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CASE No. 67240-1

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

WELLS FARGO BANK, NA, successor in interest to FIRST
INTERSTATE BANK OF WASHINGTON, N.A.,

Plaintiffs,

JPRD INVESTMENTS, LLC, a Washington Limited Liability
Company,

Assignee-Judgment Creditor/Respondent,

v.

THEARY NGY and JOHN DOE NGY, and their marital
community,

Defendants/Appellants,

US BANK,

Garnishee Defendant

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REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This reply brief is filed on behalf of the appellant Theary Ngy.

II. REPLY STATEMENT OF THE CASE

A. JPRD Misstates the Record and Directs Its Argument at Ms. Ngy Rather Than the Issues.

JPRD argues in a manner to build support for its position by unfairly maligning Ms. Ngy. JPRD begins by arguing that Ms. Ngy had no substantive defense to Wells Fargo's claim and that "[t]here is no question that [Ms.] Ngy owes JPRD money." Brief of Respondent at 2, 10 & 26. Such argument is both untrue and irrelevant. "If a judgment is void for want of jurisdiction, no showing of a meritorious defense is required to vacate the judgment." *Leen v. Demopolis*, 62 Wn. App. 473, 477, 815 P.2d 269 (1991).

Ms. Ngy acted responsibly when she turned over the car to Wells Fargo because she could no longer afford the payments. Thereafter, Ms. Ngy never received notices from Wells Fargo required under the UCC to perfect entitlement to a deficiency judgment. (CP 161). See RCW 62A.9A.-614 (for the notification requirement in consumer goods transaction).¹ A debtor, in a consumer transaction, is entitled to damages for a secured party's failure to comply with the UCC requirements for

¹ She was never aware of any further action by Wells Fargo (or assigns) seeking recovery of any deficiency from sale of the collateral until the 2011 garnishment. (CP 82).

disposition of collateral. RCW 62A.9A.-625. Statutory damages are not less than the credit service charge plus ten percent of the principal amount of the obligation or the time-price differential plus ten percent of the cash price. RCW 62A.9A.625(c)(2). The credit service charge was \$12,965.64. (CP 19). Ten percent of the principal amount of the obligation is \$3,333.50. (CP 19). The total of the two amounts is \$16,299.14. Wells Fargo sought judgment for an alleged deficiency in the amount of \$15,570.30 (CP 15-21); (CP 22-23). Ms. Ngy's statutory damages are a complete defense because they are more than the alleged deficiency.²

JPRD uses innuendo to suggest that Ms. Ngy did not act diligently with regard to the lawsuit. JPRD states that, after learning of the garnishment, Ms. Ngy "finally" contacted an attorney. Brief of Respondent at 7. The false implication is that she had some reason to consult an attorney earlier. She did not because she was not aware of the lawsuit.

JPRD states that "there is also evidence that indicates Ngy knew about this lawsuit back in 2003." Brief of Respondent at 19. The "evidence" is not specified. The statement is completely unsupported.

² JPRD cites to *Empire South, Inc. v. Repp*, 51 Wn. App. 868, 756 P.2d 745 (1988) regarding the debtor's remedies for the secured party's non-compliance with the UCC. Brief of Respondent at 26. This case pre-dates the 2001 amendments to Article 9 of the UCC providing for statutory damages in a consumer transaction as described in the text.

JPRD argues without purpose that Ms. Ngy has “conspicuously” failed to identify who her employers were during the period 2001 to 2005. Brief of Respondent at 8. JPRD also claims that the Muckleshoot Indian Tribe was one of Ms. Ngy’s employers and that she has failed to produce her employment information from the Muckleshoots for 2003 or 2004. Id. at 10, 22 & 37. This argument is again without any facts to support these statements.

She explained her employment history (CP 81-82) and fully answered JPRD’s discovery requests on this subject (CP 175). She never worked for the Muckleshoots. She was at the Muckleshoot Casino as a customer. One time, she won enough money to require reporting of the income to the IRS. The Muckleshoot Indian Casino reported it as “miscellaneous other income” not wages. (CP 111).

JPRD states that “[w]hile [Ms.] Ngy provided certain of her tax returns, she has failed to provide her 2003 federal tax return.” Brief of Respondent at 8, 9. In 2011, she had no copies of tax returns going back that far. For this matter, she was able to obtain copies of her tax returns for 2000, 2001 and 2002 from H&R Block because they prepared the returns. (CP 83, 85-114).

She tried to get a copy of the 2003 return at the same time but it was not available. She only worked for a few months in 2003 for the

Silver Dollar Casino. (CP 175). H&R Block did not have a copy of the 2003 return because they did not prepare it. She had minimal income from this limited work in 2003 and prepared the return herself but did not retain a copy. (CP 83). When this controversy developed, she promptly requested a copy from the IRS. (CP 176); (CP 209-210 & 212).

The IRS told her it would take 60 days to process her request. (CP 176). About 60 days later, she finally received a copy of the wage and income transcript from the IRS for the Silver Dollar Casino. (CP 212). This 2003 wage transcript from this employer confirms her address in SeaTac, Washington. (CP 209-210, 212).

These circumstances were explained to JPRD in response to their discovery. (CP 176). There is no reason for JPRD to skew the facts or disparage Ms. Ngy on these points. Moreover, JPRD does not dispute that her resident address in 2003 was at the Carriage House Apartments in SeaTac, Washington. Their argument is that this fact is not dispositive because a person can have more than one usual mailing address.

B. Material Facts Are Not Reasonably Contested.

It is not reasonably disputed that Ms. Ngy had no knowledge of this lawsuit until the 2011 garnishment action. JPRD makes unsupported statements to the contrary, but cites no evidence to support such a claim.

It also is not disputed that she acted immediately upon learning of this problem.

There also is no dispute that her last contact with Wells Fargo Bank was in 2002 when she returned the car. (CP 82). She gave Wells Fargo Bank her current address at the Carriage House Apartments and arranged for them to repossess the car at that location. (CP 82). JPRD has not contested this fact although it states: “Other than [Ms.] Ngy’s own declaration, there is no evidence in the record that Wells Fargo or attorney Bradley Jones knew or had reason to know that [Ms.] Ngy lived at her boyfriend’s address at the time this action was initiated.” Brief of Respondent at 8.

But, JPRD needed to challenge or controvert her declaration if they believed it was not credible. They had access to Wells Fargo and the bank’s records. Ms. Ngy’s sworn statement is that “I called Wells Fargo Bank and . . . gave them my residence address at the Carriage House Apartments in SeaTac, Washington.” (CP 82). There is no dispute that Wells Fargo Bank picked up the car from her and disposed of it. JPRD needed to meet this evidence or accept it as established. When a nonmoving party fails to controvert relevant facts supporting the motion, those facts are considered to have been established. *Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697

(1989). The rule that a trial court may not disregard credible uncontradicted evidence is fundamental. *Smith v. Pacific Pools, Inc.*, 12 Wn. App. 578, 582, 530 P.2d 658 (1975) (Horowitz, J.).

There also is no dispute that Ms. Ngy was not living at her brother's home in Federal Way in 2003. The process server was told she did not live there. Brief of Respondent at 5. JPRD's argument is that Ms. "Ngy continued to use her brother's address as a mailing address after she allegedly moved out of his domicile." Brief of Respondent at 8. The problem with their position is that they have no competent evidence to support that conclusion. All JPRD offers is innuendo, hearsay, speculation and argument.

Summarizing, this case presents solely a controversy over whether substitute service was valid under Subsection 16. That issue presents two critical questions. First, the threshold issue is whether Wells Fargo Bank exercised reasonable diligence in attempting personal or abode service before resort to substitute service by mail. Second, if the analysis gets beyond the threshold issue, then was her brother's address a usual mailing address meaning "some level of actual use for the receipt of mail or arrangements contemplating an actual use for receiving and forwarding mail." *Goettemoeller v. Twist*, 161 Wn. App. 103, 109, 253 P.3d 405 (2011).

III. REBUTTAL ARGUMENT

A. JPRD Did Not Show Reasonable Diligence Before Resorting to Substituted Service By Mail

Ms. Ngy cited authority that there must be strict compliance with statutory requirements before resort to substitute service by mail. Brief of Appellant at 27. See also *Harvey v. Obermeit*, 2011 Wash. App. LEXIS 2010 (filed August 29, 2011) at *9 providing that the “statute [providing for substitute service] requires strict compliance, or else jurisdiction is not obtained.” Further, that the validity of substitute service is reviewed based on information actually before the court at the time the default judgment is entered. *Pascua v. Heil*, 126 Wn. App. 520, 527-28, 108 P.3d 1253 (2005). JPRD does not question this authority or cite contrary authority.

JPRD argues, however, that Wells Fargo exercised due diligence. Brief of Respondent at 23-24. JPRD argues this issue based on Terry Poppa’s actions. Id. Yet, Bradley Jones (the attorney) and Terry Poppa (the process server) did not have to do more than ask Wells Fargo Bank for the debtor’s current address. Furthermore, JPRD does not dispute that there was no evidence in the court record in 2003 to even support the resort to substitute service. As in *Harvey v. Obermeit, supra*, Wells Fargo’s efforts “were not due and diligent and that as a result there was no personal jurisdiction over [Ms. Ngy].” *Harvey v. Obermeit, supra* at *14.

B. There Was No Admissible Evidence That the Brother's Address Was a Usual Mailing Address for Ms. Ngy.

This court in *Goettemoeller v. Twist*, 161 Wn. App. 103, 253 P.3d 405 (2011) addressed what constitutes a “**usual mailing address**” for purposes of service under RCW 4.28.080(16). In *Goettemoeller*, this Court stated that “**there must be more than the existence of a mailing address.**” *Id.* at 109. “**A ‘usual mailing address’ must mean some level of actual use for the receipt of mail or arrangements contemplating an actual use for receiving and forwarding mail.**” *Id.* The existence of an old mailing address where some mail may continue to be sent is not evidence of a “usual mailing address.”

Theary Ngy and her brother, Vanna Ngy, both testify that she moved out of her brother's home prior to 2003. She never returned to pick-up mail and he never forwarded any mail. It was not a usual mailing address; it was a past-outdated address no longer in use.

In opposition, JPRD claims it “presented signed declarations sworn to under penalty of perjury” establishing otherwise. Brief of Respondent at 29. JPRD relied heavily on the Bank of America, but JPRD presented no “signed declaration sworn to under penalty of perjury” from Bank of America. JPRD presented an unsworn non-detailed informal piece of correspondence from the bank in response to a subpoena. (CP 141). The

letter stated that the bank retained no records related to any account for Ms. Ngy and the bank could only provide a name and an address from its computer system. (CP 216-220). Ms. Ngy explained that she did not use the bank account except to establish a customer relationship sufficient to cash checks. (CP 210). Bank of America explained in a formal sworn declaration under penalty of perjury that the last address in their computer system dated back to 1997 and the bank had no knowledge or competent information regarding whether Ms. Ngy was using the address in 2003 or even whether the account was active then. (CP 216-217).

JPRD presented a sworn declaration from Mr. Poppa, but he has no personal or testimonial knowledge regarding Ms. Ngy's usual mailing address in 2003. All he contributed was hearsay, guess, opinion and speculation. Ms. Ngy objected to his conclusions based upon unreliable postal traces and out of court statements attributed to her brother. (CP 162). She moved to strike the inadmissible evidence. (CP 158). Judge Heavey would not address the evidentiary issues though asked to do so. (RP 7, lines 20-22). Judge Heavy stated “. . . I'm unsure whether it's admissible or not.” (RP 8).

JPRD argues that the brother's statement comes within the state of mind exception to the hearsay rule. Brief of Respondent at 30. JPRD also argues that it is not offered for the truth of the matter asserted. Id. at 31.

JPRD further argues that the statement is an admission by a party-opponent. Id. at 32.

The state of mind exception does not apply. Mr. Poppa is not expressing emotions or feelings. 5C Tegland, Washington Practice §803.10 at 32. He is not expressing a plan or intent to do something. *Id.* He is not expressing pain, bodily condition or health. *Furthermore, his state of mind is not relevant.*

The issue is Ms. Ngy's usual mailing address. The alleged statement is offered for the truth of the matter asserted – i.e., that she is receiving mail there. That is clearly hearsay and inadmissible because of its inherent unreliability. If the statement is not offered to prove Ms. Ngy's usual mailing address, then it is not relevant.

It is also not a statement by a party-opponent. Vanna Ngy is not a party to this action. He is not Ms. Ngy's agent or servant. Vanna Ngy had no authority to act for Theary Ngy for any purpose. They had no relationship except an estranged sibling relationship.

JPRD argues there is inconsistency between her declaration and her brother's declaration. Brief of Respondent at 7 & 22. Yet, the only inconsistency JPRD identifies is the date she moved out. Id. at 7. JPRD argues that Ms. Ngy remembers moving out sometime in 1999; whereas, Vanna Ngy's memory is that she moved out sometime in 2000. That

difference in recall is immaterial. Either way, she moved out and never returned 3 to 4 years before April 2003. More importantly, both Ms. Ngy and her brother say that after she moved out, she never returned. (CP 81); (CP 116); (CP 214-215). She was not receiving mail from him; he was not forwarding it. Id.

There is no admissible evidence that Ms. Ngy ever returned to her brother's home for any purpose after moving out. This case is like *Farmer v. Davis*, 161 Wn. App. 250, P.3d 138, 420, 429 (2011), *Goettemoeller v. Twist*, 161 Wn. App. 103, 253 P.3d 405 (2011), *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994), and *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010). The admissible evidence is not divided. It is all one-sided. As in those cases, the burden of proof and the evidentiary standard make no difference.

C. The Burden of Proof Does Not Shift and the Evidentiary Standard is Not Clear and Convincing.

JPRD articulates no principled reason why a defendant who does not delay contesting service should have the burden of proof to a heightened evidentiary standard. JPRD cites no Washington case expressly addressing the issue and holding that the defendant who acts diligently should nonetheless assume this burden otherwise on the plaintiff. JPRD also does not provide any reasoned basis for not following

the Ninth Circuit analysis in *Securities & Exchange Commission v. Internet Solutions for Business*, 509 F.3d 1161 (9th Cir. 2007).

JPRD has the initial burden. It may satisfy that burden by a prima facie valid affidavit of service that is presumed correct. The burden of going forward with the evidence then shifts to Ms. Ngy. If she produces competent evidence indicating service is invalid, which she did, then JPRD had the burden of meeting this evidence and presenting other evidence showing valid service by a preponderance of the evidence. JPRD did not show reasonable diligence nor did they produce competent evidence to support the use of an out-dated address.

In *Cook v. Cook*, 80 Wn.2d 642, 645, 497 P.2d 584 (1972), the Washington Supreme Court commented on a burden of proof described in that case as “conclusive, definite, certain and beyond all legitimate controversy.” *Id.* at 645. The *Cook* court said:

“Courts throughout the land are engaging in a flight of abstract legalistic verbosity which promises to end only when they run out of new adjectives. It is truly a flight into a land of fantasy since neither lawyer nor layman has any idea of the fine and shadowy distinctions, if any, between all of the adjectives used to describe or define the burden of persuasion.”

Id. quoting Judge Wiehl, *Our Burden of Burdens*, 41 Wash. L. Rev. 109 (1966). The *Cook* court concluded that between the civil burden of “more probable than not” and the criminal burden of proof “beyond a reasonable

doubt”, all the various intermediate burdens of proof require that the trier of fact be convinced that the alleged fact is highly probable. Id. at 646-47.

The cases where the heightened standard applies should be the unusual exception not the general rule. Furthermore, when the heightened standard applies, it should apply in a manner as articulated in *Cook*. Any applicable heightened standard should not result in an impossible burden to meet simply because of some controversy between the parties which can be easily created whether legitimate or not. Unfortunately, the heightened standard had that effect in this case.

D. JPRD’s Other Arguments Are of No Merit on The Issue of the Validity of Service.

JPRD argues that Ms. Ngy waived her right to argue that service did not meet the minimum requirements of due process. Brief of Respondent at 14. The minimum requirement of due process is “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950) quoted in *Pascua v. Heil*, supra 126 Wn. App. at 528. Critical to the due process notice requirement is strict compliance with the statute allowing substitute service by mail because following those procedures affords the best

opportunity for actual notice. Here, plaintiff failed to serve in strict compliance with statutory requirements. This position has never been waived.

JPRD argues that Ms. Ngy has waived her right to argue that the order denying the motion for reconsideration was error or that the judgment against the garnishee defendant was error. Brief of Respondent at 14. Judge Heavey stated in his oral ruling that he would take a look at supplemental evidence. RP at 6. Ms. Ngy's counsel asked for a 30 day stay or continuance to allow time to address issues related to the Bank of America and the IRS. RP 7-9. "Maybe 'stay' was the wrong word to use. Maybe what I'm asking you to do is continue this for 30 days to allow us time to check out the matters that are of concern to you." Id. at 11. Judge Heavey indicated he would not decide for 30 days. Id. He suggested we go to the Bank of America on the following Monday. Id. He would be inclined to look at a motion for reconsideration. Id. at 12. "Until I deny that motion for reconsideration, it's not a done deal." Id. at 10. JPRD correctly observes that the "trial court also considered [Ms.] Ngy's supplemental declarations in connection with her motion for reconsideration." Brief of Respondent at 29. This supplemental evidence was presented and received on the merits. There was no waiver.

This extra effort should not have been necessary. A trial judge is presumed to be able to disregard inadmissible evidence such as the hearsay from Mr. Poppa and an unsworn letter from the Bank of America. *State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991). Very obviously, neither Mr. Poppa nor the Bank had any personal knowledge on the subject.

JPRD argues that reconsideration needs to be based on one of the factors in CR 59(a). Brief of Respondent at 33. It constitutes “surprise” pursuant to CR 59(a)(3) and error of law pursuant to CR 59(a)(8) when the lower court considers hearsay testimony from Mr. Poppa, an unsworn letter from the bank and then indulges assumptions and speculation to fill in the evidentiary gaps. It also constitutes “surprise” and “error of law” to learn that JPRD does not have to show reasonable diligence before resort to substitute service by mail despite the express statutory requirement.

The address information off of the 2003 wage and income transcript from the IRS (CP 212) was newly discovered evidence (CR 59(a)(4)) in the sense that the document was obtained after the initial hearing. It could not have been obtained prior to the April 29, 2011 hearing because of the time the IRS needed to process the request. (CP 176; 209). The information was cumulative from the defense perspective, but JPRD regarded it as material because it argued to the lower court

based on the absence of such IRS records for 2003. (CP 132). Finally, the purpose of the continuance was to try and “get it right” (RP 9 & 11) and do substantial justice within the meaning of CR 59(a)(9).

Judge Heavey rested his decision denying the motion for reconsideration on the “bank records” and the “declaration of Mr. Poppa.” (CP 245). The motion for reconsideration gave Judge Heavey another opportunity to evaluate the evidence and correct his preliminary opinion. Ms. Ngoy never waived argument that the evidence was insufficient to deny her motion to vacate.

JPRD argues that the lower court’s order denying the motion to present live testimony was not error on the authority of *Hazeltine v. Rockey*, 90 Wn. 248, 155 P. 1056 (1916) and *In re Marriage of Irwin*, 64 Wn. App. 38, 822 P.2d 797 (1992). Brief of Respondent at 26-27. The *Hazeltine* case did not present any issue regarding the validity of service on conflicting affidavits. *Irwin* is entirely different because the trial judge who ruled on the motion to vacate was the same judge who presided over the entire dissolution trial and had seen and heard from the witnesses and was well versed in the circumstances. “He did not need oral testimony to help him judge credibility.” *Id.* at 62.

Here, the lower court never heard from any of the witnesses. It had no basis from which to weigh credibility or resolve any conflict in the

evidence. If there was a conflict in the admissible evidence, then the lower court should have conducted a fact-finding hearing as the lower court did in *Harvey v. Obermeit*, supra. In *Harvey*, this court stated that “. . . a court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact requiring a determination of witness credibility.” *Harvey*, supra 2011 Wash. App. LEXIS 2010 at *26 citing *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994).

JPRD distinguishes *Woodruff v. Spence*, supra, on the basis that “the parties have not presented unequivocal and completely contradictory evidence.” Brief of Respondent at 28. Further, according to JPRD, “credibility determinations were not necessary for the trial court to rule” Id. We agree, but for the different reason that the competent evidence is all one-sided in support of Ms. Ngy’s motion to vacate. Accordingly, there was no need for a fact-finding hearing. However, if the lower court had found competent evidence in conflict with Ms. Ngy’s testimony, then the lower court should have conducted a fact-finding hearing.

JPRD argues that Ms. Ngy’s self-serving declarations should not be considered and are insufficient to create a conflict. Brief of Respondent at 29-30. Certainly, self-serving opinions or conclusions like JPRD offered in the form of Brian Fair’s declaration (CP 145-146) can be disregarded. A party’s sworn factual statement, however, should not be

disregarded. In *Woodruff*, the process server swore he personally served Spence. Spence swore that he was not personally served. *Woodruff* held this factual dispute required an evidentiary hearing to resolve. *Woodruff v. Spence*, 76 Wn. App. supra at 210. According to JPRD, the *Woodruff* court should have rejected Spence’s testimony because it was “self-serving” and accepted the process server’s testimony because he or she was a non-party. If that were the rule, then it would disqualify a party from testifying in his or her own defense.

JPRD argues without basis that the statute of limitations should be equitably tolled if the default judgment is vacated. Brief of Respondent at 36-37. JPRD makes unsupported allegations of bad faith and deception directed at Ms. Ngy and her brother. Neither Ms. Ngy nor her brother have done anything or said anything material to the running of the statute of limitations.

Vanna Ngy is a nonparty and has no “vested interest” in the outcome of this case. JPRD has not identified any “false assurances” by Vanna Ngy deceiving them into allowing the statute of limitations to expire. Furthermore, equitable tolling does not apply to “false assurances” by a nonparty. *Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 406, 225 P.3d 439 (2010). In connection with the motion to vacate, Vanna Ngy testified simply and directly on the material facts within his personal

knowledge. His testimony in 2011 long after the statute of limitations expired cannot be the basis of an equitable tolling theory.

It is equally inconceivable how JPRD can ethically argue that Ms. Ngy has acted deceptively. She had no involvement with the case until 2011 long after any applicable statute of limitation had expired. She is not at fault for the failure of personal service. She provided her address to Wells Fargo Bank. Wells Fargo, its attorney and Mr. Poppa, failed to follow-up on this available information through no fault of Ms. Ngy.

Even if she knew they were looking for her, which she did not, she has no duty to assist them. *Goettemoeller v. Twist, supra*, 161 Wn. App. at 110 (“no duty to assist a process server”). However, she was in no position to mislead or deceive anyone because she was not even aware of this lawsuit until 2011. These unsupported allegations of bad faith and deception take the factual gamesmanship going on here too far.

E. Attorney Fees.

JPRD argues without merit that *Lindgren v. Lindgren*, 58 Wn. App. 588, 598, 794 P.2d 526 (1991) and *Allstate Ins. Co. v. Khani, supra* cases are not authority for awarding attorney fees to Ms. Ngy on a statutory basis if she prevails. Brief of Respondent at 37. Both cases establish that the defendant is entitled to fees and costs, pursuant to RCW 6.27.230, for services rendered successfully vacating the default judgment

and quashing the writ of garnishment both at the trial court level and on appeal. As to fees for services at the trial court level, if contested as to amount and if the appellate court is not in a position to resolve the dispute, then as in *Khani* the issue may be remanded with instructions to the trial court to determine the reasonable amount to award. As to fees for services at the appellate level, the *amount* to award is in the discretion of the Court of Appeals pursuant to the post-decision procedures under RAP 18.1.

JRPD also challenges the right to fees and costs by contract. JRPD argues that it took an assignment of the judgment not the contract and, therefore, cannot have obligations under the contract between Wells Fargo Bank and Ms. Ngy. Brief of Respondent at 38. Yet, this sidesteps the fact that “[o]n a valid assignment of a judgment the assignee succeeds to all the rights, interest and authority of his assignor, *including the debt or claim on which the judgment was based . . .*” *Johnson v. Dahlquist*, 130 Wn. 2d 29, 30, 225 P. 817 (1924) (emphasis added). Absent some limitations in the terms of the assignment, the assignment of a judgment has the effect of also assigning the claim upon which it rests. Id. at 30-31.

A person takes nothing when a void judgment is assigned to the person, as a void judgment is a nullity when rendered. 46 Am.Jur. 2d, Judgment § 483 at 752. Thus, upon vacation of the judgment, JRPD is left with the claim upon which the judgment rests. Ms. Ngy is entitled to a

dismissal of the contract claim with prejudice based on the lack of personal jurisdiction and the time-bar of the statute of limitations. As the prevailing party on the contract claim, she is entitled to fees and costs pursuant to contract.

Under the UCC, the rights of an assignee are subject to “[a]ll terms of the agreement between the account debtor and assignor and any defense RCW 62A.9A-404(1). JPRD, as assignee of Wells Fargo, stands in the assignor’s shoes with all rights and obligations. An assignee of a judgment has no other or greater right than the assignor. *Associated Indemnity Corp. v. Wachsmith*, 2 Wn.2d 679, 694, 99 P.2d 420 (1940).

JPRD’s liability to the debtor who successfully defends the contract claim is the same as Wells Fargo’s liability. JPRD’s recourse, if any, is against Wells Fargo Bank for assigning an invalid judgment. Absent some disclaimer, the assignor implicitly warrants that the right assigned actually exists and is subject to no limitations or defenses. 6 Am. Jur.2d, Assignments § 158 at 247.

JPRD argues that it is entitled to attorney fees if it prevails. Brief of Respondent at 39. If the default judgment is upheld as valid, then it determines JPRD’s entitlement to fees for services rendered to collect the judgment. A valid final judgment on a contract extinguishes the contract, and any contractual basis for an attorney fee award does not apply to the

subsequent action to enforce the judgment. *Woodcraft Constr. v. Hamilton*, 56 Wn. App. 885, 888, 786 P.2d 307 (1990). This judgment does not provide for attorney fees in a subsequent action to enforce or collect it. (CP 22-23).

JPRD relies upon *Caine & Weiner v. Barker*, 42 Wn. App. 835, 713 P.2d 1133 (1986) and *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn.2d 799, 314 P.2d 935 (1957). Brief of Respondent at 39. *Caine* supports the *Woodcraft* decision because both involve postjudgment actions to collect or enforce the judgment as here without a provision in the judgment providing for fees. Accordingly, both cases deny fees. *Lillions*, in contrast, involved an appeal from the initial judgment not an appeal from postjudgment enforcement action. Thus, its reasoning is not applicable here where the appeal is from a postjudgment enforcement action.

JPRD argues Wells Fargo Bank cannot be liable for Ms. Ngy's attorney fees. Brief of Respondent at 40. However, absent a novation, the assignor Wells Fargo remains liable to the obligor. The terms between Wells Fargo and JPRD, not agreed to by Ms. Ngy, are not relevant to her rights. Wells Fargo is liable on the dismissed contract claim if the judgment is vacated.

Wells Fargo remains a party to this lawsuit. Wells Fargo apparently has authorized and assigned to JPRD the right to take action to collect the judgment in their joint names. JPRD has apparent authority to act on its own behalf and on behalf of Wells Fargo Bank.

This manner of conducting the proceeding, based on joint action, supports a conclusion finding Wells Fargo Bank and JPRD jointly and severally liable. Their concerted action creates a principal-agent relationship in a manner analogous to the circumstance in *DeBenedictis v. Hagen*, 77 Wn. App. 284, 890 P.2d 529 (1995). Notice to JPRD is notice to Wells Fargo who authorized JPRD to proceed in this manner. Due process concerns are not implicated.

IV. CONCLUSION

JPRD has not presented sound argument or good authority for not granting the relief requested by Ms. Ngy.

DATED this 29 day of September 2011.

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