

No. 75107-7-I

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

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**ASSET ACCEPTANCE LLC,**

Respondent,

v.

**VIET TUAN NGUYEN,**

Appellant.

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**BRIEF OF APPELLANT**

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Mina Shahin, WSBA #46661  
Attorney for Appellant

THE SULLIVAN LAW FIRM  
M.SHAHIN@SULLIVANLAWFIRM.ORG  
701 Fifth Avenue, Suite 4600  
Seattle, WA 98104  
(206) 903-0504

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## TABLE OF CONTENTS

INTRODUCTION .....	1
ASSIGNMENTS OF ERROR.....	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
STATEMENT OF THE CASE .....	2
A. Service of the summons and complaint .....	2
B. Previous motions to vacate default judgment.....	4
C. The current motion to vacate default judgment.....	7
D. The alleged debt upon which this case is based .....	9
ARGUMENT.....	10
Argument Summary .....	10
I. MR. NGUYEN’S PREVIOUS MOTIONS TO VACATE DO NOT PRECLUDE HIS CURRENT MOTION.....	12
A. Standard of Review.....	13
B. The trial court erred in finding that Mr. Nguyen’s previous motions to vacate precluded him from bringing his current motion. ....	13
1. Mr. Nguyen’s first motion to vacate does not preclude the current motion, as it did not raise the issue of service nor was a determination made on the merits.....	14
2. Mr. Nguyen’s second motion to vacate does not preclude the current motion, as Judge North denied it without prejudice and without judgment on the merits. ....	16
C. The trial court erred in finding that Mr. Nguyen was estopped from raising a jurisdictional issue that rendered a judgment void. ....	19

II. MR. NGUYEN PRESENTED CLEAR AND CONVINCING EVIDENCE THAT HE WAS NEVER SERVED AND THAT THE DEFAULT JUDGMENT WAS THEREFORE VOID.....	21
A. Standard of Review.....	21
B. The trial court erred in finding that the Mr. Nguyen failed to provide clear and convincing evidence that he was not served. ....	21
1. Mr. Nguyen was not personally served.....	22
2. Mr. Nguyen was not served by substitute service. ....	26
3. The trial court’s determination as to proper service was inconsistent with Washington case law.....	28
4. Without proper service, the default judgment was entered against Mr. Nguyen without personal jurisdiction. ....	33
III. BASED ON THE FOREGOING, MR. NGUYEN IS ENTITLED TO VACATION OF THE DEFAULT JUDGMENT, QUASHAL OF SERVICE OF PROCESS, QUASHAL OF ALL WRITS OF GARNISHMENT, AND RETURN OF FUNDS GARNISHED PLUS INTEREST, FEES, AND COSTS. ..	34
A. Standard of Review.....	34
B. The trial court erred in not setting aside and vacating the default judgment. ....	35
C. The trial court erred in not granting the relief to which Mr. Nguyen was entitled on vacation of the judgment.....	38
D. Mr. Nguyen is entitled to attorney fees and costs on appeal. ....	42
CONCLUSION.....	42
APPENDIX: TEXT OF STATUTES AND RULES .....	A-1
RCW § 4.28.080: Civil procedure—Commencement of actions—Summons, how served.....	A-1

RCW § 6.27.230: Enforcement of judgments—Garnishment— Controversion—Costs and attorney’s fees .....	A-1
CR 55(c)(1): Default and judgment—Setting aside default— Generally .....	A-1
CR 60(b): Relief from judgment or order—Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.....	A-2
King County Local Civil Rule 60(e)(1): Relief from judgment or order—Procedure on vacation of judgment—Default judgment.....	A-2
RAP 12.8: Effect of reversal on intervening rights .....	A-2
RAP 14.2: Who is entitled to costs.....	A-3
RAP 18.1(a): Attorney fees and expenses—Generally .....	A-3

## TABLE OF AUTHORITIES

### Cases

<i>A. H. Averill Mach. Co. v. Allbritton</i> , 51 Wash. 30, 97 P. 1082 (1908) .....	17–18
<i>Allied Fid. Ins. Co. v. Ruth</i> , 57 Wn. App. 783, 790 P.2d 206 (1990) .....	19, 34, 36, 38
<i>Allstate Ins. Co. v. Khani</i> , 75 Wn. App. 317, 877 P.2d 724 (1994) .....	36, 39, 41–42
<i>Ballard Savs. &amp; Loan Ass'n v. Linden</i> , 188 Wash. 490, 62 P.2d 1364 (1936) .....	36–37
<i>Balt. &amp; Ohio R.R. Co. v. United States</i> , 279 U.S. 781, 49 S. Ct. 492, 73 L. Ed. 954 (1929) .....	40–41
<i>Boss Logger, Inc. v. Aetna Cas. &amp; Sur. Co.</i> , 93 Wn. App. 682, 970 P.2d 755 (1998) .....	37
<i>Brenner v. Port of Bellingham</i> , 53 Wn. App. 182, 765 P.2d 1333 (1989) .....	34, 36
<i>Brown-Edwards v. Powell</i> , 144 Wn. App. 109, 182 P.3d 441 (2008) .....	24–25
<i>Christensen v. Grant Cnty. Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004) .....	13
<i>Colacurcio v. Burger</i> , 110 Wn. App. 488, 41 P.3d 506 (2002) .....	20
<i>Davis v. Dep't of Labor &amp; Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980) .....	22
<i>Davis v. Nielson</i> , 9 Wn. App. 864, 515 P.2d 995 (1973) .....	15
<i>Dlouhy v. Dlouhy</i> , 55 Wn.2d 718, 349 P.2d 1073 (1960) .....	36

<i>Doe v. Fife Mun. Court</i> , 74 Wn. App. 444, 874 P.2d 182 (1994).....	13, 19–20, 38
<i>Griggs v. Averbek Realty</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	35
<i>Gross v. Evert-Rosenberg</i> , 85 Wn. App. 539, 933 P.2d 439 (1997).....	32
<i>Harvey v. Obermeit</i> , 163 Wn. App. 311, 261 P.3d 671 (2011) .....	33
<i>In re Dependency of P.A.D.</i> , 58 Wn. App. 18, 792 P.2d 159 (1990).....	22
<i>In re Marriage of Hardt</i> , 39 Wn. App. 493, 693 P.2d 1386 (1985).....	39
<i>In re Marriage of Leslie</i> , 112 Wn.2d 612, 772 P.2d 1013 (1989).....	38–39
<i>In re Marriage of Markowski</i> , 50 Wn. App. 633, 749 P.2d 754 (1988).....	22, 33–34
<i>In re Marriage of Wilson</i> , 117 Wn. App. 40, 68 P.3d 1121 (2003) .....	35
<i>John Hancock Mut. Life Ins. Co. v. Gooley</i> , 196 Wash. 357, 83 P.2d 221 (1938) .....	32
<i>Layne v. Hyde</i> , 54 Wn. App. 125, 773 P.2d 83 (1989).....	18
<i>Leen v. Demopolis</i> , 62 Wn. App. 473, 815 P.2d 269 (1991).....	21–22, 34, 36, 38
<i>Lepeska v. Farley</i> , 67 Wn. App. 548, 833 P.2d 437 (1992).....	22, 29–31
<i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 794 P.2d 526 (1990).....	41–42

<i>Marley v. Dep't of Labor &amp; Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	20
<i>McDaniels v. Carlson</i> , 108 Wn.2d 299, 738 P.2d 254 (1987).....	13, 15–16, 18–19
<i>Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces</i> , 36 Wn. App. 480, 674 P.2d 1271 (1984).....	29–30, 36
<i>Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007).....	34–35
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	13
<i>Salts v. Estes</i> , 133 Wn.2d 160, 943 P.2d 275 (1997).....	33
<i>Scanlan v. Townsend</i> , 181 Wn.2d 838, 336 P.3d 1155 (2014).....	21–23, 25, 32
<i>Schell v. Tri-State Irrigation</i> , 22 Wn. App. 788, 591 P.2d 1222 (1979).....	37
<i>Servatron, Inc. v. Intelligent Wireless Prods., Inc.</i> , 186 Wn. App. 666, 346 P.3d 831 (2015).....	36
<i>Sharebuilder Sec., Corp. v. Hoang</i> , 137 Wn. App. 330, 153 P.3d 222 (2007).....	21, 35
<i>Sheldon v. Fetting</i> , 129 Wn.2d 601, 919 P.2d 1209 (1996).....	32–33
<i>State ex rel. Coughlin v. Jenkins</i> , 102 Wn. App. 60, 7 P.3d 818 (2011).....	32
<i>State v. A.N.W. Seed Corp.</i> , 116 Wn.2d 39, 802 P.2d 1353 (1991).....	40–41
<i>Stephen Haskell Law Offices, PLLC v. Westport Ins. Corp.</i> , No. CV-10-437-JLQ, 2011 WL 1303376 (E.D. Wash. Apr. 5, 2011) ...	39

<i>Streeter-Dybdahl v. Huynh</i> , 157 Wn. App. 408, 236 P.3d 986 (2010).....	21, 29, 31
<i>United States v. Morgan</i> , 307 U.S. 183, 59 S. Ct. 795, 83 L. Ed. 1211 (1939).....	39–40
<i>Vukich v. Anderson</i> , 97 Wn. App. 684, 985 P.2d 952 (1999).....	31
<i>Weber v. Biddle</i> , 72 Wn.2d 22, 431 P.2d 705 (1967) .....	38
<i>Wesley v. Schneckloth</i> , 55 Wn.2d 90, 346 P.2d 658 (1959) .....	19
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968).....	38
<i>Wilbert v. Day</i> , 83 Wash. 390, 145 P. 446 (1915) .....	32
<i>Woodruff v. Spence</i> , 76 Wn. App. 207, 883 P.2d 936 (1994).....	20
<b>Statutes</b>	
RCW § 4.28.080 .....	22, 26, 28, 33
RCW § 6.27.230 .....	41–42
<b>Rules</b>	
CR 55 .....	34–37
CR 60 .....	6–7, 14, 21, 34–37, 39
King County Local Civil Rule 60 .....	16
RAP 12.8 .....	40
RAP 14.2 .....	42
RAP 18.1 .....	42

**Other Authorities**

Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805 (1985) ..... 17

Restatement (First) of Restitution (1937)..... 40–41

Restatement (Second) of Judgments (1982)..... 20

Restatement (Third) of Restitution and Unjust Enrichment (2011)..... 40

## **INTRODUCTION**

On April 16, 2009, a default judgment was entered against Appellant Kevin Nguyen (formerly known as Viet Tuan Nguyen). The default judgment was entered on Respondent Asset Acceptance LLC's representation that Mr. Nguyen had been served with a summons and complaint. Mr. Nguyen was never served, nor did he receive any notice of the claim against him until Asset Acceptance began garnishing his wages in 2012. Instead of executing proper service, Asset Acceptance had only left a copy of the summons and complaint at one of Mr. Nguyen's previous addresses, a place that was not his usual abode at the time of service. Without proper service, the trial court had no personal jurisdiction over Mr. Nguyen when it entered the default judgment. Therefore, the default judgment is void and must be set aside and vacated.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in treating Mr. Nguyen's motion to vacate as precluded or prejudiced by his previous motions.
2. The trial court erred in finding that Mr. Nguyen failed to show clear and convincing evidence that he was not properly served.
3. The trial court erred in denying Mr. Nguyen the relief to which he was entitled upon showing that the default judgment was void, namely vacation of the judgment, quashal of service of process, quashal of writs

of garnishment, restitution of funds garnished plus interest, and an award of attorney fees and costs.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does Mr. Nguyen's first motion to vacate the default judgment, filed August 22, 2012, preclude his current motion? (Assignment of Error No. 1.)
2. Does Mr. Nguyen's second motion to vacate the default judgment, filed July 1, 2013, preclude his current motion? (Assignment of Error No. 1.)
3. Has Mr. Nguyen shown clear and convincing evidence that he was not served and that the default judgment is therefore void? (Assignment of Error No. 2.)
4. What relief is Mr. Nguyen entitled to upon showing that the default judgment is void? (Assignment of Error No. 3.)

### **STATEMENT OF THE CASE**

#### **A. Service of the summons and complaint**

On October 8, 2008, Asset Acceptance made a request to ABC Legal Services for process service on Mr. Nguyen. Clerk's Papers (CP) at 408. The address Asset Acceptance provided, 3521 S. Chicago St., Seattle, did not result in service. *Id.*

On December 3, 2008, ABC Legal Services made a request for address information from the Seattle postmaster. CP at 409. The postmaster

merely confirmed that 3802 S. Benefit St., Seattle, was an address where mail was delivered. *Id.* Around the time of that request, Mr. Nguyen had recently moved to 6518 33rd Ave. S, Seattle. CP at 155. At the end of 2008, after approximately a month of residing at 6518 33rd Ave. S, Seattle, Mr. Nguyen moved again to 255 Powell Ave. SW, Renton, where he continued to live until mid-2009. *Id.*

An unsuccessful service attempt was made on February 28, 2009, at the 3802 S. Benefit St. address. CP at 407. On March 2, 2009, ABC Legal Services sent three requests for address information to the postmaster. CP at 410–12. Each request had a different address: 3802 S. Benefit St., Seattle; 6518 33rd Ave. S, Seattle; and 255 Powell Ave. SW, Renton. *Id.* The postmaster returned all three requests with a check mark next to the line “Mail is delivered to address given.” *Id.*

On March 12, 2009, an ABC Legal Services process server went to one of the three addresses, 3802 S. Benefit St., Seattle, and left the complaint and summons with one Bach Yen Thi Huynh (“Yen”)<sup>1</sup> at that address. CP at 5, 410–12. No copy of the complaint and summons was ever served on Mr. Nguyen personally. CP at 156, 416. Mr. Nguyen was not a resident at 3802 S. Benefit St. on March 12, 2009, when the ABC Legal Services

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<sup>1</sup> This brief uses the given name “Yen” to refer to Bach Yen Thi Huynh, rather than her family name, for consistency with the service documents and with the trial court record.

messenger left a copy with Yen. CP at 155–56, 161–64, 173. Yen had been Mr. Nguyen’s landlord when he lived in the basement unit at 3802 S. Benefit St. in 2008. CP at 173, 416. Mr. Nguyen has no other relation with Yen. CP at 416. Mr. Nguyen had no contact with Yen since he moved out of the basement unit of 3802 S. Benefit St. in 2008 until he contacted her earlier this year to ask for her declaration in this matter. *Id.*

On March 12, 2009, the date of the purported service, Mr. Nguyen was actually living at 255 Powell Ave. SW, Renton. CP at 155–56, 161–64. Mr. Nguyen had been living at 255 Powell Ave. SW since the beginning of 2009. CP at 155. The last time Mr. Nguyen had lived at 3802 S. Benefit St. had been months earlier, in 2008. CP at 155, 173. Yen confirms in her sworn declaration that Mr. Nguyen was not living at 3802 S. Benefit St. in March 2009 and that he had not lived there since sometime in 2008. CP at 173. Indeed, on March 8, 2009, Mr. Nguyen signed his 2008 tax returns, testifying under penalty of perjury that his address was 255 Powell Ave. SW. CP at 161–64, 167.

**B. Previous motions to vacate default judgment**

On April 15, 2009, Asset Acceptance filed its summons and complaint against Mr. Nguyen. CP at 1–4. The next day, Asset Acceptance filed a motion and order for default judgment. CP at 6–8. The motion was granted

that day. CP at 18–19. Without service, Mr. Nguyen remained entirely unaware of the proceedings. CP at 156.

Exactly three years later, on April 15, 2012, Asset Acceptance began garnishment proceedings, placing a continuing lien on Mr. Nguyen’s earnings from his employer, The Boeing Company. CP at 120–21. The first time Mr. Nguyen became aware of Asset Acceptance, its allegations that he owed it a debt, and its complaint against him was when Boeing informed him that a debt collector would be garnishing his wages. CP at 156.

Mr. Nguyen did not read, write, or speak English well, and did not understand why his wages were being garnished. *Id.* An acquaintance recommended a credit repair agency in California called uGotFICO, Inc., because it had Vietnamese-speaking employees. *Id.* The employees of uGotFICO assured Mr. Nguyen that they would fix the situation with Asset Acceptance. *Id.* In August 2012, uGotFICO sent Mr. Nguyen a form motion to set aside and vacate the default judgment and instructed him to file it with the court. *Id.* Confused by the proceedings taking place, and unable to understand the language, Mr. Nguyen filed the motion pro se on August 22, 2012. CP at 20–30, 156. The only argument made in the motion was that Mr. Nguyen “does not owe any money to Asset Acceptance LLC.” CP at 20–22. The accompanying “Memorandum of Points and Authorities” also did not identify any specific grounds for vacation, and instead contained a

verbatim copy of the entirety of CR 60 and a list of all its provisions. CP at 27–30. Unaware that he was required to attend the hearing, and believing that uGotFICO was his legal representative, Mr. Nguyen did not appear for the September 6, 2012, scheduled hearing. CP at 41–42, 156. The court denied Mr. Nguyen’s motion without a hearing. *Id.*

Mr. Nguyen did not understand that his motion had been denied and continued to believe that uGotFICO was handling the situation. CP at 156–57. Asset Acceptance continued garnishment of Mr. Nguyen’s wages. *Id.*

On July 1, 2013, Mr. Nguyen filed another pro se motion to vacate and set aside the default judgment, also prepared by uGotFICO. CP at 50–60, 157. The motion was set for hearing in the King County Superior Court Ex Parte Department—not before the assigned judge, Judge Julie Spector. CP at 50–51. On July 24, 2013, Mr. Nguyen appeared before Judge Douglass A. North for the hearing on his motion to vacate. Report of Proceedings (RP) at 1–2. The court denied Mr. Nguyen’s motion without prejudice because it was not set in the proper forum. CP at 68–69; RP at 4–6.

**The Court:** So yeah. Then I think the thing to do, then, Mr. Nguyen, is to note your motion before Judge Spector because the case was originally assigned to Judge Spector. And so the process for setting aside a judgment is to go back before Judge Spector, then. So I’m going to deny your motion now without prejudice. That is, I’m not saying that you can’t bring it again. I’m just saying I’m not going to grant it right now and that you need to bring it before Judge Spector.

RP at 4–5. Mr. Nguyen had a difficult time understanding the proceedings due to the language barrier:

**The Defendant:** I’m sorry. I try. English is my second language, so sometimes I don’t understand all things. I request a translator already, but they don’t have one available for me. So some of them, I don’t understand very much on it. So—

**The Court:** I’m sorry. I can’t hear you.

**The Defendant:** Some of them you say, I am not clear 100 percent. So you say I can—like, last time, you said I can come again with the judge, the previous judge?

RP at 5–6. The court informed Mr. Nguyen that his motion was being denied without prejudice, and that he could file his motion to vacate before Judge Spector if he wanted to bring it again. RP at 4–6. The court signed Asset Acceptance’s proposed order denying the motion, but amended it to read “denied *without* prejudice” in accordance with the oral ruling. CP at 69; RP at 5.

### **C. The current motion to vacate default judgment**

On March 11, 2016, now through counsel, Mr. Nguyen filed another motion to set aside and vacate the default judgment. CP at 70–81. The motion was brought pursuant to CR 60(b)(5) and CR 60(b)(11). *Id.*

In support of his motion, Mr. Nguyen provided several pieces of evidence. CP at 104–74. First, he provided his own declaration, attesting to his addresses of residence during the relevant period, 2008–09. CP at 155–57. On the date of service, it had been months since he had moved out from

3802 S. Benefit St., Seattle. CP at 156. His address on the date of service was 255 Powell Ave. SW, Renton. *Id.*

Mr. Nguyen also provided a corroborating declaration from Bach Yen Thi Huynh, the person to whom the process server allegedly delivered the summons and complaint. CP at 173–74. Yen unequivocally states that Mr. Nguyen was not a resident at 3802 S. Benefit St. in March 2009, the time period when service was allegedly made. CP at 173. Yen further states that Mr. Nguyen was only a resident at that address for a few months in 2008. *Id.* Finally, she states that she did not know Mr. Nguyen by the name Viet Tuan Nguyen, spoke little English at the time, and would not have been able to communicate effectively with a process server who spoke only English. *Id.*

Finally, Mr. Nguyen provided documents corroborating his address at the time of service: his 2008 tax return, dated March 8, 2009, showing that his address at the time was 255 Powell Ave. SW, Renton, and an accompanying letter from his tax preparer. CP at 156, 160–67.

On April 6, 2016, Asset Acceptance filed a response to Mr. Nguyen's motion, providing only the affidavit from the process server as evidence that Mr. Nguyen was a resident at 3802 S. Benefit St. on the date of alleged service. CP at 175–87, 189. Asset Acceptance also attached an unauthenticated document, apparently a skip trace, showing that there were

*seven* addresses that could possibly have been Mr. Nguyen's residence in March 2009. CP at 284–87. The skip trace also listed six different possible names for Mr. Nguyen and two possible dates of birth. *Id.* Mr. Nguyen filed a reply on March 7, 2016, with documents from ABC Legal Services, demonstrating that the messenger had information that 3802 S. Benefit St. was only *one of three possible addresses* that could have been Mr. Nguyen's residence at the time the summons and complaint were left with Yen. CP at 391–95, 410–12.

The hearing took place on April 8, 2016, where Mr. Nguyen was represented by counsel. RP at 8. Judge Spector denied Mr. Nguyen's motion that day. CP at 429–30. The order denying Mr. Nguyen's motion states:

The court cannot find that defendant's motion met the standard of proof (clear and convincing evidence) that he had not been properly served. The court is aware that this identical motion has been raised in 2012 and in 2013 (before J. North) raising the same issue. Both times the motion was denied. The fact that Mr. Nguyen chose to represent himself does not give rise to a lower standard of proof.

CP at 430.

**D. The alleged debt upon which this case is based**

Asset Acceptance filed this action for an alleged unpaid Citibank credit card balance of \$14,656.12 on an account held by someone named Viet Tuan Nguyen. CP at 1–4. Although born with the name Viet Tuan Nguyen, Mr. Nguyen changed his legal name to Kevin Nguyen in 2000. CP at

155. Mr. Nguyen has never had a Citibank credit card with the name Viet Tuan Nguyen. CP at 157.

The alleged debt originates from a Citibank credit card account number ending in 5985. CP at 10, 157. Mr. Nguyen is not the obligor on this account, nor has Mr. Nguyen ever used this account. CP at 157. Mr. Nguyen has a Citibank credit card account ending in 4124, which has a \$0.00 balance. CP at 157, 420.

Based on the default judgment entered against Mr. Nguyen, Asset Acceptance has garnished \$9,563.33 from Mr. Nguyen's wages and another \$1,501.67 from his BECU bank account. CP at 157, 169, 171–72. Asset Acceptance alleges that Mr. Nguyen still owes \$11,226.37. CP at 157.

## **ARGUMENT**

### **Argument Summary**

The trial court identified two main grounds for its decision to deny Mr. Nguyen's motion to vacate the default judgment. First, it noted that Mr. Nguyen had twice before brought a motion to vacate, and stated that the previous motions pertained to the same issue and had already determined that the default judgment was not void. Second, it found that there was not clear and convincing evidence of improper service. The trial court erred on both these issues.

First, it was error to treat the previous motions as having preclusive effect, as neither of Mr. Nguyen's previous motions was heard on the merits of whether Mr. Nguyen was served or whether the judgment was void. The first motion did not involve issues of service or jurisdiction, and it was denied without an appearance by Mr. Nguyen and without any determination on the merits. The second motion was denied without prejudice on procedural grounds, as Mr. Nguyen had noted the motion before the wrong judge. Moreover, a judgment entered without jurisdiction is void ab initio and must be vacated whenever the jurisdictional issue comes to light, regardless of principles of preclusion.

The court also erred in finding that there was not clear and convincing evidence of improper service. All evidence on record establishes clearly that service was not made upon Mr. Nguyen personally, nor was service made at his usual abode. Instead, the summons and complaint were served upon his former landlord at a location where he had not resided for months. Mr. Nguyen had neither actual nor constructive notice of the lawsuit against him and did not become aware of its existence until years later. A review of case law shows that the evidence presented by Mr. Nguyen easily surpasses the "clear and convincing" standard.

The trial court thus erred in denying Mr. Nguyen the relief he requested, including vacation of the default judgment as well as other relief

to which Mr. Nguyen was thereupon entitled, notably quashal of all writs of garnishment and restitution of funds already garnished.

**I. MR. NGUYEN’S PREVIOUS MOTIONS TO VACATE DO NOT PRECLUDE HIS CURRENT MOTION.**

In opposing Mr. Nguyen’s motion, Asset Acceptance argued that the motion was precluded by the doctrine of collateral estoppel, because Mr. Nguyen had already filed two previous motions to vacate the default judgment. CP at 178–79. The trial court, in denying Mr. Nguyen’s motion, agreed with Asset Acceptance’s position, finding in its decision that the previous motions had raised “the same issue”:

The court is aware that this identical motion has been raised in 2012 and in 2013 (before J. North) raising the same issue. Both times the motion was denied.

CP at 429–30. As the court explained during the March 8, 2016, hearing:

**The Court:** You keep assuming that I’m going to find the judgment is void. ... That’s quite a presumption to make since two other courts have already found that the judgment was not void.

RP at 20–21. This conclusion was erroneous in two respects. First, it was contrary to the record, as no court had previously found that the judgment was not void. Second, such findings would not have preclusive effect, as any judgment that is void must be vacated when the lack of jurisdiction comes to light, regardless of whether the motion to vacate would otherwise

be barred by principles of preclusion. *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 449, 874 P.2d 182 (1994).

**A. Standard of Review**

Whether collateral estoppel applies to bar relitigation of an issue is a question of law reviewed de novo. *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305–06, 96 P.3d 957 (2004).

**B. The trial court erred in finding that Mr. Nguyen’s previous motions to vacate precluded him from bringing his current motion.**

Collateral estoppel prevents “the relitigation of an issue or determinative fact after the party estopped has had a full and fair opportunity to present a case.” *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987). A finding of collateral estoppel requires that the following questions be answered affirmatively:

- (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
- (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

*Id.* (quoting *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)). The “burden of proof is on the party asserting estoppel.” *Id.*

1. *Mr. Nguyen's first motion to vacate does not preclude the current motion, as it did not raise the issue of service nor was a determination made on the merits.*

Mr. Nguyen filed his first motion to vacate and set aside the default judgment on August 22, 2012. CP at 20. The filing consisted of form documents from uGotFICO, containing no facts or argument specific to Mr. Nguyen's case. CP at 20–30. The filing was, from a legal perspective, almost entirely incoherent. *Id.* It was also incomplete, containing fields that were apparently meant to be completed before submission, such as “[Type text]” and “[Any other relevant legal authority: specify].” *Id.* The sole argument presented in the motion, CP at 21–22, was that “Defendant does not owe any money to Asset Acceptance LLC. and its attorneys who are debt collectors.” The only other section arguably a motion argument—labeled “Memorandum of Points and Authorities in Support of a Motion to Vacate Void Judgment”—is nothing more than a list of all grounds to bring a motion to vacate under CR 60 with unchecked boxes next to each line, followed by a verbatim recitation of the entirety of CR 60. CP at 27–30. The motion was accompanied by an affidavit, also prepared by uGotFICO, which reads more like a bizarre and incoherent manifesto than a legal document. CP at 23–25 (“Commercial Law forms the underpinnings of Western Civilization if not all Nations, Law, and Commerce in the world, is NON-JUDICIAL,” etc.).

In his first motion to vacate, therefore, Mr. Nguyen did not raise the issue of improper service or lack of jurisdiction, let alone present any argument or evidence. CP at 20–30. Neither did the court have an opportunity to inquire as to Mr. Nguyen’s basis for the motion, since he did not know he had to appear at the September 6, 2012, hearing. CP at 41–42, 156. So far as can be discerned from the record, the court denied the motion based on Mr. Nguyen’s nonappearance and the lack of any presented grounds for vacation. *Id.* The issue of improper service was not before the court and was not determined. CP at 20–30, 41–42. Collateral estoppel “precludes only those issues that have actually been litigated and determined; it ‘does not operate as a bar to matters which could have ... been raised [in prior litigation] but were not.’” *McDaniels*, 108 Wn.2d at 305 (alterations in original) (quoting *Davis v. Nielson*, 9 Wn. App. 864, 874, 515 P.2d 995 (1973)).

Finally, estoppel of Mr. Nguyen’s current motion would work an injustice on him. *See McDaniels*, 108 Wn.2d at 303 (for collateral estoppel to apply, it must “not work an injustice on the” estopped party). Mr. Nguyen spoke limited English, did not understand the proceedings, and was not at all equipped to represent himself. CP at 156–57. He had no way of knowing that the documents provided by uGotFICO were nonsensical and legally insufficient, although their incoherence would have been obvious to any

fluent speaker of English. *See* CP at 21–30. He did the best he could to navigate an unfamiliar legal system, diligently following the instructions provided by the entity he believed was acting as his legal advisor and representative. To find his previous filings to deprive him of his right to raise this jurisdictional issue now would therefore work an injustice on Mr. Nguyen. *See McDaniels*, 108 Wn.2d at 303.

2. *Mr. Nguyen's second motion to vacate does not preclude the current motion, as Judge North denied it without prejudice and without judgment on the merits.*

Mr. Nguyen did not understand that his first motion to vacate had been denied, only that the documents uGotFICO gave him must not have worked since Asset Acceptance continued to garnish his wages. CP at 156. In June 2013, uGotFICO gave Mr. Nguyen another form motion to vacate, which he filed on July 1, 2013. CP at 50, 156.

King County Local Civil Rule 60(e)(1)(A) requires that a motion to set aside a default judgment “shall be returned to the judge to whom the case had been originally assigned.” The assigned judge in this matter is Judge Julie Spector. CP at 1. As a pro se party, with very limited English language skills, Mr. Nguyen was completely unfamiliar with and incapable of understanding superior court filing rules. Therefore, the second motion to vacate and set aside was erroneously set before Judge North. CP at 50–

51, 156; RP at 4–6. Consequently, Judge North declined to assess any potential merits of Mr. Nguyen’s claims, ruling instead that the motion should be brought before Judge Spector. RP at 4–6. He therefore denied the motion without prejudice and instructed Mr. Nguyen to bring the motion again before Judge Spector at a future date if he wished to bring it again. *Id.*; CP at 68–69.

In opposing Mr. Nguyen’s second motion to vacate, Asset Acceptance put forth a proposed denial order, which would have decreed the motion to be “denied with prejudice.” CP at 68–69. The court signed this denial order, but took care to strike out the word “with” and replaced it with the word “without,” to make the sentence read as follows:

ORDERED, ADJUDGED AND DECREED that Defendant’s Motion to Vacate is denied *without* prejudice.

*Id.* To find that this order has prejudicial effect, when the court entered it “without prejudice,” is an error. *Id.*

The words “without prejudice” expressly “reserve to the parties the privilege of enforcing their rights by subsequent proceedings.” *A. H. Averill Mach. Co. v. Allbritton*, 51 Wash. 30, 33, 97 P. 1082 (1908). A “judgment expressly providing that it is without prejudice should not have preclusive effect.” Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 823 (1985) (citing numerous cases).

A finding “without prejudice” is specifically not a “final judgment on the merits” and does not estop further litigation of the same issues. *A. H. Averill Mach. Co.*, 51 Wash. at 33 (the use of the phrase *without prejudice* “clearly shows that the court did not intend to determine the cause finally and upon its merits”); *accord Layne v. Hyde*, 54 Wn. App. 125, 133, 773 P.2d 83 (1989) (plaintiffs’ contention that motion for summary judgment was barred by the court’s previous denial of another motion was “untenable since the motion was denied *without prejudice*”). Therefore, upon the court’s entry of the order without prejudice, Mr. Nguyen’s right to challenge service of process was left intact.

Judge North explicitly made no judgment on the merits as to whether Mr. Nguyen was properly served. RP at 4–6. Therefore, the trial court erred in treating Judge North’s order as having preclusive or prejudicial effect on Mr. Nguyen’s current motion. *See McDaniels*, 108 Wn.2d at 303.

As before, uGotFICO had again provided Mr. Nguyen with a motion to vacate with incomplete instructions and misrepresented itself as Mr. Nguyen’s counsel. CP at 156. By this time, uGotFICO had sent Mr. Nguyen a document to sign labelled “Designation of Counsel,” which was then forwarded to Asset Acceptance. CP at 280–81. However, no counsel ever ap-

peared for Mr. Nguyen in the record prior to his current counsel. uGot-FICO's actions perpetuated Mr. Nguyen's misunderstanding that he was being represented by legal counsel and not appearing pro se. Consequently, a finding that his second motion was preclusive also works an injustice on Mr. Nguyen. *See McDaniels*, 108 Wn.2d at 303.

**C. The trial court erred in finding that Mr. Nguyen was estopped from raising a jurisdictional issue that rendered a judgment void.**

When a court lacks jurisdiction over a defendant, any judgment it enters is entirely null and void and must be vacated by the court when the lack of jurisdiction comes to light. *Allied Fid. Ins. Co. v. Ruth*, 57 Wn. App. 783, 790, 790 P.2d 206 (1990). As the Washington Supreme Court has explained:

A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has not jurisdiction. If it does not have jurisdiction, any judgment entered is void *ab initio* and is, in legal effect, no judgment at all. Jurisdiction should not be sustained upon the doctrine of estoppel ....

*Wesley v. Schneckloth*, 55 Wn.2d 90, 93–94, 346 P.2d 658 (1959). Similarly, Division II has explained that “a void judgment is always subject to collateral attack” and is not subject to collateral estoppel. *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 449, 874 P.2d 182 (1994). As the court in that case further explained:

A judgment is considered void as opposed to merely erroneous when “the court lacks jurisdiction of the parties or the

subject matter or lacks the inherent power to enter the particular order involved”. A void judgment must be vacated whenever the lack of jurisdiction comes to light.

The critical question here is whether the judgment ... was void or merely erroneous. As we have observed, if the judgments were void, then the Does are not collaterally estopped from maintaining an independent action to recover the costs. If, however, the judgments were merely erroneous, then the Does’ action could be barred by principles of collateral estoppel.

*Id.* (footnote omitted) (citations omitted). It is for this reason that it has been said that the “classification of a matter as one of jurisdiction is thus a pathway of escape from the rigors of the rules of res judicata.” *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994) (quoting Restatement (Second) of Judgments § 12 cmt. b (1982)).

Thus, once improper service is established and “the lack of jurisdiction comes to light,” the void judgment must be vacated, regardless of whether the motion to vacate would otherwise be barred by principles of preclusion. *Doe*, 74 Wn. App. at 449. Washington courts have previously entertained successive motions to vacate void judgments. *E.g. Colacurcio v. Burger*, 110 Wn. App. 488, 493, 497, 41 P.3d 506 (2002) (affirming vacation of a void default judgment upon a second motion to vacate); *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (remanding for evidentiary hearing on defendants’ second motion to set aside a default judgment).

Therefore, the trial court erred in failing to consider and find that the default judgment against Mr. Nguyen should be vacated under CR 60(b)(5) whether or not Mr. Nguyen had made previous attempts to vacate and set aside the default judgment.

**II. MR. NGUYEN PRESENTED CLEAR AND CONVINCING EVIDENCE THAT HE WAS NEVER SERVED AND THAT THE DEFAULT JUDGMENT WAS THEREFORE VOID.**

In denying Mr. Nguyen's motion, the trial court found that he had failed to prove, based on the standard of clear and convincing evidence, that he had not been properly served. CP at 430. The court's finding was contrary to the evidence in the record.

**A. Standard of Review**

"Whether service of process was proper is a question of law that this court reviews de novo." *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010); *accord Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014); *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007) ("This court reviews de novo the trial court's denial of a motion to vacate a final order for lack of jurisdiction.").

**B. The trial court erred in finding that the Mr. Nguyen failed to provide clear and convincing evidence that he was not served.**

The review of the trial court's finding with regard to service of process is whether the record shows "clear and convincing" evidence of improper service. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269

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

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

The record shows clear and convincing evidence that no summons and complaint were delivered to Mr. Nguyen personally, nor by substitute service.

*1. Mr. Nguyen was not personally served.*

Asset Acceptance’s summons and complaint were not left with Mr. Nguyen. CP at 5. The proof of service provided by Asset Acceptance states

that the process server served the documents at 3802 S. Benefit St., Seattle, “by then presenting to and leaving [them] with YEN DOE, CO-RESIDENT WHO REFUSED TO GIVE LAST NAME 45 A/F [Asian female] 120# 5’2” BLACK HAIR, a person of suitable age and discretion residing at the defendant’s/respondent’s usual place of abode listed above [3802 S. Benefit St., Seattle].” *Id.*; *accord* CP at 406. That is, according to the process server’s own declaration, the process server did not personally serve Mr. Nguyen, but instead served a woman named Yen residing at 3802 S. Benefit St., whom the process server took to be Mr. Nguyen’s co-resident. CP at 5. The woman described in the proof of service is presumably Bach Yen Thi Huynh, Mr. Nguyen’s former landlord, whose given name is Yen and who was the resident of 3802 S. Benefit St., Seattle, on the date of service. CP at 173.

However, Asset Acceptance insisted in its response that Mr. Nguyen was personally served, arguing that “there is no issue of substitute service when the Defendant is personally served by a party meeting the requirements.” CP at 179. Asset Acceptance’s contention is based on the Washington Supreme Court’s decision in *Scanlan*. *Id.* (citing *Scanlan*, 181 Wn.2d 838). In *Scanlan*, the record demonstrated that the process server delivered the summons and complaint to the defendant’s father, who in turn handed it to the defendant. 181 Wn.2d at 840–41. The Washington Supreme Court

ruled that the defendant's father was himself competent to serve process and had effectively done so by redelivering the summons and complaint to the defendant. *Id.* at 856. In effect, the court found that "secondhand" service via an intermediary competent to serve was sufficient for personal service. *Id.* at 848–56; accord *Brown-Edwards v. Powell*, 144 Wn. App. 109, 111, 182 P.3d 441 (2008) (finding service proper where process server mistakenly served defendant's neighbor, who in turn hand-delivered the documents to defendant).

Thus, Asset Acceptance's contention appears to be that Yen redelivered the summons and complaint to Mr. Nguyen, effecting secondhand service. CP at 179. But this supposition is completely without evidentiary support. There is absolutely no evidence that Mr. Nguyen ever received the summons and complaint by any means, and clear evidence to the contrary. Mr. Nguyen himself testifies that he did not become aware of Asset Acceptance's claim against him until 2012 and that he was never served with a summons and complaint. CP at 156, 416. In addition, Yen's sworn affidavit shows that she would have been unable to effect secondhand service. CP at 173. She did not know Mr. Nguyen by his former name, Viet Tuan Nguyen, as he had changed his name to Kevin Nguyen eight years prior to living at 3802 S. Benefit St, and so she would not have recognized the documents as pertaining to him. *Id.* She also spoke poor English and would not have

understood the documents, nor would she have been able to communicate effectively with the process server. *Id.* Yen and Mr. Nguyen did not keep in touch after he stopped residing at her address in 2008; he contacted her in 2016 to ask for a declaration in this case to confirm his residence history. CP at 416. The evidence is uncontroverted that Yen could not and did not forward the summons and complaint to Mr. Nguyen. By contrast, in *Scanlan* and *Brown-Edwards*, it was uncontroverted that the defendants *did* receive the summons and complaint via an intermediary. *Scanlan*, 181 Wn.2d at 844 (defendant testified that she received the summons and complaint from her father); *Brown-Edwards*, 144 Wn. App. at 111 (neighbor signed an affidavit swearing that she had served the papers upon defendant).

Apparently seeking to equate this case with *Scanlan*, Asset Acceptance repeatedly characterized Yen as a “relative” or “family member” of Mr. Nguyen in its response brief. CP at 179–80, 183. This is completely false. CP at 416. There was and is absolutely no evidence in the record to support Asset Acceptance’s characterization of Yen as a family member of Mr. Nguyen, and it is categorically untrue. *Id.* Yen is Mr. Nguyen’s former landlord, not his relative. CP at 173, 416. They have no relation other than that he lived as a tenant in her basement for a few months in 2008. *Id.* Asset Acceptance’s characterization of Yen and Mr. Nguyen as relatives is a pure fabrication.

Nonetheless, the trial court, in considering the facts pertaining to the question of proper service, gave Asset Acceptance's unsupported misrepresentation at least equal weight with Mr. Nguyen's supported facts:

**The Court:** So you understand there's case law that supports last known address and it's his family, as I understand that.

**Ms. Shahin:** It is not his family. It was included in declaration. There was no evidence at all it was his family. Simply because they are the same native origin does not make them family members.

**The Court:** All I have is a claim that they were family, just like I have a claim from your client that he didn't live there anymore. I mean, these are all self-serving statements that are being brought to the Court seven years after the fact ....

The Court erred in assigning equal weight to the idle speculation of Asset Acceptance's counsel and the sworn affidavits of Yen and Mr. Nguyen. The unsupported argumentative assertions of counsel in a brief do not carry the same weight as sworn affidavits—indeed they are not evidence and carry no evidentiary weight at all.

As the record shows clear and convincing evidence that Mr. Nguyen was not personally served, the analysis turns to substitute service. *See* RCW § 4.28.080(16).

2. *Mr. Nguyen was not served by substitute service.*

Substitute service is made by “leaving a copy of the summons at the house of [the defendant's] usual abode with some person of suitable age and discretion then resident therein.” *Id.* The record demonstrates that Mr. Nguyen's usual place of abode was not 3802 S. Benefit St., Seattle, when the

ABC Legal messenger left the summons and complaint with Yen on March 12, 2009. CP at 155–56, 161–64, 173.

Mr. Nguyen testifies, “I was living at my 255 Powell Ave. SW, Renton, residence on March 12, 2009, not 3802 S Benefit St., Seattle.” CP at 156. Mr. Nguyen’s testimony is corroborated by Yen’s affidavit, wherein she states, “Kevin Nguyen was not a tenant in my home in March 2009.” CP at 173. Mr. Nguyen also presented copies of his 2008 tax return—a document signed under penalty of perjury—unmistakably demonstrating that his address on March 8, 2009, four days before the date of alleged service, was 255 Powell Ave. SW, Renton. CP at 161–64, 167.

The record contains no evidence that Mr. Nguyen’s usual place of abode was 3802 S. Benefit St. on March 12, 2009. Asset Acceptance’s only evidence in support of its response is the affidavit of the process server and an unauthenticated skip trace. CP at 189, 284–87. Records subpoenaed from the process server, however, show that the process server knew of *three possible addresses* where Mr. Nguyen might reside. CP at 410–12. It inquired with the postmaster as to the validity of each address, and the postmaster responded that mail could be delivered at all three addresses. *Id.* The process server evidently picked one arbitrarily and attempted service there. The process service had no actual knowledge of Mr. Nguyen’s current place of abode. *Id.*

The skip trace supplied by Asset Acceptance is similarly inconclusive; it shows *seven* addresses that could have been Mr. Nguyen’s residence in March 2009. CP at 284–87. The skip trace also listed six possible names for Mr. Nguyen and two possible dates of birth. *Id.*

Both the skip trace and the process server’s records include Mr. Nguyen’s true address at the time of service: 255 Powell Ave. SW, Renton. CP at 284, 412. But because Asset Acceptance or its process server arbitrarily chose to attempt service only at 3802 S. Benefit St., Seattle, leaving the summons and complaint with whoever it happened to find there, Mr. Nguyen never received the summons and complaint.

The record is beyond clear and convincing that 3802 S. Benefit St. was not Mr. Nguyen’s usual place of abode on the date of service and that Mr. Nguyen was therefore not properly served via substitute service. *See* RCW § 4.28.080(16).

*3. The trial court’s determination as to proper service was inconsistent with Washington case law.*

There is a great deal of Washington case law on proper service generally and the “usual abode” standard specifically. The trial court’s determination was completely inconsistent with this authority. Indeed, there are a remarkable number of cases directly on point, in which this Division of the Court of Appeals reversed an order denying a motion to vacate or dismiss

based on improper service under circumstances comparable to or more dubitable than Mr. Nguyen's situation. *E.g.*, *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 674 P.2d 1271 (1984); *Lepeska v. Farley*, 67 Wn. App. 548, 833 P.2d 437 (1992); *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010).

The plaintiff in *Mid-City Materials* sued operators of a family business, including a married couple and their son and daughter-in-law. *Mid-City Materials*, 36 Wn. App. at 482. The couple moved to vacate based on lack of personal jurisdiction, as they had been served by substitute service to the son, at the son's address. *Id.* at 482, 484. The evidence consisted of an affidavit of the father and an affidavit of the daughter-in-law, attesting that the parents were never served and had no notice of the action. *Id.* at 482–83. The trial court denied the motion. *Id.* at 483. This Division overturned the denial, explaining that although the “plaintiff apparently thought it had obtained jurisdiction over the parents” by means of “residence service on the parents at their son's residence in Federal Way,” the record showed that “at all times herein the parents did not reside with their son in Federal Way but resided in Kent.” *Id.* at 484. The court concluded that the “attempted service on the parents was, therefore, invalid for any purpose.” *Id.* Like the parents in *Mid-City Materials*, Mr. Nguyen did not reside at the same address as Yen on the date of service. Unlike *Mid-City Materials*, Yen

is not related to Mr. Nguyen and was not in communication with him, nor is she a codefendant in this case, nor are Yen and Mr. Nguyen alleged to be business partners. CP 173, 416. Mr. Nguyen was thus even more tenuously connected to Yen and her abode than the parents in *Mid-City Materials*.

The plaintiff in *Lepeska* served a summons and complaint on the defendant's mother at her residence, which was the residence address that the defendant had provided to a police officer investigating the matter. 67 Wn. App. at 549. The trial court denied a motion to vacate based on improper service. *Id.* at 550. This Division reversed, finding that the defendant was not living with his mother at the time of service (and that it did not matter whether he had lived there previously). *Id.* at 551, 554. The court's finding was based entirely on the defendant's affidavit, which stated that "he did not live with his parents, but maintained his own household in Burien." *Id.* at 551. Here, as in *Lepeska*, Mr. Nguyen attested in his declaration that he did not live at 3802 S. Benefit St. at the time of service. CP at 156. Unlike the defendant in *Lepeska*, Mr. Nguyen was not related to the person on whom service was made and had never provided 3802 S. Benefit St. as an address in connection with the cause of action, and hence is even more tenuously connected to the address of service than the defendant in *Lepeska*. CP at 173, 416. In addition, Mr. Nguyen never became aware of

the action at all until years after entry of default judgment, while the defendant in *Lepeska* timely learned of the service from his mother and even sent a letter to the plaintiff's attorney about the action. 67 Wn. App. at 549.

In *Streeter-Dybdahl*, the plaintiff made service on the defendant's former residence. 157 Wn. App. at 410–11. Although the defendant's brother lived at the house and even gathered mail there to pass along to the defendant, this Division ruled that it was not her usual abode and that the trial court had erred in denying her motion to dismiss. *Id.* at 412–15. It did so based on the statements of the defendant and her brother, as well as property records showing she had bought her new home before the date of service. *Id.* at 411–12. As in *Streeter-Dybdahl*, Mr. Nguyen provided declarations from himself and Yen, as well as his 2008 tax return showing that he was not residing at 3802 S. Benefit St. on the date of service. But as with the other cases mentioned, Mr. Nguyen is even more tenuously connected to the service residence than the defendant in *Streeter-Dybdahl* because he was not related to Yen, and Yen was not in communication with him. CP at 173, 416.

These are but a few examples. Many other comparable Washington cases reached similar outcomes, again under circumstances similar to or more dubitable than Mr. Nguyen's situation. *E.g.*, *Vukich v. Anderson*, 97 Wn. App. 684, 985 P.2d 952 (1999) (reversing trial court's denial of motion

to vacate default judgment, where service was made to defendant's tenant, at a home defendant owned but did not live in); *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439 (1997) (upholding dismissal when service was made to defendant's son-in-law, at a house that defendant owned and that was defendant's address of voter registration and tax registration, but where defendant no longer lived); *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938) (finding default decree void where plaintiff served defendants' daughter-in-law in defendants' hotel room, because hotel room was not defendants' usual abode); *Wilbert v. Day*, 83 Wash. 390, 145 P. 446 (1915) (reversing default judgment because plaintiff served defendant's wife at a house where she was temporarily living while their child received medical treatment, but where defendant did not live).

In contrast, cases in which courts have found substitute service proper have invariably relied on special circumstances not present here. For example, in *Scanlan*, 181 Wn.2d at 840–41, as noted earlier, the defendant received summons via “secondhand” service through his father. In *State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60, 65–66, 7 P.3d 818 (2011), the state proved that the defendant regularly sent and received mail at the address of service and used it as his primary address. In *Sheldon v. Fettig*, 129 Wn.2d 601, 604, 919 P.2d 1209 (1996), where the defendant spent time at

her parents' home for several days each month, the court found that the parents' home constituted a second place of abode. The Washington Supreme Court has noted that *Sheldon* marks "the outer boundaries" of RCW § 4.28.080(16), suggesting that a defendant with less connection to the place of service than the one in *Sheldon* cannot be found to have his abode there. *Salts v. Estes*, 133 Wn.2d 160, 166, 943 P.2d 275 (1997).

Based on prevailing Washington case law and the record, the trial court's finding that Mr. Nguyen did not provide clear and convincing evidence of improper service was patently erroneous.

4. *Without proper service, the default judgment was entered against Mr. Nguyen without personal jurisdiction.*

"Proper service of the summons and complaint is a prerequisite to a court obtaining jurisdiction over a party." *Harvey v. Obermeit*, 163 Wn. App. 311, 318, 261 P.3d 671 (2011). A judgment entered without personal jurisdiction is void. *In re Marriage of Markowski*, 50 Wn. App. 633, 635–36, 749 P.2d 754 (1988).

Here, Asset Acceptance neither personally served Mr. Nguyen nor left the summons and complaint at his usual abode. Without proper service, the trial court did not have personal jurisdiction over Mr. Nguyen when it entered a default judgment against him on April 16, 2009. Thus, the judgment is void, and the trial court erred in finding otherwise.

**III. BASED ON THE FOREGOING, MR. NGUYEN IS ENTITLED TO VACATION OF THE DEFAULT JUDGMENT, QUASHAL OF SERVICE OF PROCESS, QUASHAL OF ALL WRITS OF GARNISHMENT, AND RETURN OF FUNDS GARNISHED PLUS INTEREST, FEES, AND COSTS.**

Vacation of default judgments is governed by CR 55(c) and CR 60(b). *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). CR 55(c)(1) specifies that default judgments may be set aside “in accordance with rule 60(b).” CR 60(b), in turn, sets out eleven specific grounds under which a judgment may be vacated. Of relevance here, CR 60(b)(5) provides that a judgment may be vacated if “[t]he judgment is void.”

**A. Standard of Review**

While vacation of default judgments is usually a matter of judicial discretion, courts have a nondiscretionary duty to vacate *void* default judgments. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) (“Generally, a decision to grant or deny a motion to vacate a default judgment is within the sound discretion of the trial court. ... Courts, however, have a nondiscretionary duty to vacate void judgments.”); *Allied Fid. Ins. Co. v. Ruth*, 57 Wn. App. 783, 790, 790 P.2d 206 (1990) (“A trial court has no discretion when dealing with a void judgment; the court must vacate it.”); *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989); *Markowski*, 50 Wn. App. at 635.

Therefore, denial of a motion to vacate a default judgment as void for lack of jurisdiction is reviewed de novo. *Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 334, 153 P.3d 222 (2007) (“This court reviews de novo the trial court’s denial of a motion to vacate a final order for lack of jurisdiction.”); *In re Marriage of Wilson*, 117 Wn. App. 40, 45, 68 P.3d 1121 (2003) (“A motion to vacate a final order for lack of jurisdiction as void is reviewed de novo.”).

Because the trial court did not vacate the default judgment, it did not reach the issue of further remedies—i.e., whether Mr. Nguyen should be granted quashal of service of process, quashal of writs of garnishment, restitution, and costs.

**B. The trial court erred in not setting aside and vacating the default judgment.**

The Washington Supreme Court has repeatedly emphasized that the law strongly favors resolution of disputes on the merits, and therefore default judgments should be set aside liberally. *Morin*, 160 Wn.2d at 754 (“This court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice.”); *Griggs v. Averbek Realty*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (“Default judgments are not favored in the law.”); *Dlouhy v. Dlouhy*,

55 Wn.2d 718, 721, 349 P.2d 1073 (1960) (“It is the policy of the law that controversies be determined on the merits rather than by default.”). This is doubly true for void judgments, where vacation is a nondiscretionary duty and a matter of right. *Leen*, 62 Wn. App. at 478; *Allied Fid.*, 57 Wn. App. at 790; *Ballard Savs. & Loan Ass’n v. Linden*, 188 Wash. 490, 492, 62 P.2d 1364 (1936) (recognizing that a party adversely affected by a void judgment may have it vacated “as a matter of right”).

There is no time limit on motions to vacate void default judgments, since a void judgment is absolutely null and must be vacated regardless of the passage of time. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323–24, 877 P.2d 724 (1994); *Servatron, Inc. v. Intelligent Wireless Prods., Inc.*, 186 Wn. App. 666, 679, 346 P.3d 831 (2015) (“There is no time limit to bring a motion to vacate a void judgment. A party can wait several years to vacate a void default judgment.” (citation omitted)); *Brenner*, 53 Wn. App. at 188 (vacating a 16-year-old judgment on grounds that a default judgment entered without valid service is void).

Neither is a showing of a meritorious defense necessary for vacation of a void judgment. *Leen*, 62 Wn. App. at 477; accord *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 486, 674 P.2d 1271 (1984) (“The customary CR 60 meritorious defense requirement is immaterial where the court entering an in personam judgment had no jurisdiction

of the defendants in the first instance.”); *Schell v. Tri-State Irrigation*, 22 Wn. App. 788, 792, 591 P.2d 1222 (1979) (“According to CR 55(c) and 60(b)(5), a default judgment may be set aside if it is void. The defendant need not offer a meritorious defense if the challenge to the judgment is based upon lack of personal jurisdiction.”); *Ballard Savs. & Loan Ass’n*, 188 Wash. at 492.

Nevertheless, it is worth noting that Mr. Nguyen does indeed have a meritorious defense to Asset Acceptance’s debt claim, as there is significant evidence that Mr. Nguyen does not owe the alleged credit card debt and is not the obligor on the account. *See* CP at 157, 417, 420. As this Division has observed, “[i]f it clearly appears that a strong defense on the merits exists, the courts will spend scant time inquiring into the reasons which resulted in the entry of the order of default.” *Boss Logger, Inc. v. Aetna Cas. & Sur. Co.*, 93 Wn. App. 682, 686, 970 P.2d 755 (1998). Vacation of the default judgment is therefore not only required based on the facts showing that the judgment was entered without jurisdiction, but also demanded by the interests of justice, as Mr. Nguyen has suffered a significant financial hardship in having \$11,000 taken from him that he does not owe, without opportunity to present a defense.

In the court below, Asset Acceptance argued at length that Mr. Nguyen was obliged to meet the four discretionary factors for vacation of default

judgments set out in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), including presence of a prima facie defense. CP at 181–83. As Mr. Nguyen noted in reply, this argument was in error; the discretionary factors of *White* do not apply when a judgment is void, as vacation of a void judgment is nondiscretionary. CP at 394–95; *Leen*, 62 Wn. App. at 478. A void judgment *must* be vacated. *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 449, 874 P.2d 182 (1994); *Allied Fid.*, 57 Wn. App. at 790. Nonetheless, Mr. Nguyen does, in fact, meet all the *White* factors. CP at 395 n.4.

Based on the arguments in earlier sections establishing that the default judgment entered against Mr. Nguyen is void for lack of personal jurisdiction, it follows that the trial court erred in not fulfilling its nondiscretionary duty to vacate void judgments. *See Leen*, 62 Wn. App. at 478.

**C. The trial court erred in not granting the relief to which Mr. Nguyen was entitled on vacation of the judgment.**

A judgment that is vacated ceases to have effect; vacation of a judgment leaves the parties' rights as though no judgment was ever entered. *In re Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989) (“A vacated judgment has no effect. The rights of the parties are left as though the judgment had never been entered.”); *Weber v. Biddle*, 72 Wn.2d 22, 28, 431 P.2d 705 (1967) (“a judgment which has been vacated by a valid order is entirely destroyed, and the rights of the parties are left as though no such

judgment had ever been entered”). As a consequence, vacation of the default judgment against Mr. Nguyen will, as a matter of law, restore his property rights in the funds that have been garnished or are yet to be garnished. Thus, upon vacation of the default judgment, all writs of garnishment entered pursuant to the void judgment must be quashed, as must the defective service of process. *Cf. Allstate*, 75 Wn. App. at 325, 328 (vacating default judgment, quashing service of process, and quashing writ of garnishment due to defective service).

Courts have consistently ordered that payments must be reimbursed when a judgment is vacated and payments have already been made pursuant to it. *E.g., In re Marriage of Hardt*, 39 Wn. App. 493, 499, 693 P.2d 1386 (1985) (finding that the “strong weight of authority” required monies paid pursuant to a void decree be reimbursed upon vacation of the decree under CR 60(b), despite a five-year lapse between the entry of the decree and the motion to vacate), *discussed in Leslie*, 112 Wn.2d at 618; *Stephen Haskell Law Offices, PLLC v. Westport Ins. Corp.*, No. CV-10-437-JLQ, 2011 WL 1303376, at \*6 (E.D. Wash. Apr. 5, 2011) (finding that “equity and common sense compel the conclusion” that a party is “entitled to return of those monies” paid based on a vacated judgment and citing Washington state case law). As the *Hardt* and *Stephen Haskell* courts noted, such reimbursement is required by longstanding principles of law. *United States v. Morgan*, 307

U.S. 183, 197, 59 S. Ct. 795, 83 L. Ed. 1211 (1939) (“What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution.”); *Balt. & Ohio R.R. Co. v. United States*, 279 U.S. 781, 786, 49 S. Ct. 492, 73 L. Ed. 954 (1929) (“The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established.”); Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011); Restatement (First) of Restitution § 74 (1937). Therefore, upon vacation of the judgment, Asset Acceptance should be ordered to return all funds garnished from Mr. Nguyen, and the trial court erred in denying such restitution.

On appeal, RAP 12.8 provides an additional basis for restoration of the garnished funds and specifies the procedure by which such restoration is granted. It states in relevant part:

If a party has ... involuntarily partially ... satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution.

RAP 12.8. Case law confirms that this rule applies to vacation of default judgments, and hence a party successfully vacating a default judgment on appeal is entitled upon remand to restitution of property already taken. *State v. A.N.W. Seed Corp.*, 116 Wn.2d 39, 802 P.2d 1353 (1991).

Mr. Nguyen is also entitled to an award of interest on the garnished funds. *See id.* at 46–47 (citing Restatement (First) of Restitution § 74 cmt. d (“If payment has been made to the judgment creditor . . . , upon reversal of the judgment the payor is entitled to receive from the creditor the amount thus paid *with interest* . . . .” (emphasis added))); *Balt. & Ohio R.R. Co.*, 279 U.S. at 786 (“When the erroneous decree was reversed and the invalid order was set aside, the law raised an obligation . . . to make restitution of the payments made . . . in compliance with the order . . . *together with interest thereon*” (emphasis added)).

Finally, Mr. Nguyen is entitled to an award of attorney fees and costs pursuant to RCW § 6.27.230. *Allstate*, 75 Wn. App. at 327 (“when a party must vacate a default judgment before successfully challenging a writ of garnishment, RCW 6.27.230 allows that party to recover attorney fees and costs for both proceedings”); *Lindgren v. Lindgren*, 58 Wn. App. 588, 598, 794 P.2d 526 (1990) (“The statute requires imposition of attorney’s fees and gives the trial court no discretion to deny such fees in this circumstance.”).

In denying Mr. Nguyen’s motion to vacate the default judgment, the trial court also erred in refusing to grant these corollary forms of relief required by law. Asset Acceptance, in its response to Mr. Nguyen’s motion, did not dispute these consequences of vacating the default judgment. CP at 175–84, 395.

**D. Mr. Nguyen is entitled to attorney fees and costs on appeal.**

The same statute that entitles Mr. Nguyen to fees and costs at the trial court level also entitles him to fees and costs incurred in bringing this appeal. *Allstate*, 75 Wn. App. at 327 (“Because Khani had to vacate the default judgment before he could oppose the writ of garnishment, he is entitled under RCW § 6.27.230 to his attorney fees and costs *both in the trial court and on appeal.*” (emphasis added)); *Lindgren*, 58 Wn. App. at 599 (“An award of attorney fees under RCW 6.27.230 is a proper basis upon which to award attorney’s fees on appeal.”). In addition to the relief requested at the trial court level, Mr. Nguyen therefore also requests attorney fees and costs incurred in bringing this appeal, pursuant to RCW § 6.27.230, RAP 18.1(a), and RAP 14.2.

**CONCLUSION**

The record shows clearly and convincingly that Asset Acceptance filed this lawsuit and obtained a judgment without proper service, without Mr. Nguyen’s awareness, and without any opportunity for him to defend against the claim. Asset Acceptance knew of several addresses where Mr. Nguyen *might* reside, so it picked one at random and attempted service there, leaving the papers with the first person it saw: a woman who spoke little English and would not have understood what was being handed to her

nor been able to communicate meaningfully with the process server. Satisfied that it had delivered the papers to *someone at some address* that had at *some point* been linked to Mr. Nguyen, Asset Acceptance then rushed to obtain a default judgment. Asset Acceptance cannot now retain funds it took from an unwitting consumer, when clear evidence establishes that the judgment was obtained without due process.

Since learning of this lawsuit in 2012, Mr. Nguyen has faced a bewildering and demoralizing battle. Uncertain why his wages were being garnished and unfamiliar with our legal system, he sought help from a credit repair organization that spoke his native language. Unfortunately, this unscrupulous organization took Mr. Nguyen's money and purported to represent him, while giving him incompetent legal advice and directing him to file briefs that he had no way of knowing were inadequate and often nonsensical.

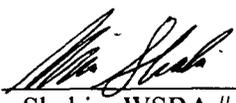
When Mr. Nguyen turned to our court system for help, he did not fare any better. Mr. Nguyen's first two motions to vacate were denied on procedural grounds: the first because he stated no grounds for vacation and did not know he had to appear in court, and the second because he noted the motion before the wrong judge. When Mr. Nguyen, finally with aid of counsel, turned to the court a third time, the court gave the previous motions

preclusive effect, despite the fact that they never reached the merits. In addition, in ruling that Mr. Nguyen had failed to show clear and convincing evidence of improper service, the trial court did not fairly consider the evidentiary record and instead relied upon Asset Acceptance's misrepresentations, even when they flew in the face of established facts.

Mr. Nguyen now prays that the Court will (1) set aside and vacate the default judgment as void for lack of jurisdiction, (2) quash the defective service of process, (3) quash all writs of garnishment entered pursuant to the void judgment, (4) instruct the trial court to order the return of funds already garnished plus interest, and (5) award attorney fees and costs incurred in the trial court and on appeal.

**DATED** this 1st day of July 2016.

THE SULLIVAN LAW FIRM

By:   
Mina Shahin, WSBA #46661  
Attorney for Appellant

## **APPENDIX: TEXT OF STATUTES AND RULES**

Pursuant to RAP 10.4(c), this appendix reproduces the material portions of statutes and rules whose study is required by issues presented in this brief.

### **RCW § 4.28.080: Civil procedure—Commencement of actions—Summons, how served**

Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:

...

(16) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

...

### **RCW § 6.27.230: Enforcement of judgments—Garnishment—Controversion—Costs and attorney's fees**

Where the answer is controverted, the costs of the proceeding, including a reasonable compensation for attorney's fees, shall be awarded to the prevailing party: PROVIDED, That no costs or attorney's fees in such contest shall be taxable to the defendant in the event of a controversion by the plaintiff.

### **CR 55(c)(1): Default and judgment—Setting aside default—Generally**

For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

**CR 60(b): Relief from judgment or order—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 the party's legal representative from a final judgment, order, or proceeding for the following reasons:

...

(5) The judgment is void;

...

(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.

**King County Local Civil Rule 60(e)(1): Relief from judgment or order—Procedure on vacation of judgment—Default judgment**

The return on the order to show cause to set aside a default judgment shall be as follows:

(A) Case originally assigned to a judge who has not been assigned (transferred) to a new case designation area or to juvenile court: The order to show cause shall be returned to the judge to whom the case had been originally assigned, regardless of which judicial officer signed the judgment of default.

...

**RAP 12.8: Effect of reversal on intervening rights**

If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. An interest

in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.

**RAP 14.2: Who is entitled to costs**

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

**RAP 18.1(a): Attorney fees and expenses—Generally**

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

**CERTIFICATE OF SERVICE**

I, Jennifer Marroquin, legal assistant at Sullivan Law Firm, certify that on the date below I caused a true copy of the Brief of Appellant and Verbatim Report to be served upon opposing counsel of record in this matter, by email and by regular ABC messenger, addressed as follows:

John Reid  
Galen Ryan  
SUTTELL HAMMER & WHITE P.S.  
10900 NE 8th Street, Suite 605  
Bellevue, WA 98004  
*johnr@suttelllaw.com*  
*galenr@suttelllaw.com*

And that I further caused a copy of the same to be filed with the Court of Appeals, Division I, in person:

Court of Appeals, Division I  
Attn: Richard D. Johnson, Clerk  
600 University Street  
Seattle, WA 98101

Dated at Seattle, WA, this 1st day of July 2016.

  
Jennifer Marroquin, Legal Assistant  
Sullivan Law Firm