and Complaint. CP 2-3.

On April 3, 2012, Discover Bank cited its motion for default judgment against Petrenko for not answering to its complaint.

On April 23, 2012, Petrenko filed Answer in response to the Discover Bank's Complaint where Petrenko noted again that he did not waive proper service of Summons and Complaint as required by Civil Rule 4. CP 4-7.

On June 29, 2012, Discover Bank cited its motion for Summary Judgment.

On August 24, 2012, the trial court granted Discover Bank's Motion for Summary Judgment and entered order against Petrenko. CP 8-10.

On December 12, 2012, Petrenko filed Defendant's CR 60(b)(5) and (11) Motion to Vacate Void Judgment/Order on the basis that the trial court lacked personal jurisdiction over Petrenko for lack of proper service by Discover Bank. CP 11-12; CP 15-24.

In support of his CR 60 Motion to Vacate Void Judgment/Order, Boris Petrenko submitted his personal declaration and declaration of Lena Petrenko. CP 34-35; CP 73-74.

On January 25, 2013, the trial court denied Petrenko's CR 60(b)(5) and (11) Motion to Vacate Void Judgment/Order and entered order to that effect finding that Petrenko was properly served with Summons and Complaint. CP 85-86.

### C. SUMMARY OF ARGUMENT

In order to commence its action against Boris Petrenko, the Respondent, Discover Bank, attempted to comply with RCW 4.28.080(15). The statute allows Discover Bank to leave the summons and complaint with a person other than the defendant but only if that person is

of suitable age and discretion **and** resides at the defendant’s dwelling house or usual place of abode. Discover Bank left its summons and complaint at the Petrenko’s place of usual abode, however, with a non-resident visitor, Jane Doe, who was not authorized to accept service on behalf of Boris Petrenko. As a result, Discover Bank had not acquired jurisdiction over the defendant Boris Petrenko and the judgment entered by the trial court was void for that reason.

#### D. ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR OF LAW WHEN IT RULED THAT “THE TERM RESIDENT DOES NOT REQUIRE ANY PARTICULAR LENGTH OF STAY.”

##### 1. **Service of Process Requirements**

A ruling under CR 60(b)(5) on grounds that the judgment was void is reviewed as a matter of law. No exercise of discretion is involved.<sup>1</sup>

The ways in which a person may be served with summons are set forth in RCW 4.28.080. Pursuant to RCW 4.28.080(15), personal service may be made at a person’s place of usual abode with someone of suitable age and discretion who resides therein.<sup>2</sup> For purposes of RCW 4.28.080(15) “resident” must be given its ordinary meaning—a person is

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<sup>1</sup> *Allstate Ins. Co. v. Khani*, 75 Wn.App. 317, 323, 877 P.2d 724 (1994) (defective service of process); *Brickum Inv. Co. v. Vernham Corp.*, 46 Wn.App. 517, 520-21, 731 P.2d 533 (1987) (lack of personal jurisdiction).

<sup>2</sup> *Sheldon v. Fetting*, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996).

resident if the person is actually living in the particular home.<sup>3</sup> A judgment entered without proper service of the summons and complaint is void for lack of jurisdiction.<sup>4</sup> A plaintiff has the initial burden to produce an affidavit of service that on its face shows that service was properly carried out.<sup>5</sup> If the plaintiff makes this showing, the burden then shifts to the defendant to prove by clear and convincing evidence that service was improper.<sup>6</sup>

Generally, though there is a return showing that process was served, this return may be contradicted on motion to vacate the judgment and the motion granted, if notwithstanding the return the court is convinced that it had not acquired jurisdiction over the defendant.<sup>7</sup>

A voluntary appearance of a defendant does not preclude his right to challenge lack of jurisdiction over his person, insufficiency of process, or insufficiency of service of process pursuant to rule 12(b).<sup>8</sup>

The service of process requirement is taken very seriously in Washington and the appellate courts apply a stringent scrutiny. For example, in *Vukich v. Anderson*, 97 Wn.App. 684, 985 P.2d 952 (1999),

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<sup>3</sup> *Salts v. Estes*, 133 Wash.2d 160, 170, 943 P.2d 275 (1997).

<sup>4</sup> *Vukich v. Anderson*, 97 Wn.App. 684, 691, 985 P.2d 952 (1999).

<sup>5</sup> *Witt v. Port of Olympia*, 126 Wn.App. 752, 757, 109 P.3d 489 (2005) (quoting 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 4.40, at 108 (2004)).

<sup>6</sup> *Id.*

<sup>7</sup> *Johnson v. Gregory*, 4 Wash. 109, 112, 29 P. 831 (1892).

<sup>8</sup> *CR 4(d)(5)*.

service upon a tenant living in a home owned by the defendant was held ineffective. In *Scott v. Goldman*, 82 Wn.App. 1, 917 P.2d 131 (1996), service upon a person holding power of attorney for the defendant was held insufficient. In *Gross v. Evert-Rosenberg*, 85 Wn.App. 539, 933 P.2d 439 (1997), service at a home rented to defendant's daughter and son-in-law was held insufficient. In *Salts v. Estes*, 133 Wn.2d 160, 943 P.2d 275 (1997), service upon a neighbor in defendant's home, checking on defendant's home while defendant was on vacation, was held insufficient.

**2. Service was Not Made on a Resident of Mr. Petrenko's Usual Place of Abode as Required by RCW 4.28.080(15).**

If service papers are left at the defendant's place of abode, but are left with a person who does not reside there, service is insufficient.<sup>9</sup> Under rare circumstances, some courts have held that a close relative of a defendant may qualify as a "resident" under the service statute.<sup>10</sup> This has been allowed where the person receiving service papers was: (1) a close relative of the defendant; (2) and overnight resident at defendant's usual house of abode at the time of service; and (3) in sole possession of the defendant's house of abode. *Wichert* at 152. However, Washington courts

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<sup>9</sup> *Salts v. Estes*, 133 Wn.2d 160, 943 P.2d 275 (1997) (service upon neighbor in defendant's home, checking on defendant's home while defendant was on vacation was held insufficient).

<sup>10</sup> *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991). (service was sufficient upon defendant's adult child who was overnight resident in, and sole occupant of, defendant's resident).

have made it clear that this method of service marks the “outer boundaries” of substitute service and have refused to stretch these boundaries any farther. *Salts* at 165-166.

a. *Service on Jane Doe Does Not Fall Within “Outer Boundaries” of Sufficient Substitute Service.*

This case is unlike *Wichert* which marks the “outer boundaries” of sufficient substitute service. In *Wichert*, plaintiff served defendants at their home while they were out of state. *Wichert* at 150-152. The process server left service papers with defendant’s 26 year-old daughter who had stayed overnight at defendant’s home the night before and had stayed there in the past as well. *Id.* The Supreme Court held that:

[s]ervice upon a defendant’s adult child who is an overnight resident in the house of defendant’s usual abode, and then the sole occupant thereof, is reasonably calculated to accomplish notice to the defendant.

*Wichert* at 152.

Thus, *Wichert* creates a three part test:

- (1) was the person served an adult child of the defendant (or close family member);
- (2) was the person served an overnight resident at the time of service; and
- (3) was the person served the sole occupant of the family home.

Unlike the person accepting service in *Wichert*, Discover Bank made no showing that Jane Doe, later identified as Lena Petrenko, was a close relative of the defendant, Boris Petrenko. Unlike the person accepting service in *Wichert* who had spent the night at defendant's home prior to service, Lena Petrenko had not stayed overnight at the Boris Petrenko's home prior to service and, instead, had arrived there shortly before service was attempted. Finally, Plaintiff made no showing that Lena Petrenko was the sole occupant of defendant's home at the time of service. For these reasons, service on Lena Petrenko is insufficient.

b. *Service Insufficient When Made on the Others Who are Merely "Present" in Defendant's Home.*

This case is similar to the case of *Salts* in which the Supreme Court held that service on employees and others who are merely present or who have a fleeting occupancy of defendant's home is insufficient. In *Salts* plaintiff's process server went to the defendant's home and left papers with a woman named Mary TerHorst who was inside defendant's home. *Salts* at 163. Ms. TerHorst was neither married to nor related to the defendant. *Id.* Ms. Terhorst was merely looking after the defendant's home for a two-week period while the defendant was out of town. *Id.* she visited the home to feed the dog, bring in the mail, and take care of similar matters. *Id.* Ms. TerHorst had never lived at defendant's home. *Id.*

The trial court held that service was insufficient and dismissed the lawsuit. The Court of Appeals affirmed the trial court's decision. The Supreme Court agreed and distinguished this case from cases in which service was made on a relative of defendant who had stayed overnight at defendant's home *Id.* at 168-169. Citing to other cases involving service on janitors, secretaries, and housekeepers, the Supreme Court held that "service on an employee of the defendant who spends only a part of his time at defendant's residence is defective." *Id.* at 169.

Here, Discover Bank provided an affidavit of service showing that service of process was made on Jane Doe, a brown-haired white female, who refused to give name, co-resident at Petrenko's home. The burden shifts to Petrenko to prove by clear and convincing evidence that service was improper.

The facts of the present case are similar to the facts in the *Salts*. Just as the person who accepted service in *Salts* was at the home temporarily to care for the house, Lena Petrenko was only shortly at the Petrenko's home to visit defendant and was ready to leave.

In order to meet the burden of clear and convincing evidence that service was improper, Boris Petrenko provided his personal declaration under oath that no Jane Doe female resided at his address and that only Petrenko's father was co-resident. In the same declaration Boris Petrenko

further testified that he never authorized any female Jane Doe to accept process on his behalf and that he was not personally served with Summons and Complaint in this action.

In addition, Lena Petrenko, who was initially identified in Declaration of Service as Jane Doe, white female, also submitted her personal declaration under oath that she was not resident at Mr. Petrenko's address. Lena Petrenko specifically testified in her declaration that she was not a resident at 1734 157<sup>th</sup> Ave. NE, B-204, Bellevue, WA; that since 2008 to the present time she was permanently residing in Sammamish, Washington. Lena Petrenko described that on January 7<sup>th</sup> 2012, in the evening hours, she was visiting Boris Petrenko and was ready to leave when she heard a doorbell rang. When she went to open the door there was a guy who asked her if Boris Petrenko lived at that residence to which she responded: "Yes, but he is not home." When Lena Petrenko asked the person "Who are you?" that person did not identify himself. Instead he just handed to her some papers and immediately left. Lena Petrenko further testified that the guy did not ask her if she was living at Mr. Petrenko's residence. Finally, Lena Petrenko testified that she made no statement that she was a resident or lived at 1734 157<sup>th</sup> Ave. NE, B-204, Bellevue, WA 98008.

In *Salts v. Estes*, the Supreme Court of Washington said:

“RCW 4.28.080(15) is unambiguous. “Resident” requires something more than “present” in the defendant’s usual abode. When the Legislature required in RCW 4.28.080(15) that service be on a person who is “then resident” in the defendant’s usual abode, it meant something more than fleeting occupancy.”<sup>11</sup>

The Supreme Court further said:

“We decline to interpret RCW 4.28.080(15) so that mere presence in the defendant’s home or “possession” of the premises is sufficient to satisfy the statutory residency requirement. Under such a view, service on just about any person present at the defendant’s home, regardless of the person’s real connection with the defendant, will be proper. A housekeeper, a baby-sitter, a repair person or a visitor at the defendant’s home could be served. Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underline service of process statutes.”

Here, just like in *Salts*, Lena Petrenko had not resided overnight at the defendant’s home at the time of service. Discover Bank did not present any additional testimony or evidence that defendant Petrenko was properly served. As in *Salts*, service in this case is insufficient. Hence, Petrenko met his burden of proof by presenting clear and convincing

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<sup>11</sup> *Salts*, 133 Wash.2d 160, 167, 943 P.2d 275 (1997).

evidence that service was improper and for this reason the trial court lacked personal jurisdiction.

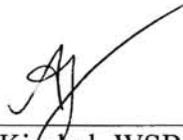
E. REQUEST FOR ATTORNEY'S FEE ON APPEAL

Pursuant to the clear terms of the Discover Bank Cardmember Agreement and pursuant to RCW 4.84.330 the prevailing party is entitled to all of its attorney's fees and costs incurred in litigation and in this appeal. Pursuant to Rule of Appellate Procedure ("RAP") 18.1, Appellant Petrenko hereby requests such fees and costs incurred in this appeal. At the conclusion of this appeal, Appellant Petrenko will submit supporting accounting and calculations reflecting reasonable amount of attorney's fees, costs and expenses.

F. CONCLUSION

For the reasons stated, Appellant Boris Petrenko requests that the Court of Appeals reverse the August 24, 2012, Summary Judgment Order against Boris Petrenko and remand this case for trial.

Respectfully submitted this 29<sup>th</sup> day of April, 2013.

  
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Andreas Kischel, WSBA 42435  
Attorney for Appellant Petrenko

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION I**

BORIS PETRENKO )  
Appellant, )  
vs. )  
DISCOVER BANK, ISSUER OF THE )  
DISCOVER CARD, )  
Defendant. )

No. 699644

DECLARATION OF MAILING

~~COURT OF APPEALS  
STATE OF WASHINGTON  
2013 APR 29 PM 12:47  
CLERK'S DIV 1~~

I am, Boris Petrenko, under penalty of perjury under the laws of the State of Washington declare:

That on this day, I Boris Petrenko, hand delivered, the following BRIEF OF APPELLANT PETRENKO to the

attorneys of record for Defendant:

Peter R. Osterman  
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Jeff Mackie  
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Containing a true copy of the document to which this declaration is attached.

Dated at Bellevue, Washington this 29<sup>th</sup> day of April, 2013.



Boris Petrenko