

No. 67155-3-I

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

JOHN F. BUCHAN CONSTRUCTION INC.,  
a Washington Corporation,

Respondent,

v.

MICHAEL GIACOMO AUSTIN, an unmarried individual, GIACOMO  
DUMMOND AUSTIN, an unmarried individual, J.P. MORGAN CHASE BANK,  
N.A., a federally chartered bank as successor-in-interest to WASHINGTON  
MUTUAL BANK, and JOHN DOES and JANE DOES 1-10,

Appellants.

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BRIEF OF RESPONDENT

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ORIGINAL

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## I. INTRODUCTION

Silvana Di Giacomo and her sons Michael Austin and Giacomo Austin live in Italy. Ms. Di Giacomo owned a house in Redmond, Washington, that she gave to her sons in 2009. The house burned down while Ms. Di Giacomo still owned it, and she contracted with John F. Buchan Construction, Inc. (“Buchan”) to rebuild the house. Throughout the rebuild, her insurance company paid Buchan. Though she gave the house to her sons during the rebuild, she continued to deal with Buchan on their behalf.

After the construction was complete, Ms. Di Giacomo received a check from the insurance company in the amount of approximately \$185,000 and sent it to Buchan with the notation “final payment.” Because the check did not cover the balance owed, Buchan asked for a new check without that notation. Ms. Di Giacomo then sent a check for a smaller amount without the “final payment” notation, but the check bounced. At that point, Ms. Di Giacomo began to deny that she owed Buchan even that smaller amount.

Because Ms. Di Giacomo refused its repeated payment requests, Buchan filed a complaint for breach of contract and to foreclose on two mechanics’ liens. Buchan’s attorney emailed Ms. Di Giacomo a copy of

the complaint and encouraged her and her sons to retain a lawyer. Ms. Di Giacomo confirmed that she and her sons are not Washington residents and balked at the suggestion that she hire an attorney or otherwise respond to the lawsuit. At that time, and to this day, she and her sons had the benefit of the \$185,000 she had received from the insurance company for payment to Buchan.

Buchan served the Austins by publication as authorized under RCW 4.28.100. Buchan was under no obligation to serve the Austins personally or by certified mail. Serving the Austins personally in Italy was not only unnecessary but would have been extremely expensive and would have required compliance with international treaties. The service by publication was valid and effective, though the expense and trouble could have been avoided if the Austins had retained an attorney as Buchan's attorney had urged them to do.

When service was complete, Buchan obtained an order of default and then, a month later, sought entry of a default judgment and a decree of foreclosure, which the trial court granted. Only then did an attorney appear on behalf of the Austins. They filed a motion to vacate the default judgment in which they denied all knowledge of the lawsuit and failed to submit any evidence of a defense to Buchan's claims beyond vague assertions. The trial court denied their motion. Then, they moved for

reconsideration. In their motion for reconsideration, they maintained that even Ms. Di Giacomo had no notice of the lawsuit, contrary to the substantial documentary evidence before the court showing that she did. The trial court denied the motion for reconsideration.

The trial court's rulings should be affirmed. The Austins now challenge the effectiveness of the service by publication, but it was clearly authorized by RCW 4.28.100, and Buchan strictly complied with that statute. Once Buchan confirmed that the Austins were not Washington residents, it was under no obligation to serve them personally or by certified mail. They also contend that the dispute should have been submitted to mediation and arbitration pursuant to the contract with Buchan, but that contract does not require mediation and arbitration in an action where, as here, a third party (J.P. Morgan Chase Bank N.A.) is involved as a plaintiff or defendant. Finally, the trial court did not abuse its discretion when it declined to vacate the default judgment under *White v. Holm*: the Austins had actual notice of the lawsuit such that their neglect in responding was not excusable, and they failed to present substantial evidence of a meritorious defense to Buchan's claims.

## **II. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR**

1. Did the trial court have personal jurisdiction over the Austins where the Austins were served by publication as permitted by, and in strict compliance with, RCW 4.28.100?

2. The agreement between Buchan and the Austins requires that some disputes arising under it be submitted to mediation and arbitration, but excludes other disputes from that requirement, including “any action involving, as a plaintiff or a defendant, a person or entity which is not a party” to the agreement. Because J.P. Morgan Chase Bank N.A. (“Chase”), an entity not a party to the agreement, was involved as a defendant in this action, was Buchan required to submit this dispute to mediation and arbitration?

3. Assuming that Austins had the right to demand mediation and arbitration (which they did not), did they waive that right by failing to raise mediation or arbitration until six months after they learned that the lawsuit had been filed?

4. Did the trial court abuse its discretion in declining to vacate the default judgment where (1) the Austins had actual notice of the lawsuit and were repeatedly advised to retain an attorney; (2) the Austins did nothing to protect their rights for nearly six months in spite of their actual knowledge; (3) the Austins presented no evidence of a meritorious

defense; and (4) Buchan has suffered and will continue to suffer substantial hardship if the default judgment is vacated by, among other things, having to litigate with absent defendants?

### STATEMENT OF THE CASE

#### **A. The Austins Failed To Pay Buchan in Full for Its Work.**

Silvana Di Giacomo, the Austins' mother, contracted with Buchan to build a new house on her property after the first one was destroyed by a fire. CP 153-54; CP 158-72. Ms. Di Giacomo agreed to pay \$856,140.00 plus any additional sums to which the parties agreed for changes in the work. CP 154. While Buchan was performing the work, Ms. Di Giacomo's insurance company, Farmers Insurance Company ("Farmers"), made payments to Ms. Di Giacomo's lender, who then disbursed the payments to Buchan. *Id.* A total of \$684,222.20 was paid to Buchan in this manner. *Id.*

For reasons unknown to Buchan, Farmers tendered its final check, in the amount of \$184,699.51, directly to Ms. Di Giacomo. *Id.* Buchan asked Ms. Di Giacomo to deposit Farmers' check into her account and send Buchan a check in the full amount as soon as the check cleared. *Id.* Accordingly, Ms. Di Giacomo sent Buchan check number 1180 in the amount of \$184,699.51. *Id.* However, her check contained the notation "final payment house." *Id.* Because \$184,699.51 was *not* the final

amount due, Buchan asked Ms. Di Giacomo to send a new check without the notation. *Id.*; CP 174-76. Ms. Di Giacomo did not dispute at that time that she owed at least the \$184,699.51 that Farmers had tendered for payment to Buchan, and which Ms. DiGiacomo held in trust to pay Buchan. *Id.*

Shortly thereafter, Ms. Di Giacomo sent Buchan check number 1184, this time without the “final payment” notation, but also for less than \$184,699.51. CP 154. Buchan attempted to deposit the check, but Ms. Di Giacomo’s account contained insufficient funds and the check would not clear. CP 154-55. Buchan emailed Ms. Di Giacomo and asked her to deposit funds into her account so that Buchan could deposit the check and be paid at least the amount of the new check. CP 155; CP 178-79.

Ms. Di Giacomo did not do so. Instead, she suddenly took the position that she owed even less, emailing Buchan and asking it to return check number 1184. *Id.* Ms. Di Giacomo never sent Buchan another payment, even though she had received \$184,699.51 from Farmers that was specifically allocated for payment to Buchan for its work. CP 155.

As of September 2010, Ms. Di Giacomo still owed Buchan \$217,172.37, but had refused for months to make any further payments to Buchan. CP 155. Though the Austins now dispute that at least some of that amount is owed, it does not appear they are taking the position that

they do not owe any of it. *See, e.g.*, CP 211, 215, 270. Regardless, despite having been in possession of the \$184,699.51 from Farmer's for a year now, neither Ms. Di Giacomo nor the Austins have ever paid Buchan the undisputed amount. (In fact, Buchan's attorney suggested to Ms. Di Giacomo in October 2010 that such an action might go a long way to resolving the dispute, but Ms. Di Giacomo ignored that suggestion. CP 54.)

On September 22, 2010, Buchan notified her that it would soon file an action to collect all outstanding amounts. CP 187. As part of its efforts to get paid, Buchan recorded two mechanics' liens on the property in the amount of \$217,172.37, which is the full amount Buchan claimed was due and owing for its work, not including interest, attorneys' fees, and costs. CP 155; CP 74-75; CP 77-78.

Previously, while Buchan's work on the new house was proceeding, Ms. Di Giacomo assigned her contract with Buchan to the Austins, having earlier transferred the property to them. CP 155; CP 184-85. However, Buchan always dealt with Ms. Di Giacomo only, and never with the Austins. CP 155. As the Austins admitted in their declarations to the trial court, Ms. Di Giacomo acted as the Austins' agent with respect to negotiating with Buchan. CP 138; CP 140 ("Silvana Di Giacomo was handling the negotiations with Buchan as she originally was a party to the

Contract.”). They further admitted that Buchan’s attorney could have informed them that the lawsuit had been filed by emailing their mother, Ms. Di Giacomo. *Id.* (“The attorney for Buchan could have e-mailed my mother or myself, or sent us registered mail to our Italian residence informing us of the filing of this case, but chose not to do so.”) (As explained below, the Austins’ assertion that Buchan’s attorney had not e-mailed their mother to inform her of the filing of the case was incorrect. Buchan’s attorney did email Ms. Di Giacomo to inform her the complaint had been filed, and urged her repeatedly to seek an attorney. CP 192-93.)

**B. Buchan’s Attorney Sent Ms. Di Giacomo a Copy of the Complaint on October 12, 2010 and Advised Her To Retain an Attorney.**

Receiving no response from Ms. Di Giacomo regarding Buchan’s intent to file an action to collect the outstanding amounts, Buchan filed a Complaint for Breach of Contract, Unjust Enrichment and Foreclosure of Lien (“Complaint”) on October 7, 2010. CP 1-14.<sup>1</sup>

On October 12, 2010, one of Buchan’s attorneys, Romney Brain, emailed Ms. Di Giacomo, attaching a copy of the Complaint. As Mr. Brain stated in pertinent part in the email:

Please understand that you and/or your children will need to pay the amounts due

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<sup>1</sup> Chase was also named as a defendant because it had a recorded deed of trust on the property. CP 2.

immediately, or defend the Complaint. **If you choose to defend the Complaint, you will need to contact an attorney to represent you in the matter. Either way, it is urgent that you take action on this as soon as possible.**

CP 192-93. (Emphasis added.)

In other words, not only did Buchan’s attorney send Ms. Di Giacomo the Complaint, he also made it clear that she needed to take action to protect her rights. It is indisputable that Ms. Di Giacomo received the email, because she responded two days later, attempting to explain why she had asked Buchan to return the check that had been rejected for insufficient funds. *Id.* Brain responded to Ms. Di Giacomo that same day, and again emphasized the importance of hiring an attorney to deal with the Complaint: “I . . . think you and your children should seriously consider hiring an attorney here [*i.e.*, in King County] to deal with us and resolve the amounts outstanding.” *Id.*

Ms. Di Giacomo responded two days later. CP 191-92. In pertinent part, Ms. Di Giacomo confirmed that neither she nor her sons resided in Washington. As Ms. Di Giacomo explained, she resided in Rome along with one of her sons, while her other son resided between London and Milan. *Id.* Ms. Di Giacomo copied jackaustin@hotmail.it — presumably one of her sons — on the email. *Id.* Thus, that son was in receipt of the email train that included Mr. Brain’s original email in which

he attached the Complaint, along with his multiple statements advising Ms. Di Giacomo and her sons to retain counsel. In her email, Ms. Di Giacomo responded to Mr. Brain's suggestion that they retain an attorney: "Then to tell us to get a lawyer is a bit simplistic. We are not there and we would need a lawyer that has some background in finance." *Id.*

Although the Austins now suggest the Complaint was not actually attached (Brief of Appellants at 6 n.1, 29), that suggestion is belied by the evidence. Specifically, in her March 15, 2011 email to the trial court's bailiff, Jonathan Bussey, Ms. Digiacomo stated that "the Buchan lawyer emailed me this complaint against my sons." CP 198. Moreover, certain comments in Ms. Di Giacomo's October 16 response to Mr. Brain would be inexplicable if she had not seen the Complaint. She referred to the "the figure of \$217,000" and states "I really can't understand why Buchan of all people would say we are residing in WA." CP 191. These comments indicate that Ms. Di Giacomo had in fact seen the Complaint, which identified \$217,172.37 as the amount owing and stated — incorrectly, as it turned out — that the Austins were Washington residents. CP 1-2, 4.

**C. Upon Confirmation That the Austins Did Not Reside in Washington, Buchan Served the Austins by Publication.**

After filing the Complaint, having received confirmation from Ms. Di Giacomo that the Austins did not reside in Washington, Buchan

commenced serving the Austins by publication, at substantial expense. CP 20-25; CP 33; CP 57. Buchan's attorney filed an affidavit in support of service by publication, stating that he believed the Austins were not residents of Washington, and that his belief was based on an email from their mother stating that one of the Austins was residing between Milan and London and that the other was residing in Rome. CP 21; CP 24. Buchan's attorney further stated in the affidavit that he would send the complaint and summons by mail to the Austins' last-known address, the address of their house in Redmond, which he did. CP 21.

Naturally, the time and expense of service by publication could have been avoided if Ms. Di Giacomo and her sons had simply heeded Mr. Brain's advice and retained an attorney who could have accepted service on their behalf. But Ms. Di Giacomo and her sons instead chose to take advantage of their absence from the country. They did not make any further payments, they did not hire an attorney, and they did nothing to defend the lawsuit. Meanwhile, they had full advantage of the \$184,699.51 allocated by the insurance company for payment to Buchan.

**D. Buchan Obtained an Order of Default and Entry of Judgment.**

Buchan moved for an order of default in January 2011, which the court granted in February. CP 95-96. Ms. Di Giacomo did not resurface

until March 9, 2011, when she emailed Mr. Brain claiming she had not received anything from his office. CP 195-96. Mr. Brain reminded Ms. Di Giacomo that he had emailed her the Complaint and that he had advised her and the Austins to retain an attorney. *Id.* Mr. Brain also advised Ms. Di Giacomo that Buchan had obtained an order of default, and intended to proceed to obtain a default judgment and order of foreclosure. *Id.* Again, Ms. Di Giacomo did not respond.

On March 11, Buchan moved for entry of a default judgment against the Austins and a decree foreclosing the construction liens, which the court granted on March 22. CP 121-23.

On March 15, Ms. Di Giacomo sent her email to the trial court's bailiff, inquiring about the order of default. In that email, Ms. Di Giacomo represented to Mr. Bussey that she asked Mr. Brain "if he wanted me to send him my sons' addresses and he didn't respond." CP 198. Ms. Di Giacomo was not being truthful. In fact, Mr. Brain had asked her to send him the addresses and emails of her sons on March 9, 2011, but she did not do so. CP 195.

On approximately March 31, 2011, nearly six months after Mr. Brain sent Ms. Di Giacomo the Complaint and advised Ms. Di Giacomo that she and her sons should retain an attorney, an attorney finally appeared on behalf of the Austins. CP 124-25.

**E. The Trial Court Denied the Austins' Motion To Vacate the Default Judgment and Motion for Reconsideration.**

The Austins then moved to vacate the order of default, default judgment, and decree of foreclosure, but the trial court denied their motion. CP 207-08. Incredibly, the Austins took the position that they had no idea that Buchan had filed a lawsuit against them until after entry of the Court's order of default, and that Buchan never made any attempt to contact them: "Buchan made no attempt to contact Austin. Austin was unaware that [a] lawsuit had been started or that a default judgment was obtained." CP 132. Yet in their declarations in support of the motion, the Austins admitted that an email to their mother would have been sufficient to give them notice of the lawsuit. "The attorney for Buchan could have e-mailed my mother or myself, or sent us registered mail to our Italian residence informing us of the filing of this case, but chose not to do so." CP 138; CP 140. But that is exactly what Buchan's attorney did, as explained above.

The Austins also failed to submit evidence of a meritorious defense to Buchan's claims. The Austins submitted two identical declarations containing nebulous assertions, unsupported by factual background or evidence, that they had some unspecified dispute with Buchan about the amounts due and owing. CP 137-40. Those identical declarations acknowledged that the Austins' mother handled all negotiations related to

Buchan's work and the parties' contract, and therefore they could not possibly have had any firsthand, personal knowledge of the matters they vaguely alleged. CP 138, 140.

After the trial court denied their motion to vacate, the Austins moved for reconsideration, which was also denied. CP 288. This time, Ms. Di Giacomo also submitted a declaration. CP 269-271. As grounds for reconsideration, the Austins claimed that she had not been available to provide a declaration when they moved to vacate the default judgment, but did not explain why. CP 209-10. In support of the motion for reconsideration, Ms. Di Giacomo submitted a declaration taking the incredible position — contrary to the evidence previously reviewed by the trial court — that she was not aware that a lawsuit had been filed until February 2011. CP 271. Ms. Di Giacomo misrepresented the facts in another way in her declaration, stating that “at no time did Buchan's counsel request that I provide my sons address or request my contact information or ask me if I was acting on their behalf.” CP 271. But as Mr. Brain stated in his March 9, 2011 email, “In the meantime, because your two sons own the property at this point, I would appreciate it if you could send me their addresses and emails.” CP 195. The trial court denied the motion for reconsideration. CP 288.

### III. ARGUMENT

The trial court's orders denying the motion to vacate default judgment and denying reconsideration should be affirmed. First, the Austins have no legitimate objection to service. Service by publication was permitted by RCW 4.28.100 and performed in strict compliance with that statute. Second, Buchan was under no obligation to submit this dispute to mediation and arbitration. The agreement between Buchan and the Austins required mediation and arbitration under some circumstances, but clearly excluded actions such as this one, in which a third party was involved as a defendant, from mediation and arbitration. Third, the trial court did not abuse its discretion when it declined to vacate the default judgment under *White v. Holm*, because the Austins had actual notice of the lawsuit and their neglect in responding was not excusable or due to surprise. Moreover, they did not present substantial evidence of a meritorious defense.

#### **A. The Trial Court Had Personal Jurisdiction Over the Austins Based on Service by Publication.**

Under RCW 4.28.100, service by publication is permitted when the defendant cannot be found within the state — either because he is not a resident, or because he is attempting to avoid service — and one of nine specified grounds exist. Three of those nine grounds existed here:

(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;

(6) 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;

(7) 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.

RCW 4.28.100. To proceed with service by publication, the plaintiff (or his attorney or agent) must file an affidavit stating that (1) at least one of the specified grounds for service by publication exists; (2) that he believes the defendant is not a resident of the state or “cannot be found therein”; and (3) that he has deposited a copy of the summons . . . and complaint in the post office, 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.”

The Austins do not dispute that grounds existed for service by publication. The Austins owned property in Washington that was the subject of Buchan’s complaint. Buchan claimed two liens on that property and sued to foreclose the liens. Nor do the Austins dispute that they could not be found within Washington; as they admit, they are residents of Italy. *See* Brief of Appellants at 1. Buchan knew this — with certainty —

because the Austins' mother and agent,<sup>2</sup> Ms. Di Giacomo, told Buchan's attorney this was so when he emailed her to inform her that Buchan had filed a complaint. As she stated, one of her sons resided in Rome, and the other was working between London and Milan. CP 191. Buchan had no reason to doubt Ms. Di Giacomo's representations about her sons' whereabouts, and those representations were, in fact, true.

Upon receiving confirmation that the Austins were not Washington residents, Buchan's attorney filed an affidavit in support of service by publication. In that affidavit, he stated that he believed the Austins were not residents of Washington, and that his belief was based on an email from their mother so stating. CP 21; CP 24. Buchan's attorney further stated in the affidavit that he would send the complaint and summons by mail to the Austins' last-known address, the address of their house in Redmond, which he did. CP 21.

Thus, service by publication was permissible and was accomplished in strict compliance with the statute: the defendants were not residents of the state; three of the enumerated statutory grounds for service by publication existed; and Buchan's attorney filed the required affidavit in compliance with RCW 4.28.100.<sup>3</sup>

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<sup>2</sup> As discussed in Section IV.B.2, below, Ms. Di Giacomo was acting as her sons' agent.

<sup>3</sup> Buchan has never argued, as the Austins contend it has (Brief of Appellants at 17), that the email notice to Ms. Di Giacomo constituted service. In fact, the Austins cite CP 147

The Austins have only identified one way in which Buchan allegedly failed to comply with RCW 4.28.100: that Buchan did not make an “honest and reasonable effort” to locate the Austins. It is true, as the Austins contend, that Washington courts hold that when the location of the defendant is unknown, the affidavit submitted in support of service by publication must demonstrate that the plaintiff made an “honest and reasonable” effort to locate the defendant before resorting to service by publication. *See Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997) (citing *Brennan v. Hurt*, 59 Wn. App. 315, 319, 796 P.2d 786 (1990)).

But the objective of such an effort is to determine whether the defendant can be served within the state; no obligation exists to serve a non-resident defendant personally or by certified mail outside the state. In all of the cases cited by the Austins in support of their contention, the whereabouts of the defendants — including whether they were within or outside Washington — was unknown. *See Dobbins*, 88 Wn. App. at 862 (holding that service by publication was insufficient where the plaintiff got

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as evidence of Buchan making this argument, but on that very page Buchan states that “it was necessary for Buchan to resort to publication in order to obtain legal service on the Austins . . .” CP 147. The fact that Ms. Di Giacomo (and thereby the Austins) received actual notice of the lawsuit is, however, relevant to the issue of whether the Austins’ default was due to “excusable neglect,” discussed in Section IV.C.1, and to the issue of whether the Austins would have waived the right to arbitrate if such a right had existed, discussed in Section IV.B.2.

the name of the defendant wrong in the published summons); *Boes v. Bisar*, 122 Wn. App. 569, 94 P.3d 974 (2004) (holding that service by publication was valid and reversing the trial court’s dismissal for lack of service); *Martin v. Meier*, 111 Wn.2d 471, 760 P.2d 925 (1988) (holding that service by publication under the non-resident motorist statute, RCW 46.64.040, was valid); *Carson v. Northstar Development Co.*, 62 Wn. App. 310, 814 P.2d 217 (1991); *Pascua v. Heil*, 126 Wn. App. 520, 108 P.3d 1253 (2005); *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn.App. 358, 75 P.3d 1011 (2003); *Brenner v. Port of Bellingham*, 53 Wn.App. 182, 765 P.2d 1333 (1989).

Here, no uncertainty existed about the location of the defendants: Buchan *knew* that they were not residents of Washington, based on Ms. Di Giacomo’s unequivocal representation that her sons resided in Italy. The Austins acknowledged this on page 16 of their brief, when they state: “Buchan could not have received plainer notice that the Austin’s [sic] were living abroad than their mother’s email stating so.” It was clear that personal service inside the state was impossible, and Buchan was under no obligation to locate the Austins in Italy and personally serve them. Once Buchan had confirmed that the Austins were not Washington residents, Buchan’s “honest and reasonable” inquiry was complete. Service by publication was authorized by RCW 4.28.100 because the subject of the

action was the house located in Washington, and Buchan strictly complied with the statute.

An early Washington case interpreting a precursor to RCW 4.28.100 — which, although old, has not been overruled — is instructive. In *Decorvet v. Dolan*, 7 Wash. 365, 35 P. 72 (1893), plaintiffs brought an action to quiet title to property in Washington and served the non-resident defendants by publication under the precursor to RCW 4.28.100. After a decree of foreclosure and sale, the defendants argued that service of process had been defective because the affidavit supporting it simply said that the “defendants reside out of this territory,” without showing that the defendant could not, after due diligence, be found within the territory. *Id.* at 366-67. The court held that service had been valid, reasoning that all the statute required for service of publication is that the defendants resided out of the state:

But the statement that the defendants reside out of the territory is the statement of a fact, and is all that need be said about the subject. The statute does not make it necessary to show where defendants resided. This is immaterial, so that they were nonresidents.

*Id.* at 367-68. As with RCW 4.28.100, its precursor “clearly [made] the fact that the defendant resides of the territory ground for obtaining service by publication.” *Id.* at 367. Both RCW 4.28.100 and its precursor are

stated in the disjunctive: The plaintiff must file an affidavit “stating that he believes that the defendant is not a resident of the state, or cannot be found therein.” RCW 4.28.100 (emphasis added). If a plaintiff can state as a matter of fact that the defendant is not a resident of the state, it is not reasonable to require further diligence. Moreover, as the court pointed out, the cases requiring a showing of due diligence all involved the situation where the ground alleged was an inability to locate a resident defendant, as opposed to an allegation that the defendant was a non-resident. *Id.* The same is true here.

Similarly, in *Cook v. Cook*, 118 P.2d 1070 (Or. 1941), where the plaintiff knew for a fact that the defendant was not a resident of Oregon, the defendant was indeed not a resident of Oregon, and the plaintiff averred in an affidavit in support of service by publication that the defendant was not a resident of Oregon, the court held that it was not necessary for the plaintiff to demonstrate that he had exercised due diligence to locate the defendant in Oregon. As the court put it, “[t]he law does not require the doing of vain and idle things.” *Cook*, 118 P.2d at 1072. *See also U.S. Bank National Ass’n v. Oliverio*, 109 Wn. App. 68, 33 P.3d 1104 (2001) (holding that trial court properly allowed service by publication where defendant lived in New York and the subject of the

action was a security interest in real property in which the defendant claimed an interest).

Furthermore, most of the cases cited by the Austins are doubly inapposite because they deal with the entirely different situation of a defendant who is a Washington resident but is concealing himself or has departed to avoid service. *See Boes*, 122 Wn. App. at 569; *Carson*, 62 Wn. App. at 316; *Pascua*, 126 Wn. App. at 520; *Charboneau Excavating, Inc.*, 118 Wn. App. at 358.<sup>4</sup> In such cases, it makes sense that it would be more difficult for a plaintiff to demonstrate that he or she made an “honest and reasonable” effort to locate the defendant within the state but came to the belief that the defendant was avoiding service. Otherwise, plaintiffs could avoid the trouble of personally serving a defendant within the state by making a cursory attempt at service and then using service by publication.

As noted above, Buchan was under no obligation to serve the Austins personally in Italy. The Austins point out that CR 4 authorizes personal service outside the country, but it does not *require* it. On the contrary, to serve the Austins personally, Buchan would have had to comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, a costly and

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<sup>4</sup> One case involves an entirely different statute, the nonresident motorist statute, RCW 46.64.040. *See Martin*, 111 Wn.2d at 471.

complicated process. *See Broad v. Mannesmann Anlagenblau, A.G.*, 141 Wn.2d 670, 674-75, 677, 10 P.3d 371 (2000) (noting that the United States Supreme Court has held that Hague Convention preempts inconsistent methods of service prescribed by state law when the Hague Convention applies).

The Austins also imply that Buchan should have served the Austins by certified mail, citing *Ashley v. Superior Court In and For Pierce County*, 83 Wn.2d 630, 638, 521 P.2d 711 (1974). Brief of Appellants at 15. But no requirement exists that service by mail must be pursued instead of service by publication, even if it is more likely to provide the defendant with actual notice. *Ashley* involved an indigent plaintiff seeking a divorce from her nonresident husband who spent most of his time traveling, but occasionally visited his parents' house in Oregon. The plaintiff could not afford the cost of service by publication or of attempting to serve her husband personally in Oregon. Thus, the question before the court was whether the court could order payment of the costs of service costs from state funds. *Id.* at 633. To allow the plaintiff access to the courts to obtain a divorce, the court held that service by certified mail, which was cheaper, could be substituted for service by publication. *Id.* at 633, 637-38. Far from mandating service by mail, the court held that court approval would be required to substitute service by

mail for service by publication. *Id.* This is consistent with CR 4(d)(4), which provides that under the same circumstances that would justify service by publication, service may instead be made by mail, but only with court authorization.

The Austins state repeatedly that Buchan had their contact information and should have followed up on that information to determine their whereabouts. To begin with, the Austins have provided no evidence whatsoever that Buchan had their contact information. They did not submit even a single exemplar of an email or other written communication between them and Buchan. In any event, even if Buchan had been able to contact the Austins, its efforts would have led to one inescapable conclusion: The Austins were non-residents of the state of Washington. As the Austins put it, “Buchan could not have received plainer notice that the Austin’s (sic) were living abroad than their mother’s email stating so.” Brief of Appellants at 16. Once Buchan had this “plain notice,” its inquiry was at an end, and it would have been nonsensical for Buchan to continue to seek the Austins in Washington. An “honest and reasonable” effort to locate the Austins must be construed as what is “honest and reasonable” under the circumstances. Under the circumstances, it would have been patently *unreasonable* to expect Buchan to continue to seek the Austins in

Washington. Again, “[t]he law does not require the doing of vain and idle things.” *Cook*, 118 P.2d at 1072.

Moreover, even if there was some requirement for Buchan to attempt to locate the Austins in Europe, such an attempt would have been the quintessential “wild goose chase.” In her October 2010 email, Ms. Di Giacomo stated that one son resided between London and Milan, while the other was staying in Rome. CP 191. Later, in March 2011, Ms. Di Giacomo stated that one of her sons was in Germany while the other one was in Lazio. CP 196.

In short, Buchan had no obligation to serve the Austins personally in Italy or by certified mail. Service by publication was explicitly permissible and was accomplished in strict compliance with RCW 4.28.100: the Austins were indisputably not residents of the state of Washington; three of the enumerated statutory grounds for service by publication existed; and Buchan’s attorney filed the required affidavit establishing that he had made an “honest and reasonable” inquiry which informed him that the Austins were not residents of Washington. Indeed, it is difficult to imagine more appropriate circumstances justifying service by publication.

Further, it must be kept in mind that Buchan in no way attempted to ambush the Austins with a default judgment. Buchan’s attorney

emailed Ms. Di Giacomo the Complaint shortly after it was filed and urged her to hire an attorney.<sup>5</sup> Then, Buchan's attorney informed Ms. Di Giacomo that Buchan had obtained an order of default and planned to seek entry of a default judgment and foreclosure. Not only was the service by publication valid and effective, the Austins had actual notice of the lawsuit and, for whatever reason, did nothing to respond until a default judgment had been entered. The trial court properly denied the Austins' motion to vacate and motion for reconsideration.

**B. Arbitration Was Not Required.**

The Austins contend that this dispute should have been submitted to mediation and arbitration pursuant to their contract with Buchan. They are wrong, because that contract expressly exempted cases like this one, in which a third party was involved as a plaintiff or defendant, from arbitration. Moreover, the Austins waited six months after receiving notice of the lawsuit before raising the issue of mediation and arbitration. If they had had any right to arbitrate (which they did not), they waived it.

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<sup>5</sup> As discussed below, Ms. Di Giacomo was her sons' agent for all purposes relating to Buchan's work on the Austins' property. Notice to her of the lawsuit constituted notice to the Austins. See *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 268, 215 P.3d 990 (2009).

1. *The Arbitration Clause Does Not Require Arbitration in This Case.*

The mediation/arbitration provision at issue does not require arbitration here. The contract between the Austins and Buchan requires mediation and arbitration for certain disputes arising from the contract. But it expressly exempts actions involving as a plaintiff or defendant a person or entity that is not a party to the contract. In relevant part, the contract states: “At either party’s election, the following may be excluded from the mediation and arbitration provisions of this Article: . . . (b) any action involving, as a plaintiff or a defendant, a person or entity which is not a party to this Agreement.” CP 229. Here, J.P. Morgan Chase Bank, N.A. (“Chase”), the Austins’ lender, is a defendant. Thus, this action is not subject to alternative dispute resolution under the contract.

The Austins attempt to avoid the clear meaning of the arbitration provision by arguing that the “the common meaning of the dispute resolution provision is that any third party would be excluded from mediation and arbitration.” Brief of Appellants at 22. But they do not cite any authority to support that interpretation, and that is not what the provision says. It says: “any action” involving a third party as a plaintiff or defendant. The common meaning of this is that if the “action” involves a third party, then the entire “action” may be exempted from the arbitration clause at either party’s election. Moreover, the Austins’

interpretation is unreasonable. Parties agree to alternative dispute resolution because it is a faster and less expensive way to resolve disputes than litigation. Under the Austins' interpretation, if a dispute involving a third party arose, the Austins and Buchan would be required to engage in alternative dispute resolution and but pursue litigation separately with the third party, resulting in more, rather than less, time and expense.

The Austins also suggest that Chase was included as a defendant merely so that Buchan could avoid alternative dispute resolution. In reality, Chase was included as a defendant because this action is an attempt to foreclose upon a mechanics' lien, and Chase has a security interest in the property. RCW 60.04.171 provides that in an action to foreclose a mechanic's lien, "the interest in the real property of any person who, prior to the commencement of the action, has a recorded interest in the property, or any part thereof, shall not be foreclosed or affected unless they are joined as a party." Thus, it is standard practice, when seeking foreclosure of a lien, to join as a party every party with a recorded interest in the property. But regardless of *why* Chase was named as a defendant, the fact that it *was* named as a defendant means that the contract did not require arbitration here. Despite the policy favoring arbitration, parties cannot be forced to arbitrate disputes unless they have agreed to do so. *See Weiss v. Lonquist*, 153 Wn. App. 502, 510, 224 P.3d 787 (2009) ("As

arbitration is a matter of contract, parties cannot be compelled to arbitrate unless they agreed to do so.”); *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 898, 988 P.2d 12 (1999) (“[F]ederal case law confirms that, despite the strong policy in favor of arbitration, parties to a dispute will generally not be compelled to arbitrate unless they have agreed to do so.”)

Because this action involves as a defendant an entity that is not a party to the contract, Buchan elected not to pursue mediation and arbitration, and filed a lawsuit instead. Because the mediation/arbitration clause expressly does not apply, Buchan had an absolute right to do so, and the trial court was correct in declining to vacate the default judgment on these grounds.

2. *If the Austins Had a Right to Arbitration, They Waived It.*

The Austins had no right to demand mediation or arbitration in this case. But even if that right had existed, they would have waived it by failing to seek mediation and arbitration for more than six months after receiving notice of the lawsuit. See *Pedersen v. Klinkert*, 56 Wn.2d 313, 321, 352 P.2d 1025 (1960) (“It is clear that the parties to a contract having an arbitration clause may waive it; and a party does so by failing to invoke it in the trial court when an action is commenced against him on the contract.”); *Woodruff v. Spence*, 76 Wn. App. 207, 211, 883 P.2d 936

(1994) (remanding for a determination of whether defendant had notice of lawsuit before entry of default judgment and thereby waived his right to arbitrate by failing to seek arbitration).

The Austins received notice of the lawsuit on October 12, 2010, when Buchan's attorney emailed Ms. Di Giacomo and informed her that Buchan had filed a complaint. CP 191-93. Notice to Ms. Di Giacomo constituted notice to the Austins, because she was their agent in this matter. *See Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 268, 215 P.3d 990 (2009), *review denied* ("Generally, a principal is chargeable with notice of facts known to its agent.").

That Ms. Di Giacomo was the Austins' agent for purposes of the transaction with Buchan cannot be seriously disputed. For an agency relationship to have existed, the Austins need not have expressly designated Ms. Di Giacomo as their agent. An agency relationship exists, either express or impliedly, when one party acts under the direction and control of another. *See Deep Water Brewing, LLC*, 152 Wn. App. at 268. An agency relationship may arise even if the principal and agent do not have an understanding that such a relationship exists. *See Petersen v. Turnbull*, 68 Wn.2d 231, 234-35, 412 P.2d 349 (1966) (upholding trial court's finding that an agency relationship existed).

[T]he principal is bound by the act of his agent when he has placed the agent in such position that persons of ordinary prudence, reasonably conversant with business usages and customs, are thereby led to believe and assume that the agent is possessed of certain authority and to deal with him in reliance upon such assumption.

*Hoglund v. Meeks*, 139 Wn. App. 854, 867, 170 P.3d 37 (2007) (quoting *Mohr v. Sun Life Assur. Co.*, 198 Wash. 602, 603-04, 89 P.2d 504 (1939)).

Ms. Di Giacomo originally contracted with Buchan to rebuild her house. Though she gave the house to her sons and assigned the contract to them in August 2009, she continued to deal with Buchan and then Buchan's attorney on behalf of her sons. CP 154-55; CP 174-76; CP 178-79; CP 191-93. According to the Austins, she even retained the attorney that represented them before the trial court. Brief of Appellants at 9. The Austins admitted that Ms. Di Giacomo was handling the negotiations with Buchan with their authorization and on their behalf when they stated in declarations to the trial court that "Silvana Di Giacomo was handling the negotiations with Buchan as she originally was a party to the Contract." CP 138; CP 140. They have presented no evidence that was not the case. In fact, the Austins even acknowledged that Buchan could have informed them of the lawsuit's filing by emailing Ms. Di Giacomo — which Buchan's attorney had, in fact, done on October 12. CP 140; CP 191-93.

After receiving notice of the lawsuit through their agent, Ms. Di Giacomo, the Austins did nothing, while Buchan went to the expense of obtaining a default judgment. They did not raise the issue of arbitration until filing a motion to vacate the default judgment, six months later. Thus, if the Austins ever had a right to demand arbitration, they waived it.

**C. The Trial Court Did Not Abuse Its Discretion When It Declined To Vacate the Default Judgment.**

The trial court did not abuse its discretion when it declined to vacate the default judgment and denied the Austins' motion for reconsideration. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A court has discretion to vacate a default judgment where a defendant can demonstrate the following factors: (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). None of these factors favored vacating the default judgment. In particular, the Austins could not show mistake, inadvertence, surprise, or

excusable neglect, because they received actual notice of the lawsuit, and they failed to submit substantial evidence supporting a prima facie defense. These are the two most important of the four factors. *Id.* at 353.

1. *The Austins Were Not Surprised, and Their Neglect Was Not Excusable.*

The Austins acknowledge that, on October 12, 2010, Buchan's attorney emailed Ms. Di Giacomo and informed her that a complaint had been filed, attaching a copy of the summons and complaint.<sup>6</sup> But before the trial court, they took the incredible position that they had no idea that Buchan had filed a lawsuit against them until after entry of the Court's order of default in February 2011, and that Buchan never made any attempt to contact them: "Buchan made no attempt to contact Austin. Austin was unaware that [a] lawsuit had been started or that a default judgment was obtained." CP 132. They also took the even more unbelievable position that Ms. Di Giacomo herself was unaware of the lawsuit until February 2011. CP 271. The Austins never explained how they allegedly became aware of the lawsuit in February 2011, despite the fact that Ms. Di Giacomo's first email exchange with Buchan's attorney

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<sup>6</sup> The Austins now suggest that the Complaint was not actually attached. Brief of Appellants at 29, 6 n.1. But this is contradicted by the evidence. *See* Part III.B, *supra* (discussing evidence that Ms. Di Giacomo unquestionably received the Complaint).

after October took place in March, as did Ms. Di Giacomo's email exchange with the court clerk. CP 195-98.

On appeal they have backed away from that position that they were unaware of the lawsuit and now assert vaguely that they were "taken by surprise." Brief of Appellants at 30. The issue here is not whether Buchan's attorney's communications with Ms. Di Giacomo in October 2010 constituted service (they plainly did not), but whether the Austins knew about the lawsuit, such that their neglect in responding was not excusable. They did.

As explained above in Section IV.B.2, this notice to Ms. Di Giacomo constituted notice to the Austins because Ms. Di Giacomo was the Austins' agent in this matter. In fact, in their declaration in support of their motion to vacate the default judgment, the Austins acknowledged that Buchan could have informed them of the lawsuit's filing by emailing Ms. Di Giacomo — which Buchan's attorney had, in fact, done on October 12. CP 140; CP 191-93. It is plain that Ms. Di Giacomo received Mr. Brain's emails, as she responded to each of them in a way that indicates she had read the complaint, and took issue with Mr. Brain's suggestion that they retain an attorney. Ms. Di Giacomo even apparently copied one of her sons on her email response, giving that son (jackaustin@hotmail.it) actual knowledge of the lawsuit and of the advice

to retain an attorney. Failure to understand the implications of a summons and complaint does not constitute mistake, surprise, or excusable neglect. *See Hwang v. McMahill*, 103 Wn.App. 945, 952, 15 P.3d 172 (2000).

Thus, any contention that the Austins were “surprised” by the lawsuit is sheer fiction. While it was necessary for Buchan to resort to publication in order to obtain legal service on the Austins, they had actual knowledge of the lawsuit well before publication began. Then, the Austins had nearly six months — while Buchan was spending time and resources serving the Austins by publication and moving for an order of default — to retain an attorney, appear, and defend the action. There is no legitimate excuse for their failure to respond to this lawsuit.

2. *The Austins Did Not Act with Diligence.*

For the same reasons, it is incorrect to state that the Austins acted with due diligence. They were notified in October 2010 that the lawsuit had been filed, and they were notified in early March 2011 that Buchan planned to seek entry of a default judgment. They had nearly six months after receiving notice from Buchan’s attorney about the pendency of the lawsuit to retain an attorney and defend the action. Instead, they sat on their rights and did nothing until a default judgment had been entered. Meanwhile, Buchan itself was spending significant time and resources serving the Austins by publication, and otherwise attempting to protect its

own rights and collect the monies due and owing. All of this could have been avoided if the Austins had simply followed Buchan's attorney's advice by retaining an attorney or, better yet, turning over the insurance funds they held in trust for payment to Buchan.

3. *The Austins Presented No Evidence of a Meritorious Defense.*

To vacate a default judgment, a defendant must show substantial evidence supporting a prima facie defense. *White*, 73 Wn.2d at 352. In their motion to vacate the default judgment, the Austins submitted *no* evidence, much less *substantial* evidence. The Austins submitted two identical declarations containing nebulous assertions, unsupported by factual background or evidence, that they had some unspecified dispute with Buchan about the amounts due and owing. CP 137-40. Furthermore, those identical declarations acknowledged that the Austins never personally dealt with Buchan, and that their mother handled all negotiations related to Buchan's work and the parties' contract, and therefore they could not possibly have had any firsthand, personal knowledge of the matters they vaguely alleged. CP 138, 140.

For example, both of the Austin brothers stated that "Buchan failed to perform certain items in the contract, failed to adequately perform other items, and failed to provide adequate invoices for certain items." *Id.* They

did not identify a single “certain item” or “other item.” The Austin Declarations also stated that “Buchan’s negligence resulted in damages that I have not been compensated for.” *Id.* at ¶ 8. But, again, the Austins did not even begin to describe how Buchan was negligent, or how the Austins were damaged. The Austins did not offer even a single example of a negligent act on the part of Buchan. Likewise, the Austins stated: “Certain amounts were paid directly to subcontractors for work that was contemplated in the Contract.” *Id.* at ¶ 9. Again, the Austins provided no support for this assertion. They did not bother to explain what these “certain amounts” were, to whom they were paid, or how such alleged payments affect the amounts the Austins are obligated to pay to Buchan. Finally, both declarations stated, “I have a good faith dispute with Buchan as to the final amount owing to Buchan.” *Id.* at ¶ 11. But, as with their other contentions, the Austins provided no factual basis for the alleged “dispute,” nor did they even bother to describe the nature of the dispute. Those declarations hardly constituted “substantial evidence.” As noted above, even if the Austins had provided actual facts to support their vague claims, they plainly had no personal knowledge related to such facts. As both of the Austins admitted, “Silvana Di Giacomo was handling the negotiations with Buchan . . . .” *Id.* at ¶ 10. And, indeed, Ms. Di Giacomo is the only representative of the Defendants with whom Buchan

ever had any dealings. CP 155. Thus, in addition to a lack of showing on the other factors, the Austins did not present substantial evidence of a prima facie defense.

Then, when they moved for reconsideration, the Austins submitted a declaration from Ms. Di Giacomo detailing their alleged disputes with Buchan in more detail. CP 269-71. They also submitted additional affidavits from the Austins, stating that “it was impossible to obtain additional affidavits to rebut Buchan’s response . . . in light of the reply deadline and the fact that the Austins reside out of the country.” CP 213. The Austins’ new affidavits simply repeated the information in their mother’s declaration regarding disputes with Buchan, without any supporting documentary evidence. *Compare* CP 270 *with* CP 273 and 276. It is the evidence in these declarations upon which they now rely to show that that they submitted substantial evidence of a prima facie defense. But even if these declarations constitute such evidence, the trial court did not abuse its discretion when it denied reconsideration. Despite the Austins’ claims, Ms. Di Giacomo’s declaration did not constitute “newly discovered evidence” that the Austins could not with “reasonable diligence” have produced when they moved to vacate the default judgment. *See* CR 60(b)(4); CP 209-10, 212. They claimed that Ms. Di Giacomo had not been available to provide a declaration when they moved

to vacate the default judgment, but they did not explain why she had been unavailable. *Id.* A motion for reconsideration does not entitle parties to another opportunity to submit evidence that was available but not offered before. See *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999) (holding that the trial court did not abuse its discretion in denying a motion for reconsideration of summary judgment decision where additional evidence submitted had been available at the time of the summary judgment); *Adams v. Western Host, Inc.*, 55 Wn.App. 601, 608, 779 P.2d 281 (1989) (“The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence.”). Therefore, it would be inappropriate for the Court to consider the statements contained in Ms. Di Giacomo’s declaration.

In any event, those statements are just that: self-serving statements unsupported by any documentary evidence. Other than Ms. Di Giacomo’s unsupported assertions, there is no evidence that there was a legitimate dispute between the parties regarding the monies owing. On the contrary, Ms. Di Giacomo’s statements are belied by the fact that she sent a check to Buchan in the amount of \$184,699.51 — given to her by the insurance company for payment to Buchan — which she designated “final payment house.” Thus, Ms. Di Giacomo has tacitly admitted that she owed at least

that much. Nor did Ms. Di Giacomo submit any evidence in support of the contention that she had some agreement with Buchan that it would reimburse funds that were not actually owing. Indeed, the contention is contradicted by the fact that Buchan balked at the “final payment” notation, because it believed more was owing.

Furthermore, if — as the Austins contend — the full \$184,699.51 was not due and owing, it stands to reason that all amounts not owing should have been returned to Farmers, the insurance company. It was Farmers who paid the money for Buchan’s work, not Ms. Di Giacomo or the Austins. Nowhere do the Austins state that they returned any funds to Farmers, which they should have if the monies were not legitimately owing. It is a nice windfall for Ms. Di Giacomo and her sons: Farmers paid nearly \$185,000 to pass along to Buchan. Instead of paying Buchan, Ms. Di Giacomo conveniently disputed that the funds were owing, and kept the payment for herself.

4. *Buchan Will Suffer Substantial Hardship if the Court Vacates the Order of Default and Judgment.*

The Austins take the position that Buchan will not suffer any hardship if the Court vacates the order of default and default judgment, and that the only effect will be that Buchan will now have to arbitrate or litigate its claims. The Austins are mistaken. Indeed, the hardship Buchan

has already suffered in attempting to get paid — and to get the Austins' attention — is a precursor to the additional, substantial hardship Buchan will suffer if the default judgment is vacated.

Because of the Austins' absence from the country, it has been particularly difficult for Buchan to protect its rights and get paid what it is owed. Buchan had to resort to long-distance email correspondence in its efforts to persuade Ms. Di Giacomo to pay the insurance funds, and then had to resort to service by publication simply to obtain legal service on the Austins, even though their agent indisputably had actual notice of the lawsuit. The Austins could easily have retained an attorney 10 months ago to accept service on their behalf, but instead took advantage of their absence from the country to avoid legal process. Meanwhile they and their mother have had all the benefit of the insurance monies they hold in trust for payment to Buchan.

If the default judgment is vacated, this hardship will continue. Buchan will be faced with the prospect of litigating against an absent defendant who, until now, has shown no inclination to respond, let alone to participate in the process of litigation in Washington. If the default judgment is vacated, Buchan will have the right to take the Austins' depositions to flesh out the alleged factual basis for the Austins' statements. But based on the Austins' actions thus far, it would be highly

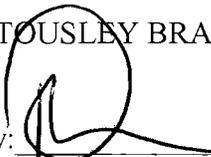
surprising if the Austins (or their mother) were to voluntarily return to Washington for their depositions without Buchan having to undergo some further legal process. Similarly, based on their past conduct, there is no guaranty that, once the default judgment is vacated, the Austins will not simply dismiss their attorney and continue to take advantage of their absence from the country, thereby continuing to thwart Buchan's efforts to protect its rights, and continuing to run up Buchan's legal fees. Buchan would be forced back to where it was 10 months ago and to essentially start the whole process over again. Simply stated, that is hardship.

#### IV. CONCLUSION

For the reasons set forth above, the court should affirm the trial court's order denying the motion to vacate default judgment and the trial court's order denying reconsideration.

RESPECTFULLY SUBMITTED this 31st day of August 2011.

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**CERTIFICATE OF SERVICE**

I, Wendy L. Cruz, hereby certify that on the 31st day of August, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

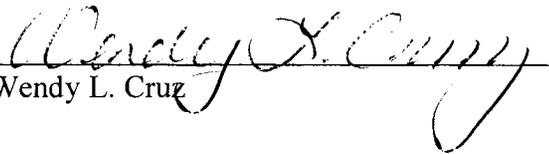
Peter Lohnes  
TALMADGE FITZPATRICK  
18010 Southcenter Parkway  
Tukwila, Washington 98188

- U.S. Mail, postage prepaid
- Hand Delivered
- Email
- Facsimile

*Attorney for judgment debtors*

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 31st day of August, 2011, at Seattle, Washington.

  
 Wendy L. Cruz

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 COURT OF APPEALS DIV I  
 STATE OF WASHINGTON  
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