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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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~~COURT OF APPEALS DIV I
STATE OF WASHINGTON~~

BRIEF OF APPELLANT

AIKEN, ST. LOUIS & SILJEG, P.S.
WILLIAM A. OLSON
Attorneys for Appellant Theary Ngy
801 Second Avenue, Suite 1200
Seattle, WA 98104
(206) 624-2650

ORIGINAL

TABLE OF CONTENTS

I.	NATURE OF CASE	1
II.	ASSIGNMENTS OF ERROR	2
III.	ISSUES PRESENTED	2
IV.	STATEMENT OF THE CASE	3
	A. Theary Ngy	3
	B. Ms. Ngy’s Discovery of the Lawsuit	4
	C. The Underlying Debt	4
	D. The 2003 Lawsuit	5
	E. Service of Process	6
	F. Ms. Ngy’s Residence and Usual Mailing Address in 2003	8
	G. Motion to Vacate Default Judgment	9
	H. The April 29, 2011 Hearing	11
	I. The Motion for Reconsideration and Motion for Permission to Present Live Testimony	14
V.	ARGUMENT	18
	A. General Legal Principles Related to Proceedings to Vacate Default Judgments	18
	1. Equitable Principles Govern	18
	2. The Duty to Vacate a Void Judgment is Nondiscretionary	19
	3. The Plaintiff has the Burden to Prove Valid Service	20
	4. The Lower Court Should Conduct an Evidentiary Hearing if There are Materially Conflicting Affidavits and Oral Testimony is Necessary to Make a Just Determination	21

5. The Burden to Prove Lack of Service by Clear and Convincing Evidence Shifts to a Defendant Who has Actual Knowledge of the Proceeding and Unreasonably Delays Contesting Jurisdiction Until Post-Judgment	22
B. Appellate Review in This Case is Independent and <i>De Novo</i>	24
C. Application of the Foregoing Legal Principles to the Circumstances of This Case	26
1. General Statement of Appellant’s Position	26
2. JPRD Did Not Meet Its Initial Burden of Proof to Demonstrate the Validity of Service	27
3. Ms. Ngy Presented Direct Positive Testimony, Confirmed by Secondary Evidence, That She Had No Presence Whatsoever For Any Purpose at Her Brother’s Residence	31
4. JPRD Failed to Respond With Any Admissible Facts Showing That There Was Any Factual Issue for Hearing	34
5. The Superior Court Should have Conducted an Evidentiary Hearing If It Believed There Was Admissible Evidence Creating a Material Issue of Fact	39
D. There is No Factual Basis In This Case for Shifting the Burden to the Defendant by a Clear and Convincing Standard	40
E. Request for Attorney Fees and Costs	47
VI. CONCLUSION	48

TABLE OF AUTHORITIES

Cases

<i>Allen v. Starr</i> , 104 Wn. 246, 176 P. 2 (1918)...	23, 41, 42, 43, 44, 45
<i>Allstate Ins. Co. v. Khani</i> , 75 Wn. App. 317, 323, 877 P.2d 724 (1994).....	20, 47
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 250-253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).....	35
<i>Brenner v. Port of Bellingham</i> , 53 Wn. App. 182, 187, 765 P.2d 1333 (1989).....	29
<i>Brickum Inv. Co. v. Vernham Corp.</i> , 46 Wn. App. 517, 520-21, 731 P.2d 533	20
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986)	35
<i>Central Wash. Bank v. Mendelson-Zeller, Inc.</i> , 113 Wn.2d 346, 354, 779 P.2d 697 (1989)	29
<i>Charboneau Excavating v. Turnipseed</i> , 118 Wn. App. 358, 362, 75 P.3d 1011 (2003)	19, 29
<i>CTVC of Hawaii, Co., Ltd. v. Shinawatra</i> , 82 Wn. App. 699, 707-08, 919 P.2d 1243 (1996)	24
<i>Danielson v. City of Seattle</i> , 45 Wn. App. 235, 240, 724 P.2d 1115 (1986).....	24
<i>Farmer v. Davis</i> , 161 Wn. App. 250 P.3d 138, 420, 429 (2011).....	20, 23, 24, 26, 27, 35, 36, 38, 42, 43, 44, 45

<i>Federal Financial Co. v. Gerard</i> , 90 Wn. App. 169, 949 P.2d 412 (1998)	47
<i>Forsythe v. Overmyer</i> , 576 F.2d 779, 781 (9th Cir. 1978).....	21
<i>Goettemoeller v. Twist</i> , 161 Wn. App. 103, 107, 253 P.3d 405 (2011).....	21, 25, 26, 32, 33
<i>Gross v. Sunding</i> , 139 Wn. App. 54, 60 161 P.3d 380 (2007).....	21, 27, 31, 34
<i>Gunnar v. Brice</i> , 17 Wn. App. 819, 823, 565 P.2d 1212 (1977) ...	26
<i>In re Marriage of Hardt</i> , 39 Wn. App. 493, 496, 693 P.2d 1386 (1985).....	19
<i>In re Marriage of Maddix</i> , 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).....	22
<i>Leen v. Demopolis</i> , 62 Wn. App. 473, 478, 815 P.2d 269 (1991).....	19, 20, 23, 42
<i>Lewis v. Bours</i> , 119 Wn.2d 667, 669, 835 P.2d 221 (1992).....	25
<i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 598, 794 P.2d 526 (1991).....	47
<i>Lobdell v. Sugar 'n Spice</i> , 33 Wn. App. 881, 887, 658 P.2d 1267 (1983).....	24
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)	35
<i>Matter of the Dependency of A.G.</i> , 93 Wn. App. 268, 968 P.2d 424 (1998).....	42

<i>McHugh v. Conner</i> , 68 Wn. 229, 231, 122 P. 1018 (1912).....	23, 41, 42
<i>Miebach v. Colasurdo</i> , 35 Wn. App. 803, 670 P.2d 276 (1983)....	42
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)	19
<i>Painter v. Olney</i> , 37 Wn. App. 424, 427, 680 P.2d 1066 (1984).....	19, 27, 30
<i>Pascua v. Heil</i> , 126 Wn. App. 520, 528, 108 P.3d 1253 (2005).....	19, 27, 29
<i>Peoples State Bank v. Hickey</i> , 55 Wn. App. 367, 371, 777 P.2d 1056 (1989).....	18, 20, 23
<i>Relational, LLC v. Hodges</i> , 627 F.3d 668, 672 (7th Cir. 2010)	21
<i>Schmelling v. Hoffman</i> , 111 Wn. 408, 414, 191 P. 618 (1920)	30
<i>Securities and Exchange Commission v. Internet Solutions for Business, Inc.</i> , 509 F.3d 1161 (9th Cir. 2007)	23, 45
<i>Sheldon v. Fettig</i> , 129 Wn.2d 601, 919 P.2d 1209 (1996)	27
<i>Smith v. Skagit County</i> , 75 Wn.2d 715, 718, 453 P.2d 832 (1969).....	22
<i>State v. Walker</i> , 153 Wn. App. 701, 708, 224 P.3d 814 (2009).....	25
<i>Streeter-Dybdahl v. Nguyet Huynh</i> , 157 Wn. App. 408, 236 P.3d 986 (2010).....	33, 43, 45
<i>Vetter v. Security Continental Ins. Co.</i> , 567 N.W.2d 516, 521 (Minn. 1997)	48

<i>Vukich v. Anderson</i> , 97 Wn. App. 684, 691, 985 P.2d 745 (1997).....	30
<i>White v. State</i> , 131 Wn.2d 1, 9, 929 P.2d 396 (1997).....	34
<i>Wood v. Copeland Lumber Co.</i> , 41 Wn.2d 119, 247 P.2d 801 (1952).....	22
<i>Woodruff v. Spence</i> , 76 Wn. App. 207, 209, 883 P.2d 936 (1994).....	20, 21, 22
<i>Young v. Key Pharmaceuticals, Inc.</i> , 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989).....	34

Statutes

RCW 4.28.080 (15).....	7, 9
RCW 4.28.080 (16)	3, 9, 28
RCW 4.84.330.....	47
RCW 6.27.230.....	47

Other Authorities

<u>Restatement (Second) of Judgments</u>	44
Theresa L. Kruk, Annotation, <u>Who Has Burden of Proof in Proceeding Under Rule 60(b)(4) of Federal Rules of Civil Procedure to Have Default Judgment Set Aside on Ground That It Is Void for Lack of Jurisdiction</u> , 102 A.L.R. Fed. 811 (1991).....	23, 46

I. NATURE OF THE CASE

This appeal follows from the Superior Court's denial of a motion to vacate a default judgment for lack of personal jurisdiction. The default judgment was entered in 2003. In 2011, the respondent JPRD Investments, LLC (hereafter "JPRD"), a collection agency and an assignee of Wells Fargo Bank (the original plaintiff and judgment creditor), garnished the defendant/appellant Theary Ngy's bank account. Ms. Ngy had no prior notice of the 2003 lawsuit against her. She also had no notice of the garnishment action until after funds were removed from her bank account. She had no notice of either proceeding because Wells Fargo Bank and JPRD served by mail and used an outdated address for her.

Ms. Ngy moved to dismiss the case and quash the writ of garnishment for lack of personal service. There is no dispute that she was not personally served. In 2003, the process server left the summons and complaint at her brother's residence and mailed a copy to the same address. Ms. Ngy did not reside at her brother's residence, although she had lived there in past years. After moving out, over a personal family disagreement, she had no further contact with her brother. She was not picking up mail at his address; he was not forwarding mail.

The Superior Court denied the motion to vacate the default judgment on the basis that service was valid because her brother's

residence had been a mailing address for her. The Superior Court also denied a motion to permit live testimony in support of the motion to vacate and denied a motion for reconsideration.

II. ASSIGNMENTS OF ERROR

The Superior Court erred in entering:

1. Order Denying Defendant's Motion to Vacate Default Judgment, Quash Writ of Garnishment and Dismiss Action entered on or about May 31, 2011 (CP 278-279);
2. Order Denying Defendant's Motion for Reconsideration of Denial of Motion to Vacate Default Judgment and Quash Writ of Garnishment dated on or about May 27, 2011 (CP 245-246);
3. Order Denying Defendant Theary Ngy's Motion for Permission to Present Live Testimony and for Oral Argument entered on or about May 20, 2011 (CP 242-243).
4. Judgment on Garnishee Defendant's Answer and Order to Pay entered on or about June 8, 2011 (CP 323-325).

III. ISSUES PRESENTED

1. Whether the 2003 default judgment is void for lack of personal jurisdiction given that Ms. Ngy was not validly served?
2. Whether service met the minimum requirements of constitutional due process?

3. Whether reasonable diligence was exercised before resort to alternative service by mail under RCW 4.28.080(16)?

4. Whether the Superior Court erred in relying upon inadmissible hearsay, unsworn statements, speculation and opinion?

5. Whether the Superior Court erred in refusing to conduct an evidentiary hearing and hear live testimony from the witnesses if the admissible evidence raised a conflict in the material facts?

6. Whether the Superior Court erred in shifting the burden of proof to the defendant and analyzing the issue regarding whether to vacate the default judgment pursuant to a clear and convincing standard of proof?

IV. STATEMENT OF THE CASE

A. Theary Ngy.

Theary Ngy's name is pronounced "Terry Nee." (CP 80). She was born in Cambodia on December 5, 1977. (CP 80). She moved to the United States in 1988 when she was 10 years old. (CP 80). She moved with her mother, one sister and three brothers. (CP 80). Prior to coming to the United States, they first went to a refugee camp in Thailand (for about 5 years), then to the Philippines to participate in a program to learn the English language and receive other assistance for the move to the United States. (CP 80). In the United States, she attended Brian Elementary School, Madison Middle School in West Seattle and Federal

Way High School. (CP 80-81). She presently is 33 years old and works as a dental assistant. (CP 82).

B. Ms. Ngy's Discovery of the Lawsuit.

In 2011, Ms. Ngy was banking at U.S. Bank in Renton, Washington. (CP 82). On February 25, 2011, she learned from the bank that all the money in her account had been removed – approximately \$7,500.00. (CP 82); (CP 58); (CP 78-79). Her bank account had been garnished. She did not understand what this meant. (CP 82-83). She had never been sued and had no prior notice of the garnishment action in 2011. (CP 82-83). Her counsel's staff did an electronic search in the King County Superior Court records for any lawsuit against her. (CP 59). This lawsuit was discovered. (CP 59).

C. The Underlying Debt.

In June 2000, Ms. Ngy borrowed money to purchase a used 1997 BMW automobile from Bellevue Auto House. (CP 82). She was 22 years old at the time. (CP 82). Her brother's address was used on the loan papers because his name and address was on the title to the trade-in. (CP 82). At the time, she was working for Northwest Hospital as a nurse's assistant and living with friends in an apartment. (CP 82).

After approximately 2 years, she could no longer afford the payments. (CP 82). Her loan payments were \$643.07 per month.

(CP 82). In 2002, she was working only part-time and made \$4,704.00 for the year. (CP 82; CP 106).

Bellevue Auto House had placed the original loan with Wells Fargo Bank. (CP 4); (CP 18-21). Ms. Ngy had been making her payments to Wells Fargo Bank. (CP 82). Ms. Ngy called Wells Fargo Bank and told them she could not afford the payments any longer. (CP 82). Wells Fargo Bank made arrangements to pick-up the car from her. (CP 82).

She gave Wells Fargo Bank her current address in 2002 at the Carriage House Apartments in SeaTac, Washington. (CP 82). Her address was Carriage House Apartments, 3602 South 180th Street, Apartment A7, SeaTac, Washington. (CP 81). Wells Fargo Bank sent a tow truck to the Carriage House Apartments to pick-up the car and towed it away. (CP 82). Ms. Ngy never heard or received anything further from Wells Fargo Bank on the subject of this loan. (CP 82).

D. The 2003 Lawsuit.

Unknown to Ms. Ngy, Wells Fargo Bank filed a complaint against her in April 2003. (CP 3-4). The complaint is dated January 20, 2003. (CP 4). Attorney Bradley Jones represented Wells Fargo Bank. (CP 4).

The complaint says nothing about the 2002 repossession of the car. (CP 3-4). There is no allegation about compliance with the notification

procedures under the Uniform Commercial Code to perfect a right to a deficiency judgment after re-taking and disposing of collateral. See RCW 62A.9A-611 et seq. The 2003 Complaint seeks a money judgment against Theory Ngy in the amount of \$17,690.98 plus post-judgment interest at 12%. (CP 4).

The complaint has Ms. Ngy's name backwards. (CP 3). It refers to her as Ngy Theory. The default judgment was entered against "Ngy Theory" on April 25, 2003 in the amount of \$18,944.64 plus post-judgment at 12%. (CP 22-23). Eight years later, in connection with the garnishment action, JPRD¹ states that the amount now due is \$36,375.45 with the addition of post-judgment interest. (CP 28).

E. Service of Process.

The declaration of service, dated April 8, 2003 and signed by Dawn Baldwin, states service occurred at 232 S. 330th Place, Federal Way, Washington by leaving the same with "Vanna Theray." (CP 14). This address is the residence of Ms. Ngy's brother. (CP 115). His name is Vanna Ngy not "Vanna Theray." (CP 115). The declaration of service further states that on "April 2, 2003, two copies of said documents were

¹ JPRD is in "the business of buying consumer debt receivables". (CP 145). JPRD filed an assignment of judgment on January 16, 2009. (CP 24-25). The assignment of judgment states that the judgment was purchased on October 14, 2008. (CP 24). JPRD, represented by attorney Bradley Williams, filed an application for a Writ of Garnishment on February 7, 2011. (CP 27-36).

then mailed to the defendants at the above-noted address via U.S. Postal Service, postage pre-paid.” (CP 14).

Terry Poppa, the owner of Advantage Process & Investigators, corresponded with Attorney Bradley Jones on April 2, 2003. (CP 64). He had concerns about the validity of service. He said service occurred at the Federal Way address, but in a “roundabout” way. (CP 64). He said “your defendant” “used to live there but no longer does.” (CP 64). He decided to serve at the address for the brother anyway and also mail a copy. (CP 64). He said that the defendant’s brother “acknowledged that the defendant gets her mail there.” (CP 64).

The affidavit filed by Attorney Bradley Jones, on April 22, 2003 in support of the default judgment, does not mention these potential problems with service. His affidavit states service occurred “**at place of residence and/or place of business**” (CP 15-16). There is no statement in Mr. Jones’ affidavit to support service by mail or any showing of “reasonable diligence” to support alternative service. Thus, abode service, under RCW 4.28.080(15), is the only basis stated by counsel to support valid service in support of the default judgment. Thus, despite the fact that the process server had advised that she did not live at that address, the representation to the court was that there was valid abode service.

F. Ms. Ngy's Residence and Usual Mailing Address in 2003.

In 2003, Ms. Ngy was residing at the Carriage House Apartments. (CP 81). She had been living there since 2001. (CP 81). Ms. Ngy was not living at her brother's residence at 232 S. 330th Place, Federal Way, Washington in 2003. (CP 81).

When she graduated from high school in 1996, she was living with her mother in public housing in Federal Way, Washington. (CP 81). After turning 18 years old and graduating from school, she could no longer live with her mother in public housing and had to move. (CP 81). Accordingly, in 1996, she moved in with her older brother, Vanna Ngy and his wife, at their residence at 232 S. 330th Place, Federal Way, Washington. (CP 81). After living together for a while, her relationship with her brother, and particularly his wife, became strained and particularly difficult to manage. (CP 81). They could not get along with each other and she had to separate from them. (CP 81).

She moved out and went to live with friends. (CP 81). She took her personal belongings and she never returned. (CP 81). She never saw her brother or spoke to him for years afterward. (CP 81). She has never been back to his home. (CP 81). She never went there to pick-up mail

and he never forwarded any mail to her. (CP 81). Since 2008, she has seen her brother, but not often, and rarely speaks to him. (CP 81).

G. Motion to Vacate Default Judgment

Ms. Ngy first learned of the lawsuit following the garnishment of her bank account on or about February 25, 2011. (CP 82-83; CP 58). She filed the motion to vacate the default judgment on March 22, 2011. (CP 45). The motion was supported by the declarations of Theary Ngy with tax records showing her address (CP 80-114), Vanna Ngy (her brother) confirming her testimony (CP 115-116) and her counsel's statements regarding the past litigation (CP 58-79).

In response to the motion, JPRD argued that service was valid pursuant to RCW 4.28.080(15) (abode service) and/or RCW 4.28.080(16) (service by mail). (CP 128). JPRD submitted the declaration of Terry Poppa. (CP 151-155). As explained above, his company served the summons and complaint, although he did not personally. (CP 152-153). Dawn Baldwin, who worked for him, signed the declaration of service. (CP 14). Mr. Poppa testified to the alleged 2003 conversation with Ms. Ngy's brother who he incorrectly identifies as "Mr. Theray." (CP 153). Mr. Poppa says that "Mr. Theray" "acknowledged that his sister, Ms. Ngy,

did in fact receive her mail at his residence back in March 2003.”² (CP 153).

JPRD also subpoenaed records from Bank of America. The subpoena requested bank records of Theary Ngy for the period January 1, 2000 to December 31, 2004. (CP 142-144). Bank of America responded by letter stating that the “Bank is unable to locate any other information or records on any account(s) for the date requested as the date exceeds the Bank’s retention period.” (CP 141).

Bank of America had Theary Ngy’s name as a past customer and an address for her of 232 S. 330th Place, Federal Way, Washington, but no other information. (CP 141). JPRD argued that this information showed her “good” and usual mailing address in 2003. (CP 134). JPRD also argued from a “2002 Form 1099” from the Muckleshoot Casino for Theary Ngy showing her brother’s address. (CP 131).

Despite their arguments, JPRD knew from their own personal experience that Ms. Ngy’s brother’s address was not an effective address for her. JPRD sent the statutorily required notices and exemption forms related to the garnishment action to Ms. Ngy’s brother’s address. (CP 264-267). The certified mail envelope came back to JPRD marked

² Mr. Poppa also inaccurately testifies to an alleged conversation with Ms. Ngy’s mother who he identifies as Sopheap Ngy. (CP 152). Ms. Ngy’s mother’s name is Lang Nget. (CP 210). She does not speak English. (CP 210). Sopheap Ngy is Theary Ngy’s sister, but she is not an old woman as described by Mr. Poppa. (CP 210).

“NATA” (not at this address) “MLF” (moved left no forwarding) and “return to sender”. (CP 267).

Ms. Ngy responded that JPRD’s opposition to the motion was not based on any admissible evidence. (CP 158-162). Ms. Ngy moved to strike the inadmissible opinion and hearsay. (CP 158, 159, 161 & 162). Mr. Poppa’s testimony about what Vanna Ngy allegedly said was unreliable hearsay. (CP 162). Furthermore, the Bank of America had only an old address for Ms. Ngy prior to her move away from her brother’s residence. (CP 160). The Muckleshoot Casino also had no personal knowledge of her usual mailing address in 2003. (CP 160). The 2002 Form 1099 (to report winnings for income tax purposes) from the Muckleshoot Casino used an outdated address off of Ms. Ngy’s driver’s license. (CP 160).

JPRD offered no testimony whatsoever to rebut Ms. Ngy’s testimony that she gave Wells Fargo Bank her then current SeaTac, Washington address when they picked up the car. (CP 159). JPRD simply ignored it. Thus, her testimony that Wells Fargo Bank possessed direct knowledge of her residential address was unchallenged.

H. The April 29, 2011 Hearing.

The hearing on the motion to vacate took place on April 29, 2011. Theary Ngy was present. The courtroom microphone was not turned on

during oral argument so there was no audio recording of the argument. Both counsel urged the Superior Court to receive live testimony if necessary to resolve any fact issues.³ (CP 225).

Following argument, Judge Heavey orally ruled from the bench (**a copy of the transcript is in the appendix**) without taking any testimony. He stated that the burden is on the defendant to show by clear and convincing evidence that the defendant was not properly served. (RP at 2, lines 11-13). He ruled that abode service was not valid “because I don’t believe this was her residence or her usual abode.” (RP at 2, lines 17-19).

However, Judge Heavey ruled that service was valid under Section 16. “I find Mr. [Poppa] to be credible. . . . He states that the brother stated to him that the defendant received her mail there. This is confirmed by the Bank of America information.” (RP at 2 & 3.) Ms. Ngy’s counsel had pointed out that Poppa’s statement was hearsay and the Bank of America did not have any records. There was no showing of any activity on the account or “confirming information”.

Judge Heavey responded that in his opinion “they sent monthly checking statements for five years.” “Now, if the defendant can show me she had another checking account at a different bank in 2003, I might

³ JPRD’s counsel explained, in response to the formal written motion for presentation of live testimony, that he only sought live testimony in the event the Superior Court was going to rule against JPRD. (CP 228-229).

reconsider that. Or if you can show me that they got all these checking statements back, or that they never sent her a checking statement, that would be helpful. I would take a look at that. But the bottom line is this: It's her burden. And I find that she has failed to show, by clear and convincing evidence, that she was not properly served." (RP 6-7). Ms. Ngy's counsel requested a ruling on the evidentiary issues. (RP 7). Judge Heavey declined to address admissibility. "I'm unsure whether it is admissible or not." (RP 8). But, "it's her burden to show, by clear and convincing evidence, that that was not a usual mailing address for her." (RP 8).

Ms. Ngy's counsel also requested Judge Heavey continue the matter for 30 days to allow time to clarify the facts with the Bank of America. (RP 7-9). Counsel stated that "we're indulging a lot of assumptions and speculation here. And all we know right now is that Bank of America had an address for her that didn't change. And that's all we know. We don't know whether there was any mailing activity." (RP 8-9).

Judge Heavey responded that the defendant "will need to make a motion for reconsideration. I suggest that you try to go to the Bank of America immediately on Monday and see if they've got some sort of record that you feel – or have the ability to get some sort of record that

you might feel might be helpful to your case so you have something to make this motion for reconsideration on.” (RP 10-11). Judge Heavey declined to sign a written order on April 29, 2011 to allow time for this inquiry of Bank of America. He requested JPRD’s counsel present a written order at a later date and note it for presentation on May 31, 2011. (RP 12-13).

I. The Motion for Reconsideration and Motion for Permission to Present Live Testimony.

Ms. Ngy’s counsel met with Bank of America personnel the following Monday. (CP 202-203). Jeff Vail is employed by Bank of America and works in the Legal Order Processing Department. (CP 216). He had prepared the letter in response to the subpoena issued by JPRD. (CP 216).

He provided a written declaration explaining that “Bank of America has no records related to the bank account of Theary Ngy.” (CP 216-217). He explained as follows:

The Bank’s computer database shows that Ms. Ngy had a customer relationship in 1997. The computer system shows that an address change took place on or about 1/22/97. The address on our system is 232 So. 330th Place, Federal Way, Washington 98003. Bank of America has no information on whether an account was opened or when it was closed. It has no information on account activity. Bank of America has no record of cancelled checks or bank statements because the Bank cannot locate an account. The statement in my letter that ‘this address was in affect

during your date range of 01/01/2000 and 12/31/2004' is merely a statement that this address is the only address in our system. It is not a statement that an account was active during that period or that Ms. Ngy used this address. Bank of America does not have knowledge on that subject."

(CP 217). This expressly confirmed that the Bank of America had no knowledge on the subject of Ms. Ngy's usual mailing address in 2003. This clarifying testimony was provided to Judge Heavey with the motion for reconsideration.

Theary Ngy also filed a supplement declaration to explain why she opened an account at Bank of America and how she used it. (CP 209-211). She was living with her brother in 1997 on the date reflected in the Bank of America database. (CP 210). She explained that she opened the account at Bank of America when she was 18 to establish a place to cash her payroll checks. (CP 210).

I took my payroll checks to the bank and received the money in cash. My only expenses were school expenses, a cell phone and later the automobile payments. I paid the cell phone charges in cash each month. Likewise, I went to the nearest branch of Wells Fargo and made the auto loan payments in cash. Similarly, I paid for books and other costs for schooling in cash. I did not keep much money in the bank account. I did not have much need to write checks and no need to see bank statements or balance bank statements. If the bank mailed anything to me at my brother's address after I moved out, I did not receive it because I was not using his home as a mailing address or picking mail up there.

(CP 210).

Also on May 6, 2011, after the April 29 hearing, the IRS finally responded to Ms. Ngy's earlier request for 2003 income tax records. (CP 209-210); (CP 176). The IRS provided a copy of her wage and income transcript for the tax period ending December 2003. (CP 212). In 2003, she was working part-time at the Silver Dollar Casino and, as previously testified, living at 3602 So. 180th Street, A7, SeaTac, Washington. (CP 175). The IRS records confirm that this was the address she gave her employer, the Silver Dollar Casino in Tukwila. (CP 212). This additional confirming information was provided to Judge Heavey with the motion for reconsideration.

Ms. Ngy's counsel also personally met and interviewed Theory Ngy's brother Vanna. (CP 203). Vanna Ngy provided a supplemental declaration for Judge Heavey as follows:

My understanding is that there is a question regarding whether my sister, Theory, receives mail at my residence located at 232 S. 330th Place, Federal Way, Washington. I have been shown a copy of a letter dated April 2, 2003 written by Terry Poppa stating that Theory gets her mail at my address. Theory was not living with me in 2003. She had moved out about 3 years earlier. After she moved out, she was not getting mail at my address. I had no contact with Theory after she moved out until sometime in 2008. Any mail for her sent to my address was thrown out or returned to sender. I did not forward her mail and she did not come to pick-up any mail. I do not recall the event described in Mr. Poppa's letter. I know that if he delivered a summons and complaint to me or at my home I did not deliver it to Theory and she never came to my house to

pick-up any mail. We were not speaking with one another and she would not have been aware of any such papers. The statement in Mr. Poppa's letter that she was getting mail at my home is not true. After she moved out, she was not getting any mail or any papers hand-delivered at my address. If Mr. Poppa understood me to say that she was getting mail at my address, then he misunderstood me. I may have been getting some mail for her at my address from senders who did not have a current address, but not much. Whatever I received either my wife or I discarded or returned to sender. Theory was not receiving or getting mail at my address."⁴

(CP 214-215).

The motion for reconsideration, with these supplemental declarations, was presented to Judge Heavey. (CP 194-201). Ms. Ngy repeated her objection to the hearsay, speculation and opinion testimony being offered by JPRD (CP 195, 196 & 200). At the same time, Ms. Ngy filed a formal written Motion for Permission to Present Live Testimony if the lower court still believed there were factual issues to resolve. (CP 224-226). In connection with this motion, the hearsay issue was argued again, for the fourth time (three times in writing as part of motion practice and once in oral argument). (CP 158-162; CP 230-231; CP 239-240). Judge Heavey denied both the motion for reconsideration (CP 245-246) and the motion for permission to present live testimony. (CP 242-243).

⁴ His testimony is confirmed by the certified mail JPRD sent to his address in connection with the garnishment action. (CP 264-267).

He ruled without calling for a response to the motion for reconsideration and without oral argument on either motion. His order on the motion to present live testimony states: “Live testimony from Defendant or her brother would not be helpful. It is uncontroverted that her bank statements were mailed to her brother’s address. Defendant has failed to show by clear and convincing evidence that the brother’s residence was not a mailing address for her.” (CP 242-243). After denying the motion for reconsideration, he entered the written order denying the motion to vacate (CP 278-279) and later entered the judgment on the answer to the writ of garnishment.⁵ (CP 323-325).

V. ARGUMENT

A. General Legal Principles Related to Proceedings to Vacate Default Judgments.

1. Equitable Principles Govern.

A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989). “Default judgments are not favored in the law.” *Id.* “The law prefers that controversies be determined on the merits rather than by default.” *Id.* A court “should exercise its authority liberally to preserve

⁵ Judge Heavey superseded the judgment on the answer to the writ of garnishment by ordering the garnished funds paid into the court registry pending this appeal. (CP 334-335).

substantial rights and do justice between the parties.” *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985).

“Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of a pending action. *Pascua v. Heil*, 126 Wn. App. 520, 528, 108 P.3d 1253 (2005) citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Substitute service is not the ideal method of providing notice and meeting due process requirements. *Id.* Accordingly, the support for such service should be closely scrutinized to ensure that substitute or constructive service **is used as a last resort**. *Id.* (emphasis added). Conclusory statements from the plaintiff are insufficient to support substitute service. *Id.* See also *Charboneau Excavating v. Turnipseed*, 118 Wn. App. 358, 362, 75 P.3d 1011 (2003). “Statutes authorizing service by means other than personal service, i.e., constructive and substituted service, require strict compliance.” *Painter v. Olney*, 37 Wn. App. 424, 427, 680 P.2d 1066 (1984).

2. The Duty to Vacate a Void Judgment is Nondiscretionary.

Some cases state that, generally, a decision to grant or deny a motion to vacate a default judgment is within the sound discretion of the trial court. See, e.g., *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). This general statement, however, varies in application

dependent on the asserted grounds for seeking vacation of a default judgment. These same cases, such as *Leen*, and others, state that *no exercise of discretion is involved when there is a lack of jurisdiction*. A court has a nondiscretionary duty to vacate a void judgment. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994) (defective service of process); *Brickum Inv. Co. v. Vernham Corp.*, 46 Wn. App. 517, 520-21, 731 P.2d 533 (lack of personal jurisdiction). This nondiscretionary duty to vacate a void judgment is the reason why a meritorious defense is not a factor for consideration. *Leen v. Demopolis*, *supra* 62 Wn. App. at 477.

3. The Plaintiff Has the Burden to Prove Valid Service.

It is well established that due process requires proper service of process for a court to have jurisdiction to adjudicate the rights of the parties. *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1994). A judgment entered without jurisdiction is void. *Id.* The burden rests with the plaintiff to prove that service was properly made. *Farmer v. Davis*, 161 Wn. App. 420, 250 P.3d 138, 429 (2011) (“ . . . the plaintiff bears the burden of demonstrating the validity of its service.”) (citing to federal cases))⁶. In all cases, the plaintiff has the burden to prove

⁶ “. . . [W]hen Washington [rules] have the same purpose as their federal counterparts, we will look to federal decisions to aid us in reaching the appropriate construction. *Peoples State Bank v. Hickey*, *supra* 55 Wn. App. at 371.

jurisdiction. *Gross v. Sunding*, 139 Wn. App. 54, 60 161 P.3d 380 (2007).

See also *Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir. 1978).

The plaintiff may meet this burden by producing an affidavit of service that on its face shows that service was properly carried out. *Goettemoeller v. Twist*, 161 Wn. App. 103, 107, 253 P.3d 405 (2011). To make a prima facie showing, the return of service must identify the recipient and note when and where service occurred, thereby providing enough detail so the opposing party knows what evidence he must rebut. *Relational, LLC v. Hodges*, 627 F.3d 668, 672 (7th Cir. 2010). It is said that such an affidavit regular on its face as to form and substance is presumptively correct. The burden of going forward (and sometimes the burden of proof) then shifts to the defendant to produce evidence rebutting the affidavit of service.

4. The Lower Court Should Conduct an Evidentiary Hearing if There Are Materially Conflicting Affidavits and Oral Testimony is Necessary to Make a Just Determination.

In *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994), the court of appeals stated this principle as follows:

When a motion to set aside a default judgment is supported by affidavits asserting lack of personal service, and the plaintiff files controverting affidavits, a triable issue of fact is presented. . . . The court, in its discretion, may direct that an issue raised by motion be heard on oral testimony if that is necessary for a just determination. *Swan v. Landgren*, 6 Wn. App. 713, 495 P.2d 1044 (1972); CR

43(e) (1). A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility.

In *Woodruff*, the court said that the affidavits in that case “present an issue of fact which can only be resolved by determining the credibility of the witnesses. The matter must be remanded for an evidentiary hearing to resolve this fact issue.” *Id.* See also *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).

In *Wood v. Copeland Lumber Co.*, 41 Wn.2d 119, 247 P.2d 801 (1952), the Supreme Court stated that a trial court should not decide factual issues raised in a petition to vacate the judgment on ex parte affidavits, any more than it could give judgment in the original action on the basis of ex parte affidavits and statements. *Id.* at 122. Where the trial court has not seen nor heard testimony it is not in a position to assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence. *Smith v. Skagit County*, 75 Wn.2d 715, 718, 453 P.2d 832 (1969).

5. The Burden to Prove Lack of Service By Clear and Convincing Evidence Shifts to a Defendant Who Has Actual Knowledge of the Proceeding and Unreasonably Delays Contesting Jurisdiction Until Post-Judgment.

The burden to prove lack of service shifts to the defendant under some circumstances. When the issue is jurisdiction, this situation occurs

when a defendant who has actual notice of the proceeding delays contesting jurisdiction until after a default judgment has been entered. *Farmer v. Davis*, *supra* 161 Wn. App. at 428-29; *Allen v. Starr*, 104 Wn. 246, 176 P. 2 (1918); *McHugh v. Conner*, 68 Wn. 229, 231, 122 P. 1018 (1912); *Leen v. Demopolis*, *supra* 62 Wn. App. at 478; *Securities and Exchange Commission v. Internet Solutions for Business, Inc.*, 509 F.3d 1161 (9th Cir. 2007) citing *inter alia* Theresa L. Kruk, Annotation, Who Has Burden of Proof in Proceeding Under Rule 60(b)(4) of Federal Rules of Civil Procedure to Have Default Judgment Set Aside on Ground That It Is Void for Lack of Jurisdiction, 102 A.L.R. Fed. 811 (1991).

The defendant who chooses not to put the plaintiff to its burden of proof, but instead allows a default judgment to be taken and waits, for whatever reason, to challenge jurisdiction, should have to bear the consequences of such delay. *Securities and Exchange Commission v. Internet Solutions for Business, Inc.*, *supra* 509 F.3d at 1166. The consequence is that the defendant must assume the burden of overcoming prima facie evidence of valid service by contrary evidence that is **clear and convincing**.⁷ *Id.*

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⁷ The burden of proof, and the clear and convincing standard, also is on the defendant when he or she seeks to vacate a judgment on the grounds of fraud, misrepresentation or misconduct. *Peoples State Bank v. Hickey*, *supra* 55 Wn. App. at 372.

B. Appellate Review In This Case is Independent and De Novo.

The standard of appellate review depends upon how the lower court reached its decision that service is either defective or not. If the lower court reached its decision based on written submissions, then review is *de novo* because the appellate court is in the same position as the lower court to reach the question. Where the dispute as to personal jurisdiction is presented in the form of affidavits like a summary judgment motion, the appellate court applies traditional CR 56 *de novo* review. *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn. App. 699, 707-08, 919 P.2d 1243 (1996). See also *Farmer v. Davis, supra*. Stated differently, the “. . . Court of Appeals is not bound by a superior court’s finding of fact based on documentary, nontestimonial evidence. In such a situation the Court of Appeals is as competent as the superior court to weigh and consider the evidence.” *Danielson v. City of Seattle*, 45 Wn. App. 235, 240, 724 P.2d 1115 (1986). “An appellate court may . . . independently review evidence consisting of written documents.” *Lobdell v. Sugar ‘n Spice*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983). Also, when the underlying facts do not present a material dispute, the issue of personal jurisdiction is a question of law that the appellate court may review *de novo*. *Lewis v. Bours*, 119

Wn.2d 667, 669, 835 P.2d 221 (1992).⁸ If there is a material conflict in the evidence, then the trial court must exercise its fact-finding responsibility. Appellate courts are simply “not in a position either to take evidence or weigh contested evidence and make factual determinations.” *State v. Walker*, 153 Wn. App. 701, 708, 224 P.3d 814 (2009).

In this case, appellate review of the evidence is independent of the Superior Court because the Superior Court decided the issue based on written submissions without any fact-finding hearing. As a result, this appellate court is in the same position as the lower court to grant the requested relief if warranted based upon its independent review of the record. In other words, this Court may decide that JPRD did not present sufficient evidence to support valid service and Ms. Ngy is entitled to the requested relief as a matter of law. If, however, this Court finds material conflicting evidence raising a genuine factual issue, then this appellate court should remand and order the lower court to hold a fact-finding hearing to resolve those factual questions.

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⁸ In *Goettemoeller v. Twist*, 161 Wn. App. 103, 253 P.3d 405 (2001), the court stated that whether “service of process is proper is a question of law that this court reviews *de novo*.” *Id.* at 107. Perhaps, stated more precisely, when the underlying facts do not present a material dispute the question is one of law reviewable *de novo*. It is Ms. Ngy’s position that JPRD did not present sufficient evidence to raise a factual dispute, entitling her to relief as a matter of law.

C. Application of the Foregoing Legal Principles to the Circumstances of This Case.

1. General Statement of Appellant's Position.

In this case, it is Ms. Ngy's position that JPRD failed to file controverting affidavits, containing admissible evidence, sufficient to raise a triable issue of fact. Neither the superior court nor this appellate court is at liberty to consider hearsay and conclusory statements in JPRD's affidavits. *Gunnar v. Brice*, 17 Wn. App. 819, 823, 565 P.2d 1212 (1977). When such chaff has been eliminated, there is no admissible evidence contrary to Ms. Ngy's sworn testimony, corroborated by her brother's testimony and documentary evidence, that she did not live at or receive mail at her brother's residence. Here, as in *Farmer v. Davis, supra*, and *Goettemoeller v. Twist, supra*, there is no admissible evidence raising any genuine issue. The default judgment should be vacated as a matter of law.

In this context, much of the legal analysis provided above becomes academic. It does not really matter who has the burden of proof or whether the evidentiary standard is clear and convincing. In all events, Ms. Ngy's unrebutted evidence establishes invalid service under any procedural approach or evidentiary standard bearing on the issue. Nonetheless, the following analysis proceeds under the legal rules to show the proper approach to the issue to avoid the error that occurred below.

2. JPRD Did Not Meet Its Initial Burden of Proof to Demonstrate the Validity of Service.

As stated above, the plaintiff always bears a threshold burden of demonstrating the validity of its service. *Farmer v. Davis, supra* 161 Wn. App. at 429; *Gross v. Sunding, supra* 139 Wn. App. at 160. Statute requires a showing of reasonable diligence before resorting to substituted service by mail. RCW 4.28.080 (16) (**copy in the appendix**). See also CR 4(d)(4) (authorizing substitute service by mail in circumstances justifying service by publication); *Pascua v. Heil, supra* 126 Wn. App. at 526-27 (same). Substitute service is a last resort because it is doubtful whether it will provide adequate notice. Both the statute and the rule require a showing of reasonable or due diligence before using it. Strict compliance is required. *Pascua v. Heil, supra* 126 Wn. App. at 526; *Painter v. Olney, supra* 37 Wn. App. at 427.⁹ 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, supra* at 126 Wn. App. at 527-28.

Wells Fargo Bank, the plaintiff in 2003, never attempted to show any facts justifying service by mail. Terry Poppa wrote Attorney Jones, on April 5, 2003, that service happened in a “**roundabout**” way and

⁹ A liberal construction of statutory language, see *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996) does not mean statutory requirements for substituted service can be abandoned. *Farmer v. Davis, supra* 161 Wn. App. at 435.

disclosed that he did not believe he had abode service. (CP 64). “The residence belongs to her brother, who told me on 2/23 that she used to live there but no longer does.” (CP 64). There is no indication in the record that Mr. Jones acted on this information or disclosed to the Superior Court the lack of abode service.

Mr. Jones filed an affidavit attesting to abode service without any mention of “reasonable diligence” to support service by mail. (CP 16). Dawn Baldwin’s declaration (she was the process server) claims abode service and, in addition, states that she mailed the summons and complaint, but she says nothing about the effort to locate Ms. Ngy before resorting to service by mail.¹⁰ (CP 14). In short, there was no evidence of record in 2003 to support service by mail.

In support of the motion to vacate, Ms. Ngy attested to the fact that in 2002 she provided Wells Fargo Bank with her then current address at the Carriage House Apartments. (CP 80-84). Wells Fargo Bank repossessed the car at that address. (CP 80-84). Ms. Ngy remained at that address throughout 2003. (CP 80-84). Her testimony on these facts is not rebutted by contrary evidence from Wells Fargo. “When a nonmoving party fails to controvert relevant facts supporting a summary judgment

¹⁰ If Ms. Baldwin thought she had abode service, there was no need to resort to service by mail. RCW 4.28.080 (16) authorizes service by mail only when the defendant cannot be served with reasonable diligence at the place of abode. She cannot claim abode service and, at the same time, claim she could not serve at the place of abode.

motion, those facts are considered to have been established.” *Central Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Thus, on this record, it is established that Wells Fargo Bank knew her current address but did not act upon it.

Reasonable diligence requires “plaintiff to follow-up on any information possessed [by the plaintiff] that might reasonably assist in determining the defendant’s whereabouts.” *Pascua v. Heil, supra* 126 Wn. App. at 529. See also *Charboneau Excavating v. Turnipseed, supra* 118 Wn. App. at 363 n. 15 citing *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 187, 765 P.2d 1333 (1989) (“[W]here a plaintiff possesses information that might reasonably assist in determining a defendant’s whereabouts, but fails to follow up on that information, the plaintiff has not made the honest and reasonable effort necessary to allow for [substitute] service”). “A plaintiff cannot throw his hands in the air and claim that he conducted a diligent search when he failed to pursue information which, on its face, had a reasonable possibility of being fruitful.” *Pascua v. Heil, supra* 126 Wn. App. at 530-31.

If Attorney Bradley Jones and Wells Fargo Bank had consulted with one another in a reasonably diligent manner they would not have overlooked the address for Ms. Ngy she gave to Wells Fargo Bank related to the repossession of the car. “[I]f all the available, reliable and easily

accessible sources of information to be had at the date of the affidavit by the plaintiff . . . as to the residence of [the defendant] may be wholly ignored, then the right to resort to constructive service of process . . . may be readily made a weapon to practically deprive a resident defendant of the sacred right of having his day in court.” *Painter v. Olney, supra* 37 Wn. App. at 426 quoting *Schmelling v. Hoffman*, 111 Wn. 408, 414, 191 P. 618 (1920).

As the court in the *Painter* case stated, “the plaintiff, in having an agent of her attorney call only at a house where it appears that neither defendant had ever lived and then abandoning the search, despite possessing additional information regarding the defendants’ whereabouts, did not make the honest and reasonable effort to allow for service by publication.” *Id.* Likewise, Wells Fargo did not exercise reasonable diligence when it went to a house where Ms. Ngy did not live, knowing she did not live there and then simply mailed to the same address with specific knowledge it was not her address, despite possessing additional information regarding her whereabouts at the Carriage House. “Service at that address would not be reasonably calculated to come to [Ms. Ngy’s] attention.” *Vukich v. Anderson*, 97 Wn. App. 684, 691, 985 P.2d 745 (1997).

Here, the default judgment was entered in 2003 based on an assumption and a representation to the Superior Court that there was valid abode service. That was error. Support for substitute service by mail was not provided in strict compliance with the statute. As in *Gross v. Sunding*, *supra* 139 Wn. App. at 60, the plaintiff “has failed to establish a *prima facie* case for proper service.”

Judge Heavey disregarded JPRD’s failure to show “reasonable diligence” as not meaningful. “That an attorney’s declaration did not properly cite the appropriate method of obtaining service [service by mail rather than abode service] is irrelevant.” (RP at 3, lines 22-24). Thus, the Superior Court concluded that this error in failing to show reasonable diligence was a technicality that it could overlook. In other words, the Superior Court reasoned that if service occurred at a “usual mailing address” then it did not matter whether reasonable diligence was lacking in not serving at the place of abode. This is an erroneous conclusion of law reviewable by this court *de novo*.

3. Ms. Ngy Presented Direct Positive Testimony, Confirmed by Secondary Evidence, That She Had No Presence whatsoever For Any Purpose at Her Brother’s Residence.

Theary Ngy presented her own declaration (CP 80-114), Vanna Ngy’s declaration (CP 115-116; CP 214-215) and documentary evidence from her employer (CP 212), from H&R Block (CP 86-114) and from the

IRS confirming her residence at the Carriage House Apartments (CP 212). This same residential address was confirmed by her counsel's legal messenger service who searched records that were publicly accessible in 2003. (CP 166).

In response to interrogatories, Ms., Ngy provided detailed information on where she lived after moving out of her brother's residence. (CP 174). She lived at an apartment complex on Capitol Hill, then another apartment in Tukwila and then one on Rainier Avenue. (CP 174). She finally moved to the Carriage House Apartments in 2001 where she remained until 2004. (CP 174). This was her residence in 2002 when Wells Fargo Bank picked up the car. In 2004, she moved to the Halltree Apartments in Des Moines. (CP 174).

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.”

In *Goettemoeller*, this court observed, under the facts of that case, “there is no evidence that Twist used the mailbox for any mail at all or that he arranged to forward mail from the private mailbox.” *Id.* at 109-110. The *Goettemoeller* opinion goes on to state as follows: “The facts here are more closely aligned with those in *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010). In *Streeter-Dybdahl*, this court held that service of a summons and complaint on someone in a residence where the defendant did not reside and only visited occasionally to pick up mail that was transmitted to the defendant at that address was insufficient to effectuate substitute service.” *Id.* at 110.

Ms. Ngy’s circumstance presents an even more compelling case for the same result. The mere existence of an outdated old mailing address is insufficient. The fact that third parties might send mail to an old address does not establish that address as a usual mailing address.

Here, as in *Goettemoeller*, there is no evidence that she used her brother’s residence for any mail at all or that she arranged to pick-up mail there or have it forwarded from there. She did not even occasionally pick-up mail there. After moving out, she never returned for any purpose.

It also is significant, though not required to vacate the judgment, that Ms. Ngy had a **meritorious defense** to the complaint. She never had any notice of a sale of the collateral or the creditor’s intent to pursue a

deficiency judgment as required by the Uniform Commercial Code (RCW 62A.9A & 611 *et seq.*) to perfect that right. (CP 82). This point is significant to the result here if the equitable principles stated above that a court “should exercise its authority liberally to preserve substantial rights and do justice between the parties” has meaning.

4. JPRD Failed to Respond With Any Admissible Facts Showing That There Was Any Factual Issue for Hearing.

JPRD, in response to Ms. Ngy’s sworn testimony, had the burden to show that Ms. Ngy was in fact using her brother’s residence for the *usual receipt of mail*. The opposing party must respond with **specific facts** and cannot rely upon bare allegations. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997) (the burden shifts to the nonmoving party to establish by affidavits or other evidence the existence of facts on which it has the burden of proof at trial). This burden is not met with innuendo, hearsay, argumentative assertions, opinion or speculation. *Id.* See also *Gross v. Sunding, supra* 139 Wn. App. at 59-60 (“nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment.”).

JPRD had to come forward with substantial factual evidence. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989) adopting the federal summary judgment standard set forth in

Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986). An “opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The evidence must be substantial enough to submit to a trier of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This standard involves a qualitative assessment of the evidence. “If the evidence is merely colorable, . . ., or is not significantly probative, [the motion] may be granted”. *Id.* at 249.

These legal principles have been restated in Washington law in the context of motions to vacate default judgments. In *Farmer v. Davis, supra* 161 Wn. App. 420, 427-30 (2011), the court applied summary judgment evidentiary standards. The plaintiff’s affidavits should set forth admissible matter and warrant no special weight or treatment. *Farmer v. Davis, supra* 161 Wn. App. at 430. Hearsay, improper opinion and speculation are unacceptable. *Id.* at 431.

In *Farmer*, the court observed that “[t]here was no admissible evidence that Mr. Davis was continuing to use his old Tombstone address for any purpose. Undisputed evidence established that since getting married, he had not lived or stayed overnight at his mother’s home. There

was no evidence that Mr. Davis relied on his mother to handle business or legal matters on his behalf.” *Id.* at 435 (emphasis added).

The same can be said for the facts in this case. There was no admissible evidence that Ms. Ngy was continuing to use her brother’s address for any purpose. Undisputed evidence established that since moving out, she had never returned to her brother’s home. There was no evidence that she relied on her brother to handle any matter for her.

JPRD argued that postal traces show mail going to the Federal Way address. A postal trace is not factual evidence showing Ms. Ngy is receiving mail at that address or using that address. A postal trace does no more than indicate someone has sent mail for Ms. Ngy to that address. The postal trace does not reveal what happens to mail sent to that address; it only invites inadmissible speculation. In this case, it was either discarded or returned to sender. (CP 215). Even JPRD’s mail sent in 2011 to the Federal Way address was returned marked “Not At This Address” and “Moved Left No Forwarding.” (CP 253).

JPRD relied on the “letter” response from the Bank of America to the subpoena issued to it. (CP 141-144). The letter is not admissible evidence. It is not sworn testimony. It is an out of court statement by a non-party that is inherently unreliable. Moreover, the Bank of America clarified by sworn declaration that the only knowledge they have of any

address for Ms. Ngy was provided to them in 1997. (CP 216-220). The Bank of America had no knowledge whether she was using that address in 2003. Bank of America contributes nothing to the case.

JPRD relied upon the hearsay testimony from Terry Poppa that Vanna Ngy told him (or his process server) that Theary Ngy received mail at his home. (CP 64); (CP 153). Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Poppa is the declarant. He is offering a statement by another person – Vanna Ngy – to prove the truth of the matter asserted.

This is unreliable and unacceptable hearsay.¹¹ It is not personal knowledge of Mr. Poppa. It is repetition of what someone heard someone else say. It is subject to misunderstanding, miscommunication or the hearer's interpretation of the statement. It is not sufficiently probative for use in legal proceedings. If the alleged statement was ever made, it may have been no more than a statement by Vanna Ngy that *he* is getting mail for his sister. It does not follow that *she* is getting it. Both Vanna Ngy

¹¹ Ms. Ngy objected on multiple occasions: (1) in the reply brief in support of the motion to vacate (CP 162); (2) at oral argument on April 29, 2011 with a request for a ruling on the evidentiary issues (CP at 7); (3) in the motion for reconsideration (CP 195, 196 & 198); and (4) in the reply brief in support of the motion to present live testimony (CP 239-240).

and Theory Ngy testify under oath on personal knowledge that this was not the situation.

Yet, Judge Heavey accepted the hearsay. “I find Mr. Poppa to be credible. . . . He states that the brother stated to him that the defendant received her mail there.” (RP at 2 & 3). This ruling disregards evidentiary law.

JPRD also relies upon a “2002 Form 1099” from the Muckleshoot Casino list[ing] her address as her brother’s.” She was playing cards at the Muckleshoot Casino. She won a jackpot at the casino. Ms. Ngy’s Answers to JPRD Interrogatories. (CP 176). The casino required her identification for purposes of reporting the winnings for income tax purposes. She provided her driver’s license which still had her outdated brother’s address on it. (CP176). The casino used the address to report “poker” winnings to the IRS. ¹² In *Farmer v. Davis, supra*, 161 Wn. App. at 426, 431-32 & 435, on similar facts, the court of appeals ruled that the defendant’s use of a driver’s license with an outdated address is not sufficient evidence of a usual place of abode. Likewise, it is not sufficient evidence of a usual mailing address.

¹² This type of income “i.e., poker” is reported on the form itself confirming her testimony. (CP 111). When H&R Block prepared her 2002 return, they had to get a wage/earnings transcript from the IRS because she did not have the information. Ms. Ngy’s usual mailing address in 2002 was her SeaTac address as shown on the returns which is why she did not get the copy if it was sent to her brother’s address.

JPRD offered the declaration of Brian Fair, the owner of JPRD. (CP 145-150). He has no personal knowledge of any facts supporting service. He merely testified to his opinion that “I firmly believe the Defendant resided at and/or regularly received mail at the aforesaid address in March and April of 2003.” (CP 146). This testimony is just improper opinion testimony. Moreover, he (or his agency) acquired knowledge to the contrary in 2011 when mail they sent to the Federal Way address was returned. (CP 253). It is hard to image how Mr. Fair can hold his “firm belief” when his own experience from mail JPRD personally sent to this address indicated it was not a valid address for her.

5. The Superior Court Should Have Conducted an Evidentiary Hearing If It Believed There Was Admissible Evidence Creating a Material Issue of Fact.

An evidentiary hearing was not necessary because there was no admissible evidence contrary to Ms. Ngy’s evidence. However, Ms. Ngy orally urged the Superior Court to conduct an evidentiary hearing if the Superior Court disagreed. (CP 224-226). Ms. Ngy also moved formally, by written motion, for permission to present live testimony to resolve any fact issues that the Superior Court thought were present. (CP 224-226). The Superior Court denied the motion. (CP 242-243).

If there were genuine issues of material fact, then the Superior Court should have heard from the witnesses to make a just determination.

The decision vitally impacts Ms. Ngy. She is facing a financially devastating claim of over \$36,000 largely consisting of post-judgment interest for 8 years (over a lawsuit she never heard about until a few months ago and had no opportunity to defend). If our standards of due process mean anything, then there should be vigilance in protecting her right to be heard and to have this issue fairly determined (if this reviewing Court finds any substantial conflict in the admissible evidence).

D. There is No Factual Basis In This Case for Shifting the Burden to the Defendant By a Clear and Convincing Standard.

Ms. Ngy had no knowledge whatsoever about this lawsuit until 2011 after the garnishment of her bank account. There is no legal basis for shifting the burden of proof to her when she was never aware of legal proceedings against her and had no prior opportunity to contest these issues. If this case is remanded for an evidentiary hearing, and in any event for purposes of clarifying Washington law for future cases, this Court should address this issue even if it is not necessary to the result in this case.

Washington law does not require shifting the burden of proof to the defendant pursuant to a clear and convincing standard of proof in every case involving a motion to set aside a default judgment. The facts of the individual case determine whether the plaintiff retains the ordinary

standard of proof or whether there is a heightened standard of proof shifted to the defendant to show invalid service. The point of departure in those decisions that shift the burden to the defendant has been the fact that the defendant had actual notice of the lawsuit but nonetheless took no action on the information and allowed the action to go to default.

In Washington law, the subject first appears in a cursory opinion in the 1918 case of *Allen v. Starr*, 104 Wn. 246, 176 P. 2 (1918). There was evidence that the defendant had notice of the lawsuit from service on his wife. The defendant allowed judgment to be taken and did not contest jurisdiction until after execution was issued.

The trial court conducted an evidentiary hearing and found against the defendant based upon substantial evidence. The Supreme Court affirmed stating that after allowing judgment to be taken, the defendant needs to provide clear and convincing evidence of invalid service. *Id.* at 247. Implicit in the statement that the defendant chose to allow a default judgment to be taken, is a finding of fact that the defendant was aware of the proceeding and allowed it to go to default rather than contest it.

The *Allen* case cites to the 1912 case of *McHugh v. Connor*, 68 Wn. 229, 122 P. 1018 (1912). In that case, the proof of service showed that the defendant and his wife were personally served. The defendants acknowledged receiving the complaint but said they were not served with

the summons. There was no dispute that they had actual notice of the lawsuit.

The defendants took no action and allowed judgment to be taken. The defendants only decided to contest jurisdiction following an execution sale of their real estate and after the period of redemption expired. The Supreme Court said in that circumstance the burden shifted to the defendant to show service was not valid (while not saying anything about clear and convincing evidence).

The Washington Supreme Court has not cited *Allen v. Starr, supra*, in the years since 1918. The Washington Court of Appeals has cited the case four times in published opinions. One of those cases is the recent 2011 decision from Division III in *Farmer v. Davis, supra*, cited herein and discussed above. The three other cases are *In the Matter of the Dependency of A.G.*, 93 Wn. App. 268, 968 P.2d 424 (1998), *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991) and *Miebach v. Colasurdo*, 35 Wn. App. 803, 670 P.2d 276 (1983). The latter three cases fit the factual pattern present in *Allen* and in *McHugh* of actual knowledge of legal proceedings but inaction by the defendant who elected not to contest jurisdiction until after judgment.

The 2011 Division III decision in *Farmer v. Davis, supra*, is the most significant opinion on the subject since *Allen v. Starr* because it is

the only one that makes some attempt to give closer scrutiny to the burden of proof and the clear and convincing standard. *Farmer* is a personal injury case involving an automobile accident. The defendant Davis was served at his mother's home where he did not reside. Davis hired a lawyer who filed a notice of appearance within days after the improper service. Davis moved to dismiss for insufficient service. *Accordingly, Farmer involves facts where the defendant had actual notice of the lawsuit but did not delay contesting service.*

The plaintiff Farmer argued that proof of service was valid on its face, being regular in form and substance, because the mother's home was "a usual place of abode" if not the only place of abode. According to Farmer, Davis had the burden of proving improper service by clear and convincing evidence citing *Allen v. Starr* and other cases.¹³ Division III disagreed.

Division III, distinguished *Allen v. Starr*, and reasoned that the heightened standard only applies when the motion to vacate is made post-judgment. It explained that the heightened standard is appropriate post-

¹³ Decisions like *Streeter-Dybdahl v. Nguyet-Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010) (Division I) appear on the surface to support Farmer's position on the burden of proof. In *Streeter-Dybdahl*, the court stated, without discussion of any facts bearing on the issue, that an "affidavit of service is presumptively correct, and the party challenging the service of process bears the burden of showing by clear and convincing evidence that the service was improper." If this language is applied *ipso facto* based merely on an affidavit of service, then it suggests that Farmer was right and Davis had the stated burden regardless of the facts.

judgment (but not pre-judgment) because of policy considerations regarding the regularity and stability of judgments.

Division III cites the Restatement (Second) of Judgments, and explains that the heightened standard serves “to protect judgments from contrived attack at a time when the attack may be hard to contradict if the memory of the plaintiff’s witness to the service has faded” *Id.* at 429. The *Farmer* court concludes that there is “no principled reason . . . to apply a presumption or heightened burden of proof where no judgment is being attacked.” *Id.* Thus, according to Division III, the burden remained with the plaintiff where it always is to prove the validity of service. *Id.*

The *Farmer* decision does not completely explain the “principled reason” for distinguishing *Allen* and like cases. As a result, it may perpetuate the confusion in the case law. The proper analysis needs to **focus on the circumstance of the defendant**, as in *Allen v. Starr*, *not on the circumstance of the case* (i.e. pre-judgment or post-judgment stage of the proceeding). The important fact bearing on an equitable shifting of the burden to the defendant is whether the defendant, knowing of the lawsuit, chose to delay raising the jurisdictional issue.

There is no reason in fairness or equity to shift the burden to a defendant who is wholly ignorant of the lawsuit and does not find out about it until post-judgment. The happenstance that there is a judgment

against an ignorant defendant is no reason to penalize him or her with the burden of proof and a heightened standard to set it aside. Policy considerations regarding the stability of judgments are not a factor because the ignorant defendant is not contriving to attack a judgment at a later time when the evidence has faded away. The plaintiff bears responsibility for the problem by not resorting to service calculated to give actual notice to the defendant.

The result in *Farmer* is correct, applying *Allen v. Starr*, for this reason. There needs to be both (1) actual notice of the lawsuit and (2) unreasonable delay in acting on the information before shifting the burden with a heightened standard to the defendant. In *Farmer*, only the first circumstance was present, not both. Davis had actual notice of the lawsuit but he did not delay in contesting service. Accordingly, application of the heightened standard was not appropriate or fair to Davis.¹⁴

The Ninth Circuit stated the rule properly in *Securities Exchange Commission v. Internet Solutions for Business, Inc.*, *supra* 509 F.3d 1161 (9th Cir. 2007) as follows:

¹⁴ In *Streeter-Dybdahl*, the same or similar facts were present as in *Farmer*. The defendant also had actual notice but also did not delay in contesting jurisdiction. The same result should have followed. In other words, the defendant in *Streeter-Dybdahl* should have had the burden of going forward with the evidence but not the burden of proof and not to a clear and convincing standard. Nonetheless, the Court stated the burden was with the defendant to a clear and convincing standard. However, the court also ruled the defendant met the burden rendering the issue academic.

In a context where “the defendant had actual notice of the original proceeding but delayed in bringing the motion [to vacate] until after entry of default judgment, [the defendant] bears the burden of proving that service did not occur. This rule has been adopted by the Second and Seventh Circuits and a number of district courts [including the Eastern District of Washington]. *Id.* citing as secondary authority Theresa L. Kruk, Annotation, Who Has Burden of Proof in Proceeding Under Rule 60(b)(4) of Federal Rules of Civil Procedure to Have Default Judgment Set Aside on Ground That It Is Void for Lack of Jurisdiction, 102 A.L.R. Fed. 811 (1991). “The rule . . . comports with general principles of fairness. A defendant who has notice of an action against him may force the plaintiff to prove that service has been made and that jurisdiction is proper by filing a Rule 12(b) motion to dismiss. . . . The defendant who chooses not to put the plaintiff to its proof, but instead allows default judgment to be entered and waits, for whatever reason, until a later time to challenge the plaintiff’s action, should have to bear the consequences of such delay. Having clarified [the burden of proof] . . . , we turn to whether that burden has been met here.”

Id. at 1166.

Here, in this case, neither of these two factual circumstances are present. Ms. Ngy never had notice of the lawsuit before judgment or even after judgment until 8 years later in 2011. When she learned of the lawsuit, she acted promptly to contest it. There is no principled reason or fair justification to place a heightened standard of proof on her when she did nothing to create this situation.

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E. Request for Attorney Fees and Costs.

Pursuant to RAP 18.1(b), Ms. Ngy requests an award for her attorney's fees and costs. The request for fees and costs is based on RCW 6.27.230 and *Lindgren v. Lindgren*, 58 Wn. App. 588, 598, 794 P.2d 526 (1991) and *Allstate Insurance Co. v. Khani*, 75 Wn. App. 317, 327, 877 P.2d 724 (1994). “. . . [W]hen 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.” *Allstate Ins. Co. v. Khani, supra* at 327. This statutory liability for fees and costs is the separate liability of the assignee JPRD Investments, LLC, arising out of their prosecution of the garnishment action.

Ms. Ngy also is entitled to her fees and costs by contract. Wells Fargo Bank sued on a contract providing for fees and costs in the event of default. (CP 69-71). RCW 4.84.330 provides for an award of fees and costs to the prevailing party on such a contract. JPRD Investments, LLC, as assignee, stands in the shoes of Wells Fargo Bank with regard to this liability under the contract. *Federal Financial Co. v. Gerard*, 90 Wn. App. 169, 949 P.2d 412 (1998). Additionally, absent a novation, not present here, the plaintiff Wells Fargo Bank remains liable to the obligor for the

performance of this obligation. A third person's assumption of the obligation simply makes the third person an additional obligor. *Vetter v. Security Continental Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997). Accordingly, the contractual obligation is a joint and several obligation of JPRD Investments, LLC, and Wells Fargo Bank. A fee affidavit will be filed when and as required by RAP 18.1(d).

VI. CONCLUSION

Ms. Ngy should be granted the relief requested below in accordance with the equitable principles governing this issue. Wells Fargo Bank knew her location, but without reasonable diligence used unauthorized substituted service at a different location where she was known not to live. Ms. Ngy's testimony that her brother's address was not her address for any purpose was not rebutted by competent and substantial evidence. This Court should reverse and remand with instructions to vacate the default judgment, quash the writ of garnishment and award judgment for reasonable attorney's fees and costs in the trial court and in the amount awarded by this Court on appeal. Alternatively, if the

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Court should find disputed fact issues, then the Court should reverse and remand for an evidentiary hearing to resolve the facts.

DATED this 2 day of August 2011.

AIKEN, ST. LOUIS & SILJEG, P.S.

A handwritten signature in cursive script that reads "William A. Olson".

William A. Olson, WSBA No. 9588
Attorney for Defendant/Appellant
Theary Ngy

APPENDIX

RCW 4.28.080
Summons, how served.

*** CHANGE IN 2011 *** (SEE 5213.SL) ***

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

- (1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.
- (2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.
- (3) If against a school or fire district, to the superintendent or commissioner thereof or by leaving the same in his or her office with an assistant superintendent, deputy commissioner, or business manager during normal business hours.
- (4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state.
- (5) If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state.
- (6) If against a domestic insurance company, to any agent authorized by such company to solicit insurance within this state.
- (7) If against a foreign or alien insurance company, as provided in chapter 48.05 RCW.
- (8) If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state.
- (9) If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.
- (10) If the suit be against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.
- (11) If against a minor under the age of fourteen years, to such minor personally, and also to his or her father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he or she resides, or in whose service he or she is employed, if such there be.
- (12) If against any person for whom a guardian has been appointed for any cause, then to such guardian.
- (13) If against a foreign or alien steamship company or steamship charterer, to any agent authorized by such company or charterer to solicit cargo or passengers for transportation to or from ports in the state of Washington.
- (14) If against a self-insurance program regulated by chapter 48.62 RCW, as provided in chapter 48.62 RCW.
- (15) 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.
- (16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" shall not include a United States postal service post office box or the person's place of employment.

[1997 c 380 § 1; 1996 c 223 § 1; 1991 sp.s. c 30 § 28; 1987 c 361 § 1; 1977 ex.s. c 120 § 1; 1967 c 11 § 1; 1957 c 202 § 1; 1893 c 127 § 7; RRS § 226, part. FORMER PART OF SECTION: 1897 c 97 § 1 now codified in RCW 4.28.081.]

Notes:

Rules of court: Service of process -- CR 4(d), (e).

Effective date, implementation, application -- Severability -- 1991 sp.s. c 30: See RCW 48.62.900 and 48.62.901.

Severability -- 1977 ex.s. c 120: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 120 § 3.]

Service of process on

foreign corporation: RCW 23B.15.100 and 23B.15.310.

foreign savings and loan association: RCW 33.32.050.

nonadmitted foreign corporation: RCW 23B.18.040.

nonresident motor vehicle operator: RCW 46.64.040.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WELLS FARGO BANK,)
)
 Plaintiff,)
)
 vs.) No. 03-2-03661-7 KNT
)
 THEARY NGY,)
)
 Defendant.)
 _____)

TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS
BEFORE THE HONORABLE MICHAEL HEAVEY
APRIL 29, 2011

APPEARANCES

For WELLS FARGO: Alexander Kleinberg
Attorney at Law
Eisenhower & Carlson, PLLC
1201 Pacific Avenue
Tacoma, WA 98402

For THEARY NGY: William A. Olson
Attorney at Law
Aiken, St. Louis & Siljeg, P.S.
801 Second Avenue, Suite 1200
Seattle, WA 98104

1 THE COURT: Okay. This is Defendant Theory
2 Ngy's motion to quash the writ of garnishment to
3 vacate the default judgment and to dismiss the lawsuit
4 based upon improper service. Cause number is
5 03-2-03661-7 KNT. This is Judge Heavey. Are you
6 picking me up?

7 I have heard argument from both counsel,
8 Mr. Olson and Mr. Kleinberg. I've also read the
9 brief, the response brief, the reply briefs and the
10 declarations that were included in those.

11 The burden is on the defendant to show, by
12 clear and convincing evidence, that the defendant,
13 Theory Ngy, was not properly served. RCW 4.28.020
14 discusses, in Section 15, serving the defendant
15 personally, or leaving a copy of the summons at her
16 usual abode with the -- with some person of suitable
17 age and discretion. This was not done, because I
18 don't believe this was her residence or her usual
19 abode.

20 It is this court's opinion that the default
21 judgment, however, is not defective for alleging
22 service by Section 15 if there was otherwise effective
23 service, in this case, possibly under Section 16. I
24 find Mr. Papa [spelled phonetically] to be credible.
25 He wrote his letter to Attorney Jones on April 2,

1 statute. I believe she was.

2 Ms. Ngy and her -- the defendant, Ms. Ngy,
3 states in her declaration her -- she received her mail
4 at 3602 South 180th Street in SeaTac, Carriage House
5 Apartments. She says this was her usual mailing
6 address. It may have been. But also I think another
7 usual mailing address was the brother's house.
8 Nothing came up in Mr. -- office check, postal check
9 at the time, nor is it reflected again by the Bank of
10 America records, or I would add the Muckleshoot
11 records.

12 A person can have two usual mailing
13 addresses. She states that this was the address used
14 by the bank and the IRS. It's not true that it was
15 the address used by the bank, unless she's got a
16 different account. It was the -- that is not the
17 address -- the SeaTac address is not the address that
18 the bank used.

19 Also, as to the IRS, she did not file for
20 2000, 2001 and 2002 and 2003, didn't file those
21 return--

22 (Break in audio recording)

23 THE COURT: -- -4. This does not establish
24 her usual mailing address at SeaTac until 2004, if at
25 all, because in 2004, the bank was still sending their

1 2003, that he used reasonable diligence in finding the
2 address, a postal check. He even took license plate
3 numbers outside of the residence and traced them back
4 to the defendant's mother. He tried to serve the
5 defendant also at her mother's house. He realized
6 that wasn't any good. He states that the brother
7 stated to him that the defendant received her mail
8 there.

9 This is confirmed by the Bank of America
10 information. Mr. Papa left a copy of the summons and
11 complaint with the brother of the defendant at at
12 least -- at her usual mailing address at the time,
13 certainly one of her usual mailing addresses.

14 And it was left with a person of suitable age
15 and discretion. And thereafter, he mailed a copy by
16 first class mail, postage prepaid to the brother's
17 address. And I don't believe he ever -- he
18 certainly -- I don't know if he addressed it in his
19 declaration, but I don't believe it was sent back to
20 him.

21 So that is a usual mailing address of the
22 defendant at the time. Service was good. That an
23 attorney's declaration did not properly cite the
24 appropriate method of obtaining service is irrelevant.
25 The question is, was the defendant served under the

1 monthly statements at least to that location.

2 Because she did not file her 2000, 2001, 2002
3 and 2003 returns until 2004, it does little to -- does
4 little to -- to make her establish her burden of
5 showing, by clear and convincing evidence, that the
6 brother's address was not her usual mailing address.

7 I find the brother's declaration to be less
8 than candid with this court. He says, quote, "Any
9 papers served to me or any mail were returned to
10 sender."

11 Okay. First of all, I don't know why you --
12 I don't know how you -- if you're served, how you
13 return it to sender. I guess you put it in the mail
14 and send it to the attorney. I've got no evidence
15 that was done.

16 He doesn't say, "I was never served." Or he
17 doesn't say, "I never gave them to our mother. That's
18 where I always put her mail. She got it from Mom,"
19 which might have happened in this case. Nor does the
20 mother -- nor does the brother deny that he told
21 Mr. Papa that she received her mail there. Nor does
22 he deny that he received the service of papers from
23 Mr. Papa in 2003.

24 Further, again, this does not comport with
25 the Bank of America records. To my knowledge, they

1 never received mail back from the brother.
2 I guess I'd say, Mr. Olson, if you can show
3 me that they -- the brother sent every single check
4 statement back to the Bank of America on a monthly
5 basis for five years, I would be willing to have an
6 evidentiary hearing on that.

7 MR. OLSON: I appreciate that, Your Honor.
8 I'm not even certain there was any activity on that
9 account or even any statements generated.

10 THE COURT: I get -- I have old bank accounts
11 that I got nothing in it, and there's no activity, but
12 I still get a monthly statement. And it's Bank of
13 America.

14 And it was at the address they sent at
15 least -- in my opinion, they sent monthly checking
16 statements for five years.

17 Now, if the defendant can show me she had
18 another checking account at a different bank in 2003,
19 I might reconsider that. Or if you can show me that
20 they got all these checking statements back, or that
21 they never sent her a checking statement, that would
22 be helpful. I would -- I would take a look at that.

23 But the bottom line is this: It's her
24 burden. And I find that she has failed to show, by
25 clear and convincing evidence, that she was not

1 information. I've got --

2 MR. OLSON: Well, okay. Do I understand
3 correctly, then, you're not relying upon that hearsay.
4 (Break in audio recording)

5 THE COURT: Well, like I said, I'm unsure
6 whether it's admissible or not. It's -- it's her
7 burden to show, by clear and convincing evidence, that
8 that was not a usual mailing address for her.

9 MR. OLSON: Well, I would -- finally, and
10 I'll stop talking --

11 THE COURT: Because all I have, of records of
12 people that sent her records, is 2002 Muckleshoots to
13 her brother's. I know. "That was the address on my
14 driver's license." Well, addresses on driver's
15 licenses are changed every four years. If she moved
16 out in '99, maybe it -- that might have fallen in
17 there. I don't know.

18 But --

19 MR. OLSON: Allow me the time to get to Sea
20 First, or Bank of America, and --

21 THE COURT: I still say Sea First too.

22 MR. OLSON: Because that apparently is
23 troubling you. And we're indulging a lot of
24 assumptions and speculation here. And all we know
25 right now is that Bank of America had an address for

1 properly served. The motion to vacate the default
2 order is denied. Motion to quash the writ of
3 garnishment is denied. And the motion to quash -- or
4 the motion to dismiss the case is denied.

5 MR. OLSON: Your Honor, I have two questions,
6 if I may.

7 THE COURT: I -- you can ask questions. I
8 can't guarantee an answer, Mr. Olson.

9 MR. OLSON: Okay. The two -- first question
10 is I'd like you to stay your decision for 30 days to
11 allow me time to see if I can investigate into the
12 bank records in the manner that you've asked for. And
13 also, it'll give me more time to try and get that IRS
14 2003 tax return that we're still waiting on.

15 If you could stay your decision for 30
16 days -- you know, a motion for reconsideration, I
17 believe, is ten days. That's not adequate enough time
18 for me to do what needs to be done. So that's my
19 first question.

20 My second question is, I think your decision
21 should address the evidentiary issues, the hearsay
22 evidence and the speculative and opinion testimony --

23 THE COURT: I hear what you're saying, but
24 even without that, it's her burden. And the only
25 thing I really have is the Muckleshoot Bank of America

1 her that didn't change. And that's all we know. We
2 don't know whether there's any mailing activity.

3 THE COURT: I'm afraid that if I -- if I --
4 if I stay this for 30 days, that in 29 days, you're
5 going to say, "I need 30 more days."

6 MR. OLSON: Well, I think we need to allow
7 the time to investigate this right. If you -- if you
8 think this is important, 30 days ought to be
9 sufficient for her and me to go to Bank of America
10 and --

11 THE COURT: It doesn't really do you much
12 good in terms of, you still don't get an order
13 quashing the writ of -- writ of garnishment.

14 MR. OLSON: No. But if you stay your
15 decision for 30 days, they -- they can't move the
16 money out of US Bank without a further court order.
17 The garnishment statutes say that the garnishing
18 defendant will hold that money until further order of
19 the court upon notice to us. And if you -- if you
20 stay your decision for 30 days, that money's not going
21 anywhere.

22 THE COURT: Mr. Kleinberg, do you have a
23 position on the 30 days?

24
25 MR. KLEINBERG: Well, yes, we do. We object,

1 Your Honor. I mean, this -- we're here today because
2 of the defendant and her motion to vacate, quash.
3 She's not met her burden. The Court has found such.
4 And we, again, maintain she hasn't come close to
5 meeting her burden.

6 The judgment was entered eight years ago. My
7 client purchased it. It should be able to execute.
8 If the defendant wants to file a notice of appeal,
9 move for supersedeas, stay the Court's ruling, let the
10 Court of Appeals consider the matter, then so be it.
11 But we'd object to the request for continuance.

12 THE COURT: Okay. Now, he has the right to
13 make a motion for reconsideration. And when that's
14 done, he need -- he could do that ten days from today.
15 He can file a motion for reconsideration. Until I
16 deny that motion for reconsideration, it's not a done
17 deal.

18 So -- and then what I'd probably do is I
19 would set up a briefing schedule for you to respond to
20 his motion for reconsideration and a briefing schedule
21 for reply. And then I'd probably take at least 30
22 days from today to arrive at my decision to deny.

23 So I see, really, you could skin the cat a
24 couple different ways. And I want to see what -- I
25 will -- I don't know how to stay my decision other

1 than you doing it the normal way by making a motion
2 for reconsideration.

3 But I will tell you this: Is if you make a
4 motion for reconsideration, I will not decide until 30
5 days from today. So you will need to make a motion
6 for reconsideration. I suggest that you try to go to
7 the Bank of America immediately on Monday and see if
8 they've got some sort of record that you feel -- or
9 have the ability to get some sort of record that you
10 might feel might be helpful to your case so you have
11 something to make this motion for reconsideration on.

12 MR. OLSON: Maybe "stay" was the wrong word
13 to use. Maybe what I'm asking you to do is continue
14 this for 30 days to allow us time to check out the
15 matters that are of concern to you.

16 MR. KLEINBERG: It -- may I just, very
17 briefly, respond?

18 THE COURT: Sure.

19 MR. KLEINBERG: Your Honor, we request that
20 the Court not stay its ruling today because in the
21 event the garnishee defendant pays the -- this money
22 over to my client pursuant to the garnishment
23 statutes, and in the event the judgment's later

1 vacated, set aside, then the defendant will have a
2 claim against my client for the return of that money.
3 So at the end of the day, the defendant will have her
4 day in court, so to speak, if she continues to pursue
5 this --

6 (Break in audio recording)
7 MR. KLEINBERG: -- wind up with whatever
8 money or refund she might be due.

9 THE COURT: I thought Mr. Olson said that
10 your client's not going to get paid until a further
11 order of the court.

12 MR. KLEINBERG: I believe that's what he's
13 requesting, Your Honor. But -- but I believe at this
14 point, under the garnishment statutes, it would be --
15 unless the Court stays its ruling today, my client can
16 move for a judgment and order to pay against the
17 garnishee defendant. And then if that judgment's
18 entered, the garnishee defendant will pay this money
19 to the court registry which in turn goes to my client,
20 so --

21 THE COURT: Okay. As I said, he can make a
22 motion for reconsideration. I would be inclined to
23 take a look at that, not necessarily inclined to
24 reverse my decision. But I'd be inclined to take a
25 look at it.

1 So I think what I will do is I'd like you to
2 prepare an order denying the motion, denying the writ,
3 quashing the writ -- denying the motion to quash the
4 writ and dismissing the case. And I will -- I expect
5 to sign that on May 31st, 32 days from now. And so
6 sign it -- do an order, and we will note it on my --
7 and put a note on your cover letter that I was
8 inclined to sign this order on May 31st.

9 MR. OLSON: Your Honor, I want to cooperate
10 with the Court and Mr. Kleinberg, and I'm going to
11 make every effort to get the information that we're
12 talking about within two weeks. I think that ought to
13 be doable with Bank of America, absent some unexpected
14 procedural problems they have that I might not be
15 aware of. I don't know how hard I can push the IRS.

16 THE COURT: You might want to get a look
17 at -- at her -- the records that they sent, the
18 copies, how many checks she wrote per month and that
19 sort of thing.

20 MR. OLSON: If they have bank statements, I
21 want to get copies of those and see what activity
22 there was. So --

23 THE COURT: One would assume, if there was
24 some activity, she was making deposits, and they were
25 sending statements to her brother's address.

1 MR. OLSON: I don't know that that's true. I
2 don't know that's true.

3 THE COURT: Well, we don't, but I just --

4 MR. OLSON: We certainly don't have anything
5 in this record that says --

6 THE COURT: I --

7 MR. OLSON: -- that happened.

8 THE COURT: What was her job in those years?

9 MR. OLSON: 2000 to 2004, Theory, do you
10 recall?

11 THEARY NGY: I was working (unintelligible).

12 THE COURT: Well, I guess what I'm saying is
13 I assume she was getting paychecks and not cash.

14 MR. OLSON: She was --

15 THE COURT: She filed -- she had W-2s and --

16 MR. OLSON: Her income was very modest during
17 some of these years. I recall one of the years it was
18 \$6,000.

19 THE COURT: I have no doubt that it was
20 modest. The question is what was her usual mailing
21 address.

22 MR. OLSON: Your Honor, I very much
23 appreciate your willingness to work with us on this to
24 see if we can correct this or -- or make a better
25 record for you.

1 THE COURT: Okay. Thank you.

2
3 MR. KLEINBERG: Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Kleinberg. Have a
5 nice weekend.

6 MR. OLSON: Thank you.

7 (End of recorded proceedings.)

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