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No. 75107-7-I

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

ASSET ACCEPTANCE LLC,

Respondent,

v.

VIET TUAN NGUYEN,

Appellant.

REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

I. STANDARD OF REVIEW

As explained in the opening brief, the standard of review is de novo for each issue presented. Br. Appellant 13, 21, 34–35. Asset Acceptance’s arguments to the contrary are unsupported.

Asset Acceptance first states that motions to vacate are reviewed for abuse of discretion. Br. Resp’t 4. However, as previously explained, this general rule does not apply on appeal of a decision denying a motion to vacate a *void* judgment. Br. Appellant 34–35 (citing numerous cases). “Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court’s decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo.” *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010).

Asset Acceptance next argues that questions of collateral estoppel are reviewed under a “substantial evidence” standard or an “abuse of discretion” standard. Br. Resp’t 4–5. This is incorrect. Whether collateral estoppel applies to bar relitigation is a question of law reviewed de novo. *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305–06, 96 P.3d 957 (2004). Asset Acceptance argues that *Christensen* is distinguishable because it involved a motion for summary judgment, not a motion to vacate. Br. Resp’t 4. This argument is vacuous. A question of law remains a

question of law regardless of the procedural context in which it appears. Indeed, Washington courts have reiterated across an incredibly wide range of procedural contexts that the applicability of collateral estoppel is a question of law reviewed de novo. *E.g.*, *Lemond v. State, Dept. of Licensing*, 143 Wn. App. 797, 803, 180 P.3d 829 (2008) (review of administrative driver license suspension action); *World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wn. App. 289, 304, 103 P.3d 1265 (2005) (appeal of dismissal of land use petition), *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001) (appeal of criminal conviction), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). There is no merit to the idea that the applicability of collateral estoppel becomes a discretionary question if it occurs in the context of a motion to vacate.

As sole support, Asset Acceptance cites an unpublished Division III decision. Br. Resp't 5 (citing *M & M Harrison Elec., Co. v. Ins. Co. of Pa.*, No. 20766-8-III, 2003 WL 21513619 (Wash. Ct. App. July 3, 2003), *noted at* 117 Wn. App. 1049). This citation violates GR 14.1(a), and the Court should give it no weight. Moreover, the only mention of standard of review in *M & M Harrison* is a brief recitation of the principle, discussed above, that CR 60(b) motions are generally reviewed for abuse of discretion. 2003 WL 21513619, at *2. Though the case involved issues of collateral estoppel, the appeals court reviewed those in full, apparently de novo; Division III

made no suggestion that the collateral estoppel questions were discretionary. *Id.* at *4–5. Thus, even were *M & M Harrison* published, it still would not stand as authority for the proposition that the applicability of collateral estoppel to a motion to vacate a void default judgment is a matter of judicial discretion.

II. ASSET ACCEPTANCE FAILS TO MEET ITS BURDEN TO DEMONSTRATE THAT COLLATERAL ESTOPPEL APPLIES.

The parties agree that a finding of collateral estoppel requires that *all* of the following questions be answered affirmatively:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Br. Appellant 13 (quoting *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987)); *accord* Br. Resp't 5–6. “The burden of proof is on the party asserting estoppel.” *McDaniels*, 108 Wn.2d at 303; *accord* *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 714, 899 P.2d 6 (1995) (“The party invoking collateral estoppel has the burden of proving the facts needed to sustain it.”).

A. Mr. Nguyen’s first motion to vacate was not brought on the issue of improper service, nor was the denial of the motion a decision on the merits of whether service was proper.

Asset Acceptance fails to meet its burden to demonstrate that the issue presented in Mr. Nguyen’s first motion to vacate is “identical with the one presented in the” current action, or that the denial of the motion included a “judgment on the merits” of the issue of service. *McDaniels*, 108 Wn.2d at 303. “For collateral estoppel to be available as a bar to the subsequent action, it must be *clear* the same issues were litigated in the prior action.” *Mead v. Park Place Props.*, 37 Wn. App. 403, 407, 681 P.2d 256 (1984) (emphasis added).

Asset Acceptance asserts that Mr. Nguyen raised the issue of service in his first motion. Br. Resp’t 7. This is untrue; the only basis that Mr. Nguyen’s first motion provided for vacation was that “Defendant does not owe any money to Asset Acceptance” and that he “has a strong defense.” CP at 21–22. Mr. Nguyen’s filing consisted of form documents containing no clear argument specific to his case. *See* Br. Appellant 14. Indeed, the supporting “Memorandum of Points and Authorities” consisted of a verbatim copy of the entirety of CR 60 and a list of all its provisions. CP at 27–30. While the declaration included a brief assertion that Mr. Nguyen “was never served with this lawsuit,” this was not connected to any argument for vacation. CP at 24. Nowhere in his first motion or accompanying documents did

Mr. Nguyen argue that the address of service was not his usual abode or that the trial court lacked personal jurisdiction when it entered the default judgment. CP at 20–33. The documents never reached the substance of the issues raised by the present proceeding. *Id.* It defies reason to suggest that an off-hand remark in a declaration could preclude raising these issues subsequently.

Because Mr. Nguyen’s motion did not argue the issue of service, and because Mr. Nguyen did not appear for oral argument, the trial court did not hear or consider the issue of proper service. *See* Br. Appellant 15. Indeed, the order denying Mr. Nguyen’s motion made no findings on, and did not mention, the issue of service. CP at 41–42. Instead, it observed that Mr. Nguyen had failed to appear for oral argument and stated that the motion was denied. *Id.* Nothing in the record suggests that the trial court considered the issue of service, let alone reached a final judgment on the issue in this current matter: whether Asset Acceptance’s service upon Bach Yen Thi Huynh was proper substitute service.

But even if there were some ambiguity—even if Mr. Nguyen’s first motion could be read as raising the issue of service, and even if the trial court’s ruling could have been a final judgment on the issue—this very uncertainty renders collateral estoppel inapplicable. As this Court has explained, “[i]f there is ambiguity or indefiniteness in a verdict or judgment,

collateral estoppel will not be applied as to that issue.” *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n.2, 751 P.2d 329 (1988) (quoting *Mead*, 37 Wn. App. at 407) (internal quotation mark omitted). “If there is uncertainty whether a matter was previously litigated, collateral estoppel is inappropriate.” *Id.*; accord *Davis v. Nielson*, 9 Wn. App. 864, 875, 515 P.2d 995 (1973) (quoting 2 Lewis H. Orland, *Washington Practice* § 368 (3d ed. 1972) (“And, where, because of the ambiguity or indefiniteness of the verdict or judgment, the appellate court cannot say that the issue was determined in the prior action, collateral estoppel will not be applied as to that issue.”)).

Here, Mr. Nguyen did not clearly raise the issue of improper service, let alone present any argument pertaining to it, so collateral estoppel cannot apply. *See Mead*, 37 Wn. App. at 407 (for collateral estoppel to apply, “it must be clear” the issues are the same). Similarly, the trial court’s ruling on Mr. Nguyen’s first motion was indefinite as to the basis for the denial and was not clearly a final judgment on the issue of proper service; this indefiniteness prevents the application of collateral estoppel. *See State Farm*, 50 Wn. App. at 872 n.2; *Nielson*, 9 Wn. App. at 875.

Finally, even a clear final judgment on the identical issue of service in Mr. Nguyen’s previous motions would not have preclusive effect, as a

judgment entered without jurisdiction is absolutely void and must be vacated whenever the lack of jurisdiction comes to light, regardless of principles of preclusion. *See* Br. Appellant 19–20. Without proper service, a default judgment cannot stand. *Id.*

B. Asset Acceptance does not deny that the second motion to vacate did not reach a final judgment on the merits.

Although Asset Acceptance claims “Nguyen raised the issue of service in both of his previous motions to vacate,” it agrees that the finding in Mr. Nguyen’s second motion to vacate was “without prejudice.” Br. Resp’t 3, 7. As fully explained in the opening brief, a finding “without prejudice” is not a “final judgment on the merits,” which is required for collateral estoppel to apply. Br. Appellant 17–18.

Asset Acceptance misrepresents Judge North’s ruling, stating that the motion was “denied based on Nguyen’s arguments.” Br. Resp’t 2. However, no argument was heard, since Judge North immediately pointed out that the motion had been filed in the wrong forum. RP at 1–4. Judge North explained that he was “not saying that [Mr. Nguyen] could not bring it again,” only that he was “not going to grant it right now and that [Mr. Nguyen] need[s] to bring it to before Judge Spector.” RP at 4–5. It was left for the current proceeding to determine whether the order on Mr. Nguyen’s first

motion had finally determined the issue of service. *Id.* Therefore, this Court should not find that the second motion has preclusive effect.

C. Asset Acceptance fails to demonstrate that the application of collateral estoppel would not work an injustice against Mr. Nguyen.

Collateral estoppel requires that “the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied.” *McDaniels*, 108 Wn.2d at 303.

Asset Acceptance appears to respond to this element by arguing that pro se defendants should be held to the same standards as attorneys. Br. Resp’t 6. This argument does not succeed in addressing the issue of whether the application of collateral estoppel would work an injustice. Mr. Nguyen does not contend that he should have been held to a different legal or procedural standard than an attorney. Instead, he asks that the Court consider the consequent injustice that preclusion would work on him. Br. Appellant 15–16, 18–19. The circumstances occasioning vacation are the direct result of Asset Acceptance’s failure to follow required legal procedures and properly serve him. It is unjust for Mr. Nguyen to suffer economic loss due to Asset Acceptance’s lack of diligence. Moreover, the failure of his previous motions was the result of the disadvantages he faced as a non-English-speaking immigrant. Br. Appellant 5, 7, 15–16. As a result of these circumstances, Mr. Nguyen has been forced to pay for a debt he does not owe and

endure years struggling to traverse the legal system to correct this error. CP at 157, 417; Br. Appellant 9–10, 14, 37.

The Washington Supreme Court has maintained that “[t]he doctrine [of collateral estoppel] may be qualified or rejected when its application would contravene public policy.’ . . . It must not apply ‘so rigidly as to defeat the ends of justice, or to work an injustice.’” *Reninger v. State Dept. of Corr.*, 134 Wn.2d 437, 451, 951 P.2d 782 (1998) (second alteration in original) (citations omitted). In light of the controlling law in Washington and the circumstances present here, the application of collateral estoppel to this motion would undoubtedly work an injustice against Mr. Nguyen.

D. Mr. Nguyen’s federal claim has no preclusive effect.

Asset Acceptance also argues that Mr. Nguyen raised the issue of service in his federal action against Asset Acceptance, filed in U.S. District Court on August 23, 2012. Br. Resp’t 1. This complaint (which, like Mr. Nguyen’s state court filings, was prepared by uGotFICO) sought damages for FDCPA violations arising from Asset Acceptance’s attempt to collect a debt not owed. CP at 222–25. Although the complaint contained the same “was never served” language as Mr. Nguyen’s state court filing, service was not a basis for Mr. Nguyen’s claim. *Id.* Regardless, the federal claim was dismissed before any issues were reached, as Mr. Nguyen failed

to oppose Asset Acceptance’s motion to dismiss the action for lack of subject matter jurisdiction and failure to state a claim. CP at 220–21. Since there was neither a final judgment on the merits nor identity of issues, the federal action cannot have preclusive effect here. *See McDaniels*, 108 Wn.2d at 303.

III. ASSET ACCEPTANCE FAILED TO SERVE MR. NGUYEN, AS THERE IS CLEAR AND CONVINCING EVIDENCE THAT 3802 S. BENEFIT ST. WAS NOT MR. NGUYEN’S ABODE AT THE TIME OF SERVICE.

Mr. Nguyen was not personally served, nor does Asset Acceptance now contend that he was personally served. Br. Appellant 22–26; Br. Resp’t 8–12. According to the process server’s own declaration, the process server did not personally serve Mr. Nguyen, but instead served a woman named Yen residing at 3802 S. Benefit St.¹ CP at 5. Yen was the resident of 3802 S. Benefit St., Seattle, on the date of service. CP at 173. Any conclusion that Yen redelivered the summons and complaint to Mr. Nguyen would be without any evidentiary support. *See* Br. Appellant 24–25. Therefore, a decision on Mr. Nguyen’s motion to vacate rests on whether 3802 S. Benefit St. was Mr. Nguyen’s “usual abode” at the time of service. RCW § 4.28.080(16).

¹ Asset Acceptance, in its brief, refers to Ms. Bach Yen Thi Huynh as though she were male, repeatedly using the pronoun “he” and referring to her as “Mr. Huynh.” Br. Resp’t at 11. Both the service documents and the declarations consistently establish Yen as female. CP at 5, 406, 416. This bears mentioning to dispel any confusion that might result from Asset Acceptance’s misgendering, since there is no actual controversy about Yen’s gender. It is also a striking reprise of Asset Acceptance’s position in the trial court, where it repeatedly and falsely insisted, without any evidence, that Yen was a relative of Mr. Nguyen, and where the trial court relied on this misrepresentation. *See* Br. Appellant 25–26.

Asset Acceptance incorrectly assumes that Mr. Nguyen's admittance that he lived at 3802 Benefit St. at one point in his life is equivalent to an admission that he was living there at the time of service. Br. Resp't 10. However, Mr. Nguyen testified that he had moved out of 3802 Benefit St. by the end of 2008, and that his abode in March 2009 was 255 Powell Ave. SW, Renton. CP at 155–56. Mr. Nguyen's testimony is corroborated by the affidavit of his former landlord, Yen, who states that "Kevin Nguyen was not a tenant in my home in March 2009." CP at 173. Mr. Nguyen also presented his 2008 tax return—a document signed under penalty of perjury—demonstrating that his address on March 8, 2009, four days before the date of service, was 255 Powell Ave. SW, Renton. CP at 161–64, 167. Thus, based on the evidence in the record, the process server left the summons and complaint at an address that was not Mr. Nguyen's place of abode in March 2009. CP at 155–56, 161–64, 173.

By contrast, the evidence presented by Asset Acceptance is singularly unpersuasive. Asset Acceptance points to three pieces of evidence that it claims support the conclusion that 3802 Benefit St. was Mr. Nguyen's abode at the time of service: "the original proof of service, TLO Property search showing the service address as a residence of Nguyen during the time period of the service, and the numerous communication [sic] Nguyen had

with Asset.” Br. Resp’t 11. None of these show what Asset Acceptance claims they show.

First, although an “affidavit of service, regular in form and substance, is presumptively correct,” it “is subject to attack and may be discredited by competent evidence.” *Lee v. W. Processing Co.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983); *accord Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). Here, although the affidavit of service is regular in form and contains the standard language characterizing the service address as Mr. Nguyen’s abode, this can be overcome by showing evidence that Mr. Nguyen did not actually reside there at the time of service, as indeed Mr. Nguyen has done.

Moreover, the process server’s own records show that the process server knew of three possible addresses where Mr. Nguyen might reside, including both 3802 S. Benefit St., Seattle (the address where it ultimately served the documents on Yen), and 255 Powell Ave. SW, Renton (Mr. Nguyen’s true abode on the date of service). CP at 410–12. The process server had no knowledge of which address was actually Mr. Nguyen’s current abode. *Id.* Asset Acceptance instructed the process server to “sub-serve regardless.” CP at 406; *accord* CP at 408 (“You may sub-serve on any resident who is 14 years or older on the 1st attempt.”). Thus, Asset Acceptance and its process server arbitrarily decided to leave the documents with whoever

happened to answer the door at 3802 S. Benefit St., resulting in improper service and years of hardship for Mr. Nguyen.

Similarly, the skip trace filed by Asset Acceptance (described by Asset Acceptance as a “TLO Property search”) shows seven addresses that could have been Mr. Nguyen’s residence in March 2009, including both 3802 S. Benefit St., Seattle, and 255 Powell Ave. SW, Renton. CP at 284–87. To the extent that this unauthenticated list of possible addresses proves anything at all, it corroborates, rather than refutes, Mr. Nguyen’s testimony about where he lived, as it shows him taking up residence in 255 Powell Ave. SW, Renton, before the date of service, exactly as he attests that he did. CP at 284. The skip trace records evidently contain no information on the date when Mr. Nguyen stopped living at 3802 S. Benefit St., as it shows his residence there (along with several other addresses) extending to the date when the skip trace was produced in April 2016. *Id.* This document thus does not support Asset Acceptance’s position; on the contrary, if anything, it shows that 255 Powell Ave. SW, Renton, was Mr. Nguyen’s last known address as of March 2009. *Id.*

Asset Acceptance finally cites “the numerous communication [sic] Nguyen had with Asset” as evidence of service. Br. Resp’t 11. However, these communications all occurred in 2012 or later, after Mr. Nguyen became aware of the action via Asset Acceptance’s garnishment of his wages.

CP at 190–204, 230–71, 275–82. These are not evidence of proper service in 2009. Neither are they evidence that Mr. Nguyen’s abode was 3802 S. Benefit St. at or after the time of service; these communications all used a later address, 8317 37th Ave. S, Seattle. *Id.*

Asset Acceptance compares this case with *State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60, 7 P.3d 818 (2000), and *Northwick v. Long*, 192 Wn. App. 256, 364 P.3d 1067 (2015). Br. Resp’t 9–10. These cases are highly distinguishable from this case. Moreover, they are consistent with the large body of case law discussed in the Brief of Appellant, which strongly supports a finding that Mr. Nguyen has met his burden of clear and convincing evidence. Br. Appellant 28–33.

In *Coughlin*, the state filed a parentage petition against the defendant and served it upon his wife. 102 Wn. App. at 62. The defendant, Jenkins, promptly responded to the petition by letter; the letter’s return address was the same as the service address. *Id.* In subsequent communications, Jenkins acknowledged that he was in receipt of the state’s notices sent to the service address and continued to use the service address as his return address. *Id.* Three years after a trial court entered summary judgment as to parentage based on a blood test, Jenkins moved to vacate the judgment for lack of jurisdiction, arguing that the service address was not his abode. *Id.* at 62, 65. As evidence, he provided an affidavit from his wife, stating that they

were estranged at the time of service, and an affidavit from his mother. *Id.* at 65. Division II found this unpersuasive, since the affidavits contradicted the letters Jenkins had written to the state, implying that he and his wife were happily married. *Id.* Additionally, it was well established that Jenkins received the notices the state sent to the service address, and that he used the service address as his return address for the entire proceeding. *Id.*

Here, none of these elements are present. Unlike Jenkins, Mr. Nguyen never received the summons and complaint. CP at 156. Mr. Nguyen did not use the service address to send or receive mail at or after the time of service. Mr. Nguyen did not become aware of the action via service at 3802 S. Benefit St. at all, but instead learned of it via garnishment proceedings three years later. *Id.* The evidence on record consistently confirms these facts, including Mr. Nguyen's affidavits, his former landlord's affidavit, and tax records. Unlike in *Coughlin*, there is no contradiction that would cast doubt on these facts. Thus, *Coughlin* is highly distinguishable. The present case is much more similar in fact pattern to cases such as *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 674 P.2d 1271 (1984), and *Lepeska v. Farley*, 67 Wn. App. 548, 833 P.2d 437 (1992), as discussed in the opening brief. Br. Appellant 29–30.

In the second case discussed by Asset Acceptance, *Northwick*, the plaintiff served the summons and complaint on the defendant's father in

Snohomish, which was the address where the defendant's car was registered. 192 Wn. App. at 259. The process server testified that the father stated that the defendant lived there and agreed to deliver the documents to the defendant. *Id.* at 259–60. The defendant immediately appeared and moved to dismiss for lack of service. *Id.* His motion for dismissal was supported by his father's declaration but not his own. *Id.* at 259. This Court found the father's declaration unpersuasive in light of the controverting deposition testimony from the process server. *Id.* at 264. In addition, the plaintiff produced records establishing the Snohomish address as the defendant's:

Northwick also presented evidence that [the defendant]'s address on file with the post office and the DOL at the time of service was the Snohomish address. [The defendant] produced no similar evidence for a different address. He provided no documentation relating to housing, banking, and other activities highly probative of domestic activity linking him to a different address.

Id.

Here, the facts are entirely different. Mr. Nguyen did not become aware of the action and did not appear. Far from providing only a single controverted declaration as evidence, he produced his own declarations, the declaration of the recipient of service, and tax records, uncontrovertedly establishing his address as 255 Powell Ave. SW, Renton, on the date of service. CP at 155–56, 161–64, 173, 416. Documents from a landlord, tax agency, and tax advisor are exactly the sort of “documentation relating to

housing, banking, and other activities highly probative of domestic activity linking him to a different address” that was lacking in *Northwick*. 192 Wn. App. at 264. Finally, the records of Asset Acceptance and its process server themselves contain the 255 Powell Ave. SW address where Mr. Nguyen states he lived. The skip trace produced by Asset Acceptance shows 3802 S. Benefit St. and 255 Powell Ave. SW as *both* being possible addresses for Mr. Nguyen; so does the process server’s postal search. CP at 284, 410–12. Thus, unlike in *Northwick*, the Court need not look beyond Asset Acceptance’s own documents to find “similar evidence for a different address.” 192 Wn. App. at 264.

The evidence in the record is clear, convincing, and unrefuted that the process server did not leave the summons and complaint at Mr. Nguyen’s usual place of abode on March 12, 2009. Without proper service, the trial court did not have personal jurisdiction over Mr. Nguyen when it entered a default judgment against him. Thus, the judgment is void, and the trial court erred in finding otherwise.

IV. THE DISCRETIONARY *WHITE* FACTORS ARE INAPPLICABLE TO VACATION OF A VOID JUDGMENT, WHICH IS NONDISCRETIONARY; NONETHELESS, MR. NGUYEN SATISFIES THE FACTORS.

Asset Acceptance continues to base its argument against vacation on the four discretionary factors set out in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). Br. Resp’t 12–13. As discussed in the opening brief, these

discretionary factors do not apply where a motion to vacate is based on CR 60(b)(5). Br. Appellant 37–38 (citing *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991)). When a judgment is entered without jurisdiction, its vacation is nondiscretionary; such a judgment is entirely void and must be vacated as a matter of right whenever the lack of jurisdiction comes to light. *Id.* at 35–38.

More specifically, *White* sets out four discretionary factors that courts may consider in exercising their discretion to grant or deny a motion to vacate a default judgment. 73 Wn.2d at 352. Briefly summarized, they are the (1) presence of a meritorious defense, (2) reason for the movant’s failure to timely appear, (3) movant’s diligence after notice of default judgment, and (4) hardship to the opposing party. *Id.* Again, courts do not apply these factors to vacation of a *void* judgment, which is nondiscretionary. *Leen*, 62 Wn. App. at 478. In particular, courts have repeatedly emphasized that a motion to vacate based on lack of jurisdiction does not require a meritorious defense, and that such a motion can be brought at any time without regard for timeliness or seasonability. *See* Br. Appellant 36–37 (citing numerous cases). Asset Acceptance’s insistence that Mr. Nguyen must meet these factors is thus meritless, and its argument that Mr. Nguyen brought

this motion without adequate diligence or timeliness is irrelevant. Nevertheless, as Mr. Nguyen alternatively argued in the trial court, he does satisfy the *White* factors. CP at 395 n.4.

First, Mr. Nguyen raised a meritorious prima facie defense to Asset Acceptance's debt claim, as there is significant evidence that Mr. Nguyen does not owe the alleged credit card debt and is not the obligor on the account. CP at 157, 417. In deciding whether a prima facie defense exists, courts "must examine the evidence and reasonable inferences in the light most favorable to the moving party." *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 449, 332 P.3d 991 (2014), *review denied*, 182 Wn.2d 1006 (2015). In this light, substantial evidence exists to support a prima facie defense to Asset Acceptance's breach of contract claim. Indeed, the weight of evidence suggests that Mr. Nguyen likely does not owe the alleged debt; this alone would be sufficient to justify vacation. *See Boss Logger, Inc. v. Aetna Cas. & Sur. Co.*, 93 Wn. App. 682, 686, 970 P.2d 755 (1998) ("If it clearly appears that a strong defense on the merits exists, the courts will spend scant time inquiring into the reasons which resulted in the entry of the order of default.").

The second *White* factor pertains to the "plausibility and excusability of the defaulted defendants' reason for failing to initially and timely appear in the action." 73 Wn.2d at 353–54. Here, Mr. Nguyen did not timely

appear in 2009 because he had no notice of the action against him, as he was not served.

The third *White* factor is whether Mr. Nguyen acted with due diligence after notice of the default. *Id.* at 352. As soon as he became aware of the default judgment in 2012, he attempted to rectify the situation, hiring a credit repair agency called uGotFICO that assured him it could set things right. CP at 156. He followed the instructions of uGotFICO, which he believed to be his legal representative, precisely and diligently. *See* Br. Appellant 5–6. After uGotFICO’s instructions repeatedly failed to resolve the matter, Mr. Nguyen finally retained an actual lawyer in 2016; that was the first time he knew, or could have known, how badly uGotFICO had misled him. Br. Appellant 7. In any case, as noted previously, “[t]here is no time limit to bring a motion to vacate a default judgment that is void.” *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010).

Finally, Asset Acceptance attempts to support its contention that it will suffer substantial hardship by asserting that it “brought this suit within the statute of limitations.” Br. Resp’t 13. Certainly, Asset Acceptance *filed* its suit within the statute of limitations. But whether Asset Acceptance timely *served* Mr. Nguyen is the very question now before this Court. Moreover, any resulting hardship to Asset Acceptance would be the result of its

own failure to properly serve Mr. Nguyen. It was Asset Acceptance's decision to execute substitute service at 3802 S. Benefit St., despite the fact that it was uncertain whether Mr. Nguyen lived there and knew of other possible addresses where he might live, that led to the entry of a default judgment and that now requires its vacation. *See* Br. Appellant 27–28; CP at 406, 408.

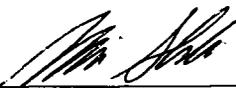
Thus, even if the *White* factors were to be applied here as Asset Acceptance suggests, they would require vacation of the default judgment.

CONCLUSION

Based on the foregoing, Mr. Nguyen respectfully requests that the Court grant relief as set out in the Brief of Appellant, by (1) setting aside and vacating the default judgment as void, (2) quashing service of process, (3) quashing all writs of garnishment, (4) instructing the trial court to order restitution of funds garnished, and (5) awarding fees and costs.

DATED this 26th day of August 2016.

THE SULLIVAN LAW FIRM

By: 
Mina Shahin, WSBA #46661
Attorney for Appellant

CERTIFICATE OF SERVICE

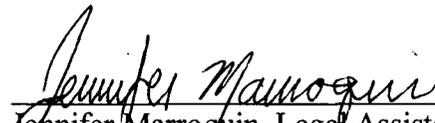
I, Jennifer Marroquin, legal assistant at Sullivan Law Firm, certify that on the date below I caused a true copy of the Reply Brief of Appellant to be served upon opposing counsel of record in this matter, by email and by regular ABC messenger, addressed as follows:

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And that I further caused a copy of the same to be filed with the Court of Appeals, Division I, in person:

Court of Appeals, Division I
Attn: Richard D. Johnson, Clerk
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Dated at Seattle, WA, this 26th day of August 2016.


Jennifer Marroquin, Legal Assistant
Sullivan Law Firm

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