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No. 67824-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GLOBAL EDUCATION SERVICES, INC., on behalf of itself and all
others similarly situated,

Respondent/Appellees

vs.

MOBAL COMMUNICATIONS, INC.,

Petitioner/Appellant.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENTS

The key aspects of this dispute are that: 1) Global's failed attempt to effectuate service of process on Mobal was made in New York; and 2) Global failed to file the affidavit required by RCW 4.28.185(4) prior to obtaining its default judgment against Mobal. These established facts are case-dispositive under Washington law. Thus, the trial court erred in declining to vacate Global's default judgment.

Global's core propositions are that: 1) neither Washington's Legislature nor this Court meant what it said about the requirements for valid service of process outside of Washington; and 2) radical changes to Washington's nearly 120 year old statutory scheme can be implied from the Legislature's (and the courts') mere silence. Global depends upon misstatements of Washington law and misapplications of the fundamentals of statutory interpretation to advance these arguments. Moreover, Global ignores the distinction between predicate acts for jurisdiction and the perfection of jurisdiction through valid service of process.

Despite Global's legal gymnastics, there is no basis in Washington law for the proposition that personal service outside of Washington could be valid absent compliance with RCW 4.28.180 and .185, collectively Washington's long-arm statute. Since the earliest days of statehood, whenever out-of-state service on a nonresident foreign corporation has

been permitted, Washington law has *always* required an affidavit stating that the defendant could not be found or served in Washington.¹ Global provided no authority to suggest that subsequent legislation carved out exceptions to this nearly 120 year old requirement. Because Global does not dispute its failure to comply with RCW 4.28.185(4), which required Global to file an affidavit prior to the entry of judgment, this Court need go no further to determine that the trial court erred, and that vacation of the default judgment improperly entered against Mobal was mandated.

Should the Court look beyond the case-dispositive affidavit issue, it still should conclude that reversal of the trial court is required. Global's failed service attempt was made on Mobal's former outside legal counsel in New York. That former counsel lacked the authority to accept service of process for Mobal. Global's failure to read correctly the New York Secretary of State's website cannot create authority for a purported agent

¹ The version of RCW 4.28.180 enacted just after statehood authorized out-of-state personal service on foreign corporations *that owned property located in Washington*, but required an affidavit "stating that [plaintiff] believes that the defendant is not a resident of the state, or cannot be found therein[.]" See 1893 Wash. Laws. c 127, §§ 9 & 11, attached hereto as Appendix 1. Subpart 9 of Section 7 of the same enactment ultimately became RCW 4.28.080(10), upon which Global attempts to rely for its independent "doing business" jurisdiction argument. See *id.* The Legislature must be presumed to have understood at the time of enactment how these provisions for service on foreign corporations interacted. See *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 797, 246 P.3d 768 (2011). There is no suggestion in the 1893 law that valid out-of-state service of process on a foreign corporation could be effectuated without an affidavit (*even if it owned property in Washington*). RCW 4.28.185, enacted in 1959, expanded the reach of Washington courts, but retained the affidavit requirement. See *Mahnkey v. King*, 5 Wn. App. 555, 558, 489 P.2d 361 (1971), *abrogated on other grounds*; RCW 4.28.185(4).

that Mobal did not itself grant.² Absent service of process on an agent with authority to accept it, there was no *perfected* personal jurisdiction over Mobal, and the default judgment entered against Mobal was therefore void *from the inception*.

Global's final argument, that Mobal cannot recover its fees because Washington's long-arm statute does not apply, is incorrect. Moreover, Global ignored Mobal's other bases for its fee request, leaving those arguments unopposed. Under all the circumstances, the Court should hold that Mobal is entitled to recover its fees in this matter.

Washington's statutory scheme and this Court's jurisprudence are straightforward. All Global had to do was make personal service on Mobal itself or on Mobal's *actually designated* agent, the New York Department of State, and then file the required affidavit at some point in the litigation *prior to the entry of judgment*. Neither of these statutory requirements is onerous, yet Global failed to do both. *Either* of Global's

² Global's repeated assertions that Mobal had given the Segal Law Firm ("Segal") authority to "accept service from the New York Secretary of State" and that Segal was designated as Mobal's "agent for service of process on the New York Secretary of State" are demonstrably false. *See, e.g.*, Opposition, pp. 2, 5, 6, 7, 33, 36, 37. The New York Secretary of State's website identifies Segal's address as simply the "[a]ddress to which *DOS* will mail process *if accepted on behalf of the entity*." CP 103 (emphasis added). Service on a corporation through the Secretary of State is effective on receipt of the summons and complaint by the Secretary of State's office; mailing to the corporation thereafter is not "service," but merely forwarding. *See* RCW 23B.05.040 and 23B.15.100; *accord* N. Y. Bus. Corp. §306 ("Service of process on such corporation *shall be complete* when the secretary of state is so served.") (emphasis added), attached hereto as Appendix 2.

failures independently renders the default judgment entered against Mobal void. Adopting Global's unsupported arguments to the contrary would radically change and unduly complicate Washington's long-established legal framework for out-of-state service of process. Instead, this Court should cure the myriad errors below by reversing the trial court and allowing Mobal to recover its fees.

II. ARGUMENT

A. RCW 4.28.185(4)'s Affidavit Requirement is Dispositive

Global's admitted non-compliance with RCW 4.28.185(4) is case-dispositive. For nearly 120 years, Washington law has provided that, whenever out-of-state service of process is authorized on a nonresident, foreign corporation, an affidavit must be filed stating that the corporation could not be located or served in Washington. *Compare* Appendix 1 (1893 Wash. Laws. c 127, §§ 9 and 11) *and* RCW 4.28.185(4). Washington's long-arm statute is unequivocal:

Personal service outside the state shall be valid *only* when an affidavit is made and filed to the effect that service cannot be made within the state.

RCW 4.28.185(4) (emphasis added).³ As Washington's Supreme Court consistently has held, "[a] court 'is required to assume the Legislature

³ RCWs 4.28.180 and 4.28.185(2) and (4) enable personal service of process beyond the "territorial limits of the state" as required by the Civil Rules. *See* CR 4(f) ("process...may be served within the territorial limits of the state, and when a statute or

meant exactly what it said and apply the statute as written.” *HomeStreet, Inc. v. State Dept. of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)). “Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words.” *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004). In other words, the Legislature’s use of the word “only” in RCW 4.28.185(4) must be taken to mean “only.”⁴

In accordance with those principles, this Court recently held that “[i]f there is no compliance with the affidavit requirement of RCW 4.28.185(4), personal jurisdiction does not attach to the defendant and the judgment is void.” *Ralph’s Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 591, 225 P.3d 1035 (2010); *see also Sharebuilder Securities, Corp. v. Hoang*, 137 Wn. App. 330, 335, 153 P.3d 222 (2007). Other courts have reached similar results. *See, e.g., Morris v. Palouse River and Coulee City R.R., Inc.*, 149 Wn. App. 366,

these rules so provide beyond the territorial limits of the state”). RCW 4.28.080, by contrast, originally part of the same enactment as what became RCW 4.28.180, contains no such enabling language for extra-territorial service. RCW 19.86.160 expressly incorporates the long-arm statute, RCW 4.28.180 and .185, by reference.

⁴ Our courts have reached similar conclusions with analogous language. *See, e.g., Kabbae v. Dep’t. of Social & Health Svcs.*, 144 Wn. App. 432, 441, 192 P.3d 903 (2008) (noting that, absent clear legislative intent to the contrary, the word “shall” in a statute is a mandatory directive).

371-72, 203 P.3d 1069 (2009). In Washington, “a court has a nondiscretionary duty to vacate a void judgment.” *See Allstate Ins. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994).

Here, Global does not dispute that it failed to comply with Washington’s *actual* long-arm statute, RCW 4.28.180 and .185.⁵ Rather, Global offers implausible and legally unsupported arguments for why its non-compliance with RCW 4.28.185(4) was somehow excused—despite the fact that affidavits have been required for out-of-state service of process since the beginning of Washington law. *See* Appendix 1. In essence, Global argues—without genuine authority—that at least three other statutes serve as alternative and heretofore unknown “long-arm” statutes. But Global’s arguments conflict with more than a century of Washington statutory law, the letter of Washington’s current statute on point, and with this Court’s unequivocal interpretation of that law. Simply put, Global’s admitted failure to comply with RCW 4.28.185(4) is case-

⁵ Global also chose not to pursue its misleading suggestion that Global failed to raise timely Global’s non-compliance with RCW 4.28.185(4). *See* Opposition, p. 8. As such, that issue is not before this Court. *See* RAP 10.3(b). In fact, Global was informed about its fatal error before the trial court issued the show cause order (and, regardless, Global should have been aware of its failure to comply with the affidavit requirement found in RCW 4.28.185(4)). CP 253-55, 465. Moreover, the doctrines of waiver and laches are inapplicable, so Global could have alerted the trial court to Global’s failure to comply with RCW 4.28.185(4) at any time. *See Khani*, 75 Wn. App. at 324, 877 P.2d 724. A default judgment entered without proper service is void, not merely voidable. *See id.*

dispositive. The trial court erred when it ruled to the contrary. This Court can and should reverse the trial court on that basis.

B. Washington’s Consumer Protection Act Does Not Excuse Non-Compliance with RCW 4.28.185(4)

Global argues for the first time on appeal that service on Mobal was valid because it was made pursuant to RCW 19.86.160. Not only is that argument unsupported by any legal authority, it conflicts with fundamental principles of statutory interpretation.

1. The *Reader’s Digest* case does not support Global’s argument.

The sole case Global argues is “directly on point,” *State v. Reader’s Digest Ass’n*, 81 Wn.2d 259, 501 P.2d 290 (1972), does not support Global’s argument.⁶ In fact, although Global baldly asserts that “the *Reader’s Digest* court *held* that long-arm jurisdiction is proper *when the requirements of only the CPA’s long-arm statute are met*,” that case held nothing of the sort.⁷ See Opposition, p. 14 (emphasis added).

⁶ Global’s repeated description of RCW 19.86.160 as the “CPA’s long-arm statute” is its own misleading creation. The *Reader’s Digest* court described that statute merely as a “long-arm provision.” See *Reader’s Digest*, 81 Wn.2d 259, 276, 501 P.2d 290. A plain reading of RCW 19.86.160, enacted in 1961, just two years after RCW 4.28.185, indicates that it simply identifies unfair trade practices covered by the CPA as predicate acts for the exercise of long-arm jurisdiction, pursuant to RCW 4.28.180 and .185 themselves, which RCW 19.86.160 incorporates by reference.

⁷ Tellingly, Global offers no pinpoint citation for this purported “holding”.

The relevant issue in the *Reader's Digest* case was the existence of minimum contacts with Washington, not the mechanics of personal service of process on the out-of-state defendant. As the *Reader's Digest* Court framed it after quoting RCW 19.86.160 in full:

The question [was] whether the performance of an unfair trade practice in this state by a foreign corporation which has no agents, employees, offices or other property in this state is a sufficient contact to establish jurisdiction?

Reader's Digest, 81 Wn.2d at 276. After posing that question, the *Reader's Digest* court then examined precedent regarding the necessary minimum contacts. *See id.* at 276-78.

The *actual* holding of the *Reader's Digest* court was that, on the facts of that case, the minimum contacts necessary for the proper exercise of jurisdiction were met. *See id.* at 276-78. In reaching that outcome, the *Reader's Digest* Court did not address the mechanics of out-of-state service of process, and did not “hold” that compliance with RCW 19.86.160 alone would be sufficient to make the exercise of jurisdiction proper. Nor has either party here been able to find any Washington case in the ensuing forty years citing the *Reader's Digest* case for this proposition. Moreover, there is nothing in the *Reader's Digest* case to suggest that the plaintiff, Washington's Attorney General, failed to comply with RCW 4.28.185(4) by filing the required affidavit. As such,

the *Reader's Digest* case offers no insight into out-of-state personal service mechanics, and therefore provides no legal support for Global's argument that compliance with RCW 4.28.185(4) was unnecessary here.

2. Global's proposed statutory analysis leads to absurd results.

Global also turns fundamental principles of statutory interpretation on their heads. The "primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose." *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 797, 246 P.3d 768 (2011) (en banc). This is done by "considering the statute as a whole, giving effect to all the legislature has said, *and by using related statutes to help identify the legislative intent embodied in the provision in question.*" *See id.* (emphasis added). The "'plain meaning' of a statutory provision is to be ascertained from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, *related provisions, and the statutory scheme as a whole.*" *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009) (en banc) (emphasis added); *Tingney v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007) (en banc).

As Global notes, when two statutes "relate to the same subject and are *not actually in conflict*," they "should be interpreted to give meaning

and effect to both.” See Opposition, p. 15 (emphasis added) (citing *Martin v. Triol*, 121 Wn.2d 135, 148, 847 P.2d 471 (1993) (en banc). Moreover, as Global also notes, Washington courts “presume that the legislature does not use superfluous words.” See *Winebrenner*, 167 Wn.2d at 458, 219 P.3d 686. Finally, Washington courts avoid “unlikely, absurd, or strained” statutory interpretations, because “it will not be presumed that the legislature intended absurd results.” See *Tingney*, 159 Wn.2d at 664, 152 P.3d 1020 (citations and quotation marks omitted). Yet, Global’s proposed interpretation of RCW 19.86.160 as an alternative, stand-alone long-arm statute leads inevitably to such absurd results as explained below. Accordingly, Global’s view cannot prevail. See *id.*

A simple illustration of the absurdity of Global’s novel approach to RCW 19.86.160 is that it would eliminate RCW 4.28.180’s century-old requirement that summonses “shall require the party to appear and answer within sixty days after such personal service out of the state” because that requirement is not contained in RCW 19.86.160. See Appendix 1. But when the Legislature enacted RCW 19.86.160 in 1961, just two years after enacting RCW 4.28.185 and revising RCW 4.28.180 in 1959, it gave no indication that such was its intent. Moreover, Civil Rule 4.1(b)(2) requires that summonses be adapted from the form set forth in that Rule, and states that “[t]he summons for personal service out of state should be adapted

from this form and ***must include the modifications required by statute.*** See RCW 4.28.180.” CR 4.1(b)(2) (emphasis added); see also CR 4(e)(2), 12(a)(3). Absent any indication that the Legislature intended to eliminate the century-old response time on out-of-state summonses only for certain claims (i.e., CPA claims), an analytical approach that produces such a result is not viable. Furthermore, if Global’s stand-alone reading of RCW 19.86.160 were correct, Global could ***only*** have served Mobal itself, because RCW 19.86.160 contains no language permitting service on an “agent.” Nor does RCW 19.86.160 reference RCW 4.28.080(10) and that provision’s “agent” language.

In addition to the foregoing, there are many other flaws in Global’s reasoning. For example, Global argues that harmonization of RCW 19.86.160 and .185—which Global apparently concedes are “not actually in conflict”—requires the Court to ***disregard*** RCW 4.28.185(4)’s affidavit requirement.⁸ To the contrary, Global’s analysis runs afoul of the very precedent it cites, which requires the Court to give effect to the non-conflicting affidavit requirement. See *Martin*, 121 Wn.2d at 148, 847 P.2d 471 (statutes not in conflict “should be interpreted to give meaning and

⁸ Global also argues that a “plain reading” of RCW 19.86.160 demonstrates that that statute, not the actual long-arm statute, RCW 4.28.180 and .185, applies. See Opposition, p. 14. But nothing on the face of these statutes remotely suggests that they are in conflict, as Global effectively concedes in its very next paragraph. See *id.*

effect to both”). Moreover, Global’s reasoning is irrational because it depends on the proposition that “personal service” under RCW 19.86.160 is somehow a different “manner of service” than “personal service” under RCW 4.28.180 and .185.⁹ *See Tingney*, 159 Wn.2d at 664, 152 P.3d 1020.

Global’s third flawed proposition is that a court may not integrate RCW 4.28.185(4)’s affidavit requirement with RCW 19.86.160 because the latter statute is *silent* on the issue of out-of-state service mechanics. As such, Global posits that requiring a pre-judgment affidavit would somehow render RCW 19.86.160’s *silence* superfluous.¹⁰ *See Opposition*, p. 16. If Global’s position were true, then every statute would be required to expressly cross-reference or contain the full language of every other statute with which it interacts. Again, Global’s analysis is implausible and irrational. *See Tingney*, 159 Wn.2d at 664, 152 P.3d 1020.

Fourth, Global wrongly posits that liberal construction of the CPA precludes pre-judgment affidavits pursuant to RCW 4.28.185(4). But Global offers no legal authority for why a defendant would be owed less due process for an alleged CPA violation than for any other alleged

⁹ Global even admits later that the CPA provides no definition of “personal service.” *See Opposition*, p. 20.

¹⁰ Perversely, Global also asserts that the less detailed RCW 19.86.160, which expressly references RCW 4.28.180 and .185 for certain additional information, is, nevertheless, the more specific statute for statutory analysis purposes. *See Opposition*, p. 16.

violation of Washington law.¹¹ Absent authority, such an aberrant outcome seems implausible and irrational when affidavits have been required in Washington since early statehood for out-of-state service of process. *See Tingney*, 159 Wn.2d at 664, 152 P.3d 1020; Appendix 1.

Global's fifth and most breathtakingly irrational proposition is that a court could not require an RCW 4.28.185(4) affidavit *even if the Legislature said that such was its intent*. Global nonsensically asserts:

[E]ven *if* the CPA's long-arm statute explicitly provided that it incorporated the requirements of the general long arm statute [RCW 4.28.180 and .185], there would still be no affidavit required by the CPA's long-arm statute.

¹¹ Global tries to rely on language in RCW 70.110.080 that mirrors RCW 19.86.160. Yet Global offers no authority to demonstrate that the Legislature actually intended this result, nor to suggest that any court has applied Global's novel interpretation of either statute. *See* Opposition, p. 17. As such, Global's assertion that the Legislature "has eliminated some of the formalities of the general long-arm statute" for alleged CPA violations is unsupported lawyer argument, which the Court need not credit. *See Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 814 (2000) ("We need not consider arguments for which a party has cited no authority."). Moreover, the notion that being required to file a single affidavit *at any point prior to the entry of judgment*, as required for almost 120 years under Washington law, is somehow unduly onerous in some cases and not unduly onerous in others is without any basis in logic, fact, or law. In fact, the "intent of the legislature" regarding "liberal construction" is expressed on the face of the CPA itself. *See* RCW 19.86.920. The Legislature's stated intent was that Washington courts be guided by the decisions of the federal courts and the Federal Trade Commission regarding unfair trade practices. *See id.* The Legislature said nothing about modifying statutory requirements for valid service of out-of-state process. In any event, RCW 4.28.185 already extends the reach of Washington courts to the full extent permitted by the U.S. Constitution, except as expressly limited by that statute's own terms. *See, e.g., Mahnkey*, 5 Wn. App. at 558, 489 P.2d 361 ("The intent of our legislature in enacting RCW 4.28.185 was to allow our courts to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause of the fourteenth amendment to the United States Constitution, except as limited by the terms of the statute.").

See Opposition, p. 19 (italics original). Such a proposition is diametrically opposed to the supreme court’s guidance. *See Yakima*, 170 Wn.2d at 797, 246 P.3d 768 (courts seek to identify Legislature’s intent); *Tingney*, 159 Wn.2d at 664, 152 P.3d 1020 (courts avoid absurd results).

Simply put, Global’s discourse on statutory interpretation is wrong. Nothing in RCW 19.86.160, enacted in 1961, suggests a conflict with RCW 4.28.185(4), enacted just two years earlier in 1959. The Legislature and this Court have identified RCW 4.28.185(4) compliance as the “only” way to make personal service outside of Washington valid. *See* RCW 4.28.185(4); *Ralph’s*, 154 Wn. App. at 591, 225 P.3d 1035. Thus, RCW 4.28.185(4)’s affidavit requirement operates alongside RCW 19.86.160, just as the 60-day response time does for out-of-state service. *See Martin*, 121 Wn.2d at 148, 847 P.2d 471; RCW 4.28.180; CR 4(e)(2), 4.1(b)(2), 12(a)(3). The rest of Global’s argument about RCW 19.86.160 is mere sound and fury, signifying nothing.

C. There is no “Doing Business” Exception to RCW 4.28.185(4)’s Affidavit Requirement

Global’s arguments about purported “doing business” jurisdiction also rely on misstatements of Washington authority, misapplication of fundamental principles of statutory interpretation, and a misunderstanding

of the difference between minimum contacts for jurisdiction and the *perfection* of that jurisdiction through valid service of process.

1. The *Kennedy* case does not support the proposition that compliance with RCW 4.28.080(10) alone is sufficient for jurisdiction over a nonresident defendant served out-of-state.

Global's lead case for the proposition that serving an agent under RCW 4.28.080(10) excuses compliance with RCW 4.28.185(4)'s affidavit requirement says nothing of the sort.¹² As Mobal pointed out in its Opening Brief, the issue in *Kennedy v. Sundown Speed Marine, Inc.* was limited to whether an appropriate agent for the defendant had been served, *not* whether an RCW 4.28.185(4) affidavit is required. *See* 97 Wn.2d 544, 546, 647 P.2d 30 (1982) (en banc); *see also* Opening Brief, p. 31, n. 13.

As the supreme court put it:

The question is whether the person upon whom the papers were served was an agent in fact. [Defendant] does not deny service could have been made at the [out-of-state location]; *it denies only that service was made on a person authorized to receive it.*

¹² RCW 4.28.080 provides in pertinent part that: "Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:... (10) If against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof." Nothing on the face of RCW 4.28.080(10) suggests that it has anything to do with *out-of-state* service of process. Moreover, the provision that ultimately became RCW 4.28.080(10) was part of the same legislative enactment from 1893 that included what became RCW 4.28.180 and was modified by RCW 4.28.185. *See* Appendix 1.

See id. Yet, Global bafflingly asserts that “if the long-arm statute had to be followed in addition to the doing-business statute, ***the court would have said so.***”¹³ *See* Opposition, p. 30 (emphasis). Global’s reliance on *Kennedy* is based on the perverse notion that the absence of language in a case that did not address an issue trumps unequivocal language in case and statutory law that is directly on point. Global offers no authority for this astonishing contention.

Mobal is not aware of any case that actually applies Global’s interpretation of *Kennedy*—not even *Kennedy* itself.¹⁴ In fact, a recent case addressing the interaction between RCW 4.28.080 and .185 confirms that Global’s interpretation is wrong. *See Morris*, 149 Wn. App. at 371-72, 203 P.3d 1069. Although RCW 4.28.080(4) limits service to agents within Washington, the *Morris* court reasoned that out-of-state service nevertheless could have been valid through compliance with RCW 4.28.185(4). *See id.* However, because the plaintiff’s filed affidavits failed to explain *why* service could not have been made in Washington,

¹³ In fact, a leading secondary source notes that, although the *Kennedy* opinion does not mention it, “the trial court file shows that the case was commenced as a long-arm case[.]” *See* 14 WASH. PRAC., CIVIL PROCEDURE § 4:29 (2011).

¹⁴ As Mobal has previously noted, the Mississippi federal court’s statements regarding *Kennedy* were foreign *dicta* interpreting a different statute than the one that decided the issue actually before that court. *See* Opening Brief, pp. 30-31; *see also Mu-Petco Shipping Co. v. Divesco, Inc.*, 101 F.R.D. 753, 756-57 (S.D. Miss. 1984) (holding that valid service of process had been made under RCW 4.28.185).

service was invalid, and the trial court's denial of the defendant's motion to vacate the resulting default judgment was reversed. *See id.* In sum, the *Kennedy* opinion does not support Global's assertion that mere compliance with RCW 4.28.080(10) trumps controlling precedent (and the Legislature's unequivocal statement) that compliance with RCW 4.28.185(4)'s affidavit requirement is the "only" way to make personal service outside of Washington valid.

2. Global's statutory interpretation arguments about independent "doing business" jurisdiction fail.

Global also wrongly suggests that the language and history of RCW 4.28.080(10) somehow eliminate RCW 4.28.185(4)'s affidavit requirement.¹⁵ Global's core argument is that because the Legislature did not amend RCW 4.28.080(10) when it enacted RCW 4.28.185 in 1959, the latter statute's affidavit requirement can be ignored. This is utterly nonsensical, particularly because the original affidavit requirement was found in the same 1893 legislative enactment as the provision that became RCW 4.28.080(10). *See* Appendix 1; *Yakima*, 170 Wn.2d at 797, 246 P.3d 768 (context provided by entire enactment). In other words, the

¹⁵ Global's strange logic also would eliminate the century-plus old 60-day response period for out-of-state summonses required under RCW 4.28.180 and CRs 4(e)(2), 4.1(b)(2), and 12(a)(3).

affidavit requirement and what is now RCW 4.28.080(10) have been operating in tandem from the inception.

Global's assertion that the "doing-business statute [RCW 4.28.080(10)] independently grants jurisdiction over out-of-state companies" is accurate in the sense that "doing business" in Washington can establish minimum contacts, but it ignores the bedrock requirement that jurisdiction also must be *perfected* by valid service of process in compliance with statutory requirements.¹⁶ See, e.g., *Ralph's*, 154 Wn. App. at 585, 225 P.3d 1035 ("[p]roper service of process is basic to personal jurisdiction").

Global also erroneously argues that, prior to the passage of the long-arm statute in 1959, Washington courts could exercise jurisdiction over a nonresident foreign corporation *served outside of Washington* pursuant to RCW 4.28.080(10). See Opposition, p. 25 (arguing that, before RCW 4.28.185 was enacted, "out-of-state companies were sued in Washington courts and compliance with the doing-business statute was enough to confer personal jurisdiction"); *id.*, p. 29 (stating that subsection

¹⁶ Had Mobal had a chance to address Global's claims, Mobal would have contested the notion that a single facsimile could support Global's assertion that Mobal "did business" in Washington pursuant to RCW 4.28.080(10). See, e.g., *Croze*, 88 Wn.2d at 54, 558 P.2d 764 ("RCW 4.28.080(10) requires that the nonresident defendant transact a substantial part of its ordinary business in the state. The business must be continuous in that it is distinguished from merely a casual or occasional transaction."). Global's argument that it was somehow "handicapped" in making its jurisdictional showing is perplexing since Global prevailed below only by default. See Opposition, p. 30.

6 of RCW 4.28.185 “explicitly *preserve*[s] the doing business statute as a separate and sufficient source of personal jurisdiction”) (emphasis added). But none of Global’s cases address nonresident defendants served outside of Washington.¹⁷ Nor do any of Global’s cases suggest that out-of-state service on a nonresident, foreign corporation *without any property in this state* was permissible prior to the 1959 enactment of RCW 4.28.185.

In contrast, a plethora of cases demonstrates that the purpose of RCW 4.28.185 was to *extend* the jurisdictional reach of Washington courts beyond common law territorial limits to reach non-resident defendants served outside of Washington (regardless of property ownership).¹⁸ If out-of-state service on a nonresident corporation without

¹⁷ The *Crose* case involved service on two out-of-state entities. But the supreme court held that the exercise of jurisdiction was appropriate because both entities were “justifiably subject to service of process in the State of Washington,” and found valid service only through an agent that was located in Washington. See *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 57-58, 558 P.2d 764 (1977). Notably, the *Crose* case was decided *after* the enactment of RCW 4.28.185 in 1959.

¹⁸ See, e.g., *Tyee Construction Co. v. Dulien Steel Products, Inc. of Wash.*, 62 Wn.2d 106, 109, 381 P.2d 245 (1963) (RCW 4.28.185 “reflects on the part of the legislature ‘a conscious purpose to assert jurisdiction over nonresident defendants’”); *Summerise v. Stephens*, 75 Wn.2d 808, 812, 454 P.2d 224 (1969) (RCW 4.28.185 “makes it possible by securing personal service on a defendant outside the state to secure a personal judgment against him in the courts of this state”); *Mahnkey v. King*, 5 Wn. App. 555, 558, 489 P.2d 361 (1971), *abrogated on other grounds*, (“The intent of our legislature in enacting RCW 4.28.185 was to allow our courts to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause of the fourteenth amendment to the United States Constitution, except as limited by the terms of the statute.”); see also *Ralph’s*, 154 Wn. App. at 584-85, 225 P.3d 1035 (“statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements”); *Morris*, 149 Wn. App. at 371-72, 203 P.3d 1069 (“Jurisdiction over a person ‘by service outside the state is of purely statutory creation and is in derogation of the common law.’”) (citation omitted).

property in this state was not permitted *prior* to RCW 4.28.185's enactment, it defies reason to suggest that the pre-existing RCW 4.28.080(10) could grant that power on its own *after* RCW 4.28.185 was enacted. Global's argument about "doing business" jurisdiction is thus fatally flawed.

Furthermore, Global's argument that RCW 4.28.080(10) trumps the affidavit requirement fails for the same reasons discussed above with respect to RCW 19.86.160. *See supra* at II.B.2. RCW 4.28.080(10) harmonizes seamlessly with RCW 4.28.180 and RCW 4.28.185. RCW 4.28.080(10) identifies *upon whom* to serve process, and RCW 4.28.180 and .185 address *how* to make valid out-of-state service on a nonresident, foreign corporation—including the RCW 4.28.185(4) affidavit. *See* RCW 4.28.080(10); RCW 4.28.180 and .185; *Martin*, 121 Wn.2d at 148, 847 P.2d 471 (statutes not in conflict "should be interpreted to give meaning and effect to both"). Thus, Global is wrong to suggest that the Legislature had to amend RCW 4.28.080(10) if it wanted to require an affidavit. To the contrary, as discussed above, RCW 4.28.080(10) was part of the same 1893 enactment that contained the original affidavit requirement. Global's argument fails for that reason, as well.

D. Mere “Delivery” of the Summons and Complaint to a Non-Agent Law Firm Could Not Constitute “Substantial Compliance” With Washington’s Personal Service Requirements

Global’s admitted failure to file the affidavit required by RCW 4.28.185(4) is case-dispositive, making the issue of alleged “substantial compliance” irrelevant. But Global’s failure to serve an appropriate agent for Mobal is equally and independently fatal.

Under century-old Washington law, attorneys at law are not proper agents for original service of process unless their clients have provided them written authority for that purpose. *See Ashcraft v. Powers*, 22 Wash. 440, 443, 61 P. 161 (1900).¹⁹ Even for non-lawyers, absent *actual* authority to accept service, authority to accept “service of process” on behalf of a litigant must be reasonably implied for a service attempt to be legally valid.²⁰ *See Fox v. Sunmaster Products, Inc.*, 63 Wn. App. 561,

¹⁹ The relevant portion of *Ashcraft* states that “it is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client of the original process by which the jurisdiction of the court over the person is first established; for, until that be done, the relation of client and attorney cannot begin, nor can it be created by the act of the attorney alone. To exercise such a power would be to act rather as an agent or an attorney in fact than as an attorney of the court, and to give effect to it, therefore, there must needs be a special authority for it.” 22 Wash. at 443, 61 P. 161.

²⁰ Global suggests that it *actually relied* on Segal’s designation as a mailing address, but that suggestion is demonstrably false. *See* Opposition, p. 34 (“it was reasonable for Global Education to rely on that selection”); p. 36 (“it was reasonable and just to infer that Segal could also accept personal service”). The *evidence* is that Global attempted service on Segal based upon the mistaken belief that Segal was Mobal’s “registered agent.” *See* CP 307 (“[w]e filed our class action complaint on 10/27/05, [and] served Mobal’s registered agent on 11/14/05.”). As such, Global’s “substantial compliance” arguments are obvious *post hoc* rationalizations solely made to overcome its own error.

563, 821 P.2d 502 (1991). Moreover, even actual authority to perform certain services on a principal's behalf results only in "implied authority to perform the usual and necessary acts associated with the authorized services." *Hoglund v. Meeks*, 139 Wn. App. 854, 866, 170 P.3d 37 (2007).

Here, Global admits that Segal had no written authority to accept original "service of process" for Mobal, but refuses to accept the consequences of that admission.²¹ Tellingly, Global offers no authority in support of any of its gambits.

First, Global argues that there is no "qualitative difference" between authority to mail documents to Mobal when received from the New York Secretary of State after legally valid service on the Secretary, and authority to mail documents to Mobal after delivery to Segal by a messenger. But that misses the point. The issue is not whether Segal had authority to receive mail for (and forward it to) Mobal. The issue here is whether Segal had authority to accept original "service of process" for Mobal. It did not. And Global offers no authority for the proposition that receiving original service of process is a "usual and necessary" act

²¹ Global's suggestion that the "parties agree, then, that Mobal had given Segal express authority to accept service from the New York Secretary of State" is also false. What is undisputed is that the New York Secretary of State's website identifies Segal's address only as the "[a]ddress to which DOS will mail process if accepted on behalf of the entity." CP 103 (emphasis added).

associated with authority to receive and send mail. *See Hogleund*, 139 Wn. App. at 866, 170 P.3d 37. If Global's position were actually the law, any designated mailing address could become a *de facto* registered agent. For example, the mere delivery of a summons and complaint to a clerk or janitor at Mail Boxes Etc. could bind any and all potential litigants who chose to have their mail delivered there. That is not Washington law. Indeed, Washington law goes so far as to hold that perfection of service of process is legally deficient even where an agent holding a "*general* power of attorney" to handle the affairs of another, including the expressly stated authority to initiate a lawsuit on his principal's behalf, lacks the authority to accept original service of process for the principal. *See Scott v. Goldman*, 82 Wn. App. 1, 7-9, 917 P.2d 131 (1996) (emphasis added). Given this, it is nearly impossible to imagine how a sparsely worded, one page document found on the New York Secretary of State's website identifying Segal as an agent solely for purposes of receiving *mail* could somehow be deemed under Washington law to have created authority in Segal to receive original service of process on Mobal behalf.

Global also tries to invert precedent regarding an agent's inability to *create* authority for himself by suggesting that *denial* of such authority by the purported agent must be ignored. It is true that an agent's denial might be ineffective if there were *actual* authority to receive process. But

the denial of authority to accept service for another obviously affects the reasonableness of implying authority when, as here, actual authority was absent. *See Fox*, 63 Wn. App. at 566, 821 P.2d 502 (determination of implied authority based on review of surrounding facts and proper inferences therefrom).

Finally, Global attempts to distinguish controlling authority that attorneys at law are not agents for service of process by distorting the record and brushing legal precedent aside as “irrelevant” or narrower than its actual holdings. As Mobal has demonstrated, Global’s repeated assertions that Segal was listed as an “agent for service of process” are patently false. At most, Segal had apparent authority solely to accept mail from the New York Department of State *after* service of process had been effectuated on Mobal’s *actual* agent for service, i.e., the New York Department of State. *See* CP 103; *see also* N.Y. Bus. Corp. § 306 (“Service of process on such corporation shall be complete when the secretary of state is so served.”); *cf.* RCW 23B.05.40 and 23B.15.100 (discussing service on Secretary of State and subsequent forwarding).

Global fails to cite any authority for its argument that *Ashcraft* and *Scott* do not control. Simply put, Global has provided no legal justification for the Court to rule, contrary to controlling and persuasive

Washington precedent, that mere delivery of the summons and complaint to Segal could effectuate formal legal service on Mobal.

E. Mobal is Entitled to Recover its Fees and Costs

Global's only argument against Mobal's fee request is that Washington's long-arm statute does not apply. Global is wrong; compliance with RCW 4.28.185(4)'s affidavit requirement is the "only" way to effectuate valid out-of-state personal service. Global's arguments fly in the face of more than a century of Washington legislation and jurisprudence.

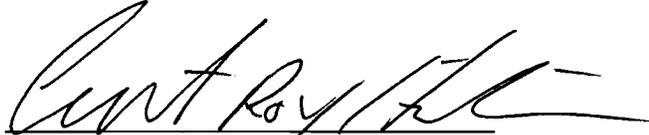
Moreover, Mobal's argument that it is entitled to recover fees was not limited to statutory bases, but also drew upon provisions in the Civil Rules providing for the recovery of fees when a void default judgment is vacated. Global offers no opposition to these Rule-based arguments. Since Global's statute-based argument fails, and Global does not object to Mobal's request for fees under the Civil Rules, Mobal's fee request is effectively unopposed. Accordingly, Mobal reiterates its request that the Court remand to the trial court for the assessment of fees and costs.

III. CONCLUSION

For the foregoing reasons, Mobal respectfully requests that this Court reverse the trial court and remand this matter for an assessment of the fees and costs to be awarded to Mobal.

Respectfully submitted this 1st day of March, 2012.

BRACEWELL & GIULIANI LLP

A handwritten signature in black ink, appearing to read "Curt Roy Hinline", written over a horizontal line.

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PROOF OF SERVICE

I caused a copy of the foregoing APPELLANT'S REPLY BRIEF to be served today, on the following via the method indicated:

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Global Education Services, Inc.*

DATED this 1st day of March, 2012.


Serita Smith
Assistant to Curt Roy Hine
and Robert M. Crowley

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APPENDIX 1

SESSION LAWS

OF THE

STATE OF WASHINGTON

SESSION OF 1893.

COMPILED IN CHAPTERS, WITH MARGINAL NOTES,
BY JAMES H. PRICE, SECRETARY OF STATE.

PUBLISHED BY AUTHORITY.

OLYMPIA, WASH.:
O. C. WHITE, . . . STATE PRINTER.
1893.

CHAPTER CXXVII.

[S. B. No. 187.]

COMMENCEMENT OF CIVIL ACTIONS IN SUPERIOR COURTS.

AN ACT to provide for the manner of commencing civil actions in the superior courts, and bringing the same to trial.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided.

SEC. 2. The summons must be subscribed by the plaintiff ^{Summons.} or his attorney, and directed to the defendant requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a postoffice, within twenty days after the service of the summons, exclusive of the day of service.

SEC. 3. The summons shall also contain—(1) The title ^{Contents of summons.} of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant. (2) A direction to the defendants summoning them to appear within twenty days after service of the summons, exclusive of the day of service, and defend the action. (3) A notice that, in case of failure so to do, judgment will be rendered against them, according to the demand of the complaint. It shall be subscribed by the plaintiff, or his attorney, with the addition of his postoffice address, at which the papers in the action may be served on him by mail. There may, at the option of the plaintiff, be added at the foot, when the complaint is not served with the summons, and the only relief sought is the recovery of the money, whether upon tort or contract, a brief notice specifying the sum to be demanded by the complaint.

SEC. 4. Such summons shall be substantially in the following form:

..... COURT, COUNTY.

A B, *Plaintiff*,
vs.
C D, *Defendant*.

Form of summons.

The State of Washington,, to the said, defendant: You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, which will be filed with the clerk of said court, or a copy of which is herewith served upon you.

E F, *Plaintiff's Attorney*.

P. O. Address, County, Wash.

Service of summons to be accompanied by a copy of complaint, when.

SEC. 5. A copy of the complaint must be served upon the defendant with the summons unless the complaint itself be filed in the office of the clerk of the superior court of the county in which the action is commenced within five days after service of such summons, in which case the service of the copy may be omitted; but the summons in such case must notify the defendant that the complaint will be filed with the clerk of said court; and if the defendant appear within ten days after the service of the summons, the plaintiff must serve a copy of the complaint on the defendant or his attorney within ten days after the notice of such appearance, and the defendant shall have at least ten days thereafter to answer the same; and no judgment shall be entered against him for want of an answer in such case till the expiration of the time.

Who may serve summons.

SEC. 6. In all cases, except when service is made by publication, as hereinafter provided, the summons shall be served by the sheriff of the county wherein the service is made or by his deputy, or by any person over twenty-one years of age, who is competent to be a witness in the action, other than the plaintiff.

On whom summons must be served.

SEC. 7. The summons shall be served by delivering a copy thereof, as follows: (1) If the action be against any county in this state, to the county auditor. (2) If against any town or incorporated city in the state, to the mayor thereof. (3) If against a school district, to the clerk

thereof. (4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state. (5) If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state. (6) If against an insurance company, to any agent authorized by such company to solicit insurance within this state. (7) If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state. (8) If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, secretary, cashier or managing agent thereof. (9) If the suit be against a foreign corporation or non-resident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof. (10) If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian, or if there be none within this state; then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed, if such there be. (11) If against any person for whom a guardian has been appointed for any cause, then to such guardian. (12) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Service made in the modes provided in this section shall be taken and held to be personal service.

SEC. 8. Whenever any corporation, created by the laws of this state, or late Territory of Washington, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the secretary of state, which shall be taken, deemed and treated as personal service on such corporation:

Manner of making service on domestic corporation.

Provided, A copy of said summons, writ, or other process, shall be deposited in the postoffice, postage paid, directed to the secretary or other proper officer of such corporation, at the place where the main business of such corporation is transacted, when such place of business is known to the plaintiff, and be published at least once a week for six weeks in some newspaper printed and published at the seat of government of this state, before such service shall be deemed perfect.

SEC. 9. When the defendant can not be found within the state, of which the return of the sheriff of the county in which the action is brought, that the defendant can not be found in the county, is *prima facie* evidence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or can not be found therein, and that he has deposited a copy of the summons and complaint in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in either of the following cases: (1) When the defendant is a foreign corporation, and has property within the state. (2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent. (3) When the defendant is not a resident of the state, but has property therein and the court has jurisdiction of the subject of the action. (4) When the action is for divorce in the cases prescribed by law. (5) When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein. (6) When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the county where the action is brought, or satisfy or redeem from the same. (7) When the action is

Service by
publication.

against any corporation, whether private or municipal, organized under the laws of this state and the proper officers on whom to make service do not exist or can not be found.

SEC. 10. The publication shall be made in a newspaper printed and published in the county where the action is brought (and if there be no newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county, then a newspaper printed and published at the capital of the state) once each week for six consecutive weeks; and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. Publication of summons.

SEC. 11. Personal service on the defendant out of the state shall be equivalent to service by publication, and the defendant shall be required to appear and answer within sixty days after such service.

SEC. 12. If the summons is not served personally on the defendant in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs.

SEC. 13. When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows: Manner of proceeding in certain cases.
 (1) If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served. (2) If the action is against defendants severally liable, he may proceed against the de-

defendants served in the same manner as if they were the only defendants. (3) Though all the defendants may have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone.

Proof of service.

SEC. 14. Proof of service shall be as follows: (1) If served by the sheriff or his deputy, the return of such sheriff or his deputy indorsed upon or attached to the summons; (2) if by any other person, his affidavit thereof indorsed upon or attached to the summons; or (3) in case of publication, the affidavit of the printer, publisher, foreman, principal clerk or business manager of the newspaper showing the same, together with a printed copy of the summons as published; or (4) the written admission of the defendant; (5) in case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or a clerk of a court of record. In case of service otherwise than by publication, the return, admission or affidavit must state the time, place and manner of service.

Voluntary appearance equivalent to personal service.

SEC. 15. From the time of the service of the summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him.

SEC. 16. A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance.

Actions affecting title to real property.

SEC. 17. In an action affecting the title to real property the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a writ of attachment of property shall be issued, or at any time afterwards, the plaintiff

or a defendant, when he sets up an affirmative cause of action in his answer, and demands substantive relief at the time of filing his answer, or at any time afterwards, if the same be intended to affect real property, may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: *Provided, however,* That such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record.

SEC. 18. Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections where not otherwise provided by statute.

SEC. 19. The services may be personal or by delivery to the party or attorney on whom service is required to be made, or it may be as follows: Manner of making service.

1. If upon an attorney, it may be made during his absence from his office by leaving the papers with his clerk

therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office; or, if it is not open to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the papers at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

SEC. 20. Service by mail may be made when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail.

Service
by mail.

SEC. 21. In case of service by mail, the papers shall be deposited in the postoffice, addressed to the person on whom it is served, at his place of residence, and the postage paid; and in such case the time of service shall be double that required in case of personal service.

Service when
no attorney
appears.

SEC. 22. Where a plaintiff or defendant who has appeared resides out of the state and has no attorney in the action, the service may be made by mail if his residence is known; if not known, on the clerk for him. But where a party, whether resident or non-resident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. But if the attorney shall have removed from the state, such service may be made upon him personally either within or without the state, or by mail to him at his place of residence, if known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. And if the residence of neither the party or attorney are known, the service may be made upon the clerk for the attorney.

Service upon
the attorney.

Service upon
attorney's
clerk.

Not apply to
contempt
proceedings.

SEC. 23. The provisions of the four preceding sections do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

Validity of
notice not
affected by
defect in title
or omission
thereof.

SEC. 24. A notice or other paper is valid and effectual though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceed-

ings; and in furtherance of justice upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired, except that the time for bringing a writ of error or appeal shall in no case be enlarged, or a party permitted to bring such writ of error or appeal after the time therefor has expired.

Time within which court may allow amendment.

Time may be extended.

SEC. 25. A defendant who has appeared may, without answering, demand in writing an assessment of damages, of the amount which the plaintiff is entitled to recover, and thereupon such assessment shall be had or any such amount ascertained in such manner as the court on application may direct, and judgment entered by the clerk for the amount so assessed or ascertained.

Defendant may demand an assessment of damages.

SEC. 26. The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day falls on a Sunday it shall be excluded.

Defining the time in which act to be done.

SEC. 27. The publication of legal notices required by law, or by an order of a judge or court, to be published in a newspaper once in each week for a specified number of weeks, shall be made on the day of each week in which such newspaper is published.

SEC. 28. Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other, they are of two kinds—First, of law; and second, of fact.

Issues arise upon pleadings, when.

SEC. 29. An issue of law arises upon a demurrer to the complaint, answer or reply.

SEC. 30. An issue of fact arises—*First*, Upon a material allegation in the complaint controverted by the answer; or, *second*, upon new matter in the answer, controverted by the reply; or, *third*, upon new matter in the reply, except when an issue of law is joined thereon; issues

When issue of fact arises.

both of law and of fact may arise upon different and distinct parts of the pleadings in the same action.

Trial. SEC. 31. A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.

Issue of law. SEC. 32. An issue of law shall be tried by the court, unless it is referred as provided by the statutes relating to referees.

Jury trial in certain cases, of issue of fact. SEC. 33. An issue of fact, in an action for the recovery of money only, or of specific real or personal property shall be tried by a jury, unless a jury is waived, as provided by law, or a reference ordered, as provided by statute relating to referees.

All other issues of fact tried by court. SEC. 34. Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury, or referred.

Notice of trial of issue of fact. SEC. 35. At any time after the issues of fact are completed in any case by the service of complaint and answer or reply when necessary, as herein provided, either party may cause the issues of fact to be brought on for trial, by serving upon the opposite party a notice of trial at least three days before any day provided by rules of court for setting causes for trial, which notice shall give the title of the cause as in the pleadings, and notify the opposite party that the issues in such action will be brought on for trial at the time set by the court; and the party giving such notice of trial shall, at least three days before the day of setting such causes for trial file with the clerk of the court a note of issue containing the title of the action, the names of the attorneys and the date when the last pleading was served; and the clerk shall thereupon enter the cause upon the trial docket according to the date of the issue. In case an issue of law raised upon the pleadings is desired to be brought on for argument, either party shall, at least three days before the day set apart by the court under its rules for hearing issues of law, serve upon the opposite party a like notice of trial and furnish the clerk of the court with

Notice of trial of issue of law.

a note of issue as above provided, which note of issue shall specify that the issue to be tried is an issue of law; and the clerk of the court shall thereupon enter such action upon the motion docket of the court. When a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day, but shall remain upon the docket from session to session or from law day to law day until final disposition or stricken off by the court. The party upon whom notice of trial is served may file the note of issue and cause the action to be placed upon the calendar without further notice on his part.

Cause once docketed remains from day to day.

SEC. 36. Either party, after the notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

Either party, after notice, may bring issue to trial.

SEC. 37. All pleadings in any civil action shall be filed with the clerk of the court, on or before the day when the case is called for trial, or the day when any application is made to the court for an order therein, and in case the moving party shall fail, or neglect to cause the pleadings to be filed with the clerk of the court as above required, the adverse party may apply to the court, without notice, for an order on such moving party to file such pleadings forthwith, and for a failure to comply with such order the court may order the cause dismissed unless good cause is shown for granting an extension of time within which to file such pleadings.

Filing of pleadings.

SEC. 38. All acts and parts of acts inconsistent with this act are hereby repealed.

Repeal.

Approved March 15, 1893.

APPENDIX 2

§ 306. Service of process.

(a) Service of process on a registered agent may be made in the manner provided by law for the service of a summons, as if the registered agent was a defendant.

(b) (1) Service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. Service of process on such corporation shall be complete when the secretary of state is so served. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose. If a domestic or authorized foreign corporation has no such address on file in the department of state, the secretary of state shall so mail such copy, in the case of a domestic corporation, in care of any director named in its certificate of incorporation at the director's address stated therein or, in the case of an authorized foreign corporation, to such corporation at the address of its office within this state on file in the department.

(2) An additional service of the summons may be made pursuant to paragraph four of subdivision (f) of section thirty-two hundred fifteen of the civil practice law and rules.

(c) If an action or special proceeding is instituted in a court of limited jurisdiction, service of process may be made in the manner provided in this section if the office of the domestic or foreign corporation is within the territorial jurisdiction of the court.

(d) Nothing in this section shall affect the right to serve process in any other manner permitted by law.