
COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION ONE

RICHARD AZPITARTE, *appellant*

v.

JASON BISCAY, JANE DOE BISCAY and the marital community composed thereof and
MARVIN BURNETT, JANE DOE BURNETT, and the marital community composed thereof

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STATE OF WASHINGTON
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ON APPEAL FROM KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON, THE HONORABLE JUDGE JAMES CAYCE

OPENING BRIEF

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Table of Contents

	PAGE
<u>ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW</u>	1
A. Assignments of error	1
B. Issues relating to the Assignment of error.	1
STATEMENT OF THE CASE	2
A. Procedural Facts	2
B. Substantive Facts	10
<u>SUMMARY OF THE ARGUMENT</u>	18
ARGUMENT	19
<u>1. THE COURT MADE INSUFFICIENT FINDINGS WHICH PRECLUDE MEANINGFUL REVIEW.</u>	19
<u>2 THE DEFENDANTS SUPPLIED UNRELIABLE DECLARATIONS CONTAINING MULTIPLE MISPRESENTATIONS WHICH PRECLUDED SETTING ASIDE THE ORDERS OF DEFAULT OR THE GRANING OF SUMMARY JUDGMENT</u>	21
<u>3. THE DEFENDANTS SUBMITTED INSUFFICIENT EVIDENCE FOR THE GRANTING OF SUMMARY JUDGMENT AS WELL AS ENGAGED IN PROCEDURAL IRREGULARITIES THAT PREVENT THE DEFENDANT FROM HAVING A FAIR SHOT TO DEFEND.</u>	31

CONCLUSION

34

**ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR
REVIEW**

A. ASSIGNMENTS OF ERROR

1. The court erred in not ruling on the motions to set aside a default judgment with respect to Burnett
2. The court erred in not ruling on the motion to set aside an order of default with respect to Burnett.
3. The court erred in setting aside the default judgment against the Biscays.
4. The court erred in setting aside the order of default against the Biscays.
5. The court erred in granting summary judgment to the defendants.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court present findings and conclusions that allow for meaningful review?
2. Did the Biscays present credible declarations supporting their motions to set aside the default judgment and orders of defaults?

3. Did the court error in granting summary judgment when the plaintiff could not attend oral argument and the defendants never served a key declaration on him for use in both the motion to set aside the default orders and the motion for summary judgment?

STATEMENT OF THE CASE

A. PROCEDURAL FACTS

1. On March 26, 2012, Richard Azpitarte filed suit against Jason Biscay and Marvin burnett for conversion and replevin. (CP 1-5)

2. On May 29, 2012, the complaint was amended to include allegations of fraud. (CP 6-9).

3. On May 30, 2012, Jason Biscay, Jane Doe Biscay, and Marvin Burnett were served by Fred Salas. (CP 23-34)

3. On June 18, 2012, an answer was filed by Jason Biscay on behalf of himself and the marital community.. (CP 10-12)

4. On June 21, 2012, a motion for default was filed against Burnett. (CP 19-22). An order of default was signed the same day. (CP 17-18)

5. On May 16, 2013 a motion for order to compel was filed by the plaintiff. (CP 35-55).

6. On May 20, 2013, a motion to change the trial date was filed by the plaintiff. (CP 56-61)

7. On May 24, 2013, the court sent out correspondence to all parties concerning the pending trial date. (CP 62-63)

8. On June 6, 2013, an order changing the trial date to 11-18-2013 was signed (CP 64-65). An order denying the motion to compel was signed the same day. (CP 66-67)

9. On June 7, 2013, a new case schedule was issued. (CP 68-69)

10. On August 8, 2013, plaintiff filed a response. (CP 70)

11. On August 26, 2013, a new motion to compel was brought (CP 71-90).

12. On September 3, 2013, a reply was filed by the plaintiff, noting that no response had been received which included a certificate of mailing issued by the post office showing the defendant had been notified by mail.. (CP 91-93).

13. On September 4, 2013, the court issued an order to compel. (CP 94-95)

14. On September 18, 2013, the court sent to the parties an order requiring a joint pretrial report. (CR 96-99)

PETITIONER'S OPENING BRIEF - 3

15. On September 24th, 2013, the plaintiff filed a motion for default based upon failure to respond to the order compelling discovery (CR 100-106).

16. On October 3, 2013, the plaintiff filed a reply stating no response had been sent. (CR 107.)

17. On October 7, 2013, an order of default was signed as to the Biscay defendants.(CR 108-109)

18. On November 1, 2013, a motion for a default judgment against defendant Burnett was filed (CR 110-116)

19. On November 6, 2013, a default judgment in the amount of \$110,000 was filed against Burnett.(CR 117-118)

20. On December 20, 2013, a Motion for Judgment was brought against the Biscays. (CR 119-125)

21. On December 30, 2013, a reply was filed with the court stating that no reply had been received. (CR 126)

22. On January 7, 2014, a judgment was signed against the Biscays. (CR 127-129).

23. On May 19, 2014, the Biscays moved to set aside the default judgment, claiming they had not been notified of any of the motions or discovery. The motion was noted for June 25th- (CR 130-152)

24. On May 22, 2014, Burnett moved to set aside the default order claiming erroneously, that the default order was dated a year later than it was. In his motion, he did not deny that he had been served with original process, and he never explained why he didn't file a notice of appearance. (CR 153-166)

25. On June 16, 2014, the defendants noted a motion to set aside the default orders and judgment on June 25th, 2014. (CR 167-172).

26. On June 23, 2014, Christopher McLeod, agreed not to oppose a continuance to allow plaintiff to respond to the motion to set aside. (CR 173-175).

27. On June 24, 2014, Azpitarte claims he still has not seen the motion to set aside, files partial response. (CR 176-187).

28. On June 26, 2014, the court sets aside the judgment for the Biscays. No ruling is made on the judgment against Burnett.(CR 188-189)

29. On July 14, 2014, plaintiff brings a motion to compel answers to the interrogatories. Plaintiff claims defendants refused to respond to his letter for a discovery conference.(CR 190-213)

30. On July 15, 2014, defendant's counsel claims he waited for phone call from plaintiff on discovery conference. (CR 214-223). An answer to the complaint was filed that same day (CR 224-225).

31. On July 21, 2014, plaintiff stated he attempted to call defendant's counsel on several occasions to confirm the discovery conference, but never got a call from counsel confirming it. The last time he called, secretary told him not to call anymore or she would file harassment charges and that counsel would call him. Consequently he waited at time of discovery conference, but never received call. He did not call counsel because he did not want secretary to file harassment charges. (CR 250-256)

32. On that same date, defense counsel brought a motion to dismiss the default orders for the Biscays and Burnett, noting it for August 1, 2014. (CR 226-249)

33. On 7-24-2014, plaintiff filed a supplemental declaration stating he had served the defendants with interrogatories with original

process and the defendants acknowledged this by stating in their answer they would not answer the interrogatories. (CR 257-258)

34. On 7-28-2014, plaintiff filed another supplemental declaration stating two of the defendants had not filed any responses to the interrogatories, while the third contained numerous objections that were untimely. (CR 259-260).

35. On 7-30-2014, defendants filed for summary judgment noting it for September 4, 2014. (CR 261-321).

36. On that same date, Richard Azpitarte filed his response to motion to set aside defaults, noting that the time for setting aside the default order for Burnett had long passed. He pointed out that the defense counsel had misrepresented to the court the wrong date that the court order was signed to make it appear as if it were less than a year. He also pointed out that he had certifications from the post office, proving he had mailed the 3 most important documents to the Biscays, and that he had declarations of service on all the rest. He also pointed out that there were mailings from the court that the Biscays hadn't explained why they were ignored. (CR 322-329).

37. On 8-1-2014, a declaration of mailing was filed by the defendants, claiming that all the documents in support of the motion for summary judgment had been mailed to the defendants. (CR 333-334)

38. On 8-1-2014, the court granted the motion to set aside the default order with respect to the Biscays. The court also set aside a default order that does not appear in the record, that is one year off the order actually entered for Burnett. (CR 337-338).

39. On 8-1-2014, the court denied the plaintiff's motion to compel. (CR 335-336)

40. On 8-27-2014, the defense counsel filed a declaration opposing summary judgment. (CR 339-350)

41. On 9-3-2014 plaintiff filed his reply to defense counsel's declaration claiming he had not received all of the documents for summary judgment. (CR 351-355)

42. On 9-23-2014 defense counsel filed a motion to strike the defendant's response. (CR 356-363).

43. On 9-23-2014, the plaintiff filed a supplemental reply stating the motion for summary judgment should be denied because the defendants filed it against the complaint instead of the first amended

complaint, which was the operative complaint. (CR 364-372). He also filed a declaration giving his facts opposing summary judgment (CR 367-372)

44. On 10-1-2014, the defendants filed a declaration of mailing showing which documents the plaintiff had been mailed. (CR 373-383). There is no indication he was ever mailed Declaration of Christopher McCleod (CR 261-314)(doc. 69)

45. On 10-2-2014, the plaintiff filed an objection over the hearing on summary judgment, claiming that he defendants would not accommodate him by setting the hearing at a time he could attend, and that he still had not received all the documents that were used to decide the motion to set aside the default orders and the motion for summary judgment. (CR 384-385)

46. On 10-3-2014, the court granted the motion for summary judgment. (CR 386-387).

47. On 10-13-2015, the plaintiff filed a timely motion for reconsideration pointing out that only one default judgment had been set aside and that the court had issued an order setting aside the default only with respect to the Biscays.. (CR 388-398)

48. On 10-16-2014, the plaintiffs filed a declaration by Elizabeth McLeod generally alleging that all documents on file have been mailed, but did not provide a specific declaration as to when and how the Declaration of Christopher MaLeod Doc 69 was served. She also claimed the process server said he was Richard Azpitarte and had also talked to him on the phone.(CR 399-400)

49 On 10-30-2014 John Scannell filed a declaration saying he had never talked to Elizabeth McLeod on the phone nor had told her he was Richard Azpitarte. (CR 401-402)

50. On 10-31-2014, the court denied the Motion for Reconsideration. (CR 403-404)

51. On 12-1-2014, plaintiff filed a timely notice of appeal. (CR 405-414)

B. SUBSTATIVE FACTS

1. Before August of 2004, Richard Azpitarte was a collector of older cars. Richard Azpitarte collected his first one when he was sixteen and had been continually collecting them for over 40 years. His specialty was the so-called "muscle cars" that were made by United States manufacturers between 1964 and 1972. Cars in good condition in this era

typically sold for between \$25,000 up to \$200,000 in 2004.. He had approximately 30 cars of this caliber and maybe another 30 cars of the same vintage but not quite as good condition. He also had a number of cars that he referred to as "runners". Runners were cars that ran, that he picked up at auctions, but were not collector cars. He bought them because they were bargains, and legal running cars. He also had other vehicles such as tow trucks ramp trucks, trailers and tow dollies that were that were used to service the collection. The value of these vehicles ranged from \$25,000 on up. The 1984 Chevy Ramp Truck, Vin #1GCHC33W8ES122693 that is the subject of this suit was one such vehicle.

2. He purchased this truck on October 12, 1998, from an out of state owner and initially spent \$60,000 to bring it into the condition it was in at the time the defendants stole it. It was a custom made Hodges car hauler with a 454 engine, and was number matching. It is not a car that could easily be purchased locally. He had to make a special trip to Indiana to get this car. To a classic car collector, the fact that it was number matching (all major parts have original VIN) make it significantly more

valuable. This car had been painted with a new red paint job to match the hauler.

3. The collector cars he had were valuable, not only because of their condition, but because they were “number matching vehicles.” This means that all major components were from the original car. Also, the rest of the vehicle was made up of Original Equipment by the Manufacturers. (hereinafter referred to as “OEM” parts). Since the cars were more correct desirable if they were “number matching” and entirely OEM parts, he also collected OEM parts. Each of the collector cars had valuable OEM parts in their trunks. The truck that is the subject of this suit also contained OEM parts for other cars.

4. For years the county had been claiming that his collector car collection was a “nuisance”. They tried for several years to make him get rid of my collection. They were generally unsuccessful until early 2004 when the County passed an ordinance that made it easier for them to declare vehicles a nuisance. He immediately made an agreement with county officials vehicles to fix up my property by eliminating all excess junk tires and reducing the number of vehicles on his property. The agreement was to reduce the number of vehicles to 12 or less.

5. By late August, 2004, he had moved virtually all of the tires and refuse and approximately 20 cars, when unexpectedly and in violation of the agreement, the police showed up to seize all his remaining cars on August 26th and 27th, 2004. The County had Jony McCall of Cedar Rapids towing supervise the towing of all the vehicles off his property.

6. By this date, he had already given the County the Vin numbers, make and model of twelve vehicles that were intended to be stored on the property. A list of those vehicles was attached his declaration. It was also his understanding that a number of other vehicles would be allowed to be parked in the parking spots around his property. When the tow began, he told the towing co-ordinator, Bill Turner that he was actually entitled to 18 cars. However, Turner ignored Azpitarte completely, and ordered all the cars towed on his property and on the right of way.

7. Jony McCall, Cedar Rapid Towing, CW Williams Construction Company, were there and were contracted to tow the cars. The supervising tow company, Cedar Rapids Towing LLC never provided Azpitarte any notices of right to appeal the tows as required by RCW 46.55.120(2)(a). Therefore, there was no opportunity for him to appeal the tows before the vehicles were sold, as required by RCW 46.55.120(2)(b).

Whenever he attempted to get an appeal form whether it be from the towing companies or agents of the county, he was refused.

8. When the county had all the vehicles towed, he immediately took steps to regain possession of them, including the truck that was at issue in this suit, with the goal of storing most of them elsewhere and coming into compliance with the new county code. Azpitarte immediately went to the tow lot where Cedar Rapids Towing was supposed to have towed the vehicles. None of the vintage muscle cars were there, nor was the truck that is the subject of this suit. Jony McCall refused to allow Azpitarte to redeem the parts that were in the cars or buses that were in the lot.

9. Azpitarte attempted to redeem the vehicles but all the agents for the county claimed that he would have to go through Cedar Rapids Towing LLC to redeem them. On September 24, 2004, he paid \$25,000 to Cedar Rapids Towing, which Jony McCall agreed was enough to pay for the redemption rights for all vehicles and property stored within vehicles. Jony McCall and Cedar Rapids Towing assured Azpitarte personally that \$25,000 was sufficient to redeem all the vehicles. In fact, he agreed that it

would pay for the entire abatement, with only approximately \$10,000 being used to pay for the tows, the rest for storage costs.

10. However, after paying the \$25,000, Azpitarte only received a fraction of the vehicles and none of his valuable muscle cars nor the truck in this suit. Whenever he went to the yards to view the cars, the more valuable collector cars and this truck were always missing.

11. An AVR was used by Biscay to obtain title to the car after it was stolen. It claims there was an auction on June 28th 2005 where the car sold. Azpitarte was carefully monitoring Cedar Rapids Towing at that time to see if there were any auction that was listed for it. Under state law, if the auction was held anywhere except the tow yard, there would have to be signs posted at the yard to; showing where the auction was held. He found no evidence that this car was auctioned at all.. Under RCW 46.55, the only way the AVR could be used to transfer title was through a public auction. However, months after this auction was supposedly held, Azpitarte saw the Hauler parked on the side of the highway in Maple Valley. He contacted the state patrol and asked if he could repossess the car because he still had title and they advised against it. The State patrol could verify that it was parked in King County at this time. Azpitarte was

also told by Officer Helton of the State Patrol, there was no way for them to sell this car without notifying Azpitarte because he had inspected the premises on May 18, 2005 and found no AVR for this vehicle nor did he find this vehicle stored on the lot as required by State law. Helton advised Azpitarte to license the vehicle in Washington, to give clear public notice that the vehicle belonged to me. This Azpitarte did on September 6, 2005.

12. Another suspicious thing about this AVR is that it claims that the car was abandoned on March 16, 2005, even though the car was towed on August 26, 2004. All the other signed AVR's he had obtained for these tows show the cars were abandoned on September 2, 2005. The only exception was one unsigned AVR that was used to transfer title to Gayle Sauve. Gayle Sauve denies purchasing that vehicle.

13. Also the AVR claims that the report was made on March 16, 2005. Within just a few days of earlier reports, the cars were inspected by McMeins. However, this one was not inspected until June 2, 2005. Azpitarte received information from the owner of the vehicle in Montana that he used as a comparison in the earlier declaration, that the truck in Montana had brown seats as well. This would mean it was highly likely that the hauler was transported out of state after it was stolen because the

chances of another truck having the same matching color scheme with brown seats from a formerly tan truck is remote. In addition, at the time the car was stolen, it contained valuable original out of state license plates and custom OEM parts worth thousands of dollars. Azpitarte later saw Biscay selling similar parts at a swap meet, but because he refused to answer discovery, it has become more and more difficult for Azpitarte to amend the complaint to include additional causes of action.

Azpitarte first learned of Biscay's involvement in the fraud when he obtained a public disclosure report showing the falsified AVR on March 27, 2009 at 10:27 a.m. when my attorney received a fax showing the fraud, and through followup documents in a report prepared by Officer Helton received a few days later showing there was strong evidence there was no auction.

14. Azpitarte claims the defendants still have not delivered the 50 page declaration that Azpitarte have stated he has never received and they admit were not served with the summary judgment papers. They have yet to provide any kind of proof of service it was ever served on him. (All substantive facts were taken from Azpitarte declaration of 9-23-2014 CR 367-372)

SUMMARY OF ARGUMENT

After multiple rounds of game-playing over two years supported by submitting perjured declarations to the court, the defendants argued for having motions for default set aside based upon an impossible set of facts. The defendants claim that they received nothing at all from the plaintiff for two years. They claimed that a certification of mailing that was stamped by the post office personnel proving postmark was “unreadable”, when the record showed clearly that it was readable.

They continue to ignore the existence of two other certificates of mailing that have been since been submitted by plaintiff to the court proving that the two next important mailings also had certificates of mailing proving they were mailed. They and their counsel have no explanation as how this could have occurred when the defendants have claimed they received nothing when they claim perfect mail service except for Mr. Azpitarte. They have no explanation as to why they did not receive notifications from the court over an impending trial.

The defendants submit additional declarations submitting additional counts of perjury in a desperate attempt to prove that somehow, they purchased these documents in Thurston County, when the documents

he used to claim the truck were supposed to have been generated at a supposed auction held in King County.

The plaintiff objects to any findings based upon these disputed declarations. There are facts that cannot be resolved on disputed declarations or even summary judgment. The plaintiff all actions taken by the trial court be reversed because the facts upon which it is based are established with unreliable affidavits.

ARGUMENT

1. THE COURT MADE INSUFFICIENT FINDINGS WHICH PRECLUDE MEANINGFUL REVIEW.

In general, a trial court must make findings of fact and conclusions of law sufficient to suggest the factual basis for its ultimate conclusion.

Groff v. Dep't of Labor & Indus., 65 Wn.2d 35, 40, 395 P.2d 633 (1964).

The degree of particularity required in these findings 'depends on the circumstances of the particular case, the basic requirement being that the findings must be sufficiently specific to permit meaningful review.' *In re*

Dependency of C.B., 61 Wn. App. 280, 287, 810 P.2d 518 (1991) (citing

In the Detention of Labelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986).

The purpose of the requirement of findings and conclusions is to insure the

trial judge 'has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made.' *Labelle*, 107 Wn.2d at 218-19 (quoting *State v. Agee*, 89 Wn.2d 416, 421, 573 P.2d 355 (1977)). Here the court did not present sufficient findings to suggest the factual basis for its ultimate conclusions.

First there was no finding or order with respect to Burnett's motion to set aside the default judgment. The order setting aside a default order made no sense as it had the wrong date. The court gave no reasons as to why it was setting aside a non-existent order instead of ruling on a motion to set aside an order that was almost two years old and therefore could not be set aside for CR 60 (b)(1)(2) or (3).

With respect to the Biscays, there was only a general finding that the defendants were not notified of some motions but the court does not say with specificity which deliveries were not made. Azpitarte submitted declarations of service of all documents and 3 documents were additionally verified with certificates of mailings issued by the post office. The court gave no reason why it ignored this credible evidence submitted

by Azpitarte in lieu of a virtually impossible set of facts suggested by the defendant's declarations.

The same is true for the order on summary judgment. The court gave no reason as to why it ruled the way it did in view of the disputed facts that should have precluded summary judgment. It also gave no reason why it ruled without Azpitarte being served a key declaration or was not allowed to attend because of the time of day the motion was heard.

**2 THE DEFENDANTS SUPPLIED UNRELIABLE
DECLARATIONS CONTAINING MULTIPLE
MISPRESENTATIONS WHICH PRECLUDED SETTING ASIDE
THE ORDERS OF DEFAULT OR THE GRANING OF SUMMARY
JUDGMENT.**

In the case of Mr. Burnett, the time for setting aside a default order has long passed for filing it on the basis of excusable neglect. That order was signed on June 21, 2012, almost two years ago. He claims to be moving on the basis of fraud, but it is unclear to the undersigned what the basis of the fraud that he and his counsel are alleging.

First, it is important to note that in Mr. Burnett's declaration he never once claims that he indicated that he intended to defend the suit when he called up the plaintiff. This is consistent with the declaration of the plaintiff, who testifies that Mr. Burnett told him that he was not going

to defend the suit because of the high cost of attorneys. Although Mr. Burnett claims that he sold the vehicle, he would not tell the plaintiff who he sold it to.

Mr. Burnett apparently wants to ride the coattails of the his fellow defendant by claiming that plaintiff Azpitarte made representations to the court that he mailed certain documents to the defendants. The problem with this alleged fraud by the plaintiff with respect to Mr. Burnett, is that the plaintiff never alleged that he mailed anything to Mr. Burnett. There was no need to. Mr. Burnett had already indicated by his words and actions that he had no intention of defending this suit. He never appeared in the action either orally or in writing. Without this fraud, Burnett has no basis for setting aside the default order. Without setting aside the default, he has cited to nothing that would allow him to set aside the default judgment under the two reasons given in CR 60 he cites to. He has a different opinion as to the value of the automobile, but there is nothing that indicates fraud on the part of Mr. Azpitarte as to the size of the judgment. Since he was not entitled to any further notice after the default was entered, he can point to no action by him that would constitute excusable neglect except for that related to the original default, which

admits to having been served and for which the time to set aside has long passed.

Washington cases have long held that considerations of the regularity and stability of judgments entered by the court require that "after a judgment has been rendered upon proof made by the sheriff's return, such judgment should only be set aside upon convincing evidence of the incorrectness of the return." *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); See also *Dependency of A.G.*, 93 Wn. App. at 277 (imposing burden of clear and convincing showing "on the person attacking service," but in the context of a motion to set aside a judgment, relying on *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) (itself resolving a postjudgment challenge to service), review denied, 118 Wn.2d 1022 (1992)); *Vukich*, 97 Wn. App. at 687 (addressing motion to set aside order of default and judgment and quoting *Woodruff*, 88 Wn. App. at 571 for its holding that "'A facially correct return of service is presumed valid and, after judgment is entered, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular'" (emphasis added)); *Woodruff*, 88 Wn. App. at 571 (itself addressing a motion to set aside judgment, citing *Miebach v. Colasurdo*, 35 Wn. App.

803, 808, 670 P.2d 276 (1983) (addressed to vacating a default judgment and citing, as authority, *Allen*, 104 Wash. at 247), aff'd in relevant part, 102 Wn.2d 170, 685 P.2d 1074 (1984)).

As far as the Biscays are concerned, the story concocted by them and their counsel makes no sense let alone meet the standard of clear and convincing evidence.. They claimed not to have received anything in over two years, but admit they have seen a certificate of mailing that was stamped by the post office. Their only explanation is that the certificate is “unreadable”

Counsel for the defense has yet to explain how a certificate of mailing could be generated by the plaintiff with a post office postmark and a machine generated postage paid stamp and yet somehow not count because some attorney considers it unreadable.

In fact, counsel should be well aware that there is no requirement under the rules to produce any certificates from the post office when obtaining an order by motion. There is only a requirement to produce a certificate of mailing by the plaintiff, which the plaintiff has done at each juncture of the case.

Biscays of the motion to compel. He also obtained certificates of mailing. These certificates, hand stamped by the post office, and containing prepaid machine generated postage stamps are attached. The defendants claim they didn't receive anything at all from the defendant which would include an envelope with Mr. Azpitarte's and the Biscay's address on it. The fact that the defendants are committing perjury should be obvious.

Misrepresentation #2: Mr. Biscay claims that he purchased this vehicle in Thurston County. But the AVR that shows the bill of sale shows that he obtained it at an auction conducted in conformance with RCW 46.55 and WAC 308.31. It contained a sworn statement attested to under the penalty of perjury that the automobile was purchased in June of 2005. Biscay cannot explain how he could use an obviously perjured document to obtain Title. How will the defendants explain a towing company doing business in King County would suddenly decide to hold an auction in Thurston County? Why would Cedar Rapids go to the expense of transporting vehicles to Thurston County for an auction, then come back and notarize the bills of sale in King County?¹

¹ Note that the caption to the affidavit which was signed to authenticate the sale on the AVR says King County.

In fact, even though the vehicle was supposedly sold at an auction in June 28th, 2005, the plaintiff reports that he still saw it parked on the side of the road in Maple Valley in January of 2006. When he contacted the state patrol that he still had title and if he should reclaim it, they advised him not to.

Misrepresentation #3: The Biscays claim they knew nothing more about the lawsuit until early 2014. But the court record shows that the parties were notified of pretrial requirements in September of 2013 by the court. How do the Biscays explain this? Did the court join in a conspiracy composing of the plaintiff and the post office to defraud the Biscays?

Misrepresentation #4: Defendants counsel claims that it was inconsistent for the plaintiff to claim that that an LR 37 conference was attempted a year earlier and use that as his LR 37 conference. The record shows clearly that exactly what the plaintiff was attempting to do in his May 13, 2013 letter. The court wanted him to try again and he did that by sending another letter. The Biscays, in their answer, gave no other way for them to be contacted except by mail. The court was aware of this when it issued the default.

Misrepresentation #5: The Biscays, in their answer, made it clear they had no intention of answering the interrogatories that were served upon them. Now, after two years of stonewalling by refusing to respond to the motions and to the court, they want this court to believe that they would have answered them if they had only been given notice (which the record shows they were given.) They claim that the plaintiff has not been prejudiced but he has already produced photographic evidence that the stolen car was moved to Montana, which means it is now more difficult to obtain evidence that the Burnetts and Biscays were involved in a federal crime, by transporting out of state a stolen vehicle. 18 U.S. Code § 2312 -

Transportation of stolen vehicles:

Whoever transports in interstate or foreign commerce a motor vehicle, vessel, or aircraft, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both.

Since the Biscays and Mr. Burnett were successful in stonewalling the plaintiff's discovery for over two years, he has lost valuable time in trying to obtain information concerning the stolen vehicle and possible additional causes of action under 18 USC §§1961-68 (Civil RICO) as well

as causes of action for parts and original license plates that were contained in the vehicle..

Misrepresentation #6: The Biscays and their counsel claim on page 4 in their motion in paragraph O and Q, that he filed for a motion on September 13, 2013 which refers that an order was served that was not created until a month later. In fact, the motion was filed for on September 21, 2013, and referred to the order signed on September 4, 2013, not October 4, 2013.

Misrepresentation #7 is that Brenda Biscay claims that plaintiff Azpitarte says he went to the Biscays home to inspect the truck. The only thing that approaches this in the file is that the plaintiff claims to have visited the Burnett house not the Biscay home.

Misrepresentation #8 is that Biscay claims that the truck was only an ordinary pickup truck using the Kelly Blue Book. He ignores the fact that the vehicle was number matching, and the Hodges custom car hauler with a 454 engine. His Kelly blue book estimate is therefore meaningless and he cannot explain why the subject vehicle was probably in Montana, listed for \$65,000.

As a result of these misrepresentations, nothing in the Biscays or Burnett's declarations should be determined to be credible with respect to venue, lack of notice, value of autos etc. The Biscay defendants now attempt to raise venue as a defense to this action but according to CR 12(1) it is considered waived unless brought forth in a responsive pleading. Their answer was never amended and they cannot amend it in a closed case so it has been waived.

Even if it had not been waived, the court should not exercise its discretion to set it aside in this case. The defendants concede a motion to set aside a default judgment is equitable in nature. However the defendants ignore the maxim that he who seeks equity must do equity, and he who comes into equity must come with clean hands, apply to this case. *McAlpine v. Miller*, 51 Wash. 2d 536, 319 P.2d 1093 (Wa. 01/09/1958).

The Biscays support their motion with multiple counts of perjury and misrepresentation by their counsel as to the absurd notion that they have perfect mail service, but apparently didn't get it anyway even though the plaintiff has three certificates of mailing stamped by post office personnel who have absolutely no motivation to lie to see the defendants get an unjust judgment. The fact that the Biscays would also claim they did

not get Also unexplained is why opposing counsel had his agents violate federal law by rifling through the mail in his mail box at a time mail thefts were occurring.

3. THE DEFENDANTS SUBMITTED INSUFFICIENT EVIDENCE FOR THE GRANTING OF SUMMARY JUDGMENT AS WELL AS ENGAGED IN PROCEDURAL IRREGULARITIES THAT PREVENT THE DEFENDANT FROM HAVING A FAIR SHOT TO DEFEND.

Washington courts review a summary judgment ruling de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

Summary judgment is appropriate where 'there is no genuine issue as to any material fact and {} the moving party is entitled to a judgment as a matter of law.' CR 56(c). Washington courts review all reasonable facts and inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

The defendants brought a motion for summary judgment only on the original complaint. They have not addressed the issues raised by the first amended complaint which the plaintiff filed as a matter of right.

Consequently, even if the court were to grant the motion as written, the three causes of action brought in the first amended complaint would remain.

In their memorandum the defendants attempt to bring their motion on the grounds of res judicata.

For res judicata to preclude a party from litigating a claim, a prior final judgment must have a concurrence of identity with that claim in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of the persons for or against whom the claim is made. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 177 P.3d 1117(2005); *Loveridge*, 125 Wn.2d at 763. The party asserting res judicata, in this case Tacoma, bears the burden of proof. *Hisle*, 151 Wn.2d at 865.

Regarding the second element of this four-part res judicata test, to determine whether two causes of action are the same, we consider whether "(1) prosecution of the later action would impair the rights established in the earlier action, (2) the evidence in both actions is substantially the same.

(3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts." *Civil Service Comm'n v. City of Kelso*, 137 Wn.2d 166, 171, 969 P.2d 474 (1999).

The suits were never properly entered into the record because they were not served on the plaintiff, involved different issues and different parties, so the principles of res judicata do not apply. For example the earlier suits involved cases involving conversion where fraud was not alleged. Here fraud was pleaded correctly. The defendants have not pointed to anything which would show how the previous judgments entered would somehow be impaired by a different judgment here involving different parties and different causes of action.

Where the court has personal and subject matter jurisdiction, a procedural irregularity renders a judgment voidable. *Marley v. Dep't of Labor & Industries*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994).

A voidable judgment may be vacated if the motion to vacate is brought within a reasonable time, and not more than one year from the judgment if the grounds asserted are mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining the order. CR 60(b) Here a

motion to vacate was not necessary. The plaintiff told the court of the procedural irregularities prior to the judgment being entered.

Furthermore, the defendants have submitted a number of allegations that are not supported by the record and other cases that are not relevant. The plaintiff moved to strike these allegations and references to these other cases as prejudicial and not relevant.

The defendants repeatedly put roadblocks that prevented the plaintiff from receiving the documents in a timely fashion or in the case on one document, not at all. They scheduled the hearing on summary judgment at 8:30 in the morning, knowing full well that the plaintiff lived in Bremerton and could not make it to the court at that time because the busses did not run that early.

CONCLUSION

For all the reasons stated above, the appellant requests that the ruling of the trial court be reversed and the case reinstated with the plaintiff being allowed to continue with discovery.

Dated this 11 day of December, 2015


Richard Azpitarte

I certify that on this date I caused a copy of this document to be mailed to

Christopher McLeod,
7030 Tacoma Mall Blvd. #310C,
Tacoma, WA. 98409

Dated this 11th day of December, 2015.


Richard Azpitarte

2015 DEC 11 PM 4:52
STATE OF WASHINGTON
SOUTH TACOMA DIVISION