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No. 74068-7-I

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

Kirk Banks and Jennifer Banks,
as assignees for BILLIE E. GETSCHMANN SKYLES

Appellants/Cross Respondents,

v.

Mark and Georgia Hopkins,

Respondents/Cross Appellants.

BRIEF OF RESPONDENTS/CROSS APPELLANTS

Thomas L. Hause, WSBA #35245
Gourley Law Group
1002 Tenth Street
Snohomish, WA 98290
(360) 568-5065
Attorney for Respondents/Cross Appellants

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INTRODUCTION

There are only two issues which require this Court's consideration: 1) Whether substantial evidence supports the Trial Court's conclusion that Respondents complied with RCW § 4.28.080; and 2) Should Respondents have received an award of attorney fees pursuant to the terms of a purchase and sale agreement? Voluminous portions of the record, unrelated to these issues, were improperly designated by Appellants and need not be considered by this Court. Likewise, unsupported, mendacious statements of counsel are not evidence and need not be considered by this Court.

ASSIGNMENT OF ERROR

Under Washington Law, in any action on a contract, where such contract provides an award of attorney fees, the court shall award such fees to the prevailing party. In this case, the purchase and sale agreement provided for an award of attorney fees. Should the Trial Court have awarded attorney fees to Respondents?

STATEMENT OF THE CASE

I. Course of Proceedings

This is an appeal from a default judgment entered against Appellants' predecessor in interest by the Superior Court of the State of Washington in and for the County of Snohomish. On November 24, 2014, Respondents filed the instant lawsuit to quiet title to certain real property sold by Appellants' predecessor in interest to Respondents ("The Property").¹ Appellants' predecessor in interest was served on December 18, 2014.² Appellants' predecessor in interest entered a Notice of Appearance on January 6, 2015.³ On January 27, 2015, Respondents obtained a judgment against Appellants' predecessor in interest, quieting title to the .75 acres and awarding costs and attorney fees in the amount of \$3,356.00.⁴

On July 21, 2015, Appellants' predecessor in interest filed a Motion to Vacate Default Judgment.⁵ Respondents filed an Opposition to Motion to Vacate Judgment on August 19, 2015.⁶ On September 1, 2015, the Court Commissioner granted a Motion to Vacate Default Judgment.⁷

¹ CP Vol. II pp. 587 – 601.

² CP Vol. I p. 404.

³ CP Vol. II pp. 373, 585.

⁴ CP Vol. II pp. 545 - 547.

⁵ CP Vol. I pp. 464 – 469.

⁶ CP Vol. I pp. 350 – 398.

⁷ CP Vol. I pp. 324 – 326.

On September 9, 2015, Respondents filed a Motion to Revise Court Commissioner ruling seeking to revise the Court Commissioner Ruling dated September 1, 2015, to Deny the Motion to Vacate Judgment and reinstate the Judgment.⁸ Based on its de novo review of the pleadings submitted to the Commissioner, the Trial Court granted Respondents' Motion to Revise Commissioner's Ruling and reinstated the original judgment.⁹

On September 28, 2015, Appellants' predecessor in interest filed a Motion for Reconsideration.¹⁰ This motion was denied on October 23, 2015.¹¹ Notice of Appeal was filed on October 14, 2015.¹²

On December 29, 2015, Appellants' predecessor in interest filed a Second Motion to Vacate Default Judgment.¹³ The Court Commissioner refused to rule on this motion. The reason is simple. Appellants' predecessor in interest passed away on September 26, 2015.¹⁴ The Minute Entry by the Trial Court states:

DEFENDANT'S MOTION TO VACATE DEFAULT ORDER/JUDGMENT: THE COURT WILL NOT GRANT, NOR DENY THE MOTION UNTIL THE IDENTITY OF THE DEFENDANT IS DETERMINED.

⁸ CP Vol. I pp. 314 – 320.

⁹ CP Vol. I pp. 160 – 161.

¹⁰ CP Vol. I pp. 148 – 159.

¹¹ CP Vol. I p. 1.

¹² CP Vol. I pp. 65 – 66.

¹³ CP Vol. III pp. 894 – 906.

¹⁴ CP Vol. III p. 651.

THE COURT IS NOT CERTAIN THAT THERE IS A VIABLE ACTION AS THIS IS PRESENTLY CONFIGURED SINCE THE DEFENDANT IS DECEASED.¹⁵

There is no order or decision on the merits to which error may be ascribed.¹⁶

Issues related to the Second Motion to Vacate are not properly before this Court.

II. The Parties

Appellants' predecessor in interest was Billie Echo Skyles-Getschmann ("Skyles-Getschmann").¹⁷ Skyles-Getschmann was the Defendant when this case was before the trial Court.¹⁸ On October 15, 2014, Skyles-Getschmann executed a quit claim deed conveying her remaining real property to Jennifer Lee Wilson and Kirk Lewis Banks for no monetary consideration, the sole consideration was "LOVE AND AFFECTION".¹⁹ Skyles-Getschmann retained a life estate for herself and agreed to pay all costs associated with the property ownership.

Jennifer Wilson (now Banks) and Kirk Banks were essentially Skyles-Getschmann caretakers ("Caretaker Wilson" "Caretaker Banks" collectively "Caretakers"). Skyles-Getschmann claimed they helped her with doctor's appointments, getting prescriptions, getting mail, personal finances, taking care of

¹⁵ CP Vol. IV p. 907

¹⁶ See RAP 2.2.

¹⁷ CP Vol. I pp. 386 – 388.

¹⁸ CP Vol. II pp. 587 – 601.

¹⁹ CP Vol. I pp. 386 – 388.

her goats, her buildings, her water system, her acres of property and the like.²⁰ Skyles-Getschmann passed away on September 26, 2015.²¹ On August 20, 2015, only about a month before her death, Skyles-Getschmann purportedly executed an Assignment.²² This assignment transferred Skyles-Getschmann interest in this litigation to the Caretakers.

Curiously, the conveyance occurred more than eight months after the time period in which Skyles-Getschmann is alleged to have been incompetent due to vulnerability, incapacity, advanced age, and infirmity. Certainly, during that time Skyles-Getschmann didn't get any younger. The assignment occurred only about a month before her death. She certainly hadn't gotten any healthier. On July 14, 2016, this Court granted Appellant's Motion to Substitute Appellant Parties and to Amend Caption. The Caretakers are now the interested parties.

Respondents Mark and Georgia Hopkins are husband and wife ("Hopkins").²³

²⁰ CP Vol. I pp. 337 – 341, 444 – 447.

²¹ CP Vol. III p. 651.

²² CP Vol. III pp. 727 – 728.

²³ CP Vol. I p. 589.

III. The Negotiations

Hopkins own the property behind and on the side of The Property. In September 2013, Mark Hopkins was approached by Caretaker Wilson who inquired if he would be interested in purchasing The Property. He declined.²⁴

Approximately two months later, Mark Hopkins was approached by Caretaker Wilson who again inquired if he was willing to purchase the property. Again, he declined.²⁵

Three months later, Mark Hopkins was again approached by Caretaker Wilson who inquired if he was willing to purchase the property. She suggested that he just make an offer because Skyles-Getschmann was behind on the taxes and was about to lose the Property to foreclosure. Mark Hopkins offered Skyles-Getschmann \$50,000.00 for the Property to be paid as follows: \$20,000.00 in cash down with Skyles-Getschmann to carry a \$30,000.00 note.²⁶

On or about February 27, 2014 Skyles-Getschmann contacted Mark Hopkins and accepted the offer.

²⁴ CP Vol. III pp. 774 – 775.

²⁵ CP Vol. III pp. 774 – 775.

²⁶ CP Vol. III pp. 774 – 775.

At the request of Caretaker Wilson and Skyles-Getschmann, Hopkins paid Skyles-Getschmann's property taxes in the amount of \$7,884.71 before the actual closing, to save the property from tax foreclosure.²⁷

IV. The Sale

On or about February 27, 2014, Skyles-Getschmann agreed to sell the property to Hopkins pursuant to a purchase and sale agreement (The "Agreement").²⁸ The Property consisted of one parcel of about 9.25 acres and the additional .75 acres was to be added to that parcel via a boundary line adjustment ("BLA") to make the 10 acres. In paragraph 13 of The Agreement, Skyles-Getschmann agreed to pay all costs incurred by Hopkins as a result of her default, including attorney fees.²⁹

In Addendum 2 to The Agreement the parties agreed to close on The Property in its current 9.225 configuration, but complete the ("BLA") after closing.³⁰ Paragraph two of Addendum 2 specifically states "Seller agrees to continue with the BLA and agrees to sign any and all documents reasonably necessary to complete the BLA and transfer the remaining .75 acres to Purchaser."³¹ The transaction closed on May 8, 2014.

²⁷ CP Vol. III pp. 774 – 775.

²⁸ CP Vol. I pp. 594 – 601.

²⁹ CP Vol. I p. 595.

³⁰ CP Vol. II p. 601.

³¹ CP Vol. I p. 601.

Unfortunately, despite repeated requests, Skyles-Getschmann refused and/or failed to sign the BLA.

V. Service of Process

As noted above, on November 24, 2014, Hopkins filed the instant lawsuit to quiet title.³² Skyles-Getschmann was served on December 18, 2014.³³ The language contained in the Affidavit of Service was in standard form. It states, “On Thursday, December 18, 2014 at approximately 3:30 pm, I served a copy of the following documents upon a woman known to me to be Billie E. Getschmann Skyles at the address of 41816 May Creek Rd, Gold Bar, WA 98251.”³⁴ In a second declaration submitted to the Trial Court, the process server goes on to explain how this was accomplished.³⁵ The declarations states, “The documents were physically handed to Kirk Banks in the presence of Billie E. Getschmann who was sitting in a chair a few feet beyond my reach but who acknowledged my presence. Documents served: Summons and Complaint cause number 14-2-07395-8.” This is personal service on Skyles-Getschmann

A corroborating witness, Ms. Jeannie Harrison also submitted a declaration.³⁶ This declaration states, in part,

³² CP Vol. II pp. 587 – 601.

³³ CP Vol. I p. 404.

³⁴ CP Vol. I p. 404.

³⁵ CP Vol. I pp. 399 – 401.

³⁶ CP Vol. I p. 429.

2. On December 18, 2014 I accompanied Richard Wagner when he went to serve Billie Getschmann Skyles.

3. I walked with Richard to the fence where I stopped and watched Richard walk to Billie's house. He returned without the papers."³⁷

ARGUMENT

I. Standard of Review

To withstand challenge on review, there must be substantial evidence to support the trial court's decision.³⁸ In *United Pac. Ins. Co. v. Discount Co.*, Division 2 of this Court states, "The essential issue on appeal is whether there is substantial evidence before the trial court to support its conclusion that service of process was validly effected upon defendant."³⁹ Substantial evidence is defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.⁴⁰ If the substantial evidence standard is satisfied, "a reviewing

³⁷ CP Vol. I p. 429.

³⁸ *United Pac. Ins. Co. v. Discount Co.*, 15 Wash.App 559, 560, 550 P.2d 699, 700 (Wash. Ct. App.1976).

³⁹ *Id.*; See also *State v. Jenkins*, 102 Wash.App 60, 7 P.3d 818 (Wash. Ct. App. 2000).

⁴⁰ *McCleary v. State*, 173 Wash.2d 477, 514, 269 P.3d 227, 245 (Wash. 2012); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369, 372 (Wash. 2003).

court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.”⁴¹

II. Substantial Evidence Supports the Trial Court’s Conclusion that Service of Process was Validly Effected Upon Skyles-Getschmann.

RCW § 4.28.080 provide, in part:

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

(16) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.⁴²

In years past, construction of service of process statutes was one of “strict construction.”⁴³ In *Sheldon*, an En Banc decision of the Supreme Court of Washington, the Court determined a more liberal construction should be applied “in order to effectuate the purpose of the statute while adhering to its spirit and intent.”⁴⁴ After citing several other decisions from the State of Washington, the *Sheldon* Court noted that many sister states apply a similar liberal construction

⁴¹ *Sunnyside Valley Irrigation Dist.*, 149 Wash.2d at 880, citing *Wenatchee Sportsman Ass’n v. Chelan*, 141 Wash.2d 169, 176, 4 P.3d 162 (Wash. 2010).

⁴² RCW §4.28.080.

⁴³ *Sheldon v. Fettig*, 129 Wash.2d 601, 607, 919 P.2d 1209 (Wash. 1996); citing *Muncie v. Westcraft Corp.*, 58 Wash.2d 36, 38, 360 P.2d 744 (Wash. 1961).

⁴⁴ *Sheldon*, 129 Wash2d at 607.

standard when actual notice is received.⁴⁵ (As noted above, Skyles-Getschmann entered an appearance. She had actual notice.) The *Sheldon* Court held, the phrase “house of [defendant’s] usual abode” is to be liberally construed.⁴⁶

In this case, the language contained in the Affidavit of Service was in standard form. It states, “On Thursday, December 18, 2014 at approximately 3:30 pm, I served a copy of the following documents upon a woman known to me to be Billie E. Getschmann Skyles at the address of 41816 May Creek Rd, Gold Bar, WA 98251.”⁴⁷ In a second declaration submitted to the Trial Court, the process server goes on to explain how this was accomplished.⁴⁸ The declarations states, “The documents were physically handed to Kirk Banks in the presence of Billie E. Getschmann who was sitting in a chair a few feet beyond my reach but who acknowledged my presence. Documents served: Summons and Complaint cause number 14-2-07395-8.”⁴⁹ Construing the statute liberally, this is certainly personal service on the Skyles-Getschmann. These facts would support the same conclusion under a strict construction standard.

⁴⁵ *Id.* at 608, 609, 360 P.2d at 1212; citing *Larson v. Hendrickson*, 394 N.W.2d 524, 526 (Minn. Ct. App. 1986); *Lavey v. Lavey*, 551 A.2d 692 (R.I. 1988); *Karlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir. 1963); *Pionski v. Halloran*, 36 Conn.Supp. 335, 337, 420 A.2d 117 (1980).

⁴⁶ *Id.* at 609; 360 P.2d 1212.

⁴⁷ CP Vol. I p. 404.

⁴⁸ CP Vol. I pp. 399 – 401.

⁴⁹ CP Vol. I pp. 399 – 401.

A corroborating witness, Ms. Jeannie Harrison also submitted a declaration.⁵⁰ This declaration states, in part,

2. On December 18, 2014 I accompanied Richard Wagner when he went to serve Billie Getschmann Skyles.

3. I walked with Richard to the fence where I stopped and watched Richard walk to Billie's house. He returned without the papers."⁵¹

A similar circumstance was considered by the Court of Appeals of Washington in *United Pac. Ins. Co v. Discount Co.*⁵² The facts in that case demonstrated "a clear attempt by the process server to yield possession and control of the documents to" the defendant.⁵³ In *United Pac. Ins. Co.*, the process server, armed with the summons and complaint, approached the defendant, an adult woman, whom the process server identified, at her usual place of abode.⁵⁴ The defendant slammed the door in the process server's face. The process server apparently left the papers on the porch and claimed he stated "she had been legally served." In finding a clear attempt to yield possession and control to the defendant, the Court states, "The Summons need not actually be placed in the defendant's hand."

⁵⁰ CP Vol. I p. 429.

⁵¹ CP Vol. I p. 429.

⁵² 15 Wash.App. 559, 550 P.2d 699 (Wash. Ct. App. 1976).

⁵³ *Id.* at 560-561, 700.

⁵⁴ *Id.*

Additionally, courts in the State of Washington often look to federal cases interpreting similar federal procedural provisions for guidance.⁵⁵ In *Errion v. Connell*,⁵⁶ the United States Court of Appeals Ninth Circuit concluded the trial court did not abuse its discretion in finding proper service had been made when the sheriff pitched papers through a hole in a screen door as the defendant ducked behind it.

In another example, when the defendant and his entourage refused to accept papers from process server, who clearly indicated that he was attempting to effectuate service, the court upheld service as it was reasonably calculated under the circumstances to notify the parties of the pendency of the action.⁵⁷

In this case, Skyles-Getschmann, personally known to the process server, was only a few feet away and acknowledged the presence of the process server as he handed the papers to her Caretaker. Service was accomplished as stated in the original Affidavit of Service. At the very least, this is substantial evidence and this Court should not substitute its judgment for that of the Trial Court.

⁵⁵ See *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 218–19, 829 P.2d 1099 (Wash. 1992).

⁵⁶ 236 F.2d 447, 457 (9th Cir. 1956).

⁵⁷ *Doe v. Qi*, 349 F. Supp. 2d 1258, 1274 (N.D. Cal. 2004).

III. Caretakers did not Provide Clear and Convincing Evidence of Improper Service.

After judgment is entered, the burden is on the person attacking service to show by clear and convincing evidence that service was irregular.⁵⁸ Caretakers did not meet this standard.

The only evidence offered by Caretakers are self-serving, conclusory statements that Skyles-Getschmann was not served.⁵⁹ There are no details. There is no further explanation. There is no corroboration. This evidence does not rise to the level of clear and convincing evidence. It certainly does not overcome the substantial evidence standard which is satisfied when there exists a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.⁶⁰ Caretakers are asking this Court to substitute its judgment for that of the Trial Court which is not permitted even though this Court may have resolved a factual dispute differently.”⁶¹

Caretakers argue that “she has always understood that Wagner handed Mr. Banks an envelope along a fence line as pictured below because the goat fences

⁵⁸ *Woodruff v. Spence*, 88 Wash.App. 565, 945 P.2d 745 (Wash. Ct. App. 1997) citing *Miebach v. Colasurdo*, 35 Wash.App. 803, 808, 670 P.2d 276 (Wash. 1983); *See also Farmer v. Davis*, 161 Wash.App. 420, 428, 250 P.3d 138, 142 (Wash. Ct. App. 2011).

⁵⁹ CP Vol. pp. 329, 331, 341.

⁶⁰ *McCleary v. State*, 173 Wash.2d 477, 514, 269 P.3d 227, 245 (Wash. 2012); *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369, 372 (Wash. 2003).

⁶¹ *Sunnyside Valley Irrigation Dist.*, 149 Wash.2d at 880, citing *Wenatchee Sportsman Ass'n v. Chelan*, 141 Wash.2d 169, 176, 4 P.3d 162 (Wash. 2010).

were too high to jump and too weak to support a grown man climbing over the top of the fence.”⁶² In support of this argument Caretakers cite to a picture of a fence. This photo was never authenticated. There is no admissible evidence to support this argument.

In fact it is directly contradicted by the testimony of Ms. Jeannie Harrison. She submitted a declaration.⁶³ This declaration states, in part,

2. On December 18, 2014 I accompanied Richard Wagner when he went to serve Billie Getschmann Skyles.

3. I walked with Richard to the fence where I stopped and watched Richard walk to Billie’s house. He returned without the papers.”⁶⁴

IV. Alternatively, the Facts Establish Service at Skyles-Getschmann Usual Place of Abode.

Under Washington law, service can be accomplished “by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.”⁶⁵ The declaration of Richard J. Wagner that was offered by Skyles-Getschmann states “I served documents on

⁶² Appellants Opening Brief p. 17.

⁶³ CP Vol. I p. 429.

⁶⁴ CP Vol. I p. 429.

⁶⁵ RCW §4.28.080(16); *Salts v. Estes*, 133 Wash.2d 160 (Wash. 1997).

Kirk Lewis Banks ... at 41816 Mill Creek Road, Gold Bar, WA 98251.” Mr. Banks resides at 41816 Mill Creek Road, Gold Bar, WA 98251, the abode of the Defendant.”⁶⁶ Caretaker Banks resides at the same abode.

This fact was confirmed by a private investigator who found Mr. Banks gave this address when he was charged with a felony in October, 2014.⁶⁷ Mr. Banks had a vehicle registered at this address until January 2015.⁶⁸ Snohomish County records indicate Mr. Banks is a co-owner of the property and uses 41816 May Creek Road, Gold Bar, WA as his mailing address.⁶⁹ He is a resident of that address. Therefore, service was properly accomplished.

Caretakers argue,

We know from Wagner’s October 2013 note about living on the property and being Skyles’ neighbor (CP 216) that he knew that as of April 2013 Kirk Banks and Jennifer Wilson/Banks lived in the trailer at the end of the driveway on the property pictured below and not with Skyles in her trailer in the bottom picture.⁷⁰

The October 2013 note does not establish this fact. (It was also never authenticated.) The note states:

Declaration of Richard
10/13/2013

⁶⁶ CP Vol. I p. 462. Hopkins believe this declaration was forged. CP Vol. I p. 399. Nevertheless, it was offered as evidence by Skyles-Getschmann.

⁶⁷ CP Vol. I pp. 421 – 424.

⁶⁸ CP Vol. I pp. 421 – 424.

⁶⁹ CP Vol. I pp. 421 – 424.

⁷⁰ Appellant’s Opening Brief p.16.

I'm Billie E. Skyles Getschmann's neighbor
At 41508 May Creek Rd Gold Bar 98251. Yes
We do share a driveway + no one else lives on this road.
Also David Krepps + I hardly tolerate each other's company. There would have to have
been no reason he was in the driveway.⁷¹

It is not a proper declaration. It is hearsay. Moreover it does not establish
Caretaker Banks lived anywhere other than with Skyles-Getschmann. The photo
at CP 833-4 does not establish anything. There is no admissible evidence in the
record that Caretaker Banks lived anywhere other than with Skyles-Getschmann.

In fact, Skyles-Getschmann testified in her declaration as follows:

I know Kirk Banks as a nice reliable man who works on my goat ranch
taking care of my goats, my buildings, my water system, and my acres of
property because I can no longer do so. My goats mean everything to me,
and I would have lost them from my life if Kirk Banks had not been in
my life.⁷²

The admissible evidence establishes Mr. Banks gave this address when he
was charged with a felony in October, 2014.⁷³ Mr. Banks had a vehicle registered
at this address until January 2015.⁷⁴ Snohomish County records indicate Mr.
Banks is a co-owner of the property and uses 41816 May Creek Road, Gold Bar,

⁷¹ CP Vol. I p. 216.

⁷² CP Vol. 1 p. 329.

⁷³ CP Vol. I pp. 421 – 424.

⁷⁴ CP Vol. I pp. 421 – 424.

WA as his mailing address.⁷⁵ Skyles-Getschmann's testimony establishes he certainly spent a lot of time there.

A person's place of abode is the "center of domestic activity."⁷⁶ 41816 May Creek Road, Gold Bar, WA is not only Skyles-Getschmann's place of abode, it is Caretaker Banks' as well.

In any event, Caretakers have not proven by clear and convincing evidence that service was improper.

Caretakers also argue that Hopkins failed to establish compliance with RCW §4.28.080 because "Wagner fails to swear under oath that he served papers at Skyles' residential abode, and he fails to swear under oath that Banks resides in Skyles' home."⁷⁷ Caretakers offer no authority for this argument and it is not well taken. In fact, CR 4(g)(7) provides, in part, "Failure to make proof of service does not affect the validity of the service." It is the fact of service that confers jurisdiction, not the return.⁷⁸ Where a return of service, in this case an affidavit of service, contains a defect or irregularities, the remedy is to amend the return.⁷⁹

⁷⁵ CP Vol. I pp. 421 – 424.

⁷⁶ *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wash. App. 408, 236 P.3d 986 (Wash. Ct. App. 2010).

⁷⁷ Appellant's Opening Brief p. 31.

⁷⁸ *In re Estate of Palucci*, 61 Wash.App 412, 416 (Wash. Ct. App. 1991) citing *Williams v. Steamship Mut. Underwriting Ass'n*, 45 Wash.2d 209, 227, 273 P.2d 803(Wash. 1954); *Lake v. Butcher*, 37 Wash.App. 228, 232, 879 P.2d 409 (Wash. 1984).

⁷⁹ *Id.*

V. The Trial Court Erred By Failing to Award Hopkins Their Attorney Fees⁸⁰

In paragraph 13 of The Agreement, Skyles-Getschmann agreed to pay all costs incurred by Hopkins as a result of her default, including attorney fees.⁸¹

RCW §4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, **shall be awarded** to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, **shall be entitled to reasonable attorneys' fees** in addition to costs and necessary disbursements. (Emphasis added.)

The statute instructs the Trial Court it shall award attorney fees. The Trial Court denied Hopkins request.⁸² The Trial Court erred in this regard.

VI. Issues Related to Skyles-Getschmann's Second Motion to Vacate Default Judgment Are Not Properly Before this Court.

Conspicuously absent from the record on appeal is any reference to a decision regarding Skyles-Getschmann's Second Motion to Vacate Default Judgment.⁸³ The reason is simple. The Trial Court refused to rule on the motion.

⁸⁰ CP Vol. I p. 1.

⁸¹ CP Vol. I p. 595.

⁸² CP Vol. I p. 1.

⁸³ CP Vol. III p. 894.

Skyles-Getschmann passed away on September 26, 2015.⁸⁴ The Motion was filed on December 30, 2015.⁸⁵ The Minute Entry by the Trial Court states:

DEFENDANT'S MOTION TO VACATE DEFAULT ORDER/JUDGMENT: THE COURT WILL NOT GRANT, NOR DENY THE MOTION UNTIL THE IDENTITY OF THE DEFENDANT IS DETERMINED.

THE COURT IS NOT CERTAIN THAT THERE IS A VIABLE ACTION AS THIS IS PRESENTLY CONFIGURED SINCE THE DFENDANT IS DECEASED.⁸⁶

RAP 2.2 enumerates the decisions of the Superior Court that may be appealed. The Trial Court's inability to rule because the identity of a party had yet to be determined is not among them. The issues raised in Skyles-Getschmann's Second Motion to Vacate Default Judgment are not properly before this Court.

Additionally, RAP 9.6 provides, "Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court." Defendant's Supplemental Clerk's Papers Volume III should not have been designated at all.

⁸⁴ CP Vol. III p. 651.

⁸⁵ CP Vol. III p. 894.

⁸⁶ CP Vol. IV p. 907

VII. Issues Related to the Second Motion to Vacate Default Judgment.

The issues discussed below need not be addressed by this Court. They are included herein in an abundance of caution.

1. The Judgment Is Not Void

Only where a court lacks jurisdiction over the parties or over the subject matter, or lacks the inherent power to make or enter the particular order is a judgment void.⁸⁷ The Trial Court obviously had subject matter jurisdiction. It is the court of general jurisdiction for the State of Washington.⁸⁸ Further, the Trial Court had already determined that it has personal jurisdiction over Getschmann Skyles as a result of proper service of process.⁸⁹ Therefore, the judgment is not void ab initio.

A judgment may be voidable and vacated upon motion if the grounds asserted are mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining the order.⁹⁰ Such is not the case here.

⁸⁷ *In the Matter of the Marriage of Mu Chai*, 122 Wash.App. 247, 254, 93 P.3d 936 (Wash. Ct. App. 2004).

⁸⁸ RCW §2.08.010.

⁸⁹ CP Vol. III pp. 748 – 749.

⁹⁰ *In the Matter of the Marriage of Mu Chai*, 122 Wash.App. at 254.

2. If the Certificate of Service is in Error it is Harmless

The language of the certificate of service does not affect whether service actually occurred. Service actually occurred in this case.⁹¹ Skyles-Getschmann received the proper notice. Where a return of service, in this case a certificate of service, contains a defect or irregularities, the remedy is to amend it. This same principle holds true even in cases of service of process which is necessary for jurisdiction.⁹²

Caretakers argue, “Both Skyles and Ms. Banks testified that no default motion pleadings arrived by mail or any other method at the above address or otherwise.”⁹³ In support of this premise, Caretakers cite to CP 447 Paragraph 12 of the Skyles Declaration. Paragraph 12 states, “I was not served with the lawsuit papers.”⁹⁴ This declaration, however, was addressing service of process not service of the Motion for Default. It is dated July 20, 2015. The Second Motion to Vacate Default Judgment was filed on December 29, 2015.⁹⁵ Skyles-Getschmann

⁹¹ CP Vol. p. 789.

⁹² *In re Estate of Palucci*, 61 Wash.App 412, 416 (Wash. Ct. App. 1991) citing *Williams v. Steamship Mut. Underwriting Ass 'n*, 45 Wash.2d 209, 227, 273 P.2d 803(Wash. 1954); *Lake v. Butcher*, 37 Wash.App. 228, 232, 879 P.2d 409 (Wash. 1984).

⁹³ Brief of Appellants p. 24.

⁹⁴ CP Vol. 1 p. 447.

⁹⁵ CP Vol. III 894 – 906.

died September 26, 2015.⁹⁶ The citation was, at best, incredibly sloppy and at worst a failed attempt to mislead the Court.

In her Declaration, Caretaker Wilson states, “Last, Mrs. Skyles did not, to my knowledge, receive a copy of the Hopkins’ Motion for Default Judgment.”⁹⁷ This is not only speculation, it is irrelevant.

At common law, the Mailbox Rule provides that the notice was presumed to have been received shortly after it was mailed. Washington law is more specific. Service is deemed complete upon the third day following the day upon which they are placed in the mail.⁹⁸

3. The Certificate Of Service Complies With CR 5(b)(2)

The Caretakers argue that the certificate of service failed to comply with the terms of CR 5(b)(2)(B). Nothing can be further from the truth. Caretakers fail to recognize the distinction between the terms shall and may.

Although CR 5(b)(2)(A), which describes how service by mail is to be accomplished, is mandatory because it incorporates the term shall; CR 5(b)(2)(B) is permissive because it incorporates the term may.⁹⁹ It provides that proof of

⁹⁶ CP Vol. III p. 651.

⁹⁷ CP Vol. III p. 841.

⁹⁸ *Seto v. American Elevator, Inc.* 159 Wash.2d 767, 776, 154 P.3d 189 (Wash. 2006) citing CR 5(b)(2).

⁹⁹ See *Nevers v. Fireside, Inc.*, 133 Wash.2d 804, 812–13, 947 P.2d 721 (Wash.1997), quoting *Pybas v. Paolino*, 73 Wash.App. 393, 400, 869 P.2d 427 n .3(Wash. Ct. App. 1994) (“whether strict compliance is required, except in exceptional circumstances, depends on the nature of the

service by mail “**may** be by written acknowledgement of service, **by affidavit of service of the person who mailed the papers** or by certificate of an attorney.”

(Emphasis added.) Moreover, whenever a matter is required or may be permitted to be proved by affidavit, it may also be proved by an unsworn written statement executed in accordance with RCW 9A.72.085.¹⁰⁰

In this case, Tracy Swanlund, a paralegal with Gourley Law Group signed a certification of service that provides as follows:

“I hereby certify that a copy of this document and all documents listed on page 3 have been mailed to the attorneys/parties listed on page 3, postage prepaid...¹⁰¹”

This is sufficient because neither GR 13 nor RCW § 9A.72.085 mandate using the phrase “under penalty of perjury.” Moreover, this certification was made on a form provided by the Superior Court in and for Snohomish County.

words of command or direction in light of policy considerations”); *See also Vaughn v. Chung*, 119 Wash.2d 273, 281, 830 P.2d 668 (Wash. 1992) (“may” indicates something is permissible: “shall” indicates something is mandatory); *Blair v. GIM Corp.*, 88 Wash.App. 475, 479–80, 945 P.2d 1149 (Wash. Ct. App. 1997) (When a garnishment statute says one ‘may respond by affidavit’ to controvert the garnishee/defendant's answer, an affidavit is not the exclusive means of controverting the answer: ‘The word “may” is permissive and not mandatory and shows in the context of this statute an elective right to use the affidavit procedure’).

¹⁰⁰ GR 13.

¹⁰¹ CP 561

4. What A Mess It Could Be.

If the Caretakers are correct and the Certificate of Service by Mail contained on a form Calendar Note provided by the Trial Court is inadequate then we all have a real mess. Every judgment/default judgment rendered after a party uses this form signed by any legal assistant would be void ab initio. The fallout from such a ruling would most certainly overwhelm the resources of the court system.

**5. It Would Have Been Inappropriate To Serve Skyles-
Getschmann c/o Caretaker Wilson**

The Caretakers argue the service should have gone to Skyles- Getschmann c/o Jennifer Wilson pursuant to the terms of the Agreement. CR 5, however, requires that service be made upon the party. Caretaker- Wilson is not an attorney. She was not an Assignee at the time of service. Service could not have been addressed to her.

6. There was no Fraud Upon the Trial Court

Caretakers' claim that undersigned counsel committed a fraud upon the Trial Court by failing to disclose the Knappe Letter. The simple response is

undersigned counsel did not know about it.¹⁰² It was not contained within the file maintained by Gourley Law Group.¹⁰³ It was not contained within the file maintained by Snohomish Escrow.¹⁰⁴

Craig Gourley first learned of Mr. Knappe's involvement in an e-mail from opposing counsel. The e-mail dated June 9, 2015 states, in part, "Do we need to include Mr. Knappe in these discussions?"¹⁰⁵ In response Mr. Gourley states, "I don't know who Mr. Knappe is so I don't see any reason for him to join the conversation."¹⁰⁶ Opposing counsel provided Mr. Gourley a copy of the letter on June 10, 2015.¹⁰⁷

What is clear from the Knappe letter is that Skyles-Getschmann was represented by counsel in regard to the Agreement. Mr. Knappe had reservations about the Agreement and for whatever reason, Skyles-Getschmann chose to ignore his advice.

What is also clear from the Knappe letter is that Caretaker Wilson was aware of Mr. Knappe's reservations about the agreement. Caretaker Wilson spoke on behalf of Skyles-Getschmann. Caretaker Wilson provided the documents to Mr. Knappe on behalf of Skyles-Getschmann. In her own words, "I (Caretaker

¹⁰² CP Vol. III p. 768.

¹⁰³ CP Vol. III p. 768.

¹⁰⁴ CP Vol. III pp. 772 – 773.

¹⁰⁵ CP Vol. III pp. 769 – 771.

¹⁰⁶ CP Vol. III pp. 769 – 771.

¹⁰⁷ CP Vol. III pp. 769 – 771.

Wilson) spoke on behalf of Mrs. Skyles during all phases to the Skyles' and Hopkins real estate transaction (the purchase and sale agreement dated February 27, 2014 [the "PSA"] – from the initial contact with the Hopkins to initiate the sale to all the final details, including the post PSA issues related to the Boundary Line Adjustment Addendum (the "BLA" Addendum)."

We will never know what Skyles-Getschmann thought or felt about The Agreement. But if there is any fraud or fault in the transaction it lies with Caretaker Wilson, the individual who stands to benefit from these proceedings.

Moreover, Caretakers do not tell the whole story. Lori O'Neil formerly of Snohomish Escrow has no recollection of Mr. Knappe.¹⁰⁸ But Lori O'Neil does recall that Chicago Title Company advised Snohomish Escrow to obtain a letter from a doctor, not a lawyer, certifying Billie E. Getschmann Skyles' competence before the transaction closed.¹⁰⁹ Accordingly, Ms. O'Neil informed Assignee Wilson of this fact and told her Snohomish Escrow would not be able to close this transaction without such a letter.¹¹⁰ A letter was obtained from Doctor Ellen M. Kim which provides:

"To Whom it may concern

¹⁰⁸ CP Vol III pages 772-773

¹⁰⁹ CP Vol III pages 772-773

¹¹⁰ CP Vol III pages 772-773

She's (Skyles-Getschmann) is under my care for her medical conditions.

She has the full mental capacity to make decisions regarding financial matters.

Please call if you need further information.”¹¹¹

7. Much of Caretaker Wilson's Declaration Is Inadmissible.

Caretaker Wilson cannot testify about what Skyles-Getschmann said – that is hearsay.¹¹² Caretaker Wilson cannot testify about how Skyles-Getschmann felt or what she thought – that is conjecture or speculation. Caretaker Wilson cannot testify about Skyles-Getschmann competence or mental abilities – she is not an expert.¹¹³ Caretaker Wilson cannot testify about what Snohomish Escrow was concerned about – she lacks personal knowledge.¹¹⁴

¹¹¹ CP Vol. III p. 735.

¹¹² See ER 801 – 806.

¹¹³ See ER 701 – 706.

¹¹⁴ See ER 602.

CONCLUSION

The Trial Court properly concluded service was properly effectuated pursuant to RCW § 4.28.080. This conclusion should be affirmed. The Trial Court erred when it denied Hopkins request for an award of attorney. This ruling should be reversed and the matter remanded for a determination regarding the award of attorney fees, both at the trial court level and for those fees and costs incurred in this appeal.

DATED this 25th day of July, 2016.

Respectfully submitted,



Thomas L. Hause, WSBA #35245
Respondents/Cross Appellants