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

COURT OF APPEALS
DIVISION II

No. 672401-I

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

STATE OF WASHINGTON
BY FIRST DEPUTY

JPRD INVESTMENTS, LLC,
a Washington Limited Liability Company,

Assignee-Judgment Creditor/Respondent,

v.

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

Defendant/Appellant.

On Appeal from the Superior Court of King County
Hon. Michael J. Heavey
Superior Court Docket Number 03-2-03661-7

BRIEF OF RESPONDENT

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ORIGINAL

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I. RESTATEMENT OF THE ISSUES

1. Whether Ngy waived her right to pursue her assignments of error concerning the issues of (a) whether the due process requirements of service have been met; (b) whether the trial court abused its discretion in denying her motion for reconsideration; and (c) whether the trial court erred by entering a judgment and order to pay against US Bank when Ngy failed to include argument or authority in support of any of these assignments of error in her opening brief. (Ngy's Assignments of Error 1, 2, and 4).

2. Whether the trial court abused its discretion when it denied Ngy's motion to vacate the default judgment that was entered against her and declined to quash the writ of garnishment and dismiss this action based on invalid service. (Ngy's Assignment of Error No. 1)

3. Whether the trial court abused its discretion by denying Ngy's motion to present live testimony and for further argument when (a) the trial court determined live testimony would not have been helpful; (b) Ngy's evidence was not unequivocal or completely contradictory to JPRD's evidence; (c) The declarations Ngy submitted in support of her position were self-serving; and (d) Ngy failed to show that service was invalid. (Ngy's Assignment of Error No. 3)

4. In the event Ngy has not waived her right to pursue her assignment of error concerning the trial court's denial of her motion for reconsideration, whether the trial court abused its discretion when it denied Ngy's motion for reconsideration when Ngy did not explain in her motion why reconsideration should be granted under CR 59(a). (Ngy's Assignment of Error No. 2)

II. STATEMENT OF THE CASE

This case arises from Defendant / Appellant Theary Ngy's decision to buy a BMW M3 on credit for \$33,335.40 when Ngy was 22 years old. Wells Fargo carried Ngy's BMW auto loan contract, which required her to make payments of \$643.07 per month. Ngy subsequently defaulted on the contract, and Wells Fargo repossessed and sold the BMW. Wells Fargo then filed this action against Ngy in 2003 for the deficiency balance of \$15,570.30, as Ngy's BMW did not fetch at sale a sum sufficient to retire her debt. A default judgment was entered against Ngy for the deficiency balance and other related sums on April 25, 2003, in the amount of \$18,944.64. Wells Fargo later sold its judgment against Ngy, and Eucalyptus Fund One, LLC and Gordon Brothers Retail Partners, LLC subsequently sold said judgment to Respondent JPRD Investments, LLC ("**JPRD**") in December 2008. This judgment remains wholly unsatisfied as of this date.

In January 2011, JPRD learned Ngy likely had a bank account at US Bank, which prompted JPRD to obtain a writ of garnishment directed to US Bank. US Bank answered the writ of garnishment and stated it was holding \$7,516.16 on behalf of Ngy. Shortly thereafter, after learning of the garnishment, Ngy retained legal counsel and moved to vacate the judgment entered against her, quash the writ of garnishment, and dismiss the underlying action due to allegedly improper service back in 2003.

Ngy did not put forward any substantive defenses to Wells Fargo's claim for the deficiency balance in her motion to vacate. Ngy acknowledged in a declaration submitted with this motion that the Wells Fargo contract that gave rise to the judgment entered against her did in fact concern her purchase of the BMW some years ago.

At the hearing concerning Ngy's motion to vacate that was held on April 29, 2011, the trial court ruled that Ngy failed to prove by clear and

convincing evidence that Wells Fargo's service was invalid in 2003. The trial court found that Ngy had more than one usual mailing address in 2003 and that Wells Fargo had properly served Ngy at her brother's address by alternate service by mail pursuant to RCW 4.28.020(16). Ngy subsequently filed a motion for reconsideration concerning this ruling, which the trial court denied. Ngy also subsequently filed a motion to present live testimony and further argument, which the trial court also denied. Afterwards, the trial court entered a judgment and order to pay against US Bank based on JPRD's writ of garnishment.

Ngy filed her amended notice of appeal on June 11, 2011. Ngy has appealed the trial court's following four (4) rulings: (1) the order denying Ngy's motion to vacate default judgment, quash writ of garnishment, and dismiss action dated May 31, 2011; (2) the order denying Ngy's motion for reconsideration of denial of motion to vacate default judgment and quash writ of garnishment dated May 27, 2011; (3) the order denying Ngy's motion for permission to present live testimony and for oral argument dated May 20, 2011; and (4) the judgment on US Bank's answer and order to pay.

This Court should affirm the trial court's rulings, which should be reviewed for abuse of discretion. The record amply reflects that the trial court did not abuse its discretion in, among other things, denying Ngy's motion to vacate the judgment, quash the writ of garnishment, and dismiss the underlying action.

III. RESTATEMENT OF FACTS

JPRD accepts Ngy's statement of facts with the following additions and revisions thereto:

A. Ngy Breaches Her Contract With Wells Fargo.

In 2000, at 22 years of age, Appellant Theary Ngy ("Ngy") bought a BMW M3 on credit for \$33,335.40. CP at 82. Wells Fargo, NA ("Wells

Fargo”) carried Ngy’s BMW auto loan contract, which required her to make payments of \$643.07 per month. CP at 82. When Ngy subsequently defaulted on the contract, Wells Fargo repossessed and sold the BMW. CP at 82. Wells Fargo then filed this action against Ngy in 2003 for the deficiency balance of \$15,570.30, as Ngy’s BMW did not fetch at sale a sum sufficient to retire her debt. CP at 3-4.

B. Wells Fargo’s Service Of Process On Ngy.

Terry Poppa of Advantage Process & Investigations is the process server that Plaintiff Wells Fargo and its attorney, Bradley Jones, hired in 2003 to serve Ngy with Wells Fargo’s Summons and Complaint for Deficiency Judgment (the “**Complaint**”) in this case. CP at 151. Mr. Poppa prepared and signed the letter to attorney Bradley Jones concerning this case that is dated April 2, 2003. CP at 151-52. Mr. Poppa has owned and operated Advantage Process & Investigations for over fifteen (15) years, and he is also a licensed private investigator. CP at 151.

As part of Mr. Poppa’s attempts to serve Ngy, Mr. Poppa’s company ran postal traces on Ngy back in early 2003 in order to determine where she was receiving her mail at that time. CP at 152. As seen from Mr. Poppa’s April 2, 2003 letter to Mr. Jones, these postal traces ultimately revealed that Ngy received her mail at her brother’s address, namely 232 S. 330th Pl., Federal Way, Washington 98003, the same address referenced in the Declaration of Service dated April 8, 2003 that is on file herein. CP at 152. These postal traces suggest Ngy’s brother’s address served as her usual mailing address. *See id.* Postal traces are a useful tool for determining residency or obtaining change of address information. CP at 153.

Mr. Poppa’s letter to Mr. Jones and the Declaration of Service accurately reflect the fact that Mr. Poppa’s company left two copies of Wells Fargo’s Summons and Complaint with Ngy’s brother Vanna

Theray, a/k/a Vanna Ngy, and also mailed two copies of these pleadings to Ngy at her brother's residence, which was one of her usual mailing address as of March 29, 2003. CP at 152.

The record reflects that the decision Mr. Poppa's company ultimately made to serve Ngy with Wells Fargo's Summons and Complaint at her brother's address was not made lightly or without reasonable investigation and inquiry. CP at 152. To illustrate, when Mr. Poppa first attempted service on Ngy at her brother's address, this gentleman told him his sister did not live there. *Id.* Mr. Poppa then did what he normally does in such cases, which is to conduct a more extensive search for the person he was hired to serve. *Id.* In this case, Mr. Poppa wrote down a description of the vehicles that were in the driveway at Mr. Theray's residence and then conducted data searches based on this information. *Id.* This caused him to learn that one of the vehicles at Mr. Theray's address was registered to a Ngy Sopheap at 33322 22nd Lane South Apt. H2, Federal Way, Washington 98003. *Id.*

Mr. Poppa then went to Ms. Sopheap's address and spoke with an elderly lady who identified herself as Ms. Sopheap. CP at 152. Ms. Sopheap informed Mr. Poppa that she was Ngy's mother, and that Ngy did not live there. *Id.* In an abundance of caution, Mr. Poppa then served Ms. Sopheap with a copy of Plaintiff's Summons and Complaint after writing his name and telephone number on these pleadings. *Id.* Mr. Poppa then asked Ms. Sopheap to have Ngy call him. *Id.* Mr. Poppa never received any telephone call or correspondence from Ngy. *Id.*

Afterwards, Mr. Poppa checked various data resources and sent out more postal traces. CP at 153. The postal trace that Mr. Poppa sent out concerning the address of Ngy's brother (Mr. Theray) came back with a notation that Ngy received her mail at that address. *Id.* However, the postal trace that Mr. Poppa sent out concerning Ms. Sopheap's address

came back negative, meaning this address was not a known address for Ngy. *Id.* Although Mr. Poppa kept looking for other addresses for Ngy using a top-of-the-line database and by checking court records, he was unable to find another address for her. *Id.*

As a licensed private investigator, Mr. Poppa has access to the IRB Search database, which is owned by Accurint, the primary data resource for the insurance industry. *Id.* The IRB Search database did not yield any other addresses for Ngy. *Id.*

After conducting the aforesaid search and speaking with Ngy's mother, Mr. Poppa sent Dawn Baldwin, an experienced process server, to serve Wells Fargo's Summons and Complaint on Ngy at her brother's address. CP at 153. This was the only verified address Mr. Poppa had for Ngy at that time. *Id.* After Mr. Baldwin served Mr. Theray with Wells Fargo's Summons and Complaint, Mr. Poppa then personally mailed two copies of these pleadings to Ngy at her brother's address on April 2, 2003 in order to satisfy the requirements for service by mail that are set forth in RCW 4.28.080(16). *Id.*

Mr. Poppa's letter to Mr. Jones dated April 2, 2003 further reflects the fact that Mr. Poppa spoke with Mr. Theray regarding this lawsuit and he acknowledged that his sister, Ngy, did in fact receive her mail at his residence back in March of 2003. CP at 153.

C. Wells Fargo Obtains A Judgment Against Ngy And Later Sells This Judgment.

Ngy did not respond to Wells Fargo's Complaint, and on April 25, 2003, the King County Superior Court entered a default judgment against Ngy. CP at 22; Appendix A. Wells Fargo later sold its judgment against Ngy, and Eucalyptus Fund One, LLC and Gordon Brothers Retail Partners, LLC subsequently sold said judgment to JPRD in December 2008. CP at 74.

D. JPRD's Garnishment Of Ngy's Bank Account Gives Rise To Her Motion to Vacate.

In December 2010, JPRD learned that Ngy might have a bank account with US Bank. *See* CP 41. JPRD subsequently served a writ of garnishment on US Bank, and US Bank answered the writ by stating its intent to hold the \$7,516.16 that Ngy had on deposit there. CP at 41. After learning of the garnishment, Ngy finally contacted an attorney. CP at 58. Ngy's attorney moved to vacate the judgment entered against her, quash the writ of garnishment, and dismiss the underlying action due to allegedly improper service back in 2003. CP at 45-54.

E. Ngy Provides Self-Serving Declarations In Support Of Her Motion To Vacate.

In support of her motion to vacate, Ngy relied on the declarations of herself, her attorney, and her brother. CP at 58-116. These declarations contain several inconsistencies and did not show, by clear and convincing evidence, that Wells Fargo's service upon her back in 2003 was invalid.

For example, although Ngy declared she moved out of her brother's residence in 1998/1999, her brother declared that she moved out in 2000. CP at 81, 115. The subject Wells Fargo automobile contract that gave rise to this case lists Ngy's address as being 232 S 330th Pl, Federal Way, Washington 98003, the same address where she was served with Wells Fargo's pleadings. This contract was entered into in June of 2000, after Ngy allegedly moved out of her brother's residence. CP at 69-72; Appendix B. The voided check Ngy tendered to Wells Fargo from her Seafirst Bank account in connection with her purchase of the BMW at issue also lists her address as being 232 S. 330th Place, Federal Way, Washington 98003, which is her brother's residence, and the same address

at which she was served with Wells Fargo's Summons and Complaint. CP at 150; Appendix C.

In addition, the 2002 Form 1099 that Ngy received from the Muckleshoot Casino lists her address as her brother's. CP at 111. Although Ngy's initial declaration submitted in support of her motion to vacate states she worked in the casino industry from 2001-2005, it conspicuously does not state who her employers were during this period. *See* CP at 83. While Ngy provided certain of her tax returns in support of her motion to vacate and quash, she has failed to provide her 2003 federal income tax return. *See* CP at 80-83.

Other than Ngy's own declaration, there is no evidence in the record that Wells Fargo or attorney Bradley Jones knew or had reason to know that Ngy lived at her boyfriend's address at the time this action was initiated. *See* CP at 57-124. Indeed, one of the terms of the contract provides that "[u]nless otherwise agreed in writing, the Property (*i.e.*, the BMW) will be located at your address listed on page 1 of the Contract" CP 71. And while there is no documentary evidence in the record that reflects Ngy changed her address after moving out of her brother's home, more importantly, there is ample evidence in the record that shows Ngy continued to use her brother's address as a mailing address after she allegedly moved out of his domicile.

Further, as seen from the Declaration of Terry Poppa, the only verified address private investigator Terry Poppa was able to locate for Ngy in 2003 was her brother's address. CP at 153. This makes sense, as Ngy herself testified that she lived a rather transient lifestyle for a number of years after allegedly moving out of her brother's home. CP 81, 174.

Ngy claims she moved out of her brother's home in 1998/1999. She entered into the contract with Wells Fargo in June of 2000. The contract calls for written notification to Wells Fargo if Ngy moves. The

record does not reflect that any such written notification was provided. Ngy provided a cancelled check, which presumably was for an automatic payment withdrawal. The address on the check is her brother's address. The successor in interest to the bank this check is drawn on indicated that according to its records, Ngy continued to use that address through 2004. In 2002 Ngy was issued a form 1099 from the Muckelshoot Casino using her brother's address. Ngy claims this address was used as a result of her providing a drivers license as identification, CP 180, which is additional evidence that indicates her brother's address was a proper place of service.

F. Background Concerning JPRD's Discovery Efforts Prior To The April 29, 2011 Hearing On Ngy's Motion To Vacate.

Although Ngy provided copies of certain of her federal income tax returns in connection with this case, she failed to provide her 2003 federal tax return, which presumably has her mailing address for 2003 listed therein. *See* CP 80-114. As a result, and in the hope of obtaining a copy of this return, JPRD issued a request for production of documents to Ngy and also issued a subpoena to H&R Block. CP at 132. JPRD believes the address listed for Ngy in her 2003 tax return is the same address Mr. Poppa served her at on March 29, 2003. CP at 132.

JPRD also learned Ngy used to have a bank account with Bank of America, f/k/a Seafirst Bank. CP at 138-39. JPRD asked Ngy to produce documents concerning her Bank of America account, and it also issued a subpoena to Bank of America. CP at 132. Counsel for JPRD received Bank of America's response to the subpoena on April 26, 2011. CP at 132. According to Bank of America, the address requested in JPRD's subpoena concerning Ngy is 232 S. 330th Place, Federal Way, Washington 98003. CP at 132. Bank of America also stated "[t]his address was in affect during you[r] date range of 01/01/2000 and 12/31/2004." CP at

132. Although Ngy claims the bank account information was only current through 1997, CP 210, that contention is in direct conflict with the evidence supplied by Bank of America, and is in direct conflict with Ngy having provided a voided check when she made her BMW purchase in 2000.

JPRD also issued a subpoena to the Muckleshoot Indian Tribe, one of Ngy's former employers. CP at 132. JPRD believes the Muckleshoot Indian Tribe has evidence reflecting Ngy's address at the time she was served with Wells Fargo's Summons and Complaint was the same address she was served at on March 29, 2003. CP at 132. However, the Muckleshoot Indian Tribe refused to provide any documents to JPRD based on the doctrine of tribal sovereign immunity. CP at 132.

G. There Is No Question That Ngy Owes JPRD Money.

Ngy's own declaration from March 11, 2011 reflects she has no substantive defense to a deficiency claim based on the three-year-old BMW she purchased at age 22 for \$643.07 per month. *See* CP at 82. Nor is there any doubt that JPRD is the successor in interest to Wells Fargo insofar as the judgment that was entered on this deficiency claim is concerned. *See* CP at 146. Thus far, Ngy's only proffered basis for vacating the judgment and quashing the writ of garnishment turns on her allegation that Wells Fargo did not properly serve her with its Summons and Complaint back in 2003, approximately eight (8) years ago. CP at 45.

H. The Trial Court Denies Ngy's Motion To Vacate.

In rendering its oral ruling on Ngy's motion to vacate the judgment, quash the writ of garnishment directed to US Bank, and dismiss this action, the trial court noted that it is the Defendant's burden to show, by clear and convincing evidence, that she was not properly served with Wells Fargo's Summons and Complaint. Verbatim Report of Proceedings ("VRP") at 2, lines 11-13. The trial court concluded that Wells Fargo had

served Ngy with the Summons and Complaint via mail pursuant to RCW 4.28.020(16), and “[t]hat an attorney’s declaration did not properly cite the appropriate method of obtaining service is irrelevant.” VRP at 3, lines 22-25. The trial court also noted the address stated in Ngy’s declaration, 3602 South 180th Street in SeaTac at the Carriage House Apartments, “may have been” her usual mailing address. VRP at 4, lines 2-5. However, the trial court determined that Ngy’s brother’s house was another usual mailing address for her, *id.* at lines 6-7, and that “[a] person can have two usual mailing addresses.” VRP at 4, lines 12-13.

In reaching its decision, the trial court specifically found “the brother’s declaration to be less than candid with this court.” VRP at 5, lines 7-8. In making this finding, the trial court made a point of stating the following:

“He [the brother] doesn’t say, ‘I was never served.’ Or he doesn’t say, ‘I never gave them [the Summons and Complaint] to our mother. That’s where I always put her mail. She got it from Mom,” which might have happened in this case. Nor does the ... brother deny that he told Mr. Papa that she received her mail there. Nor does he deny that he received the service of papers from Mr. Papa in 2003.”

While rendering its ruling the trial court went on to state — from its own personal experience — that Bank of America mails out monthly bank statements even when there is no money in the account.¹ VRP at 6, lines 10-13. The trial court then went on to express that it might reconsider its ruling on the motion to vacate “if the defendant can show me she had another checking account at a different bank in 2003[.]” VRP at 6, lines 17-19. The record reflects that Ngy never took the trial court up on this invitation.

¹ Under ER 201(b), the trial court may take judicial notice of facts not subject to reasonable dispute that are (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

I. Ngy's Motion For Reconsideration.

Ngy filed her motion for reconsideration on May 9, 2011, CP at 194-201, along with supplemental declarations from Ngy's attorney (CP at 202-208), Ngy herself (CP at 209-213), and Ngy's brother (CP at 214-215). On that same date, Ngy also provided a declaration from Jeff Vail, the records custodian at Bank of America tasked with responding to JPRD's subpoena. CP at 216-220.

Ngy did not specifically identify in her motion for reconsideration which part of CR 59(a) supported her position. CP at 194-201. However, her argument seemed to focus on the notion that the trial court was required to believe the declarations Ngy provided and take them at face value, and the idea that Terry Poppa's statement that Ngy's brother acknowledged she received her mail at his address is inadmissible hearsay. CP at 195.

Ngy also based her motion for reconsideration on "supplemental evidence" and two Court of Appeals cases rendered in April 2011, *Farmer v. Davis*, 161 Wn. App. 420, 250 P.3d 138 (2011), and *Goetemoeller v. Twist*, 161 Wn. App. 103, 253 P.3d 405 (2011). CP at 197. JPRD did not respond to Ngy's motion for reconsideration in light of LCR 59(b), for the trial court never asked JPRD to do so. CP at 245.

The trial court denied Ngy's motion for reconsideration on May 27, 2011. CP at 245-46. In doing so, the trial court found that JPRD established, "through bank records, that a mailing address for defendant was at her brother's address." CP at 245. The trial court further concluded JPRD "has met its burden to show valid service at her mailing address per the declaration of Mr. Poppa" and that "Defendant has failed to show by clear and convincing evidence that the brother's residence was not a mailing address for the defendants." CP at 245-46.

J. Ngy's Motion For Permission To Present Live Testimony And For Further Argument.

On May 9, 2011, Ngy also filed a motion for permission to present live testimony and for oral argument. CP at 224. In this motion, Ngy stated her belief “that her sworn statements are not rebutted by admissible contrary evidence” but that, “if there are material issues of fact, then the Court must hear testimony before resolving the factual issues.” CP at 225. JPRD opposed this motion. CP at 228-233. The trial court denied this motion on May 20, 2011, and made a point of specifically finding that “[l]ive 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 address was not a mailing address for her.” CP at 288-89.

K. JPRD Obtains A Judgment And Order To Pay Against Garnishee Defendant US Bank, And This Appeal Follows Shortly Thereafter.

JPRD filed its motion and affidavit for judgment on answer and order to pay concerning US Bank’s answer to the writ of garnishment on May 31, 2011. CP at 256. Ngy opposed this motion. CP at 295. The trial court granted the motion and entered the judgment and order to pay as to US Bank on June 8, 2011. CP at 323-325. US Bank has paid the money it was holding pursuant to the writ of garnishment into the court registry pending the outcome of this appeal. *See* CP at 329.

Ngy filed her amended notice of appeal on June 11, 2011. CP at 336. Said amended notice of appeal reflects that Ngy has appealed the trial court’s following four (4) rulings: (1) the order denying Defendant’s motion to vacate default judgment, quash writ of garnishment and dismiss action dated May 31, 2011; (2) the order denying Defendant’s motion for reconsideration of denial of motion to vacate default judgment and quash

writ of garnishment dated May 27, 2011; (3) the order denying Defendant Theary Ngy's motion for permission to present live testimony and for oral argument dated May 20, 2011; and (4) the judgment on Garnishee Defendant US Bank's answer and order to pay. CP at 336-337.

III. ARGUMENT

C. Ngy Has Waived Her Right To Make Certain Arguments On Appeal.

Ngy has waived her right to argue that service did not meet the minimum requirements of due process, Br. of Appellant at 2, because she failed to include argument or authority in support of this claim in her Brief of Appellant. Without argument or authority to support it, an assignment of error is waived. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986).

Further, as explained in greater detail below, Ngy also failed to provide any argument or authority in support of her challenge to the trial court's order denying her motion for reconsideration. Ngy has therefore also waived her right to make this argument on appeal.

Finally, Ngy has waived her right to appeal the judgment and order to pay entered against Garnishee Defendant US Bank because she failed to include argument or authority in support of this assignment of error in her Brief of Appellant.

Should Ngy attempt to remedy these errors in her Reply Brief, such efforts are too late to warrant this Court's consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (issue raised and argued for the first time in a reply brief is too late to warrant consideration).

D. **The Trial Court Did Not Abuse Its Discretion By Denying Ngy's Motion to Vacate The Judgment, Quash The Writ Of Garnishment, And Dismiss This Action.**

1. **Standard of Review**

An appeal from the denial of a motion for relief from judgment is not a substitute for an appeal, and is limited to the propriety of the denial, not the impropriety of the underlying order. *In re Dep. of J.R.M.*, 160 Wn. App. 929, 939 n.4, 249 P.3d 193 (2011) (citing *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)). The court of appeals reviews a trial court's decision "under CR 60(b) for abuse of discretion." *Dep. of J.R.M.*, 160 Wn. App. at 939 n.4. Thus, the only question before this Court is whether Ngy met her burden of proving by clear and convincing evidence that the judgment is void. The validity of the underlying judgment is not before this Court, and the reality is that any defenses Ngy might have had to Wells Fargo's claims are not relevant.

This Court has previously held that it reviews a trial court's decision on a motion to vacate a judgment for invalid service under an abuse of discretion standard. *Wright v. B&L Prop., Inc.*, 113 Wn. App. 450, 456, 53 P.3d 1041 (2002), *review denied*, 149 Wn.2d 1014 (2003). But this Court also recently held, without rejecting its holding in *Wright*, that it would review a trial court's order on a motion to vacate a judgment as void due to improper service under a de novo standard of review. *Ahten v. Barnes*, 158 Wn. App. 343, 350 n.4, 242 P.3d 35 (2010). Although JPRD believes that the correct standard of review is abuse of discretion, JPRD maintains that it should prevail under either an abuse of discretion or de novo standard of review.

2. The trial court did not err in applying a clear and convincing burden of proof because Ngy's motion sought postjudgment relief.

Ngy has acknowledged at several points in her brief that when a defendant attempts to attack the validity of service after judgment has been entered, the defendant must demonstrate the invalidity of service by clear and convincing evidence. Br. of Appellant at 43-44; *Farmer*, 161 Wn. App. at 428. Yet Ngy has also cited several cases claiming that JRPD had the burden of proving that service was properly made. Br. of Appellant at 20-21. In fact, these cases actually prove JRPD's argument: "postjudgment attacks on judgment" have a "heightened burden of proof." *Farmer*, 161 Wn. App. at 428.

"In that context, Washington cases have long held that considerations of the regularity and stability of judgments entered by the court require that, 'after a judgment has been rendered upon proof made by the sheriff's return, such judgment should only be set aside upon convincing evidence of the incorrectness of the return.'" *Farmer*, 161 Wn. App. at 428 (quoting *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918)) (emphasis added); see also *McHugh v. Conner*, 68 Wash. 229, 231, 176 P. 2 (1918) ("To avoid the judgment, the burden devolved upon appellants to show that no valid service had been made"); *Vukich v. Anderson*, 97 Wn. App. 684, 687, 985 P.2d 952 (1999) (on motion to set aside order of default and judgment, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular); *In re Dependency of A.G.*, 93 Wn. App. 268, 277, 968 P.2d 424 (1998) (imposing burden of clear and convincing showing "on the person attacking service," but in the context of a motion to set aside a judgment);

Woodruff v. Spence, 88 Wn. App. 565, 571, 945 P.2d 745 (1997) ("A facially correct return of service is presumed valid and, after judgment is entered, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular"); *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) ("An affidavit of service is presumptively correct, and the challenging party bears the burden of showing improper service by clear and convincing evidence") (*Woodruff I*);² *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) ("The burden is upon the person attacking the service to show by clear and convincing proof that the service was improper"); *Miebach v. Colasurdo*, 35 Wn. App. 803, 808, 670 P.2d 276 (1983).

In fact, all of the cases Ngy cites for the proposition that JPRD had the burden of proof below are *prejudgment* challenges to sufficiency of service of process, and these cases are therefore inapplicable. Br. of Appellant at 20-21, 42-45; *Forsythe v. Overmyer*, 576 F.2d 779, 781 (9th Cir. 1978); *Farmer*, 161 Wn. App. at 428; *Goettemoeller*, 253 P.3d at 406-07; *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 411-12, 236 P.2d 986 (2010); *Gross v. Sunding*, 139 Wn. App. 54, 59-60, 161 P.3d 380 (2007). Ngy appears to concede that she had the burden of proving by clear and convincing evidence the invalidity of service because she raises policy arguments about what the proper factors in determining who has the burden of proof *should be*. See Br. of Appellant at 44-45. However, the Washington Supreme Court has already declared that the important

² Ngy cites *Woodruff I* on page 20 of her Appellant's Brief for the proposition that proper service of process is required for jurisdiction to attach, yet she ignores the next sentence of *Woodruff I*, that "[a]n affidavit of service is presumptively correct, and the challenging party bears the burden of showing improper service by clear and convincing evidence." 76 Wn. App. at 210.

consideration in the postjudgment context is the regularity and stability of judgments. *Allen*, 104 Wash. at 247. As was further explained in

Farmer:

Applying a presumption and higher evidentiary burden in cases where a party seeks to vacate an existing judgment accords with the development of the common law of judgments. It was a rule in common law courts that a judgment appearing to be valid on its face could not be shown to be invalid by proof contradicting the record of the action in which the judgment was rendered. Restatement (Second) of Judgments § 77, cmt. a (1982). The purpose of the common law rule was to “constitute the judgments to which it applied incontestable muniments of the rights they purported to determine.” *Id.* The modern rule is that a judgment may be impeached by evidence that contradicts the record in the action. *Id.* However, 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, the party challenging a judgment must produce clear and convincing evidence. *Id.* at § 77(2) & cmt. b.

161 Wn. App. at 429.

As outlined above, the Court of Appeals has consistently upheld these considerations. A defendant seeking to set aside a judgment as void for insufficient service must prove the invalidity of service by clear and convincing evidence.

Ngy has also taken the position that the only time a defendant bears the burden of proving the invalidity of service is when the defendant knew of the lawsuit, took no action, allowed judgment to be entered, and only then attacked the validity of service. Br. of Appellant at 22-23, 40-41, 45-46. However, the cases Ngy cites do not support her argument.

Only one of the cases cited by Ngy holds that the burden shifts to the defendant when the defendant takes no action, having knowledge, until after judgment is entered, and this case does not involve Washington law.

Sec. & Exch. Comm'n v. Internet Solutions for Bus., 509 F.3d 1161, 1165 (9th Cir. 2007) (analyzing Fed. R. Civ. P. 60(b)).³ This federal case does not state, however, that the *only time* the burden of proof shifts to the defendant is when he or she had knowledge before the court entered judgment. *Id.* It is but one of multiple situations in which a defendant has the burden of proving insufficient service by clear and convincing evidence when he or she attacks a judgment as void.

Accordingly, the trial court did not err in finding that Ngy had the burden of proving by clear and convincing evidence that service was invalid. As such, the focus was properly on what evidence Ngy presented to the trial court, and not on the evidence presented by JPRD.

3. Ngy failed to meet her burden of showing by clear and convincing evidence that service was invalid.

Ngy failed to show by clear and convincing evidence that Wells Fargo's service upon her was invalid because there is evidence in the record reflecting that Ngy was properly served with Wells Fargo's Summons and Complaint, and there is also evidence that indicates Ngy knew about this lawsuit back in 2003. This case brings to mind *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 533 P.2d 852 (1975), which noted a defendant should not be relieved of a judgment taken against her due to her willful disregard of process, or due to her inattention or neglect where there has been no more than a prima facie showing of a defense on the merits. It bears mentioning again that a

³ Several cases Ngy cites for this proposition do not actually support her claims. Although Ngy cites *Allen*, *Farmer*, and *Leen* for this proposition, Br. of Appellant at 23, the *Allen*, *Farmer*, and *Leen* courts did not consider a situation where the defendant had actual notice of the proceedings but delayed contesting jurisdiction until after default judgment had been entered. *Allen*, 104 Wash. 246; *Farmer*, 161 Wn. App. 420; *Leen*, 68 Wn. App. at 231. In *McHugh*, defendant/appellants had actual notice and took no action until after judgment, but the Court's analysis did not focus on that fact. 68 Wash. at 231-32.

declaration 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. *Farmer*, 161 Wn. App. at 428.

In addition, it bears mentioning that many of Ngy's arguments are not relevant to this Court's analysis because she focuses on the requirements of RCW 4.28.080(15), and the trial court instead found service was proper under RCW 4.28.060(16). Ngy assigns error to JPRD's supposed failure to show that she lived at her brother's house in 2003. Br. of Appellant at 31-34. These arguments "confuse the requirements of the substitute service subsection of the statute, RCW 4.28.080(16), with the requirements set forth in the [usual place of abode] subsection, RCW 4.28.080(15)." *Wright*, 113 Wn. App. at 457. When a plaintiff does not rely on the usual place of abode method of service, the requirements of that section do not apply. *Wright*, 113 Wn. App. at 458. When substitute service by mail is made, whether the defendant lived at that address and whether the person there was authorized to accept service of process "are of no consequence." *Id.* As such, this Court's focus is not on whether JPRD proved whether Ngy lived at her brother's house in 2003, but whether Ngy proved, by clear and convincing evidence, that her brother's house was not one of her usual mailing addresses. The reality is that Ngy has failed to carry that burden.

For one thing, Ngy failed to prove invalid service because she failed to disprove that Wells Fargo left a copy of the Summons and Complaint at her usual mailing address and mailed a copy of these pleadings to her usual mailing address. RCW 4.28.080(16).⁴ Ngy argues

⁴ Ngy does not dispute that the Complaint and Summons were left "with a person of suitable age and discretion who is a resident...thereof." RCW 4.28.080(16).

that she had changed her usual mailing address, Br. of Appellant at 8, 31-33, but the record does not support such a finding. The party who asserts a change of residence in connection with attempted service of process has the burden of proof. *Sheldon v. Fettig*, 77 Wn. App. 775, 779, 893 P.2d 1136 (1995).

The April 8, 2003 Declaration of Service on file herein reflects that Ngy was served with Wells Fargo's Summons and Complaint on March 29, 2003, at 232 S. 330th Pl., Federal Way, Washington 98003 when two (2) copies of these pleadings were left with Vanna Theray, Ngy's brother, a person of suitable age and discretion then resident therein.⁵ This declaration of service also states two copies of said pleadings were mailed to Ngy at the aforesaid address on April 2, 2003. The evidence set forth in the Poppa Declaration reflects that this was the only address that process server / private investigator Terry Poppa had for Ngy in early 2003. It is undisputed that Ngy's brother told Mr. Poppa that Ngy received her mail at her brother's address in early 2003. *See* CP at 115; CP at 151-53.

Further, according to Bank of America, which has some records concerning Ngy's old bank account at Seafirst Bank, the address requested in JPRD's subpoena concerning Ngy is 232 S. 330th Place, Federal Way, Washington 98003. Bank of America also stated in its response to the subpoena that "[t]his address was in affect during you[r] date range of 01/01/2000 and 12/31/2004." Thus, according to Bank of America, the only "good" address for Ngy from January 1, 2000 through December 31,

⁵ Ngy attempts to support her arguments regarding the trial court's denial of her motion to vacate with evidence she presented in connection with her motion for reconsideration. This brief limits its analysis of the propriety of the trial court's ruling on Ngy's motion to vacate to the evidence presented to the trial court at or prior to that hearing. *See Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 91, 60 P.3d 1245 (2003) (rejecting argument that affidavit justified overturning order granting summary judgment because it had not been presented to the court at the summary judgment hearing and did not qualify as newly discovered evidence).

2004 was the address where she was served with Wells Fargo's Summons and Complaint.

Approximately eight (8) years have passed since judgment was entered in this case. Tellingly, Ngy has still failed to provide her 2003 federal tax returns or her employment information from the Muckleshoot Indian Tribe from 2003 or 2004 that lists her residence or mailing address at the inception of this case. These facts, combined with (1) the inconsistencies between Ngy's initial declaration and her brother's initial declaration; (2) the strength of the Poppa, Fair, and Kleinberg Declarations submitted below; and (3) the fact that Ngy's brother has not denied telling Mr. Poppa that Ngy used to get her mail at his residence, amply reflects that Ngy has failed to prove by clear and convincing evidence that service was improper under RCW 4.28.080(16). As a result, there simply is no legitimate basis for vacating the judgment, quashing the writ of garnishment, and dismissing this action under CR 60(b) and applicable case law.

Moreover, even if there was a legitimate question as to Ngy's "usual mailing address" back in early 2003 — there is not — Ngy's evidence showed at best that she had more than one usual mailing address for the purposes of RCW 4.28.080(16). *Goettmoeller*, 253 P.3d at 408 (just as a person may have more than one home of usual abode under RCW 4.28.080(15), "a person may have more than one 'usual mailing address'" under RCW 4.28.080(16)); *see Sheldon*, 77 Wn. App. 775 (home of defendant's parents in Washington was "usual place of abode" and service at parents' home was valid under statute allowing substituted service of process where defendant was living in Chicago and maintained apartment there but went "home" whenever she could, had mail forwarded to parents' home, and was registered voter, had automobile licensed in state, and maintained savings account in state).

As seen from the Verbatim Report of Proceedings, the trial court specifically concluded such when it held that “another usual mailing address was the brother’s house” and “[a] person can have two usual mailing addresses.” VRP at 4. The trial court was permitted to make such reasonable inferences from the evidence presented. *State v. Sanchez*, 60 Wn. App. 687, 693, 806 P.2d 782 (1991).

Ngy also failed show that Wells Fargo did not exercise due diligence before effecting substitute service. Mr. Poppa’s company ran postal traces on Ngy in early 2003 in order to determine where she received her mail at that time. CP at 152. These postal traces ultimately revealed that Ngy received her mail at her brother’s address, namely 232 S. 330th Pl., Federal Way, Washington 98003, the same address referenced in the Declaration of Service dated April 8, 2003 that is on file herein. CP at 152. These postal traces suggest that Ngy’s brother’s address served as a usual mailing address. *See id.* Mr. Poppa’s decision to serve Ngy with Wells Fargo’s Summons and Complaint at her brother’s address was not made lightly or without reasonable investigation and inquiry. CP at 152. When Mr. Poppa first attempted service on Ngy at her brother’s address, this gentleman told him his sister did not live there. *Id.* Mr. Poppa then conducted a more extensive search, and wrote down a description of the vehicles that were in the driveway at Mr. Theray’s residence and then conducted data searches based on this information. *Id.* He learned that one of the vehicles at Mr. Theray’s address was registered to a Ngy Sopheap at 33322 22nd Lane South Apt. H2, Federal Way, Washington 98003. *Id.*

Mr. Poppa then went to Ms. Sopheap’s address and spoke with an elderly lady who identified herself as Ms. Sopheap. CP at 152. Ms. Sopheap informed Mr. Poppa that she was Ngy’s mother and that Ngy did not live there. *Id.* In an abundance of caution, Mr. Poppa then served Ms.

Sopheap with a copy of Plaintiff's Summons and Complaint after writing his name and telephone number on these pleadings. *Id.* Mr. Poppa then asked Ms. Sopheap to have Ngy call him. *Id.* Mr. Poppa never received any telephone call or correspondence from Ngy. *Id.*

Afterwards, Mr. Poppa checked various data resources and sent out postal traces. CP at 153. The postal trace that Mr. Poppa sent out concerning the address of Ngy's brother (Mr. Theray) came back with a notation that Ngy received her mail at that address. *Id.* However, the postal trace that Mr. Poppa sent out concerning Ms. Sopheap's address came back negative, meaning this address was not a known address for Ngy. *Id.* Although Mr. Poppa kept looking for other addresses for Ngy using a top-of-the-line database and by checking court records, he was unable to find another address for her. *Id.* Mr. Poppa also searched the IRB Search database, which did not yield any other addresses for Ngy. *Id.*

Only after conducting the aforesaid search and speaking with Ngy's mother, did Mr. Poppa send Mr. Baldwin to serve Ngy at her brother's address. CP at 153. This was the only verified address Mr. Poppa had for Ngy at that time. *Id.* Hence, the bottom line is that Wells Fargo exercised considerable diligence in attempting to locate Ngy in 2003.

Ngy argues that under *Goettemoeller* and *Streeter-Dybdahl*, her brother's address does not constitute a usual mailing address. Br. of Appellant at 33. Nevertheless, the reality is this argument falls well short of the mark for the following reasons.

For one thing, neither *Goettemoeller* or *Streeter-Dybdahl* is applicable because those cases are pre-judgment cases that do not determine whether the defendant has shown by clear and convincing evidence that service was invalid. *Goettemoeller*, 253 P.3d at 406. Further, even if either case were instructive, they both are distinguishable.

In *Goettemoeller*, the court held that there was no evidence the defendant used the mailbox where service was made at all or that he arranged to forward the mail from that mailbox. 253 P.3d at 407. In *Streeter-Dybdahl*, the defendant's brother denied ever receiving or seeing the summons and complaint left for and mailed to the defendant at the brother's residence. 157 Wn. App. at 412. He also testified that the defendant had moved out of the residence four or five years before and only stopped by once or twice a month to collect mail that came to the defendant. *Id.* at 412. The court held that this was insufficient to establish a usual mailing address because "there was no evidence that [the defendant] was notified or aware when mail came for her at that address." *Id.* at 415.

In contrast to both *Goettemoeller* and *Streeter-Dybdahl*, the uncontroverted evidence here is that Ngy's brother told Mr. Poppa that Ngy received her mail at his address. There is also no evidence of a lag or delay in when Ngy's brother forwarded her mail, as in *Streeter-Dybdahl*. The fact is that these cases are inapplicable and do not undermine the trial court's finding that Ngy failed to prove by clear and convincing evidence that service was invalid at her brother's address. The trial court's ruling in this regard cannot credibly be called into doubt, as the only address Bank of America had on file for Ngy was her brother's address, the voided check Ngy used to purchase the BMW contained this same address, and Ngy noticeably failed to respond to the trial court's invitation to provide evidence of another bank account that she had during the relevant time frame.

Accordingly, Ngy did not meet her burden of proof, and the trial court did not err in refusing to vacate the judgment, quashing the writ of garnishment, and dismissing this action. This is especially true considering that this is not a case in which Ngy can reasonably dispute her

liability. After all, Ngy's own declaration from March 11, 2011 reflects that she has no substantive defense to a deficiency claim based on the three-year-old BMW she purchased at age 22 for \$643.07 per month. See CP at 82, lines 4-16. Nor is there any doubt that JPRD is the successor in interest to Wells Fargo insofar as the judgment that was entered on this claim is concerned. CP at 146.

Lastly, even if Ngy's claim that she did not know about Wells Fargo's sale of her BMW and the ensuing deficiency claim until 2011 is to be believed, this *still* does not automatically relieve her of her liability on such a claim. See, e.g., *Empire South, Inc. v. Repp*, 51 Wn. App. 868, 879, 756 P.2d 745 (1988) (noting failure to comply with the Uniform Commercial Code requirements requiring the sale of collateral will not result in an absolute waiver of a deficiency judgment and noting RCW 62A.9-507(1) allows the debtor to recover her losses by setoff against the deficiency judgment).

C. The Trial Court Did Not Abuse Its Discretion By Denying Ngy's Motion For Live Testimony And Further Argument.

1. Further argument would not have helped the trial court, and Ngy's evidence was not unequivocal or completely contradictory to JPRD's evidence.

The trial court did not abuse its discretion in denying Ngy's motion for live testimony and further argument. The Washington Supreme Court determined long ago that a trial court does not abuse its discretion when it refuses to hold an evidentiary hearing and vacate a default judgment when there has been a substantial lapse of time between the entry of the judgment and the filing of the motion to vacate and there are conflicting affidavits. *Hazeltine v. Rockey*, 90 Wn. 248, 155 P. 1056 (1916). *Hazeltine* is similar to this case because *Hazeltine* also presented the

situation where the judgment debtor moved to vacate a default judgment on the grounds the debtor allegedly had no notice of the judgment until after a writ of garnishment issued. *Id.* The trial court in *Hazeltine* refused to vacate the judgment, and the Washington Supreme Court affirmed this ruling. *Id.* Despite its mature vintage, *Hazeltine* remains good law.

The trial court correctly followed *Hazeltine* and declined to hear live testimony or further argument because no live testimony or further argument would have changed the fact that Ngy has not and cannot prove by clear and convincing evidence that service upon her was defective back in 2003.

Both below and on appeal, Ngy cited the Division Three Court of Appeals case entitled *In re Marriage of Maddix*, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985) in support of her position. Br. of Appellant at 22. However, as seen from the subsequent Division Three decision, *In re Marriage of Irwin*, 64 Wn. App. 38, 61, 822 P.2d 797 (1992), the fact is that oral testimony in connection with a motion to vacate is not the general rule and is discretionary. *Irwin*, 64 Wn. App. at 61 (holding CR 60 does not require the trial court to hold a hearing at which oral testimony is offered and noting “none of the authorities cited by the *Maddix* court state any requirement for live testimony in determining a CR 60 motion.”) This ruling makes perfect sense given that oral argument is not a due process right. *E.g.*, *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002).

Ngy also relies on *Woodruff I*, Br. of Appellant at 22, but that case is also distinguishable. In *Woodruff I*, each side presented unequivocal evidence regarding whether personal service had been made, and each side’s presentation of evidence was completely contradictory. 76 Wn. App. at 210. The court held that in such circumstances, resolving the issue

involved making a credibility determination and, as such, live testimony would be necessary. *Woodruff I*, 76 Wn. App. at 210.

Here, the parties have not presented unequivocal and completely contradictory evidence. As such, this case is more like *Leen v. Demopolis*. The *Woodruff I* court distinguished *Leen*, holding that deciding the validity of service in that case was not a credibility determination because the affidavit of service was corroborated by a telephone call and because defendant's evidence regarding the lack of service was equivocal. *Woodruff I*, 76 Wn. App. at 210 n.1 (distinguishing *Leen v. Demopolis*, 62 Wn. App. 473).

Here, Ngy does not deny that service was made, and her evidence did not directly contradict JPRD's evidence. Ngy's brother never denied telling Mr. Poppa that Ngy received her mail at his home. Ngy has not disputed or denied that Mr. Poppa left a copy of the Summons and Complaint at her brother's house and then mailed two copies of these pleadings to that address. Ngy has not unequivocally shown that she had only one mailing address that was different from her brother's address. In fact, Ngy has tellingly failed to provide documentary evidence of what she claims was her usual mailing address back in 2003. Indeed, Ngy's own evidence is contradictory about when she moved out of her brother's house. The bottom line is that credibility determinations were not necessary for the trial court to rule upon Ngy's motions, and the trial court did not need to take live testimony from Ngy's brother to find that he had been "less than candid" with that court.

Ngy also cites *Wood v. Copeland Lumber Co.*, 41 Wn.2d 119, 122, 247 P.2d 801 (1952) for the proposition that a trial court cannot decide factual issues raised in a motion to vacate a judgment on the basis of ex

parte affidavits and statements. Br. of App. at 22. However, *Wood* involved a statement on a motion to vacate judgment for a potential witness who “was not presented as a witness at the hearing on the petition, nor was his deposition taken; his statement upon which appellant relies is not even an *ex parte* affidavit; it is merely an unsigned, unsworn record of an examination (of which respondents had no notice) of the photographer in the office of appellant's then attorney. That statement was clearly inadmissible and was not even offered as an exhibit.” 41 Wn.2d at 121.

Unlike the appellant in *Wood*, JPRD presented signed declarations sworn to under the penalties of perjury. These declarations were admissible and rightly accepted by the trial court as competent evidence. *Wood*, therefore, is inapplicable.

In sum, the trial court did not abuse its discretion in declining to take live testimony below. That court considered the multiple declarations put forward by the parties, and issued a comprehensive oral ruling for the record on April 29, 2003. The trial court also considered Ngy's supplemental declarations in connection with her motion for reconsideration.

In addition, the trial court did not abuse its discretion in determining that no further oral argument was needed here. Counsel for the parties argued before the trial court for roughly one (1) hour on April 29, 2011. Further argument would not have changed the fact that Ngy's self-serving declarations are not credible, or that Ngy has not shown by clear and convincing evidence that the declaration of service on file herein is fatally defective. On the topic of Ngy's self-serving declarations, it bears mentioning that the Washington courts have occasionally excluded out-of-court statements on the basis that the statements were self-serving.

See 5B Karl B. Tegland, WASH. PRAC., EVIDENCE LAW AND PRACTICE § 801.16, at 358-59 (5th ed. 2007). Further, the fact that a statement is self-serving may diminish the statement's probative value as judged by the trier of fact. *Id.*, fn. 4 (citing *W.W. Conner Co. v. McCollister & Campbell*, 9 Wn.2d 407, 115 P.2d 370 (1941)). Accordingly, the trial court did not abuse its discretion in placing little if any weight on Ngy's self-serving declarations, nor in declining to take live testimony from these declarants.

2. The trial court did not abuse its discretion in denying Ngy's motion for live testimony because JRPD's evidence was admissible and not hearsay.

JRPD also submits that the trial court did not abuse its discretion in denying Ngy's motion to present live testimony because none of Ngy's sworn statements were allegedly "rebutted by admissible contrary evidence." Private investigator / process server Terry Poppa's declaration is admissible in its entirety. In particular, Mr. Poppa's assertion that Ngy's brother acknowledged to him that Ngy did in fact receive her mail at her brother's residence back in March of 2003 is admissible for a variety of reasons, some of which are set forth below.

This court reviews the trial court's admission of evidence under hearsay exceptions for abuse of discretion. *Brunridge v. Fluor Fed. Serv., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008).

First, an out of court statement offered for the truth of the matter asserted might not be hearsay and might be admissible for the truth of the matter asserted under the "state of mind" exception to the hearsay rule. *Hous. Auth. of Grant Cnty. v. Newbigging*, 105 Wn. App. 178, 19 P.3d 1081 (tenant's statement in support of her CR 60(b) motion to vacate unlawful detainer default judgment that landlord's counsel told her payment of overdue rent would settle matter was admissible under "state

of mind” exception to hearsay rule set forth in ER 803(a)(3)).

The acknowledgement Ngy’s brother, Vanna Ngy, made to Mr. Poppa that Ngy received her mail at her brother’s address is admissible under the “state of mind” exception. Mr. Poppa’s state of mind in 2003 is relevant because it bears on the question of whether Mr. Poppa acted with “reasonable diligence” and left a copy of Wells Fargo’s Summons and Complaint with someone at Ngy’s “usual mailing address.” Mr. Poppa’s state of mind in 2003 is also relevant to JPRD’s equitable tolling defense, the predicates for which are bad faith, deception, or false assurances by the defendant (or her agent) and the exercise of diligence by the plaintiff. *See Mellish v. Frog Mountain Pet Care*, 154 Wn. App. 395, 405-06, 225 P.3d 439 (2010) (discussing requirements for invocation of equitable tolling doctrine), *rev’d on other grounds*, 2011 WL 3206885 (2011).

Vanna Ngy’s acknowledgement to Mr. Poppa concerning Ngy’s usual mailing address is also admissible because it is not offered solely for the purpose of proving the truth of the matter asserted, but is also offered simply to prove that Ngy’s brother *made* such a representation concerning Ngy’s usual mailing address. The following example from Washington Practice illustrates the point:

[T]he classic textbook example hypothesizes a case in which the issue was whether X was dead at 8:00 p.m. A witness will testify that at 8:05 p.m., X said, “I own a red car.” The statement is relevant simply because it was made — *i.e.*, relevant to show X was alive — and thus is not hearsay.

See 5B Karl B. Teglund, WASH. PRAC., EVIDENCE LAW AND PRACTICE § 801.8, at 333 (5th ed. 2007). In other words, “If the statement is relevant only if true, it is hearsay.” *Id.*

Here, Ngy’s brother’s statement to Mr. Poppa is not relevant only if it is true; as seen above, it is also relevant because it bears on the issue

of whether Mr. Poppa performed “reasonable diligence” in trying to personally serve Ngy within the meaning of RCW 4.28.080(16). The statement that Ngy received her mail at her brother’s address (which, as seen from Mr. Poppa’s declaration, is the only good address Mr. Poppa located for Ngy) is also relevant to show the only good address Mr. Poppa had for Ngy was not her “usual abode” under RCW 4.28.080(15), and that service by mail under RCW 4.28.080(16) was therefore permissible.

Further, as indicated by the trial court during argument at the April 29, 2011 show cause hearing, Vanna Ngy’s acknowledgement to Mr. Poppa concerning Ngy’s usual mailing address is also admissible as an admission by a party-opponent under ER 801(d)(2)(iii) and/or ER 801(d)(2)(iv).

In addition to being permissible under the foregoing authorities, a ruling that Vanna Ngy’s acknowledgment to Mr. Poppa concerning Ngy’s regular mailing address is also admissible because Ngy is estopped to deny her brother had the authority to speak to Mr. Poppa on her behalf concerning her regular mailing address. *See Lamb v. Gen. Assoc., Inc.*, 60 Wn.2d 623, 374 P.2d 677 (1962) (citing *Pagni v. New York Life Ins. Co.*, 173 Wn. 322, 23 P.2d 6 (1933)) (noting a principal may be estopped to deny that his agent possesses the authority he assumes to exercise where the principal knowingly causes or permits him so to act as to justify a third person of ordinarily careful and prudent business habits to believe that he possesses the authority exercised, and avails himself of the benefit of the agent’s acts).

Based on the foregoing, and in light of the declarations that JPRD filed below, the reality is Ngy’s sworn statements are, in fact, rebutted by admissible contrary evidence. In sum, the trial court did not abuse its

discretion in denying Ngy's motion to present live testimony and for further argument.

D. The Trial Court Did Not Abuse Its Discretion By Denying Ngy's Motion For Reconsideration.

As explained above, although Ngy assigned error to the trial court's order denying her motion for reconsideration, she failed to present argument or authority in support of that assignment of error and has therefore waived it. Br. of Appellant at 2; *Smith*, 106 Wn.2d at 451-52.

However, if this Court still considers Ngy's assignment of error even though she failed to support it with argument and authority in her Brief of Appellant, this Court should nevertheless affirm the trial court's order denying Ngy's motion for reconsideration because Ngy failed to show below that she was entitled to reconsideration under any of CR 59's nine grounds.

This Court reviews a trial court's decision to grant or deny a motion for reconsideration for abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 150, 89 P.3d 726 (2004). The trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court. *Holaday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127 (1987).

Under CR 59(a), a trial court may grant reconsideration based on nine grounds: (1) irregularity in the proceedings, (2) misconduct, (3) accident or surprise, (4) newly discovered evidence, (5) excessive or

inadequate damages, (6) error in assessment of recovery, (7) lack of evidence, (8) error of law, or (9) substantial justice has not been done.

Ngý did not cite any of CR 59(a)'s nine grounds in support of her motion for reconsideration below. She appears to have moved for reconsideration on the basis of newly discovered evidence. Newly discovered evidence may warrant relief from judgment if it is discovered after the judgment, could not have been discovered before the judgment, is material, and is not cumulative or impeaching. *See Graves v. Dep't of Game*, 76 Wn. App. 705, 718-19, 887 P.2d 424 (1994). Here, Ngý's evidence is not newly discovered because (1) the testimony contained in the subsequent declarations of Ngý and her brother were available to her before the hearing on her motion to vacate; (2) the declaration from Jeff Vail, the Bank of America employee, was cumulative; and (3) Ngý's 2002 tax returns are not material to showing what her mailing address was in 2003.

"The realization that the first declaration was insufficient does not qualify the second declaration as newly discovered evidence." *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 91, 60 P.3d 1245 (2003).

Tellingly, after the trial court found that Ngý's evidence was insufficient to meet her burden to show invalid service by clear and convincing evidence, Ngý requested that the trial court stay its ruling so that she could further investigate evidence already presented to the trial court. VRP at 6-7. Her "investigation" produced declarations from herself and her brother presenting facts she already knew. Ngý attempted to use a reconsideration motion to do the research she should have done earlier — especially considering that the motion to vacate was her own motion, and was noted according to her own schedule.

Ngy's motion for reconsideration also failed to set forth the reasons why she could not have produced the supplemental declaration of her brother or herself at or prior to the hearing on her motion to vacate the judgment, quash the writ of garnishment, and dismiss the action. When a witness's declaration is available at the time of a dispositive hearing, a second declaration by the same witness afterwards is not newly discovered evidence. *Adams v. W. Host*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989). Thus, none of Ngy's supplemental declarations constitute "newly discovered evidence" under CR 59.

Furthermore, as seen above, the Declaration of Jeff Vail, the Bank of America employee, was cumulative. CP at 216. Mr. Vail repeated what JPRD had already proven, that Ngy's address on file with Bank of America in 2003 was 232 So. 330th Pl., Federal Way, Washington 98003, her brother's address. CP at 217, 141.

Finally, Ngy's 2002 tax returns are not material because they do not show her mailing address during the relevant time period — 2003. Tellingly, Ngy has *still* failed to produce her 2003 tax return. Even if Ngy's 2002 tax return had some bearing on her mailing address in 2003, which it does not, the tax return would not show that this was Ngy's *only* mailing address. As the trial court recognized, a person can have more than one usual mailing address.

In sum, the evidence Ngy presented in support of her motion for reconsideration could have been discovered earlier through diligent efforts, was cumulative, and was not material. As such, the trial court did not abuse its discretion in denying Ngy's motion for reconsideration.

E. The Doctrine Of Equitable Tolling Would Prevent This Case From Being Dismissed Even If The Judgment Was Vacated And The Writ Of Garnishment Was Quashed.

Equitable tolling is a legal doctrine that allows a claim to proceed when justice requires it, even though it would normally be barred by a statute of limitations. *Trotzer v. Vig*, 149 Wn. App. 594, 203 P.3d 1056 (2009). The party asserting that equitable tolling should apply bears the burden of proof. *Id.* A court may toll the statute of limitations when justice requires such tolling but must use the doctrine sparingly. *E.g.*, *Mellish*, 154 Wn. App. at 405. The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. *Mellish*, 154 Wn. App. at 406.

As the assignee of judgment creditor Wells Fargo, JPRD had absolutely nothing to do with attempting service on Ngy back in 2003. Nor did JPRD know before it purchased the subject judgment that Ngy would move to vacate it, quash the writ of garnishment, dismiss this action, and then appeal the trial court's rulings against her. On the other hand, Ngy and her brother obviously have a vested interest in getting the judgment against her vacated, even if it means engaging in bad faith or deception to accomplish this end.

Although Ngy's brother does not come out and say in his March 11, 2011 declaration that he never told Mr. Poppa that Ngy received her mail at his address, JPRD submits that the gist of his declaration is obviously designed to cause the reader to conclude otherwise. Further, it bears mentioning again that in rendering its ruling on Ngy's motion to vacate, quash the writ of garnishment, and dismiss this action on April 29, 2011, the trial court *specifically found* "the brother's declaration to be less than candid with this court." VRP at 5, lines 7-8.

In addition, JPRD maintains the fact that (1) the only good address private investigator Terry Poppa found for Ngy in early 2003 was her

brother's address; (2) Ngy has failed to provide her 2003 tax return in support of her position; (3) Ngy has failed to provide her paystubs from the Muckleshoot Indian Tribe for 2003 and 2004; and (4) the only address Bank of America has on file for Ngy for the period of January 1, 2000 to December 31, 2004 is her brother's address, the Court can properly determine that there is bad faith or deception on Ngy's part. Thus, in light of equitable concerns and the doctrine of equitable tolling, in the event the Court of Appeals reverses the trial court's ruling with instructions to vacate the judgment, JPRD submits this case should not be dismissed on statute of limitations grounds in light of the doctrine of equitable tolling.

F. The Court Should Award JPRD Its Reasonable Attorneys' Fees Incurred In This Appeal If JPRD Prevails Herein.

Attorney fees on appeal can be awarded if law, contract, or equity permits an award of fees. RAP 18.1(a).

Ngy has requested an award for her attorney fees and costs under RCW 6.27.230, *Lindgren v. Lindgren*, 58 Wn. App. 598, 794 P.2d 526 (1991), and *Allstate Insurance Co. v. Khani*, 75 Wn. App. 317, 327, 877 P.2d 724 (1994). Br of Appellant at 47. In *Lindren*, the trial court vacated creditor Demopolis's judgment under CR 60(b), quashed his writ of garnishment, and awarded debtor Kimzey part of her attorney fees, which caused Demopolis to appeal. *Id.* The Court of Appeals affirmed and granted Kimzey additional attorney fees. *Lindgren* is different from this case because JPRD successfully opposed Ngy's motion to vacate, quash the writ of garnishment, and dismiss this action at the trial court level, and Ngy was not awarded any attorney fees in that forum.

Khani also differs from this case, and does not support Ngy's request for an award of attorney fees on appeal. The *Khani* court remanded the case with instructions to vacate the default judgment, quash the service of process and the writ of garnishment, and award reasonable attorney fees for services rendered "in the trial court" — not in the Court of Appeals. 75 Wn. App. at 328, 877 P.2d 724. Accordingly, neither *Lindgren* nor *Khani* support Ngy's request for any attorney fees that she has incurred on appeal even if her appeal is ultimately successful.

Ngy also seeks an award of attorney fees and costs pursuant to contract by relying on *Federal Financial Company v. Gerard*, 90 Wn. App. 169, 949 P.2d 412 (1998). Br. of Appellant at 47-48. In *Federal Financial*, a financial institution that bought a promissory note from the FDIC in its receivership capacity brought suit against the note's maker to recover thereon. *Id.* In reversing the trial court's dismissal of the creditor's claim on the note, the Court of Appeals declined to award attorney fees to the debtor based on the provision for fees in the note and RCW 4.84.330 because the debtor was not the prevailing party on appeal and final judgment had not been rendered in favor of either party. *Id.* at 185, 949 P.2d 412. *Federal Financial* is different from this case, as the record reflects that Ngy and Wells Fargo had a contract, while JPRD simply took an assignment of Wells Fargo's judgment on this contract against Ngy. The record does not reflect that JPRD assumed any obligations Wells Fargo might have had to Ngy under the parties' contract. Accordingly, even if she prevails on appeal, Ngy has no basis for recovering attorney's fees from JPRD pursuant to contract or RCW 4.84.330.

If this Court does hold that attorney fees are recoverable on appeal,

this Court should hold that JPRD may recover its attorney fees incurred on appeal. Some courts outside of Washington have held that attorney fees incurred postjudgment cannot be recovered pursuant to an attorney fees clause in a contract that gave rise to the judgment because the contract was merged with the judgment. *E.g., Chelios v. Kaye*, 219 Cal.App.3d 75, 268 Cal.Rptr. 38 (1990); *but see New Maine Nat. Bank v. Nemon*, 588 A.2d 1191 (Me. 1991) (affirming trial court's award of postjudgment attorney's fees to bank in action for judgment on promissory note with attorney's fees provision where debtor engaged in misconduct).

One exception to this rule is that when attorney fees are provided for by agreement, they are allowed when an appeal is required to gain a final judgment for breach of the agreement. *Caine & Weiner v. Barker*, 42 Wn. App. 835, 839, 713 P.2d 1133 (1986) (citing *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn.2d 799, 314 P.2d 935 (1957)). In *Lillions*, the parties agreed that attorney fees would be paid if the particular mortgage at issue was foreclosed. *Id.* at 839, 713 P.2d 1133 (internal citations omitted). The court construed this agreement to mean that the parties intended that the mortgagee recover all legal fees necessary to prosecute the foreclosure to its "ultimate conclusion." *Id.* The mortgagee creditor obtained a foreclosure decree, but the mortgagor debtors appealed from the trial court's decision. *Id.* Since an appeal was taken, the Washington Supreme Court held that the foreclosure decree entered by the trial court was not final until affirmed on appeal, and therefore, the mortgagee was entitled to recover a fee for prosecuting the appeal. *Id.* at 839, 713 P.2d at 1136. Thus, because JPRD's judgment against Ngy cannot be deemed final until this appeal has been resolved, in the event it prevails in this forum and JPRD's judgment is upheld, JPRD should recover its attorney

fees incurred on appeal under *Lillions*.

As for Wells Fargo, in light of due process requirements, it cannot be liable for Ngy's attorney fees because Ngy has failed to provide Wells Fargo and its attorney of record with her pleadings below and on appeal. The Minnesota case Ngy has cited in support of her request for fees from Wells Fargo, *Vetter v. Security Continental Insurance Company*, 567 N.W.2d 516, 521 (Minn. 1997), is inapplicable. Br of Appellant at 48. *Vetter* noted that notwithstanding the assignment of a contract, under Minnesota law, the original obligor remains responsible for performance on the contract, and if performance is substantially different from that required of the original obligor, the original obligor may be liable; for the original obligor may not divest itself of liability without consent of the obligee. *Id.* at 521. However, as stated above, the record reflects that JPRD never took an assignment of Wells Fargo's interest in its contract with Ngy; instead, JPRD took an assignment of Wells Fargo's judgment against Ngy, which was entered on this contract. CP 145-46. Accordingly, *Vetter* does not support Ngy's claim for attorney fees against Wells Fargo.

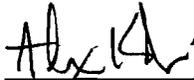
IV. CONCLUSION

The trial court did not abuse its discretion by denying Ngy's motion to vacate the default judgment, quash the writ of garnishment, and dismiss this action; her motion for reconsideration; her motion to present live testimony and for further argument; or her motion for reconsideration. Similarly, the trial court did not err when it entered the judgment and order to pay against garnishee defendant US Bank based on JPRD's writ of

garnishment. Accordingly, JPRD asks this Court to dismiss Ngy's appeal and provide JPRD with an award of its attorneys' fees incurred on appeal.

RESPECTFULLY SUBMITTED this 6 day of September, 2011.

EISENHOWER & CARLSON, PLLC

By: 

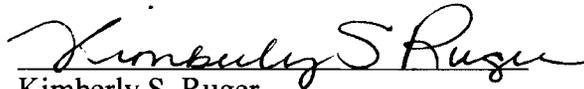
Alexander S. Kleinberg, WSBA # 34449
Chrystina R. Solum, WSBA # 41108
Attorneys for JPRD Investments, LLC

I, Kimberly S. Ruger, am a legal assistant with the firm of Eisenhower & Carlson, PLLC, and am competent to be a witness herein. On September 6, 2011, at Tacoma, Washington, I caused a true and correct copy of JPRD's Brief to be served upon the following in the manner indicated below:

William A. Olson Aiken, St. Louis & Siljeg, P.S. 801 Second Avenue, Suite 1200 Seattle, WA 98104	■ by Legal Messenger
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 6th day of September, 2011, at Tacoma, Washington.


Kimberly S. Ruger

~~FILED~~
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP - 7 AM 10:43

COURT OF APPEALS
DIVISION II
11 SEP - 6 AM 11:59
STATE OF WASHINGTON
BY _____
DEPUTY

APPENDIX A

1 reason to delay the entry of Judgment against these defendants; now,
2 therefore, it is hereby

3 ORDERED, ADJUDGED AND DECREED that the Defendant(s) NGY THEORY
4 AND JOHN DOE THEORY is/are in default in this action, and that the
5 Plaintiff is granted

6 judgment against the same as set forth in the judgment summary above.

7 DONE IN OPEN COURT this 25 day of April, 2003

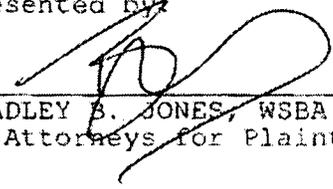
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JUDGE/COURT COMMISSIONER
ORDER & AFFIDAVITS
A DIVISION OF

APR 25 2003

ERIC B. WATNESS

11 Presented by

12 
13 BRADLEY B. JONES, WSBA #10732
14 Of Attorneys for Plaintiff

APPENDIX B

1761177

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT No. _____ Date 06/09/2000	Sell BELLEVUE AUTO HOUSE 233 106th AVE NE BELLEVUE WA 98004 "We" and "us" mean the Seller above, its successors and assigns.	Bu THEARY NGY 232 S 330TH PL FEDERAL WAY WA 98003 "You" and "your" mean each Buyer above, and guarantor, jointly and individually.
	Description of Year 1997 Motor Vehicle Make BMW Purchased Model M3 Description of 1998 HONDA Trade-In CIVIC HX	

SALE: You agree to purchase from us, on a time basis, subject to the terms and conditions of this contract and security agreement (Contract), the Motor Vehicle (Vehicle) and services described below. The Vehicle is sold in its present condition, together with the usual accessories and attachments.

Other: _____

502 1379810-9001

SECURITY: To secure your payment obligations under this Contract, you hereby give us a security interest in the Vehicle, all accessories, attachments, accessories, and proceeds of the Vehicle, and proceeds of the Property. You also assign to us and give us a security interest in all other contracts and service contracts purchased with this Contract.

PROMISE TO PAY AND PAYMENT: You agree to pay to us the Cash Price of \$46,301.04, plus finance charges accruing on the unpaid balance of the Cash Price at the rate of 11.500% per annum. Finance charges accrue on a daily basis. We will earn finance charges on the unpaid balance at 11.500% per annum. You agree to make payments according to the payment schedule and late charge provisions shown in the TRUTH IN LENDING DISCLOSURES. You also agree to pay any additional non-payment finance charge of \$0.00 that will be paid in cash. added to the Cash Price. You agree to pay a minimum finance charge of \$0.00 if you pay this Contract in full before we have earned that much in finance charges.

DOWN PAYMENT: You also agree to pay, or apply to the Cash Price, on or before today, any cash, rebate and net-trade-in value described in the ITEMIZATION OF AMOUNT FINANCED. You agree to make deferred payments as part of the cash down payment as reflected in your Payment Schedule.

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS	TOTAL SALE PRICE
The cost of your credit as a yearly rate. 11.500%	The dollar amount the credit will cost you. \$ 12965.64	The amount of credit provided to you or on your behalf. \$ 33335.40	The amount you will have paid when you have made all scheduled payments. \$ 46301.04	The total cost of your purchase on credit, including your down payment of \$400.00. \$ 46701.04

Payment Schedule: Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
72	643.07	BEGINNING 0770972000

Security: You are giving a security interest in the Motor Vehicle purchased.

Late Charge: If a payment is more than 10 days late, you will be charged 5% OF THE DELINQUENT INSTALLMENT BUT NOT LESS THAN \$ 5.00

Prepayment: If you pay off this Contract early, you may will not have to pay a Minimum Finance Charge. If you pay off this Contract early, you will not be entitled to a refund of part of the Additional Finance Charge.

Contract Provisions: You can see the terms of this Contract for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties.

CREDIT INSURANCE: Credit life, credit disability (accident and health), and any other insurance coverage quoted below, are not required to obtain credit and we will not provide them unless you sign and agree to pay the additional premium. If you want such insurance, we will obtain it for you (if you qualify for coverage). We are quoting below ONLY the coverages you have chosen to purchase.

Credit Life: Insured N/A

Single Joint Prem. \$ N/A Term _____

Credit Disability: Insured _____

Single Joint Prem. \$ _____ Term _____

Purpose signature

ITEMIZATION OF AMOUNT FINANCED

Vehicle Price (incl. sales tax of \$ 3848.48)	\$ 31740.40
Service Contract, Paid to: WARRANTECH	\$ 1795.00
Cash Price	\$ 33535.40
Manufacturer's Rebate	\$ 0.00
Cash Down Payment	\$ 1000.00
Deferred Down Payment	\$ 0.00
a. Total Cash/Rebate Down	\$ 1000.00
b. Trade-in Allowance	\$ 8500.00
c. Less: Amount owing	\$ 9100.00
1 Paid to: US BANK	
d. Net Trade-In (b. minus c.)	\$ -600.00
e. Net Cash/Trade-In (a. plus d.)	\$ 400.00
Down Payment (e.; disclose as \$0 if negative)	\$ 400.00
Unpaid Balance of Cash Price	\$ 33135.40
Insurance Premiums*	\$ _____
Type(s) of Insurance:	<u>N/A</u>
Term of Coverage:	<u>N/A</u>

Your signature below means you want (only) the Insurance coverage(s) quoted above. If none are quoted, you have declined any coverages we offered.

Security: You are giving a security interest in the Motor Vehicle purchased.
 Late Charge: If a payment is more than 10 days late, you will be charged 5 % OF THE DELINQUENT INSTALLMENT BUT NOT LESS THAN \$ 5.00
Prepayment: If you pay off this Contract early, you may will not have to pay a Minimum Finance Charge.
 If you pay off this Contract early, you will not be entitled to a refund of part of the Additional Finance Charge.
Contract Provisions: You can see the terms of this Contract for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties.

CREDIT INSURANCE: Credit life, credit disability (accident and health), and any other insurance coverage quoted below, are not required to obtain credit and we will not provide them unless you sign and agree to pay the additional premium. If you want such insurance, we will obtain it for you (if you qualify for coverage). We are quoting below ONLY the coverages you have chosen to purchase.

Credit Life: Insured N/A
 Single Joint Prem. \$ N/A Term _____
 Purpose _____
Credit Disability: Insured
 Single Joint Prem. \$ _____ Term _____
 Purpose _____

Your signature below means you want (only) the insurance coverage(s) quoted above. If none are quoted, you have declined any coverages we offered.

Buyer _____ d/o/b _____ Buyer _____ d/o/b _____

PROPERTY INSURANCE: You must insure the Property securing this Contract. YOU MAY PURCHASE OR PROVIDE THE INSURANCE THROUGH ANY INSURANCE COMPANY REASONABLY ACCEPTABLE TO US. The collision coverage deductible may not exceed \$ _____ If you get insurance from or through us you will pay \$ _____ for _____ of coverage.

- \$ _____ Deductible, Collision Coverage \$ _____
- \$ _____ Deductible, Comprehensive Cov. \$ _____
- Fire-Theft and Combined Additional Coverage \$ _____
- _____ \$ _____

The insurance coverage ordered under the terms of this Contract does not include bodily injury liability, public liability or property damage liability unless such insurance is checked and indicated.

The above insurance shall be procured by Buyer Seller.

SERVICE CONTRACT: With your purchase of the Vehicle, you agree to purchase a Service Contract to cover _____
SEE YOUR WARRANTY SERVICE CONTRACT
 This Service Contract will be in effect for _____

ASSIGNMENT: This Contract and Security Agreement is assigned to WELLS FARGO AUTO FINANCE, INC.
 the Assignee, phone _____ This assignment is made under the terms of a separate agreement. under the terms of the ASSIGNMENT BY SELLER on page 2. This assignment is made with recourse.
 Seller. By [Signature] Date 9/8/00

ITEMIZATION OF AMOUNT FINANCED

Vehicle Price (incl. sales tax of \$ <u>1818.48</u>)	\$ 31740.40
Service Contract, Paid to: <u>WARRANTECH</u>	\$ 1795.00
Cash Price	\$ 33535.40

Manufacturer's Rebate	\$ 0.00
Cash Down Payment	\$ 1000.00
Deferred Down Payment	\$ 0.00
a. Total Cash/Rebate Down	\$ 1000.00
b. Trade-In Allowance	\$ 8500.00
c. Less: Amount owing	\$ 9100.00
Paid to: <u>US BANK</u>	
d. Net Trade-In (b. minus c.)	\$ -600.00
e. Net Cash/Trade-In (a. plus d.)	\$ 400.00
Down Payment (e.; disclose as \$0 if negative)	\$ 400.00
Unpaid Balance of Cash Price	\$ 33135.40

Insurance Premiums* \$ _____
 Type(s) of Insurance: N/A
 Term of Coverage: N/A

Paid to Public Officials - Filing Fees	\$ 0.00
Paid to Dept. of Licensing*	\$ 200.00
Amount to Finance (e. (If e. is negative))	\$ _____
Additional Finance Charge(s) Paid to Seller	\$ _____
To: _____	\$ 0.00
To: _____	\$ 0.00
To: _____	\$ _____
Total Other Charges	\$ 200.00
Principal Balance	\$ 33335.40

(Unpaid Balance of Cash Price Plus Total Other Charges)	\$ 0.00
Less: Prepaid Finance Charges	\$ 33335.40
Amount Financed	\$ 12965.64
Finance Charge Dollar Amount	\$ 46301.04
Time Balance - Princ. Bal. Plus Fin. Charge	\$ 643.07
Amount Owed - payable in <u>72</u> installments of \$ _____	
each on <u>09 DAY OF EACH MONTH</u> until paid in full.	
*We may retain or receive a portion of this amount.	

NOTICE TO BUYER
 (a) Do not sign this contract before you read it or if any spaces intended for the agreed terms, except as to unavailable information, are blank. (b) You are entitled to a copy of this contract at the time you sign it. (c) You may at any time pay off the full unpaid balance due under this contract, and in so doing you may receive a partial rebate of the service charge. (d) The service charge does not exceed 11.50% per annum computed monthly.

BY SIGNING BELOW BUYER AGREES TO THE TERMS ON PAGES 1 AND 2 OF THIS CONTRACT AND ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT.

Buyer: [Signature] 06-09-00
 Signature _____ Date _____
 Signature _____ Date _____
 Seller: By _____

ADDITIONAL TERMS OF THIS CONTRACT AND SECURITY AGREEMENT

GENERAL TERMS: You have been given the opportunity to purchase the Vehicle and described services for the Cash Price or the Total Sale Price. The Total Sale Price is the total price of the Vehicle and any services if you buy them over time. You agreed to purchase the items over time. The Total Sale Price shown in the TRUTH IN LENDING DISCLOSURES assumes that all payments will be made as scheduled. The actual amount you will pay may be more or less depending on your payment record.

We do not intend to charge or collect, and you do not agree to pay, any finance charge or fee, that is more than the maximum amount permitted for this sale by state or federal law. If you pay a finance charge or fee that is contrary to this provision, we will, instead, apply it first to reduce the principal balance, and when the principal has been paid in full, refund it to you.

You understand and agree that some payments to third parties as a part of this Contract may involve money retained by us or paid back to us as commissions or other remuneration.

If any section or provision of this Contract is not enforceable, the other terms will remain part of this Contract.

PREPAYMENT: You may prepay this Contract in full or in part at any time. Any partial prepayment will not excuse any later scheduled payments until you pay in full.

A refund of any prepaid, unearned insurance premiums may be obtained from us or from the insurance company named in your policy or certificate of insurance.

OWNERSHIP AND DUTIES TOWARD PROPERTY: By giving us a security interest in the Property, you represent and agree to the following:

- Our security interest will not extend to consumer goods unless you acquire rights to them within 10 days after we enter into this Contract, or they are installed in or affixed to the Vehicle.
- You will defend our interests in the Property against claims made by anyone else. You will do whatever is necessary to keep our claim to the Property ahead of the claim of anyone else.
- The security interest you are giving us in the Property comes ahead of the claim of any other of your general or secured creditors. You agree to sign any additional documents or provide us with any additional information we may require to keep our claim to the Property ahead of the claim of anyone else. You will not do anything to change our interest in the Property.
- You will keep the Property in your possession in good condition and repair. You will use the Property for its intended and lawful purposes. Unless otherwise agreed in writing, the Property will be located at your address listed on page 1 of this Contract.
- You will not attempt to sell the Property (unless it is properly identified inventory) or otherwise transfer any rights in the Property to anyone else, without our prior written consent.
- You will pay all taxes and assessments on the Property as they become due.
- You will notify us of any loss or damage to the Property. You will provide us reasonable access to the Property for the purpose of inspection. Our entry and inspection must be accomplished lawfully, and without breaching the peace.

DEFAULT: You will be in default on this Contract if any one of the following occurs (except as prohibited by law):

- You fail to perform any obligation that you have undertaken in this Contract.
- We, in good faith, believe that you cannot, or will not, pay or perform the obligations you have agreed to in this Contract.

If you default, you agree to pay our costs for collecting amounts owing, including, without limitation, court costs, attorneys' fees (if this Contract is referred to an attorney that is not a salaried employee of ours), and fees for repossession, repair, storage and sale of the Property securing this Contract.

If an event of default occurs as to any one of you, we may exercise our remedies against any or all of you.

REMEDIES: If you are in default on this Contract, we have all of the remedies provided by law and this Contract:

- We may require you to immediately pay us, subject to any refund required by law, the remaining unpaid balance of the amount financed, finance charges and all other agreed charges.
- We may pay taxes, assessments, or other liens or make repairs to the Property if you have not done so. We are not required to do so. Any amount we pay will be added to the amount you owe us and will be due immediately. This amount will earn finance charges from the date paid at the post-maturity rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.
- We may require you to make the Property available to us at a

By choosing any one or more of these remedies, we do not waive our right to later use another remedy. By deciding not to use any remedy, we do not give up our right to consider the event a default if it happens again.

You agree that if any notice is required to be given to you of an intended sale or transfer of the Property, notice is reasonable if mailed to your last known address, as reflected in our records, at least 10 days before the date of the intended sale or transfer (or such other period of time as is required by law).

You agree that, subject to your right to recover such property, we may take possession of personal property left in or on the Property securing this Contract and taken into possession as provided above.

INSURANCE: You agree to buy property insurance on the Property protecting against loss and physical damage and subject to a maximum deductible amount indicated in the PROPERTY INSURANCE section, or as we will otherwise require. You will name us as loss payee on any such policy. In the event of loss or damage to the Property, we may require additional security or assurances of payment before we allow insurance proceeds to be used to repair or replace the Property. You agree that if the insurance proceeds do not cover the amounts you still owe us, you will pay the difference. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. You will keep the insurance in full force and effect until this Contract is paid in full.

If you fail to obtain or maintain this insurance, or name us as a loss payee, we may obtain insurance to protect our interest in the Property. This insurance may include coverages not required of you. This insurance may be written by a company other than one you would choose. It may be written at a rate higher than a rate you could obtain if you purchased the property insurance required by this Contract. We will add the premium for this insurance to the amount you owe us. Any amount we pay will be due immediately. This amount will earn finance charges from the date paid at the post-maturity rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.

OBLIGATIONS INDEPENDENT: Each person who signs this Contract agrees to pay this Contract according to its terms. This means the following:

- You must pay this Contract even if someone else has also signed it.
- We may release any co-buyer or guarantor and you will still be obligated to pay this Contract.
- We may release any security and you will still be obligated to pay this Contract.
- If we give up any of our rights, it will not affect your duty to pay this Contract.
- If we extend new credit or renew this Contract, it will not affect your duty to pay this Contract.

WARRANTY: Warranty information is provided to you separately.

WAIVER: To the extent permitted by law, you agree to give up your rights to require us to do certain things. We are not required to: (1) demand payment of amounts due; (2) give notice that amounts due have not been paid, or have not been paid in the appropriate amount, time or manner; or, (3) give notice that we intend to make, or are making, this Contract immediately due.

THIRD PARTY AGREEMENT

By signing below you agree to give us a security interest in the Property described in the SALE section. You also agree to the terms of this Contract, including the WAIVER section above, except that you will not be liable for the payments it requires. Your interest in the Property may be used to satisfy the Buyer's obligation. You agree that we may renew, extend, change this Contract, or release any party or property without releasing you from this Contract. We may take these steps without notice or demand upon you.

You acknowledge receipt of a completed copy of this Contract.

Signature _____

Date _____

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY

- be located at your address listed on page 1 of this Contract.
- E. You will not attempt to sell the Property (unless it is property identified inventory) or otherwise transfer any rights in the Property to anyone else, without our prior written consent.
 - F. You will pay all taxes and assessments on the Property as they become due.
 - G. You will notify us of any loss or damage to the Property. You will provide us reasonable access to the Property for the purpose of inspection. Our entry and inspection must be accomplished lawfully, and without breaching the peace.

DEFAULT: You will be in default on this Contract if any one of the following occurs (except as prohibited by law):

- A. You fail to perform any obligation that you have undertaken in this Contract.
- B. We, in good faith, believe that you cannot, or will not, pay or perform the obligations you have agreed to in this Contract.

If you default, you agree to pay our costs for collecting amounts owing, including, without limitation, court costs, attorneys' fees (in this Contract is referred to an attorney that is not a salaried employee of ours), and fees for repossession, repair, storage and sale of the Property securing this Contract.

If an event of default occurs as to any one of you, we may exercise our remedies against any or all of you.

REMEDIES: If you are in default on this Contract, we have all of the remedies provided by law and this Contract:

- A. We may require you to immediately pay us, subject to any refund required by law, the remaining unpaid balance of the amount financed, finance charges and all other agreed charges.
- B. We may pay taxes, assessments, or other liens or make repairs to the Property if you have not done so. We are not required to do so. Any amount we pay will be added to the amount you owe us and will be due immediately. This amount will earn finance charges from the date paid at the post-maturity rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.
- C. We may require you to make the Property available to us at a place we designate that is reasonably convenient to you and us.
- D. We may immediately take possession of the Property by legal process or self-help, but in doing so we may not breach the peace or unlawfully enter onto your premises. We may then sell the Property and apply what we receive as provided by law to our reasonable expenses and then toward your obligations.
- E. Except when prohibited by law, we may sue you for additional amounts if the proceeds of a sale do not pay all of the amounts you owe us.

- D. If we give up any of our rights, it will not affect your duty to pay this Contract.
- E. If we extend new credit or renew this Contract, it will not affect your duty to pay this Contract.

WARRANTY: Warranty information is provided to you separately.

WAIVER: To the extent permitted by law, you agree to give up your rights to require us to do certain things. We are not required to: (1) demand payment of amounts due; (2) give notice that amounts due have not been paid, or have not been paid in the appropriate amount, time or manner; or, (3) give notice that we intend to make, or are making, this Contract immediately due.

THIRD PARTY AGREEMENT

By signing below you agree to give us a security interest in the Property described in the SALE section. You also agree to the terms of this Contract, including the WAIVER section above, except that you will not be liable for the payments it requires. Your interest in the Property may be used to satisfy the Buyer's obligation. You agree that we may renew, extend, change this Contract, or release any party or property without releasing you from this Contract. We may take these steps without notice or demand upon you.

You acknowledge receipt of a completed copy of this Contract.

Signature

Date

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

IF YOU ARE BUYING A USED VEHICLE, THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

ASSIGNMENT BY SELLER

Seller sells and assigns this Retail Installment Contract and Security Agreement, (Contract), to the Assignee, its successors and assigns, including all its rights, title and interest in this Contract, and any guarantee executed in connection with this Contract. Seller gives Assignee full power, either in its own name or in Seller's name, to take all legal or other actions which Seller could have taken under this Contract. (SEPARATE AGREEMENT: If this Assignment is made "under the terms of a separate agreement" as indicated on page 1, the terms of this assignment are described in a separate writing(s) and not as provided below.)

Seller warrants:

- A. This Contract represents a sale by Seller to Buyer on a time price basis and not on a cash basis.
- B. The statements contained in this Contract are true and correct.
- C. The down payment was made by the Buyer in the manner stated on page 1 of this Contract and, except for the application of any manufacturer's rebate, no part of the down payment was loaned or paid to the Buyer by Seller or Seller's representatives.
- D. This sale was completed in accordance with all applicable federal and state laws and regulations.
- E. This Contract is valid and enforceable in accordance with its terms.
- F. The names and signatures on this Contract are not forged, fictitious or assumed, and are true and correct.
- G. This Contract is vested in the Seller free of all liens, is not subject to any claims or defenses of the Buyer, and may be sold or assigned by the Seller.
- H. A completely filled-in copy of this Contract was delivered to the Buyer at the time of execution.
- I. The Vehicle has been delivered to the Buyer in good condition and has been accepted by Buyer.
- J. Seller has or will perfect a security interest in the Property in favor of the Assignee.

If any of these warranties is breached or untrue, Seller will, upon Assignee's demand, purchase this Contract from Assignee. The purchase shall be in cash in the amount of the unpaid balance (including finance charges) plus the costs and expenses of Assignee, including attorneys' fees.

Seller will indemnify Assignee for any loss sustained by it because of judicial set-off or as the result of a recovery made against Assignee as a result of a claim or defense Buyer has against Seller.

Seller waives notice of the acceptance of this Assignment, notice of non-payment or non-performance and notice of any other remedies available to Assignee.

Assignee may, without notice to Seller, and without affecting the liability of Seller under this Assignment, compound or release any rights against, and grant extensions of time for payment to be made, to Buyer and any other person obligated under this Contract.

UNLESS OTHERWISE INDICATED ON PAGE 1, THIS ASSIGNMENT IS WITHOUT RECOURSE.

WITH RECOURSE: If this Assignment is made "with recourse" as indicated on page 1, Assignee takes this Assignment with certain rights of recourse against Seller. Seller agrees that if the Buyer defaults on any obligation of payment or performance under this Contract, Seller will, upon demand, repurchase this Contract for the amount of the unpaid balance, including finance charges, due at that time.

APPENDIX C

