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C092450

IN THE

SUPREME COURT OF CALIFORNIA

CALIFORNIA CAPITAL INSURANCE COMPANY, et al.,
Plaintiff and Respondent,

vs.

CORY MICHAEL HOEHN
Defendant and Appellant.

ON REVIEW OF DECISION OF THE THIRD DISTRICT COURT OF APPEAL, FOLLOWING APPEAL FROM A JUDGMENT OF
THE PLACER COUNTY SUPERIOR COURT
HON. MICHAEL JONES • CASE NO. SCV0026851

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Section 473(d) of the California Code of Civil Procedure states that a court "may, on motion of either party after notice to the other party, set aside any void judgment or order." Section 473(d) does not include a time limitation on a court's power to vacate a void judgment.

The question presented is: Is there a two-year time limitation for a defendant to move to vacate a judgment void for lack of proper service under section 473(d), depending on whether the judgment is shown to be void by extrinsic evidence or is void on its face?

2. Alternatively, it is undisputed that there is no time limit to move to vacate a void judgment in equity based on extrinsic fraud. This Court defines "extrinsic fraud" as depriving "the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time." [*Westphal v. Westphal* (1942) 20 Cal.2d 392, 397].

The question presented is: Does proving "extrinsic fraud" when moving to vacate a judgment void for lack of proper service require proof not only of improper service, but also an additional showing of scienter involving "inequitable conduct" that "lulled [the defendant] into a state of false security?" [Slip. Op. Exh. A, at 8, n. 7].

INTRODUCTION

This case presents the opportunity for this Court to correct a widespread problem emanating from an epidemic of "sewer service," whereby claims for debt collection result in default judgments that remain final, despite lack of notice to the defendant.[1] Specifically, a conflict in the Courts of Appeal as to whether there is a time limitation on moving to vacate judgments void for lack of proper service has exacerbated unscrupulous practices involving the service of complaints and summons, and enabled default judgments to be enforced even absent proper service, as long as the process server attests (truthfully or not), that the service was proper.

The plain language of section 473 of the Code of Civil Procedure[2] has no time limitation for a defendant to move to vacate a judgment void for lack of service of process. Thus, section 473(d) states that a court "may, on motion of either party, after notice to the other party, set aside any void judgment or order." [Code. Civ. Proc. § 473(d)]. The Legislature's omission of any time limitation to move to vacate a judgment void for lack of proper service under section 473(d) protects a fundamental principle of our jurisprudence: jurisdiction over the person by means of proper service must be obtained,

[1] [*See* Letter in Support of Review from Professors Aceves, Chemerinsky, Hoffman, Klein, Rosenbaum and Williams to the Honorable Chief Justice Cantil-Sakauye and Associate Justices (Dec. 28, 2022) (detailing the epidemic of sewer service, the rise in default judgments arising from debt collection, and the disparate impact that grafting a time restriction on section 473(d) of the Code of Civil Procedure has on low income litigants and communities of color.)].

[2] Unless otherwise noted, all section references are to the California Code of Civil Procedure.

otherwise, the court has no authority to act and any judgment is void. [*Peralta v. Heights Medical Center, Inc*. (1988) 485 U.S. 80, 84 ("[A] judgment entered without notice or service is constitutionally infirm.")].

In the decision below, the Court of Appeal ***agreed*** that section 473(d) does not have a time limit to set aside a void judgment: "True, the text of the statute does not state a time limit." [Slip. Op., Exh. "A" at 6]. Nonetheless, the Court of Appeal held that where a judgment is shown to be void by "extrinsic evidence" rather than on its face, the two-year time limit from section 473.5 applies "by analogy" to section 473(d), and Petitioner Mr. Hoehn was time-barred from moving to vacate the judgment for lack of service of process. [*Id.* at 6-7, citing *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180; *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1124]. (Notably, section 473.5 deals with an entirely different situation, where service was proper but the defendant did not receive actual notice). [Code Civ. Proc. § 475(a)].

The undisputed facts of this case exemplify the stark outcomes to California citizens that arise when a time limitation is added to section 473(d), as the Court of Appeal did below:

In 2008, Defendant Mr. Hoehn graduated from high school and moved to Roseville, California. His roommate was a fellow high school graduate named Forrest Kroll. They qualified for low-income housing, and found an apartment for $798 per month. Still a teenager himself, Mr. Hoehn took classes at Sierra College, and worked at City of Roseville's children's after school program. But less than a year had passed when

Mr. Hoehn received a call from his roommate Forrest with the news that their apartment and all of Mr. Hoehn's possessions had burned down.

Mr. Hoehn was not at the apartment before or during the fire, and as such did not know how it started. The insurance company sent an investigator, who could only surmise that the culprit was lit cigarette butts left by an unknown person on the apartment's outside porch. Despite having really no idea what caused the fire, a year later the insurance company sued Mr. Hoehn and his roommate Forrest for close to one half million dollars. The process server could not locate Forrest. For unknown reasons, the insurance company elected to dismiss Forrest from the case rather than serve him by publication. The process server was also unable to personally serve Mr. Hoehn, so instead attested that she left the complaint and summons with Mr. Hoehn's teenage girlfriend, falsely claiming the teenage girlfriend was a "competent member of the household." [Code Civ. Proc. § 415.20(b)]. The insurance company never took any action to collect the judgment, and after seven years to assign the judgment to debt collector Sequoia. Mr. Hoehn was unaware that he had been sued until ***nine years*** after entry of judgment, when debt collector Sequoia attempted to garnish his wages earned as a restaurant worker. The debt collector was presumably prompted to enforce the judgment at this late date because of the ten-year deadline within which a judgment must be enforced. [Code Civ. Proc. § 683.020]. By the time that debt collector moved to collect on the judgment, it had grown close to $1,000,000.00 with interest.

Mr. Hoehn promptly filed a motion to vacate the judgment as void for lack of proper service under section 473(d). But the trial court and the Court of Appeal below held that

Mr. Hoehn's Motion to Vacate was untimely, because the service was not void on its face, but instead shown to be void by Mr. Hoehn's unrebutted extrinsic evidence that his teenage girlfriend was never a "member of the household." The Court of Appeal also foreclosed Mr. Hoehn's alternative motion attacking the judgment on an equitable basis, erroneously holding that concededly improper service did not constitute extrinsic fraud.

The Court of Appeal's holding is egregiously wrong.

First, there is no time limitation on moving to vacate a judgment under section 473(d), regardless of whether the judgment is shown to be void "on its face" or by "extrinsic evidence," and the *Trackman/Rogers* line of case law holding that section 473.5's two-year time limitation applies by "analogy" to section 473(d) cannot be reconciled with Constitutional requirements of due process and basic principles of statutory interpretation. Indeed, numerous appellate courts reject adding a two-year time limitation to section 473(d) "by analogy," and hold—in line with the United States Supreme Court opinion in *Peralta*—that a judgment void for lack of proper service is void for all time. [*Martinez v. Encore Senior Living*, No. E070465, 2020 WL 773453 (Cal. App. Feb. 18, 2020) ("[N]umerous other courts have rejected the proposition" that a motion to vacate a void judgment under section 473(d) is subject to section 473.5(a)'s two year limit) (Attached hereto as Exhibit "B")].[3]

Second, the Court of Appeal erred in holding that improper service does not constitute extrinsic fraud. This Court has adopted a three-part test to determine if relief

[3] Unpublished cases may be cited to this Court to show the existence of a conflict and the need to secure uniformity. [Cal. Rules of Court, rule 8.500(b)(1)].

from a default judgment is warranted due to extrinsic fraud, and it was undisputed before the trial court and the Court of Appeal that Mr. Hoehn met all three parts of this test: (i) he demonstrated he has a meritorious case; (ii) he had a satisfactory excuse for not presenting a defense to the original action because he had not been served; and (iii) he moved to vacate the judgment almost immediately after it was discovered. [*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982 (setting forth the test)]. But in holding that Mr. Hoehn had not proven "extrinsic fraud," the Court of Appeal devised a fourth criteria, concluding that Mr. Hoehn must *also* show undefined "inequitable conduct" in addition to the established three-part test. [Slip. Op, Exh. A, at 8, n. 7]. This was error, and in direct contradiction to well-settled precedent, which holds that lack of proper service depriving the defendant of an opportunity to appear in court is itself extrinsic fraud.

As a policy matter, the consequences of imposing a time limit on section 473(d) are staggering: if you have not been properly served and do not know about service, you are subject to judgment if you do not somehow find out and object to the judgment as void within a two-year period after entry of judgment. And the Court of Appeal's suggestion that this problem can be solved through a separate action in equity [Slip. Op., Exh. A at 8] is belied by (i) the Court of Appeal's own high burden required to prove "extrinsic fraud;" and (ii) the well-settled law that a "party who seeks to have his default vacated under the court's equity power must make a stronger showing than is necessary to obtain relief under section 473." [*Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 291-292].

The incentives created by imposing a time limitation on section 473(d) are equally perverse: a clever process server is highly motivated to craft a service of process valid "on

its face," because time will run out for a defendant to object to lack of service by showing through extrinsic evidence that the service of process was invalid, and a fortunate debt collector may collect on a judgment without ever having to prove liability through a trial on the merits. The Court of Appeal's holding fosters the rampant problem of "sewer service," where debt collection actions result in default judgments because of lack of notice to defendants. [*See* Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 Hastings Const. L.Q. 261, 274 (2021) ("[T]here are strong incentives for plaintiff creditors, employers, and landlords to cut corners in giving notice because, in the absence of defense counsel, the likelihood that 'gutter service' will be challenged is low.")].

The California residents who will pay most dearly for this denial of due process are those with the least resources, who do not have registered agents for service, who are therefore more likely subject to the whims of an ambitious process server, and who certainly cannot afford to pay for the legal counsel necessary to untangle a judgment obtained without proper service after the expiration of the two-year ticking clock.

This Court should reverse and hold that section 473(d) does not impose a time limit on moving to vacate judgments void for lack of proper service, or in the alternative grant Mr. Hoehn equitable relief based on extrinsic fraud.

STATEMENT OF THE CASE

I. The events giving rise to the judgment.

On August 22, 2008, the year after he graduated from high school, Mr. Hoehn and his roommate Forrest Kroll entered into a lease for Unit 3605 at 1098 Woodcreek Oaks

Boulevard in Roseville, CA. [AA23]. The rent was $798 per month for both of them. [AA23 at ¶ 2]. Mr. Hoehn took classes at Sierra College, and he worked for the City of Roseville at a children's after school program. [AA24 ¶ 3].

On June 16, 2009, Mr. Hoehn received a phone call from his roommate Forrest Kroll that there had been a fire at the apartment. [AA24 at ¶ 4]. With the exception of a red dresser that the fire department was able to save, Mr. Hoehn lost all of his possessions in the fire. [AA24 at ¶ 4].

Mr. Hoehn was not present at the time of the fire. [AA24 at ¶ 5]. When Mr. Hoehn left the apartment on June 16, 2009, there was no fire, no smoke, nothing in the oven, and nothing in the stove, and no one was smoking cigarettes or cigars in or near the apartment. [AA24 at ¶ 5]. No one ever questioned Mr. Hoehn or suggested that he was in any way responsible for starting the fire. [AA24 at ¶ 5]. No one ever informed him that they would be suing him alleging that he had any responsibility for starting the fire. [AA24 at ¶ 5].

The investigator for California Capital Insurance, which insured the apartment building, determined that the cause of the fire was "careless smoking habits" by an unknown person on the outdoor patio. [AA128].

On March 18, 2010, the insurance company sued Mr. Hoehn and his roommate Forrest Kroll and twenty Doe defendants for "general negligence," alleging that they caused the fire due to "improperly discarded smoking materials." [AA41-48]. The insurance company sought $472,326 in damages. [*Id.*].

California Capital Insurance was not able to locate co-defendant Forrest Kroll, the only person sued who was actually at the apartment at the time the fire started. [AA35-36].

For unknown reasons, California Capital Insurance elected to dismiss Forrest Kroll from the lawsuit, with no attempt to serve him by publication. [AA39-40].

California Capital Insurance did not serve Mr. Hoehn directly with the Complaint and Summons. Instead, after failing to serve Mr. Hoehn personally, its process server falsely claimed that Mr. Hoehn's teenage girlfriend Shannon Smith was a "Co-Occupant" and "a competent member of the household" of Mr. Hoehn's residence at 2727 Edison Street #124, San Mateo, CA, and attested that she gave the Complaint and Summons to her. [AA50]. In fact, Shannon Smith did not live with Mr. Hoehn at the 2727 Edison residence; Mr. Hoehn lived with his roommate Kirk Haynes. [AA24 at ¶ 7].

Mr. Hoehn never received the Complaint or Summons or any legal paperwork from Shannon Smith. [AA24 at ¶ 8]. Although the process server stated that she mailed the complaint to Mr. Hoehn [AA52], Mr. Hoehn does not recall seeing the Complaint or Summons at any time. [AA24 at ¶ 8].

On May 18, 2010, California Capital Insurance requested entry of default against Mr. Hoehn for $486,529.00. [AA54-55]. The Court entered default the same day. [*Id.*].

On August 13, 2010, California Capital Insurance requested entry of judgment for $486,528.00 against Mr. Hoehn. [AA59-85]. The Request for Entry of Default was mailed to Mr. Hoehn at 2727 Edison Street, San Mateo, CA on August 6, 2010. [AA60]. But Mr. Hoehn no longer lived at the 2727 Edison address. [AA24 at ¶ 9]. He and his roommate Kirk Haynes had moved to 52 East 41st Street, San Mateo, CA. [*Id.*]. Mr. Hoehn did not receive the request for entry of judgment or notice of default. [AA24 at ¶ 10].

On February 16, 2011, the Court initially denied the request for default judgment: "Insufficient evidence submitted to support default judgment. Attorney declaration is insufficient to establish the insured's loss, cause of the same, etc. Further, no foundation is laid for Exhibit A to Schroeder, and it cannot be considered." [AA85].

On April 1, 2011, California Capital Insurance again requested entry of default judgment. [AA90-146]. California Capital Insurance did not attest that it had mailed the request for entry of default judgment to Mr. Hoehn. [AA91]. Mr. Hoehn did not receive the request for entry of judgment or notice of default. [AA24 at ¶ 10].

As part of its evidence, California Capital Insurance submitted a Declaration from its investigator, who concluded that because he found "cigarette butts" on the patio, the "cause of the fire was the result of careless smoking habits." [AA77]. The investigator did not conclude who may have started the fire, or who was present at the time the fire began. [*Id*].

The Court entered default judgment against Mr. Hoehn for $486,528.00 on April 8, 2011. [AA148]. The insurance company never moved to collect on the judgment. Instead, seven years after entry of judgment, the insurance company assigned its rights to collect upon the judgment to debt collector Sequoia. [AA152]. Nine years later, in January 2020, the debt collector had an earnings withholding order served on Mr. Hoehn's employer. [AA161]. That is when Mr. Hoehn learned that there was judgment against him as a result of the fire at Woodcreek Oaks. [AA24 at ¶ 10].

II. The trial court denies Mr. Hoehn's motion to set aside the default and vacate the judgment.

When he became aware of the judgment, Mr. Hoehn had counsel obtain the court files and immediately filed a motion to set aside the default and vacate the judgment on March 18, 2020. [AA10-199]. Mr. Hoehn established that girlfriend Shannon Smith was not a "competent member of the household" [Code Civ. Proc. § 415.20(b)]; that he had not been properly served; and that he had no notice of the judgment until debt collector Sequoia garnished his wages nine years later. [AA10-199].

Mr. Hoehn moved to vacate the default and set aside the judgment, demonstrating that: (i) the judgment was void due to lack of service, the trial court was without jurisdiction to enter the judgment, and therefore the judgment must be set aside under section 473(d); or, alternatively, (ii) the judgment should be set aside based on extrinsic fraud or mistake. [AA10-22]. A judgment may be set aside at any time based on either of these grounds.

Debt collector Sequoia did not dispute Mr. Hoehn's declaration that his teenage girlfriend was not a "competent member of the household," nor did it argue that she had actual or ostensible control of his premises. [AA201-215]. Instead, Sequoia argued that there is a rebuttable presumption of the facts stated in the return. [AA202; Evid. Code § 647]. But this is merely a "presumption affecting the burden of producing evidence," and is not a conclusive presumption. [Evid. Code § 630]. Defendant Hoehn rebutted the process server's statement that she served "Shannon Smith, Girlfriend," "a competent member of the household . . ." [AA50]. Mr. Hoehn attested that "Shannon Smith did not live with me at the 2727 Edison residence; my roommate was Kirk Haynes." [AA24 at ¶ 7]. Mr. Hoehn

further attested: "I never received a Summons or Complaint or any legal paperwork from Shannon Smith at any time. I do not recall receiving or seeing the Summons or Complaint at any time." [AA24 at ¶ 8].

Additionally, debt collector Sequoia argued that despite the lack of proper service, Mr. Hoehn's motion to set aside the default judgment was time-barred because the two-year time limitation of section 473.5 applied "by analogy" to section 473(d) under *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114. [AA204]. (Section 473.5 does not apply to situations like here where service was not affected; it applies when *proper* service of a summons "has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered . . ." [Code Civ. Proc. § 473.5(a)]). Additionally, debt collector Sequoia contended that service should be inferred based on inadmissible hearsay evidence as to alleged phone calls between Mr. Hoehn and a law firm secretary [AA207-215], to which Mr. Hoehn objected based on hearsay and relevance. [AA227-231].

The trial court denied the motion to vacate the default judgment. It agreed that a "default judgment entered against a defendant who was not served with summons as required by the statutory procedures of service of process is void" [AA241], but nonetheless held that as a matter of law Mr. Hoehn was time-barred from obtaining relief, because extrinsic evidence was required to show that service was improper, and "by analogy" under section 473.5, Mr. Hoehn was required to bring his motion to vacate within two years of entry of default judgment. [AA241, *citing Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181]. Additionally, the trial court held that "the fact that the proof of

service of summons misidentifies Shannon Smith as a co-occupant" does not "demonstrate that this statement constitutes extrinsic fraud." [AA243].

Finally, the trial court overruled Mr. Hoehn's objections to Plaintiff's evidence of "phone calls." [AA240].

Plaintiff timely appealed. [AA244-245].

III. The Court of Appeal affirms the trial court's two-year statute of limitations on a motion to vacate a void judgment.

The Court of Appeal below did not find that Mr. Hoehn had been properly served. Further, the court of appeal agreed that section 473(d) does not have a time limit to set aside a void judgment: "True, the text of the statute does not state a time limit." [Slip. Op. at 6]. But the Court of Appeal elected to apply the holding from *Trackman, supra*, 187 Cal.App.4th at 180 that "[w]here a party moved under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5, that is, the two-year outer limit." [Slip. Op. at 6]. The Court of Appeal set forth its puzzling reasoning: "We agree that a void judgment can be attacked at any time. But if a void judgment is valid on its face, it cannot be attacked via section 473, subdivision (d) at any time." [Slip. Op. at 6-7]. The Court of Appeal stated that it elected to apply *Trackman's* holding limiting a motion to vacate under section 473(d) to a two-year time period because of (i) "stability in the law;" and (ii) "[t]his is a question of statutory construction on which the Legislature can act, if it desires." [Slip. Op. at 6, n. 5].

The Court of Appeal agreed that Mr. Hoehn cited "multiple cases declaring some version of the broad proposition that 'a void judgment can be attack at any time,'" but criticized the holdings of these opinions because, according to the court of appeal below, these contrary opinions "marshalled no case law in support of that proposition." [Slip Op. at 6 and n.6]. The Court of Appeal held that the two-year time limitation, applied "by analogy" to section 473(d), would not lead to absurd results, because Mr. Hoehn could file an independent action in equity to set aside the judgment. [Slip. Op. at 8].

Next, the Court of Appeal held that Mr. Hoehn had not proven extrinsic fraud because "even if the process server *was* wrong about Hoehn's then-girlfriend's status at Hoehn's residence, that error by itself does not indicate *fraud*." [Slip. Op. at 9]. In a footnote, the Opinion below stated that because Petitioner did not argue "inequitable conduct . . . lulled [him] into a state of false security" [Slip. Op. at 8, n. 7], that "there is good reason to conclude that Hoehn has forfeited an 'extrinsic fraud' argument' on appeal." [Slip. Op. at 8-9, n. 7]. Nonetheless, the opinion below addressed the issue of extrinsic fraud on its merits, and reiterated its conclusion that Petitioner had not shown extrinsic fraud under the circumstances of this case, even where it is undisputed that service was not proper, and the debt collector waited nine years to attempt to collect on the judgment.

The Court of Appeal did not rule on whether Mr. Hoehn had shown that he had met the requisite equitable elements for extrinsic fraud of (i) a meritorious defense; (ii) a satisfactory excuse for not appearing to defend in the case; and (iii) diligence in seeking to vacate the judgment once it was discovered, none of which debt collector Sequoia contested before the trial court or in its Respondent's Brief. [Slip. Op. at 9-10]. The Court

of Appeal found that Mr. Hoehn had not preserved the issue of extrinsic mistake.[4] [Slip. Op. at 8]. Further, the court of appeal found that Mr. Hoehn "abandon[ed]" his objections to evidentiary rulings in his Reply Brief. [Slip. Op. 10]. In fact, what Mr. Hoehn stated in his Reply Brief is that while he reiterated his objections to the evidence in the Reply Brief to err on the side of caution, the Court of Appeal did not need to rule on the objections given that debt collector Sequoia conceded in its Respondent's Brief that this evidence was "of no consequence or relevance." [Reply Br. at 17].

Mr. Hoehn timely filed a Motion for Rehearing, which was denied.

Mr. Hoehn timely filed his Petition for Review with this Court, which was granted on January 25, 2023.

STATEMENT OF JURISDICTION.

The trial court denied Plaintiff's Motion to Set Aside Default and Vacate Judgment on July 10, 2020. [AA240-243] Plaintiff timely appealed. [AA244-245].

"[I]n cases where the law makes express provision for a motion to vacate such as under Code of Civil Procedure 473, an order denying such a motion is regarded as a special order made after final judgment and is appealable under [the predecessor to Code Civ. Proc. § 904.1(a)(2)]." [*Cochran v. Linn* (1984) 159 Cal.App.3d 245, 249].

[4] While Petitioner contested in its Motion for Rehearing that he had waived extrinsic mistake, for purposes of the issues presented herein, Petitioner raises only the issue of extrinsic fraud.

DISCUSSION

The issue presented by this case goes to the heart of our system of justice: does a defendant need to be properly served with process or else any judgment ensuing from this defective service is void, or does California law impose a "time limit" such that any defense based on improper service must be made within a certain time period or is forfeited?

Two axiomatic principles required the trial court and the court of appeal to set aside the default and vacate the judgment: (i) a judgment may not be entered if the summons has not been served, because personal jurisdiction has not been obtained over the defendant [*Peralta, supra*, 485 U.S. at 85 ("A judgment entered without notice or service is constitutionally infirm.")]; and (ii) a judgment void because of lack of service of summons may be set aside at any time. [Code Civ. Proc. § 473(d) (no time limit on setting aside void judgment); *see also Rochin v. Pat Johnson Manu. Co.* (1998) 67 Cal.App.4th 1228, 1239].

The opinion below recognized that section 473(d) has no time limit to set aside a void judgment. [Slip. Op. at 6 ("True, the text of the statute does not state a time limit.")]. But the opinion below held that because extrinsic evidence was used to show that the judgment is void, by "analogy" to section 473.5, the motion to set aside the judgment must occur no later than two years after the entry of default against the defendant. This legal error—in direct violation of constitutional requirements for due process—is egregiously wrong. Applying the time limits in section 473.5 to section 473(d) impermissibly upends (i) overwhelming contrary authority holding that judgments that are void—whether on their face or by extrinsic evidence—may be set aside at any time; and (ii) basic principles

of statutory interpretation, which require adherence to the plain language of the statute, and do not permit grafting the provisions of one statute onto another.

Second, and alternatively, Mr. Hoehn moved to set aside the default and vacate the void judgment under the court's equitable power based on "extrinsic fraud," which also has no time limit. [*Lovato v. Santa Fe Internat. Corp.* (1984) 151 Cal. App. 3d 549, 554]. The terms "extrinsic fraud or mistake" are given a broad interpretation and cover almost any circumstance by which a party has been deprived of a fair hearing. [Weil & Brown, et. al., Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2022) at ¶ 5:438]. The opinion below creates a conflict in the courts of appeal, by adding a *fourth* requirement to the existing three-part test for extrinsic fraud. This is also error. Extrinsic fraud includes by definition failure to affect proper service. [*Munoz v. Lopez* (1969) 275 Cal.App.2d 178, 181-182 (holding where defendant filed a declaration that he had not been served with process, inherent in the statement is that "the recital of service in the purported affidavit and certificate of service in the judgment roll is false. That falsity is of necessity either mistaken or deliberately fraudulent.")].

It is a fundamental principle of our jurisprudence that jurisdiction over the person by means of proper service must be obtained; otherwise, the court has no authority to act and any judgment is void. This case illustrates the harms that arise when this doctrine is set aside. It was undisputed that girlfriend Shannon Smith was not a "competent member of the household," and therefore service was not properly effectuated. [Code Civ. Proc. § 415.20(b)]. If the insurance company or debt collector had moved to collect on the judgment within two years of its issuance, Mr. Hoehn's motion to vacate would have been

timely even under the "two year" limitation the Court of Appeal applied to section 473(d). And had he been allowed a trial on the merits, Mr. Hoehn would have been easily able to defeat any allegations with unrebutted proof that (i) he was not at the apartment at the time the fire started, and (ii) no one investigating the fire identified Mr. Hoehn as the cause of the fire. Instead, he must now, in his late twenties, face the specter of a close to one million dollar judgment hanging over him, all because of a clever "gotcha" by the insurance company, now taken over by a debt collector happy to prosecute a million dollar windfall despite the fatal infirmities underlying its validity. In sum, it is precisely so that this situation should never occur that the Constitution requires due process and our Legislature expressly enacted a statute stating that "any void judgment" may be set aside without imposing any time limitation. [Code Civ. Proc. § 473(d)].

This Court should reverse.

I. A straightforward application of section 473(d) requires that any judgment void for lack of proper service may be vacated without time limitation.

A. The standard of review for this pure issue of law is *de novo*.

The issue as to whether there is a time limitation on a court's power to vacate judgments void for lack of proper service under section 473(d) is a matter of pure statutory interpretation, and is reviewed *de novo*. [*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 715]. No one—not Sequoia, not the trial judge, and not the Court of Appeal—argued or concluded that service in this case was proper pursuant to the strict statutory requirements of section 415.20(b), substituted service "in the presence of a competent member of the household." [Code Civ. Proc. § 415.20(b)]. Thus, the sole question

presented is whether when improper service is shown by means of extrinsic evidence, the statute of limitations from section 473.5 applies to section 473(d) to limit the time period in which a defendant may move to set aside a void judgment to two years. Because this is a pure question of law, the standard of review is *de novo*. [*Life Savings Bank v. Wilhelm* (2000) 84 Cal. App.4th 174, 177, *citing California Teachers Assn. v. San Diego Community College Dist*. (1981) 28 Cal.3d 692, 699 ("The sole issue on appeal is whether the three-month period acts as a statute of limitations such that no relief can be had under section 473 for mistake, inadvertence or excusable neglect. This being a pure question of law, we review the trial court's decision de novo.")].

Moreover, appellate courts are "favorably disposed toward orders excusing defaults and permitting controversies to be adjudicated upon their merits." [*Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1411-1412]. "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. [Citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.'" [*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980, *quoting Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233].

B. Mr. Hoehn was not properly served, therefore the trial court did not have jurisdiction to enter judgment.

At the outset, a brief analysis of the importance of proper service under California law and the U.S. Constitution is necessary to place the application of section 473(d) in context.

California has held for over 160 years that "to sustain a *personal* judgment the Court must have jurisdiction of the subject-matter, and of the person." [*Rockefeller Technology Inv. v. Changzhou* (2020) 9 Cal.5th 125, 138, *quoting Gray v. Hawes* (1857) 8 Cal. 562, 568]. "'Process' signifies a writ or summons issued in the course of a judicial proceeding." [Code Civ. Proc., § 17, subd. (b)(7)]. "'Service of process is the means by which a court having jurisdiction over the subject matter asserts its jurisdiction over the party and brings home to him reasonable notice of the action.'" [*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1464; *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 854].

Thus, formal service of process performs two important functions. From the court's perspective, service of process asserts jurisdiction over the person. "Unless a named defendant agrees to waive service, the summons continues to function as the sine qua non directing an individual or entity to participate in a civil action or forgo procedural or substantive rights." [*Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc*. (1999) 526 U.S. 344, 351]. "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." [*Zenith Corp. v. Hazeltine* (1969) 395 U.S. 100, 110]. From the defendant's perspective, "[d]ue notice to the defendant is essential to the jurisdiction of all courts, as sufficiently appears from the well-known legal maxim, that no one shall be condemned in his person or property without notice, and an opportunity to be heard in his defence." [*Earle et al. v. McVeigh* (1875) 91 U.S. 503, 503-504]. Service of process thus protects a defendant's due process right to defend against an action by providing constitutionally adequate notice of the court proceeding.

A void judgment may be challenged at any time. [*Schwab v. Southern California Gas*, 114 Cal. App.4th 1308, 1320; *Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 862]. If there has been no valid service of summons, "the judgment violates due process of law; it is void and can be set aside at any time." [Weil & Brown, et al., Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group June 2020) at ¶ 5:277; *Peralta*, *supra*, 485 U.S. at 84-85; *Calvert v. Al Binali* (2018) 29 Cal.App.5th 954, 960-961]. An order incorrectly denying relief from a void judgment is also void, as it gives effect to the judgment. [*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691].

In this case, Plaintiff attempted service on Mr. Hoehn through substituted service on his girlfriend. [AA50; Code Civ. Proc. § 415.20(b]. Such substituted service must be made "in the presence of a competent member of the household." [Code Civ. Proc. § 415.20(b)]. In fact, Ms. Smith did not live with Mr. Hoehn at 2727 Edison Street; Mr. Hoehn lived with his roommate Kirk Haynes. [AA24 at ¶ 7]. Mr. Hoehn's girlfriend was therefore not a competent member of his household, and service was not proper.

Sequoia did not dispute the fact that Ms. Smith was not a competent member of Mr. Hoehn's household. Instead, Sequoia argued that there is a rebuttable presumption of the facts stated in the return. [AA202; Evid. Code § 647]. But this is merely a "presumption affecting the burden of producing evidence," and is not a conclusive presumption. [Evid. Code § 630]. Defendant Hoehn rebutted the process server's statement that she served "Shannon Smith, Girlfriend," "a competent member of the household . . ." [AA50]. Mr. Hoehn attested that "Shannon Smith did not live with me at the 2727 Edison residence; my roommate was Kirk Haynes." [AA24 at ¶ 7]. Mr. Hoehn further attested: "I never

received a Summons or Complaint or any legal paperwork from Shannon Smith at any time. I do not recall receiving or seeing the Summons or Complaint at any time." [AA24 at ¶ 8]. Sequoia offered no evidence, or even argument, that Shannon Smith legally constituted a "competent member of the household." Accordingly, this argument is waived. [*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 863].

Next, Sequoia argued via an inadmissible triple hearsay declaration [*see* AA207-215 (Evidentiary Objections)], that Mr. Hoehn allegedly left a voicemail message with the attorney for the insurance company, and therefore Mr. Hoehn received proper statutory service by "inference." [AA205]. According to Sequoia, the possibility that Mr. Hoehn called Mr. Schroeder, "results in an inescapable conclusion that Defendant must have spoken to his girlfriend regarding service of process on her on April 1, 2010, and seen and received copy of that process . . ." [AA205-206].

This argument fails for two reasons. First and foremost, Sequoia abandoned this argument on appeal, deeming the hearsay phone records "of no consequence or relevance." [RB19-20]. (Mr. Hoehn objected to this evidence in its entirety as inadmissible hearsay, but the Court of Appeal did not rule on this issue). Second, the "service by inference" argument turns the formal statutory and Constitutional requirements for service on their head. Even assuming *arguendo* that the "evidence" submitted by Sequoia was admissible (which it is plainly not), service of summons is not determined by "inference" or "inescapable conclusion." On the contrary, formal notice is statutorily required in California [Code Civ. Proc. § 415.20]: "[f]ormal notice is an 'essential prerequisite to a valid default judgment.'" [*Engbretson & Co. v. Harrison* (1981) 125 Cal.App.3d 436, 443-

444 (mail service of amended complaint inadequate notice)]. Compliance with the statutory procedures for service of process "is essential to establish personal jurisdiction." [*Renoir v. Redstar Corp.* (2004) 123 Cal.App.4th 1145, 1152]. Thus, in *Honda Motor Co. Superior Court*, the court held that service on a Japanese corporation that did not comply with the Hague Service Convention had to be quashed even though the Japanese defendant had actually received the summons and complaint. The court explained: "[Plaintiff's] arguments share a common fallacy; they assume that in California, actual notice of the documents or receipt of them will cure a defective service. That may be true in some jurisdictions, but California is a jurisdiction where the original service of process, which confers jurisdiction, must conform to statutory requirements or all that follows is void . . . The fact that the person served 'got the word' is irrelevant." [*Honda Motor v. Superior Court* (1992) 10 Cal.App.4th 1043, 1048–1049].

C. Mr. Hoehn's motion to vacate the judgment for lack of proper service was timely under section 473(d).

Against this background demonstrating that proper service is required for a court to obtain jurisdiction over a defendant, and further that California requires strict adherence to the statutory prerequisites for service [*see supra* Section I.B.], it follows that section 473(d) was enacted to ensure that judgments void for lack of service may be vacated at any time. Thus, section 473(d) empowers the trial court "to set aside any void judgment or order," without time limitation. [Code Civ. Proc. § 473(d)].

But the Court of Appeal instead held that "[w]here a party moved under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of

proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5, that is, the two-year outer limit." [Slip. Op. at 6]. The Court of Appeal set forth its puzzling reasoning: "We agree that a void judgment can be attacked at any time. But if a void judgment is valid on its face, it cannot be attacked via section 473, subdivision (d) at any time." [Slip. Op. at 6-7]. In so holding, the opinion below followed the *Rogers*/*Trackman* line of case law, which holds that where a judgment is shown to be void by extrinsic evidence, but is not self-evidently void on its face, then the two-year statute of limitations under section 473.5 applies to section 473(d) "by analogy." [*Rogers, supra*, 216 Cal.App.2d at 1123-1124; *Trackman, supra*, 187 Cal.App.4th at 180]. This was error.

1. Numerous courts have rejected the imposition of a time limitation on section 473(d).

As the Fourth District Court of Appeal recently held in rejecting *Trackman's* holding, "numerous other courts have rejected the proposition" that "a motion under section 473, subdivision (d) to vacate a void judgment for lack of service is subject to section 473.5, subdivision (a)'s two year time limit." [*Martinez v. Encore Senior Living, supra,* at *2].[5] These courts of appeal reject the *Rogers/Trackman* authority as contrary to the "wealth of California authority" holding that a void judgment can be set aside at any time. [*Id.* at *3 ("We believe that *Trackman* was incorrect on this point."), *quoting People v. Am. Contractors Indemnity Co*. (2004) 33 Cal.4th 653, 660 ("[w]hen a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to

[5] Petitioners cite to *Martinez* to show conflict, and the need for uniformity in the law.

direct or collateral attack *at any time*.'") (emphasis added); *see also O.C. Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1330-1331 (where respondent allows facts to be established without opposition showing that a facially valid judgment is void, then the judgment must be treated as void on its face)].

Thus, while the opinion below elected to follow *Trackman* for "stability in the law" [Slip. Op. at 6, n.5], the Fourth Appellate District in *Martinez* cited numerous courts that have rejected the proposition that there is any time limit on setting aside a void judgment, regardless of whether it is void on its face or as shown by extrinsic evidence. [*Martinez, supra*, at *3, *citing Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 830 ("A void judgment can be attacked at any time by a motion under . . . section 473, subdivision (d)."); *Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 526-527 ("A void judgment, however, can be set aside at any time," citing § 473, subd. (d)); *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1226 ("Although courts have often also distinguished between a judgment void on its face, i.e., when the defects appear without going outside the record or judgment roll, versus a judgment shown by extrinsic evidence to be invalid for lack of jurisdiction, the latter is still a void judgment with all the same attributes of a judgment void on its face.")].

Indeed, the opinion below appears to concede that Petitioner demonstrated the conflict between *Trackman* and cases that hold that a void judgment is void for all time—whether void on its face or shown by extrinsic evidence—but dismisses the contrary appellate court holdings as "marshall[ing] no case law in support of that proposition." [Slip. Op. at 6-7, n. 6, rejecting the holdings in *Falahati. supra,* 127 Cal.App.4th at 830 ("A void

judgment can be attacked at any time by a motion under . . . section 473, subdivision (d)") and *Deutsche Bank, supra,* 13 Cal.App.5th at 526-527 ("A void judgment, however, can be set aside at any time," citing § 473, subd. (d))].

Finally, while not precedential for this Court, it is informative to note that federal courts applying Federal Rule of Civil Procedure 60(b)(4), which uses essentially the same language as section 473(d), do not impose a time limit on vacating void judgments. Under federal law, if a judgment is void, a court has no discretion to vacate the judgment, and there is no time limit on moving to vacate the judgment. [8 Wright & Miller, Federal Practice and Procedures, § 2862, Void Judgment (3 ed. 2022)].

2. The decision below turns principles of statutory interpretation on their head.

The opinion below and the *Trackman/Rogers* line of case law that separate void judgments into two different classes—those void on their face, and those void by extrinsic evidence—violates the most basic principles of statutory construction. The proper sequence in applying rules of statutory construction is (i) first to look at the plain meaning of the statutory language; (ii) then its legislative history; and (iii) finally to reasonableness of the proposed construction. [*Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1396]. The opinion below eviscerates this well-settled precedent in grafting the time limits of section 473.5 onto 473(d).

(a) The plain language of section 473(d) does not add a time limit to vacate a void judgment.

In construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [*Green v. State of California* (2007) 42 Cal.4th 254, 260]. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. [*Id.*].

Section 473(d) unambiguously states, without imposing any time limitation, that the court may set aside "any void judgment." [Cal. Code Civ. P. § 473(d)]. Indeed, the opinion below ***concedes*** that the statute itself contains no time limitation: "True, the text of the statute does not state a time limit." [Slip. Op. at 6]. But the opinion below justifies its application of *Trackman* (grafting the time limits of one statute onto another) with the proposition that "this is a question of statutory construction on which the Legislature can act, if it desires . . ." [Slip. Op. at 6]. But given that the Legislature expressly did not add any time limit to section 473(d), this begs the question as to what the Legislature could do to address this issue. Where the Legislature intended that there be a time limit, it expressly added a time limit. [*See, e.g,* Code Civ. Proc. § 473(b) (six month time limitation on vacating a judgment if there has been a mistake, inadvertence, surprise, or excusable neglect); Code Civ. Proc. § 473.5 (two year time limitation for motion to set aside judgment where the judgment has been properly served but the service has not resulted in actual notice)]. The Legislature should not have to point out that it is *not* adding a time limit where it does *not* enact a time limit. It is the appellate courts who have contorted the plain meaning of the statute, which this Court, and not the Legislature, is charged with correcting. [Cal. Rules of Court, rule 8.500(b)(1)].

(b) A separate statute cannot be grafted on "by analogy."

Further, California precedent does not permit applying the time limits of section 473.5 "by analogy" to section 473(d). When confronted with two statutes, one of which contains a term, and one of which does not, a court may not import the term used in the first to limit the second. [*Walt Disney Parks & Resorts v. Superior Court* (2018) 21 Cal.App.5th 872, 879-880 (holding that the trial court erred in holding that a defendant moving for a change of venue under Code Civ. Proc. § 397 is barred if the motion was not made in compliance with the timing requirements of Code Civ. Proc. § 396b)]. Instead, courts must interpret different terms used by the Legislature in the same statutory scheme to have different meanings. [*Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1352 ("[w]hen the Legislature uses different words as part of the same statutory scheme, those words are presumed to have different meanings"); *Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th 1333, 1343, (same); *see Brown v. Kelly Broadcasting Co*. (1989) 48 Cal.3d 711, 725 ("when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.")].

Thus, where, as here, the Legislature has chosen to include a phrase in one provision of the statutory scheme (e.g. "two years" in section 473.5), but to omit it in another provision (e.g. no time limitation in section 473(d)), we presume that the Legislature did not intend the language included in the first to be read into the second. [*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 73 ("When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning."); *see also*

Craven v. Crout (1985) 163 Cal.App.3d 779, 783 ("Where a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent."); *Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497 ("Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning.")].

(c) The legislative history demonstrates an intent to grant the trial courts power to vacate a void judgment at any time.

The legislative history demonstrates an intent to ensure that trial courts were vested with the power to vacate a void judgment at any time. Specifically, in 1933, the Legislature created a new section 473(d) to make explicit the court's power to vacate "any void judgment." "The only reason that we can think of, therefore, for writing it expressly into Section 473, is the probability that the legislature, which must be presumed to have known that the power to set aside void judgments was inherent in courts of record, had some fear lest if it were not, after the repeal of Sections 859 and 900a of the Code of Civil Procedure, placed in some statute, courts not of record might be held not to possess it at all." [*F.E. Young Co. v. Fernstrom* (1938) 31 Cal.App.2d Supp. 763, 765; *see also In re Estrem's Estate* (1940) 16 Cal.2d 563, 572 ("Fear existed that unless the contents of former section 900a was placed in some statute, courts not of record might be held to be without these powers.")].

Section 473(d) codified the repealed section 900a of the Code of Civil Procedure, which held that with respect to justices of the peace, "[s]aid justices shall have the power to set aside any void judgment upon motion of either party to the action after notice to the adverse party, and thereupon the action shall be treated as if no judgment had been entered." [*F.E. Young, supra,* 16 Cal.2d at 765]. Prior to the enactment of section 473(d), courts of appeal held that "attacks by motion upon judgments void for want of jurisdiction but not appearing to be void on their faces, must be made within a reasonable time," which was held by analogy to be "a maximum of one year after the entry of judgment." [*Id.*]. Certain courts of appeal interpreted the Legislature's silence in section 473(d) on the application of a "reasonable time" by "analogy" to mean that the Legislature implicitly approved such time limitation. [*See, e.g, Id*. at 765-766]. But an argument more consistent with the rules of statutory interpretation is that having been aware of the common law application of "reasonable time" to vacate a void judgment if is shown to be void by extrinsic evidence rather than on its face, the Legislature nonetheless elected not to codify this time limitation, and thereby rejected it. "After all, when enacting legislation, 'The Legislature is deemed to be aware of existing laws and judicial decisions ... in effect at the time legislation is enacted, and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.'" [*People v. Glukhoy* (2022) 77 Cal.App.5th 576, 591].

The opinion below criticizes Petitioner's citation of "cases from 1938 and 1940" (immediately following the 1933 enactment of section 473(d)) because "[t]his language does not speak to legislative intent concerning a time limit within which a party must ask

a trial court to exercise such power." [Slip. Op. at 7]. But this is precisely the point: the Legislature did ***not*** impose a time limit to vacate a void judgment, much less make any distinction between judgments "void on their face" versus shown to be void because of extrinsic evidence. Instead, the opinion below credits *Rogers*' analysis of the legislative history, because it "does discuss the question of legislative intent concerning time limits for seeking to set aside void judgments." [Slip. Op. at 7 (original emphasis)]. But *Rogers* conceded that this was an issue of first impression, as "[n]o reported decision has considered whether the limitation period contained in section 473.5 governs by analogy a motion for relief from a default judgment valid on its face but otherwise void because of improper service." [*Rogers, supra,* 216 Cal.App.3d at 1123]. And *Rogers'* rationale for applying section 473.5's two-year time limitation was that the trial court had held that there was a one year limitation on vacating judgments under section 473(d), and "[t]here is no valid reason to conclude that the Legislature intended to treat those defendants properly served more favorably than those not served at all." [*Rogers, supra*, 216 Cal.App.3d at 1123-1124]. This, *Rogers* reasoned, would lead to "an absurdity." [*Id.*]. But it is also an "absurdity" to hold—as does the opinion below—that the Legislature intended to treat defendants properly served ***the same*** as those not served at all (by grafting section 473.5 onto 473(d)).

The opinion below next contends that there are no absurd results, because the "flaw in this reasoning is that application of a two-year time limit for motions under section 473, subdivision (d) does not preclude Hoehn from filing an independent action in equity to set aside the facially valid judgment (where the parties may litigate relevant factual

questions).” [Slip. Op. at 8]. This does not withstand scrutiny. First, the parties did “litigate relevant factual questions”—e.g. was there proper service or not—and it was uncontested that there was not proper service. Second, a defendant who was never served should not have to bear the burden to prove in a separate action that as a matter of equity the judgment should be vacated, when the judgment is void in the first instance. [*See, e.g.*, *Aheroni v. Maxwell* (1988) 205 Cal.App.3d 284, 291-292 (“A party who seeks to have his default vacated under the court’s equity power must make a stronger showing than is necessary to obtain relief under section 473.”)]. Indeed, it is well-settled that a defendant bears a far lesser burden to vacate a judgment under section 473 than in an action in equity. “The Legislature has determined that during the time frame provided by Code of Civil Procedure section 473 there is a strong public policy in favor of allowing litigants their day in court. Thus, by a lesser showing than extrinsic fraud (mistake, inadvertence, surprise, or excusable neglect) public policy favors setting aside judgments under section 473.” [*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1070-1071]. Accordingly, the Court of Appeal’s “remedy” to its imposition of a time limitation on section 473(d) by requiring a separate action in equity impermissibly deprives the defendant of the strong public policy in favor of granting relief under section 473, and erroneously relegates him to only the “exceptional” relief available in equity.

(d) Applying a two-year limitation to set aside otherwise void judgments impermissibly promotes the evil that the Legislature sought to prevent.

The “evil to be prevented” under section 473(d) is allowing a judgment to stand that was obtained without proper jurisdiction. Therefore, whether the service of process is

shown to be defective because the service is void on its face or because of extrinsic evidence does not correct the simple fact that the court does not have jurisdiction over the person and therefore cannot enforce a void judgment. [*Wotton v. Bush* (1953) 41 Cal.2d 460, 467 (in interpreting statute, one must consider the objective sought to be achieved and evil to be prevented)]. This in turn means that any reasonable interpretation of section 473(d) would mean that "any void judgment" may be set aside at any time, regardless of whether "extrinsic evidence" is used to show the deficiencies in service.

In sum, the opinion below—and the *Rogers/Trackman* authority that it relies upon—sharply diverges from Constitutional requirements of due process and jurisdiction, and this Court's precedent setting forth the principles of statutory interpretation. This Court should reverse and restore the Legislature's original intent that there is no time limit on a court's power to vacate a void judgment under section 473(d).

II. In the alternative, the judgment should be vacated in equity based on extrinsic fraud.

The underlying judgment should be vacated under section 473(d), which imposes no time limit for vacating a judgment void for lack of service of process. But in the alternative, Mr. Hoehn should be afforded relief from judgment based upon extrinsic fraud, which is a wholly independent ground, and which also has no time limits. [*Department of Industrial Relations v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560, 570; *see also Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981]. The opinion below's holding as to the meaning of "extrinsic fraud" conflicts with well-settled precedent. The opinion below held that improper service did not rise to the level of "extrinsic fraud."

[Slip. Op. at 9]. But "extrinsic fraud" in this context does not require proof of intentional fraud; when there has been no service of the complaint, and the plaintiff waited nine years to collect on the judgment, these acts alone are sufficient to prove extrinsic fraud permitting a court to vacate a judgment.

A. The standard of review is abuse of discretion, but a mistake of law is an abuse of discretion.

The standard of review for denial of motion to vacate a default judgment on equitable grounds is abuse of discretion. [*Cruz v. Fagor America, Inc*. (2007) 146 Cal.App.4th 488, 503]. However, both the trial court and the court of appeal denied this equitable relief based on the mistaken legal conclusion that improper service could not constitute intrinsic fraud or mistake, and that there must be a greater showing of "inequitable conduct" that "lulled [the defendant] into a state of false security" [Slip. Op. Exh. A, at 8, n. 7 (Court of Appeal); [AA243 (trial court)]. Rulings based on a mistake of law are by definition an abuse of discretion. [*Hernandez v. Amcord* (2013) 215 Cal.App.4th 659, 678].

B. It was undisputed that Mr. Hoehn met the three well-settled criteria for proving extrinsic fraud.

The terms "extrinsic fraud or mistake" are given a broad interpretation and cover almost any circumstance by which a party has been deprived of a fair hearing. [Weil & Brown, et al., Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2022) at ¶ 5:438]. There need be no actual "fraud" or "mistake" in the strict sense. [*Marriage of Park* (1980) 27 Cal.3d 337, 342]. "The essence of extrinsic fraud is one party's preventing

the other from having his day in court." [*City and County of San Francisco v. Cartagena* (1995) 35 Cal.App.4th 1061, 1067].

In order to prove extrinsic fraud, the party seeking relief must show three elements: "(1) a meritorious defense; (2) a satisfactory excuse for not presenting a defense in the first place; and (3) diligence in seeking to set aside the default judgment once discovered." [*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750]. "The burden is on the moving party, and the greater the prejudice to the responding party, the greater the burden on the moving party. The greater the prejudice to the responding party, the more likely it is that the court will determine that equitable defenses of laches or estoppel apply to the request to vacate a valid judgment." [*In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1071]. It was ***uncontested*** at both the trial and appellate level that Mr. Hoehn met the three elements warranting equitable relief based on extrinsic fraud. Nor did debt collector Sequoia attempt to show that it would be prejudiced in any manner from vacating the underlying judgment.

1. Mr. Hoehn has a meritorious defense.

Mr. Hoehn unquestionably showed that he has a meritorious defense. [*See Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1247 (defendant may meet its burden of showing it has a meritorious defense "by submitting ... a declaration averring there is such a defense")]. Mr. Hoehn offered uncontested evidence that he was not at the apartment the day of the fire, and indeed, most of his possessions were destroyed. No one identified Mr. Hoehn as the source of the fire. The most likely culprit, roommate Forrest Kroll, who was at the apartment at the time of the fire, could not be located by the insurance company.

If Mr. Hoehn had been permitted to litigate this case on the merits, he would have defeated these claims on the merits.

2. Mr. Hoehn has a satisfactory excuse for not appearing to defend in the case.

Mr. Hoehn met his burden of showing that he had a satisfactory excuse for not defending the case—Mr. Hoehn was not served with the complaint and therefore was unaware of the lawsuit until nine years after the default judgment was entered, when debt collector Sequoia belatedly sought to garnish his wages. [AA24; *see Mechling v. Asbestos Defendants, supra,* 29 Cal.App.5th at 1248 (defendant had satisfactory excuse for not defending lawsuit because it had not been served with complaint "or other relevant pleadings")]. Indeed, the trial court and the opinion below accepted that girlfriend Shannon Smith was misidentified as a competent member of the household. [AA243]. Debt collector Sequoia did not offer evidence or argument that girlfriend Shannon Smith should be considered a "competent member of the household." [Cal. Code Civ. P. § 415.20(b)].

3. Mr. Hoehn showed diligence in seeking to vacate the judgment once it was discovered.

After becoming aware of the default in January 20, 2020, Mr. Hoehn found counsel and diligently sought to vacate it less than two months later, on March 18, 2020. Notably, due to the urgency of this matter, Mr. Hoehn's counsel moved quickly to file this Motion to Set Aside Default and Vacate the Judgment as soon as counsel was able to locate the underlying records from the court's file, and despite the fact that, in March 2020, California had moved to lockdown procedures due to the COVID epidemic. Debt collector Sequoia did not argue that Mr. Hoehn failed to act with diligence, nor did the trial court make such

a finding. [*See, e.g., Mechling v. Asbestos Defendants, supra,* 29 Cal.App.5th 1241, 1249 (diligence shown where defendant moved to vacate default judgments five months after retaining counsel to do so)].

C. The Court of Appeal impermissibly added a "fourth" criteria for the test for extrinsic fraud.

Despite the fact that it was undisputed by debt collector Sequoia, the trial court, and the Court of Appeal that Mr. Hoehn met the three criteria for relief from judgment due to extrinsic fraud [*see supra* Section II.B.], the Court of Appeal erroneously devised a "fourth" criteria called "inequitable conduct," and held that Mr. Hoehn was required to show "inequitable conduct *and* three elements: (1) a meritorious defense; (2) a satisfactory excuse for not presenting a defense in the first place; and (3) diligence in seeking to set aside the default judgment once discovered." [Slip. Op., Exh. A at 8, n. 7 (original emphasis)]. But extrinsic fraud does not require, as the Court of Appeal held, "inequitable conduct" that "lulled [the defendant] into a state of false security." [*Id*]. On the contrary, extrinsic fraud occurs when the defendant does not have knowledge of the suit, by *inter alia,* failure to effect proper service.

This Court defines extrinsic fraud as a failure to provide notice to the opposing party such that the trial court did not have jurisdiction in the first instance: "Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time." [*Westphal v. Westphal* (1942)

20 Cal.2d 393, 398 (internal citations omitted)]. Failing to serve the defendant is by definition extrinsic fraud: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as . . . where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff . . ." [*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471]. In contrast, there is no extrinsic fraud for a "party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary . . . Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack." [*Westphal, supra,* 20 Cal.2d at 398 (internal citations omitted)].

Thus, the Courts of Appeal hold that lack of proper service constitutes extrinsic fraud. "[A] false recital of service although not deliberate is treated as extrinsic fraud or mistake in the context of an equitable action to set aside a default judgment." [*Munoz v. Lopez, supra,* 275 Cal.App.2d at 181-182]. "In addition to providing proof that a judgment or order is void, a false return of summons may constitute both extrinsic fraud and mistake." [*County of San Diego v. Gorham,* 186 Cal.App.4th at 1229]. When a judgment or order is obtained based on a false return of service, the court has the inherent power to set it aside [*In re Marriage of Smith* (1982) 135 Cal.App.3d 543, 555], and a motion brought to do so may be made on such ground even though the statutory period has run. [*Munoz,* 275 Cal.App.2d at 182–183; *see also* Witkin, 8 California Procedure: Attack §§

215, 231 (6th ed. 2022) (citing *Munoz* and *Gorham* as examples of "void" judgments that were subject to attack without time limit)].

The opinion below conflicts with this precedent, and instead holds that there must be undefined "inequitable conduct" to rise to the level of extrinsic fraud—even where there has been no service of process. In support of its conclusion, the opinion below cites to inapposite authority, none of which require a showing of intentional bad acts in the context of proving extrinsic fraud where there has been no service of process. Indeed, the opinion below *misstates* the holding of *Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750 as requiring proof of "inequitable conduct." [Slip. Op. at 8, n. 7]. On the contrary, *Rodriguez* does not mention "inequitable conduct," and holds unequivocally that extrinsic fraud exists if "the judgment is one entered against a party by default under circumstances which prevented him from presenting his case . . ." [*Rodriguez, supra,* 236 Cal.App.4th at 750]. Nor does the other authority relied upon by the opinion below support its holding that extrinsic fraud must demonstrate actual scienter or bad acts. [*See, e.g., Bein v. Brechtel-Jochim Group, Inc.* (1992) 6 Cal.App.4th 1387, 1393 (extrinsic fraud not at issue; court of appeal held that service upon gate guard in gated community was proper); *In re David H.* (1995) 33 Cal.App.4th 368, 381 (extrinsic fraud in the context of vacating a judgment void for lack of service not at issue; issue presented was whether parents in termination of parental rights were induced by intentional misrepresentations to agree to forego a contested hearing on the issue of termination)]. The one case that mentions "inequitable conduct" is *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 314, and this case gives no guidance as to whether lack of service and failure to enforce a judgment rise

to the level of extrinsic fraud, because in *Gibble* the plaintiff "properly served [defendant] with the summons." [*Id.* at 315].

By expanding the meaning of "extrinsic fraud" to add a fourth element constituting proof of actual bad acts—even where it is conceded that service was not proper and the debt collector waited nine years to attempt to collect the judgment—the opinion below creates a divide with this Court's precedent, which holds that extrinsic fraud occurs where there are acts sufficient to prevent notice arising to the defendant. This Court should hold, in line with prior precedent, that extrinsic fraud arises in the context of service that has not been properly made, without the necessity for the defendant to prove an ill-defined "inequitable conduct" on the part of the Plaintiff or process server.

CONCLUSION

Petitioner prays that this Court reverse the opinion of the Court of Appeal, and for such other relief as to which Petitioner may be entitled.

DATED: March 27, 2023

KAZAN, McCLAIN, SATTERLEY & GREENWOOD
A Professional Law Corporation

By: DocuSigned by: Denyse Clancy 99B5571DD2304AE...
Denyse F. Clancy
Attorneys for Defendant, Appellant, and Petitioner

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, the foregoing is proportionally spaced and contains 11,504 words, according to the word processing program used to prepare it.

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Attorneys for Defendant, Appellant, and Petitioner

Exhibit A

Court of Appeal, Third Appellate District
Andrea K. Wallin-Rohmann, Clerk
Electronically FILED on 10/19/2022 by C. Doutherd, Deputy Clerk

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

CALIFORNIA CAPITOL INSURANCE COMPANY et al., Plaintiffs and Respondents, v. CORY MICHAEL HOEHN, Defendant and Appellant.	C092450 (Super. Ct. No. SCV0026851)

In 2020, appellant Cory Michael Hoehn filed a motion to set aside default and a 2011 default judgment. The trial court denied the motion, ruling it was untimely as to a theory of improper service of process, and unpersuasive as to a theory of extrinsic fraud. We affirm.

I. BACKGROUND

In March 2010, California Capital Insurance Company (Capital Insurance) filed a civil action alleging that Hoehn's negligence caused a June 2009 fire in a Roseville

EXHIBIT A

apartment building where Hoehn lived at the time. Pursuing a subrogation claim, Capital Insurance sought reimbursement of over $470,000 the company paid to the owner of the damaged apartment building under an insurance policy.

In April 2011, after Capital Insurance provided proof of substituted service of process on Hoehn, the trial court entered default judgment against Hoehn. The proof included a declaration under penalty of perjury by a registered California process server, stating that—on five occasions between March 27 and April 1, 2010—she attempted to serve Hoehn personally at his home in San Mateo. On the fifth unsuccessful attempt, on April 1, 2010, the process server "[s]ub-served to" Hoehn's girlfriend (a "[c]o-[o]ccupant") at the residence, as Hoehn was "not home."

The process server further declared that, the day after substituted service, she mailed copies of the complaint and summons to Hoehn at his San Mateo residence.

In March 2020, Hoehn moved to set aside default and default judgment, and for leave to file an answer to the 2010 complaint.[1] Submitting a declaration in support of his motion, Hoehn argued he did "not recall seeing the [c]omplaint or [s]ummons at any time"; he "never received the [c]omplaint or [s]ummons or any legal paperwork from" his girlfriend; and that—as his girlfriend "did not live with" him—Capital Insurance "falsely claimed that [his] girlfriend . . . was a '[c]o-[o]occupant and 'member of the household' of . . . Hoehn's residence" in San Mateo in 2010.

Thus, Hoehn argued, the judgment entered against him was "void because the service of summons was not made in the manner prescribed by" Code of Civil Procedure

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[1] After entry of judgment and before Hoehn filed this motion, Capital Insurance assigned its rights in connection with the judgment to Sequoia Concepts, Inc., the respondent in this appeal.

section 415.20, subdivision (b).[2] And pursuant to section 473, subdivision (d),[3] Hoehn contended, the void judgment could be set aside. Hoehn also argued the judgment could be "set aside on the theory of its invalidity . . . on the grounds of extrinsic fraud."

The trial court denied Hoehn's motion, ruling it: (1) was untimely with respect to the theory of improper service of process, as the judgment was facially valid; and (2) was unpersuasive on the theory of extrinsic fraud, as Hoehn "fail[ed] to demonstrate" that a "proof of service of summons misidentif[ying] [Hoehn's girlfriend] as a co-occupant" "constitute[d] extrinsic fraud."

Hoehn timely appealed.

II. DISCUSSION

A. Background Legal Principles

"[A] party who has not actually been served with summons has [multiple] avenues of relief from a default judgment." (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180 (*Trackman*).)

"First, . . . section 473.5, subdivision (a) provides," as relevant here, that " '[w]hen service of a summons has not resulted in actual notice to a party in time to defend the

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[2] Which provides, in relevant part: "If a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served . . . a summons may be served by leaving a copy of the summons and complaint at the person's dwelling house . . . in the presence of a competent member of the household . . . at least 18 years of age, who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail . . . at the place where a copy of the summons and complaint were left." (Code Civ. Proc., § 415.20, subd. (b).)

Further undesignated statutory references are to the Code of Civil Procedure.

[3] Which provides: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." (§ 473, subd. (d).)

action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding . . . two years after entry of a default judgment against him or her.' " (*Trackman, supra*, 187 Cal.App.4th at p. 180.)

"Thus, a party can make a motion showing a lack of *actual notice* not caused by avoidance of service or inexcusable neglect, but such motion must be made no later than two years after entry of judgment, and the party must act with diligence upon learning of the judgment." (*Trackman, supra*, 187 Cal.App.4th at p. 180.)

"Where a party moves under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5, that is, the two-year outer limit. (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 209, pp. 814-815 (Witkin); see *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1120-1124 [(*Rogers*)]; *Schenkel v. Resnik* (1994) 27 Cal.App.4th Supp. 1, 3-4; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 301, fn. 3.)" (*Trackman, supra*, 187 Cal.App.4th at p. 180.)

"Second, the party can show that extrinsic fraud or mistake exists, such as a falsified proof of service, and such a motion may be made at any time, provided the party acts with diligence upon learning of the relevant facts." (*Trackman, supra*, 187 Cal.App.4th at p. 181.)

"[A] third avenue of relief is a motion to set aside the default judgment on the ground that it is [invalid on its face]. [Citations.] 'A judgment or order that is invalid on the face of the record is subject to collateral attack. [Citation.] It follows that it may be set aside on motion, with no limit on the time within which the motion must be made.' " (*Trackman, supra*, 187 Cal.App.4th at p. 181.)

Fourth, "[i]f the invalidity does not appear on its face, [a] judgment or order may be attacked . . . in an independent equitable action without time limits." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1228; see *Groves v. Peterson* (2002) 100 Cal.App.4th 659, 670, fn. 5 ["A motion in the underlying case to set aside a default judgment as void for defective service of process must, under . . . section 473.5, be filed within a reasonable time not exceeding two years from the entry of the default judgment, but an independent action in equity to set aside a judgment on that ground is not subject to a time limit"]; *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 488 ["a judgment void for lack of due process notice or extrinsic fraud is subject to attack at any time in a proceeding or action initiated for that purpose"].)

In summary, to attack a judgment that is *invalid* on its face, a motion to set it aside may be made at any time in the underlying action. But if a judgment is *valid* on its face, and more than two years have passed since entry of judgment, a party seeking to attack the judgment must either (a) show extrinsic fraud or mistake via a motion in the underlying action, *or* (b) pursue an independent action in equity.

B. "Improper Service" Theory of Relief Untimely as Judgment Was Facially Valid

Here, rather than initiate an independent equitable action, Hoehn filed a motion in the underlying action attacking an almost nine-year-old judgment that was valid on its face.[4] Thus, regarding the theory of relief that the judgment was void for lack of proper service, the trial court properly ruled the motion was untimely, because it was filed more than two years after entry of judgment.

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[4] Though Hoehn argued in the trial court that the judgment was "facially invalid and void for failure to serve" him with the summons and complaint, he does not reiterate that argument on appeal, and rightly so. "Leaving papers with an apparent coresident" at defendant's address "is a method of service reasonably calculated to achieve actual service, and is therefore facially valid, whether or not *actual* service is accomplished on the facts of a given case." (*Trackman, supra*, 187 Cal.App.4th at p. 185.)

Hoehn argues that "[s]ection 473[, subdivision](d) has no time limit to set aside a void judgment." True, the text of the statute does not state a time limit. But case law does. (See *Trackman, supra*, 187 Cal.App.4th at p. 180 ["Where a party moves under section 473, subdivision (d) to set aside 'a judgment that, though valid on its face, is void for lack of proper service, the courts have adopted by analogy the statutory period for relief from a default judgment' provided by section 473.5, that is, the two-year outer limit"].)

Hoehn argues that *Trackman*, and the "line of case law" that it rests on, was wrongly decided, but cites no authority expressly disagreeing with the holding in *Trackman* that a motion—under section 473, subdivision (d)—to set aside a facially valid judgment for lack of proper service must be filed within two years of entry of judgment.[5] Rather, Hoehn cites multiple cases declaring some version of the broad proposition that "a void judgment can be attacked at any time."[6] We agree that a void judgment can be

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[5] We will apply *Trackman*'s holding in light of two considerations: (1) stability in the law (cf. *People v. Lujano* (2014) 229 Cal.App.4th 175, 190 [stability in the law has value, so an appellate court should be inclined to follow published decisions absent " ' "good reason to disagree" ' "]; *Arentz v. Blackshere* (1967) 248 Cal.App.2d 638, 640 [declining to disagree with decisions that "stood without contradiction for seven years"]); and (2) this is a question of statutory construction on which the Legislature can act, if it desires (see *Lucent Technologies, Inc. v. Board of Equalization* (2015) 241 Cal.App.4th 19, 35 ["Courts are especially hesitant to overturn prior decisions where, as here, the issue is a statutory one that our Legislature has the power to alter"]).

[6] For example, Hoehn invokes language in *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, which says that "[a] void judgment can be attacked at any time by a motion under . . . section 473, subdivision (d), or by collateral action." (*Id*. at p. 830) In support of that proposition, *Falahati* cited the language of section 473, subdivision (d) and *Rochin v. Pat Johnson Mfg. Co*. (1998) 67 Cal.App.4th 1228, 1239 (*Rochin*). (*Falahati, supra,* at p. 830, fn. 9.) But page 1239 of the *Rochin* opinion says "[a] judgment *void on its face* . . . is subject to collateral attack at any time." (*Rochin, supra*, at p. 1239, italics added.) Thus, to the extent *Falahati* might be seen as standing for the proposition that a void judgment *that is facially valid* can be attacked at any time under section 473, subdivision (d), *Falahati* marshalled no case law in support of that proposition.

attacked at any time. But if a void judgment is valid on its face, it cannot be attacked via section 473, subdivision (d) at any time. (Cf. *Kremerman v. White* (2021) 71 Cal.App.5th 358, 370 [whether a judgment is void on its face or valid on its face is a distinction that " ' "may be important in a particular case because it impacts the procedural mechanism available to attack the judgment [or order], when the judgment [or order] may be attacked, and how the party challenging the judgment [or order] proves that the judgment is void" ' "]; *Smith v. Jones* (1917) 174 Cal. 513, 517-518 [because "the motion . . . to set aside the judgment was made too late," the moving party "is required to seek whatever relief he is entitled to through an independent action in equity to set aside the judgment for want of jurisdiction in the court to pronounce it"]; *Hill v. City Cab & Transfer Co*. (1889) 79 Cal. 188, 190, 191 [explaining, in a case where defendant argued "judgment had been obtained without service upon him," that "a judgment which is void . . . cannot be shown to be void except in certain ways"].)

Hoehn argues that "legislative history demonstrates an insistence that section 473[, subdivision](d)" has no "time limit." For support of that contention, Hoehn quotes language in cases from 1938 and 1940 that reference legislative intent that trial courts have the power to set aside void judgments. This language does not speak to legislative intent concerning a time limit within which a party must ask a trial court to exercise such power. Whereas *Rogers*—a case on which *Trackman* relied (*Trackman, supra*, 187 Cal.App.4th at p. 180)—*does* discuss the question of legislative intent concerning time limits for seeking to set aside void judgments. (See *Rogers, supra*, 216 Cal.App.3d at pp. 1121-1126.)

Deutsche Bank National Trust Co. v. Pyle (2017) 13 Cal.App.5th 513—which Hoehn also invokes—cites *Falahati* for the proposition that "[a] void judgment . . . can be set aside at any time." (*Id.* at p. 526.)

Hoehn also argues that application of a "two-year limitation to set aside otherwise void judgments . . . leads to absurd results," because this "allows a judgment that is void for lack of proper service to nonetheless retain its validity." The flaw in this reasoning is that application of a two-year time limit for motions under section 473, subdivision (d) does not preclude Hoehn from filing an independent action in equity to set aside the facially valid judgment (where the parties may litigate relevant factual questions).

C. Extrinsic Fraud Was Not Demonstrated

Hoehn argues the trial court abused its discretion by failing to vacate the default judgment "due to extrinsic fraud and mistake."

As a preliminary matter, we will not consider for the first time on appeal an argument by Hoehn regarding extrinsic mistake. (See *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 [an argument or theory generally will not be considered if it is raised for the first time on appeal, because it would be unfair to the other party and the trial court].) Though Hoehn argued extrinsic *fraud* in the trial court, he did not clearly advance a theory of extrinsic *mistake*.

On the merits, and setting aside our concerns that Hoehn has failed to present developed appellate argument on the issue of extrinsic fraud,[7] we conclude the trial court

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[7] A party seeking relief from the default judgment on grounds of extrinsic fraud must show, inter alia, the other party's inequitable conduct *and* "three elements: (1) a meritorious defense; (2) a satisfactory excuse for not presenting a defense in the first place; and (3) diligence in seeking to set aside the default judgment once discovered." (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750 (*Rodriguez*); cf. *In re David H.* (1995) 33 Cal.App.4th 368, 381 ["[t]o be entitled to relief from a judgment on the ground of extrinsic fraud, a party must show he or she had a meritorious defense, which would have been raised but for the other party's wrongful conduct"].)

Here, Hoehn offers no argument that Capital Insurance or the company's attorney " ' "has by inequitable conduct . . . lulled [him] into a state of false security." ' " (*Gibble v. Car-Lene Research, Inc., supra*, 67 Cal.App.4th at p. 314.) Rather, Hoehn's opening brief jumps straight to the three *additional* elements necessary to demonstrate eligibility

did not abuse its discretion in rejecting the claim. (*Rodriguez, supra*, 236 Cal.App.4th at p. 749 [standard of review].) This is so, because "Evidence Code section 647 provides that a registered process server's declaration of service establishes a presumption that the facts stated in the declaration are true. [Citation.] A plaintiff may serve individual defendants through substitute service when they cannot be personally served with reasonable diligence. [Citations.] . . . 'Two or three attempts to personally serve a defendant at a proper place ordinarily qualifies as " 'reasonable diligence.' " [Citation.] The registered process server in this case declared under penalty of perjury that [s]he had effected substitute service on [Hoehn] by serving [Hoehn's then-girlfriend at Hoehn's residence], after [four] attempts to personally serve [Hoehn] at his [residence]. . . . This is not evidence showing that [California Capital] or [its] counsel practiced fraud on him." (*Rodriguez, supra*, 236 Cal.App.4th at pp. 750-751.)

In the trial court, Hoehn argued that California Capital (via the process server) "falsely claimed that [his] girlfriend . . . was a '[c]o-[o]ccupant' " of his San Mateo residence. But even if the process server *was* wrong about Hoehn's then-girlfriend's status at Hoehn's residence, that error by itself does not indicate *fraud*. (Cf. *Bein v. Brechtel-Jochim Group*, *Inc*. (1992) 6 Cal.App.4th 1387, 1393 [As " '[t]he evident purpose of . . . section 415.20 is to permit service to be completed upon a *good faith attempt* at physical service on a responsible person,' " "[s]ervice must be made upon a person whose 'relationship with the person to be served makes it more likely than not that

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for relief from default judgment on grounds of extrinsic fraud. Accordingly, there is good reason to conclude that Hoehn has forfeited an "extrinsic fraud" argument on appeal. (See *Oak Valley Hospital Dist. v. State Dept. of Health Care Services* (2020) 53 Cal.App.5th 212, 228 ["For lack of development, this argument is forfeited"]; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 ["We are not required to examine undeveloped claims or to supply arguments for the litigants"].)

they will deliver process to the named party,' " (italics added and original italics omitted)].)

D. Abandoned Claim

In his opening brief, Hoehn raised a claim of trial court error regarding certain evidentiary rulings. Because Hoehn abandons this claim in his reply brief, we do not address it.

III. DISPOSITION

The order denying Hoehn's motion to set aside default and default judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

RENNER, J.

We concur:

HULL, Acting P. J.

HOCH, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: California Capital Insurance Company et al. v. Hoehn
C092450
Placer County
No. SCV0026851

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Honorable Michael W. Jones
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Exhibit B

2020 WL 773453
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Fourth District, Division 2, California.

Christie MARTINEZ, Plaintiff and Appellant,
v.
ENCORE SENIOR LIVING,
LLC, Defendant and Respondent.

E070465
|
Filed 02/18/2020

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Affirmed.

Attorneys and Law Firms

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Hinshaw & Culbertson, and Frederick J. Ufkes and Aji N. Abiedu, for Defendant and Respondent.

OPINION

CODRINGTON J.

I. INTRODUCTION

***1** In 2014, plaintiff and appellant, Christie Martinez, sued several defendants, including, defendant and respondent, Encore Senior Living, LLC (ESL), for various claims related to her alleged wrongful termination. Martinez personally served her complaint at her former workplace, and Renee Lesley accepted it, purportedly on behalf of ESL. After ESL failed to timely respond to the complaint, Martinez moved for a default judgment against ESL, which the trial court granted in 2015.

Almost two years later, Martinez requested payment of the judgment from ESL. Because ESL had not received notice of Martinez's lawsuit or the judgment, ESL considered the judgment invalid and refused to pay. In March 2018, ESL moved to vacate the judgment, arguing that the trial court lacked jurisdiction over ESL because it had not been properly served. ESL simultaneously moved to be dismissed from the case because it had not been served within three years of Martinez's filing the complaint.

The trial court granted ESL's motion to vacate on the grounds of extrinsic fraud or mistake. The trial court also granted ESL's motion to dismiss and dismissed ESL from the case because Martinez failed to properly serve ESL within three years of filing her complaint.

Martinez appeals. She claims ESL's motion was untimely and that ESL was not entitled to relief from the judgment and, accordingly, ESL should not have been dismissed. We disagree and affirm the trial court's orders vacating the judgment and dismissing ESL.

II. FACTUAL AND PROCEDURAL BACKGROUND

Martinez alleged she worked for ESL, Valley Crest Residential Care (Valley Crest) and SCI Business Solutions, Inc. (collectively, Defendants) from May 2011 until her termination in July 2012. In July 2014, she sued Defendants for various claims under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.), wrongful termination, and intentional infliction of emotional distress.

Martinez filed a proof of service of summons that stated her process server personally served her complaint and summons on ESL at 18521 Corwin Road in Apple Valley, which is the business address of Valley Crest, and a woman named Renee Lesley accepted service on behalf of ESL "as an authorized agent" of ESL.

In November 2014, Martinez requested an entry of default against ESL, who had yet to respond to her complaint. Martinez served the request for entry of default on ESL by mailing it to Lesley at the Corwin Road address. After a prove-up hearing a year later, the trial court entered a default judgment against ESL.

In July 2017, Martinez's counsel sent ESL correspondence requesting payment of the judgment. In August 2017, ESL's

counsel responded by informing Martinez's counsel that ESL had never been served with the complaint or summons, Lesley was not authorized to accept service on ESL's behalf, and the judgment was therefore invalid. Martinez's counsel said he would look into the issue. In November 2017, Martinez's counsel told ESL's counsel that he considered the judgment valid and would not refrain from enforcing it.

***2** ESL therefore moved under Code of Civil Procedure [1] section 437, subdivision (d) to vacate the default judgment in March 2018. ESL argued the judgment was void because ESL had not been served with the complaint or summons, so the trial court lacked personal jurisdiction over ESL. In support of the motion, ESL submitted a declaration from its Executive Vice President, Chief Financial Officer, and Administrative Officer, Diane Bridgewater, who stated that (1) ESL had never received notice of Martinez's lawsuit, (2) ESL was never served with Martinez's complaint or summons, (3) the Corwin Road address is Valley Crest's business address, and was never the address of anyone authorized by ESL to accept service of process on ESL's behalf, and (4) Lesley was not authorized to accept service of process for ESL. Because ESL claimed it had never been served, it moved to dismiss the complaint for Martinez's failure to serve it within three years as required by section 583.250, subdivision (a).

Martinez opposed the motion as untimely. Martinez argued section 473.5, subdivision (a) imposes a two-year time limit on motions to vacate under section 473, subdivision (d), which ESL did not meet because it filed its motion more than two years after the judgment was entered. Martinez further argued that, even if ESL's motion was timely, it failed on the merits because she properly served ESL via Lesley, who represented to Martinez's process server that she was authorized to accept service on ESL's behalf. Martinez therefore asserted the trial court had personal jurisdiction over ESL, so the default judgment was entered validly, and ESL should not be dismissed.

The trial court granted ESL's motion to vacate "based on extrinsic fraud or mistake." The trial court also granted ESL's motion to dismiss "pursuant to [sections] 583.210 and 583.250," which provide that a defendant must be dismissed if not served with a complaint within three years of its filing.

Martinez timely appealed.

III. DISCUSSION

Martinez contends the trial court erred because (1) ESL's motion to vacate was untimely, (2) she properly served ESL, and (3) ESL failed to establish the judgment should be vacated due to extrinsic fraud or mistake. We disagree on all three points.

A. *ESL's Motion Was Timely*

Relying primarily on *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, Martinez asserts ESL's motion was untimely because it was not brought within the two-year limitations period mandated by section 473.5, subdivision (a). Martinez is correct the *Trackman* court held that a motion under section 473, subdivision (d) to vacate a void judgment for lack of service is subject to section 473.5, subdivision (a)'s two year time limit. (See *Trackman v. Kenney, supra*, at p. 180.) But numerous other courts have rejected the proposition. (See, e.g., *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 830 ["A void judgment can be attacked at any time by a motion under ... section 473, subdivision (d)."]; *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239 ["A judgment void on its face because rendered when the court lacked personal or subject matter jurisdiction ... is subject to collateral attack at any time."]; *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) 24 Cal.App.5th 115, 135-137, review granted Sept. 26, 2018, S249923 (*Rockefeller*) [2] ["There is a wealth of California authority for the proposition that a void judgment is vulnerable to direct or collateral attack ' " '*at any time*,' " ' "]; *Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 526-527 ["A void judgment, however, can be set aside at any time," citing § 473, subd. (d).].)

***3** We believe *Trackman* was incorrect on this point. As the California Supreme Court unambiguously held, "[w]hen a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack *at any time*.' [Citation.]" (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660, italics added.) A trial court lacks jurisdiction in a fundamental sense when it lacks personal jurisdiction over a party. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) And a trial court lacks personal jurisdiction over a party that has

not been properly served. (*People v. American Contractors Indemnity Co., supra*, at p. 660; *Yeung v. Soos* (2004) 119 Cal.App.4th 576, 582 ["If service of summons was not made or was improper, and actual notice was not received, the default judgment is void for lack of personal jurisdiction."].) Accordingly, ESL was entitled to bring its motion to vacate challenging the trial court's personal jurisdiction over it "at any time." (*People v. American Contractors Indemnity Co., supra*, at p. 660; *Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249 [holding judgment attacked for lack of personal jurisdiction may be brought at any time].)

Regardless, the trial court granted ESL's motion to vacate due to extrinsic fraud or mistake. "[C]ourts have the inherent authority to vacate a default and default judgment on equitable grounds such as extrinsic fraud or extrinsic mistake." (*Bae v. T.D. Service Co. of Arizona* (2016) 245 Cal.App.4th 89, 97.) For that reason, motions to vacate for extrinsic fraud or mistake are "not governed by any statutory time limit." (*Department of Industrial Relations v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560, 570.) The trial court therefore permissibly used its inherent authority to hear ESL's motion to vacate. (*Ibid.*; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980-981 [after the six-month deadline imposed by section 473, "a trial court may ... vacate a default on equitable grounds even if statutory relief is unavailable"].)

B. *The Trial Court Did Not Abuse its Discretion in Vacating the Default Judgment Due to Extrinsic Fraud and Mistake*

Martinez contends the trial court abused its discretion when it vacated the default against ESL due to extrinsic fraud and mistake. [3] We disagree.

"A challenge to a trial court's order on a motion to vacate a default on equitable grounds is reviewed for an abuse of discretion." (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) "[W]e will not disturb the trial court's factual findings where ... they are based on substantial evidence. It is the province of the trial court to determine the credibility of the declarants and to weigh the evidence." (*Falahati v. Kondo, supra*, 127 Cal.App.4th at p. 828.)

Extrinsic mistake is "a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits." (*Rappleyea v. Campbell, supra*, 8 Cal.4th at p. 981.) "Extrinsic mistake is found when ... a mistake led a court to do what it never intended." (*Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 471-472.) For instance, extrinsic mistake occurs when a defendant has "a satisfactory excuse for failing to timely answer" a complaint. (*Rappleyea v. Campbell, supra*, at p. 982.) Similarly, " '[e]xtrinsic fraud usually arises when a party is denied a fair adversary hearing because he has been "deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." [Citations.]' " (*Bae v. T.D. Service Co. of Arizona, supra*, 245 Cal.App.4th at p. 97.) "[T]he party seeking equitable relief on the grounds of extrinsic fraud or mistake must show three elements: (1) a meritorious defense; (2) a satisfactory excuse for not presenting a defense in the first place; and (3) diligence in seeking to set aside the default judgment once discovered." (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 750.) "When a default *judgment* has been obtained, equitable relief may be given only in exceptional circumstances." (*Rappleyea v. Campbell, supra*, at p. 981.)

***4** We conclude the trial court did not abuse its discretion by granting ESL's motion to vacate the default judgment. [4] First, ESL made the necessary "minimal showing" that it had a meritorious case. (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1148.) ESL provided evidence showing that, at the time of Martinez's termination, ESL was no longer involved with the Valley Crest facility where she worked. In her declaration, Bridgewater explained that ESL had terminated its contract with the facility in January 2012, six months before Martinez's termination, which suggests ESL was not involved in the termination decision. This evidence was sufficient for ESL to meet its burden under the first factor. (See *Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1247 [defendant may meet its burden of showing it has a meritorious defense "by submitting ... a declaration averring there is such a defense"].)

Second, ESL met its burden of showing that it had a satisfactory excuse for not defending the case—ESL was not

served with Martinez's complaint and therefore was unaware of the lawsuit until years after the default judgment was entered. (See *Mechling v. Asbestos Defendants, supra*, 29 Cal.App.5th at p. 1248 [defendant had satisfactory excuse for not defending lawsuit because it had not been served with complaint "or other relevant pleadings"].)

Third, after becoming aware of the default in July 2017, ESL diligently sought to vacate it about eight months later, in March 2018. Martinez faults ESL for not doing so sooner, but she overlooks the fact that ESL's counsel met and conferred with her counsel between August and November 2017 in an apparent attempt to avoid having to bring a motion to vacate the judgment. Martinez's counsel did not inform ESL's counsel until November 2017 that he considered the default judgment valid and intended to enforce it. About four months later, ESL filed its motion to vacate the judgment. Substantial evidence supports the trial court's implied finding that ESL acted diligently to vacate the judgment. (See *Lee v. An* (2008) 168 Cal.App.4th 558, 566 [no diligence when defendant waited over two years to move to vacate default judgment]; *Stiles v. Wallis, supra*, 147 Cal.App.3d at p. 1150 [no diligence when defendant waited 20 months to move to vacate default judgment]; *Mechling v. Asbestos Defendants, supra*, 29 Cal.App.5th 1241, 1249 [diligence shown where defendant moved to vacate default judgments five months after retaining counsel to do so].) The trial court therefore did not err in vacating the default judgment against ESL.

As explained below, we also conclude the trial court did not err in finding that Martinez failed to properly serve ESL. Because Martinez failed to do so, the trial court lacked personal jurisdiction over ESL, so the default judgment was void. Although it was not the basis for the trial court's decision, the trial court also could have properly vacated the judgment as void for lack of personal jurisdiction. (See *Yeung v. Soos, supra*, 119 Cal.App.4th at p. 582 ["If service of summons was not made or was improper, and actual notice was not received, the default judgment is void for lack of personal jurisdiction."].) We therefore affirm the trial court's order vacating the default judgment against ESL.

C. *The Trial Court Did Not Err in Dismissing ESL*

***5** Martinez contends the trial court erred in granting ESL's motion to be dismissed from the case due to her failure to serve ESL within three years of filing her complaint, because she properly served ESL. (§§ 583.210, 583.250.) We disagree.

Section 416.10 provides, in relevant part, that a corporation may be served by delivering a copy of the summons and the complaint to "a person authorized by the corporation to receive service of process." (§ 416.10, subd. (b).) This provision also applies to limited liability companies, such as ESL. (See Corp. Code, § 17701.16, subd. (a).)

Martinez contends she served ESL in accordance with section 416.10 by personally serving Lesley with a complaint and summons. She asserts Lesley was "a person authorized by [ESL] to receive service of process" because she represented to Martinez's process server that she was so authorized and she was Martinez's direct supervisor.

Lesley's statement, however, was not admissible to establish that she was authorized to accept service on ESL's behalf. As this Court explained in *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1437, "an extrajudicial statement of a person that he or she is the agent of another is not admissible to prove the fact of agency unless the statement is communicated to the principal and the principal acquiesces the statement." There is no evidence that occurred here, so Lesley's statement that she was an agent of Valley Crest is inadmissible. Martinez therefore failed to provide any admissible evidence establishing that she served ESL in accordance section 416.10. (*Ibid.*)Further, Bridgewater, stated in her declaration that she did not know who Lesley was, and that Lesley had never "been authorized by ... ESL to receive service of process." Bridgewater further stated that the Corwin Road address where Martinez served Lesley was Valley Crest's business address, "has never been the address of ... any person authorized by ... ESL to receive service of process," and that no one authorized to receive service of process by ESL had been served with Martinez's complaint or summons.

We must defer to the trial court's implied factual findings if they are supported by substantial evidence. (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1323.)In light of Bridgewater's declaration and Martinez's lack of admissible evidence, we conclude substantial evidence supports the trial court's implied factual finding that Lesley was not authorized to accept service on ESL's behalf and that no one at ESL had ever been served with Martinez's complaint or summons. We therefore conclude the trial court

did not err in implicitly finding that Martinez had not properly served ESL.

Martinez argues for the first time on appeal that she substantially complied with the requirements for service of process. Although ESL argued in its moving papers that Martinez did not do so, she provided no argument in response. Martinez therefore waived the issue. (See *366-386 Geary St., L.P. v. Superior Court* (1990) 219 Cal.App.3d 1186, 1199 ["[R]eal parties failed to adequately raise this issue in the superior court, and it may not be raised for the first time on appeal."].)

Even if Martinez had not waived the argument, we would reject it on the merits. "A finding of substantial compliance can only be sustained where ... the service relied upon by the plaintiff imparted *actual notice to the defendant* that the suit was pending and that he was bound to defend." (*Carol Gilbert, Inc. v. Haller* (2009) 179 Cal.App.4th 852, 855, italics added.) As Bridgewater's declaration confirms, ESL did not have actual notice of Martinez's lawsuit until years after the default judgment was entered—and about three years after Martinez filed her complaint. Martinez provided no evidence that suggests otherwise. Martinez therefore did not substantially comply with the requirements for service of process. (See *ibid.*)

***6** As outlined above, substantial evidence supports the trial court's finding that Martinez did not properly serve ESL in 2014, when she served her complaint and summons on Lesley. Because Martinez failed to serve ESL by July 2017, three years after she filed her complaint, the trial court was required to dismiss ESL. (See *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1234 ["[O]nce the court determined the default judgment was void as a matter of law based on the lack of personal jurisdiction, it was required to dismiss this action"].) The trial court therefore did not err in granting ESL's motion to dismiss.

IV. DISPOSITION

The trial court's orders vacating the default judgment against ESL and dismissing ESL are affirmed. Each party shall bear its own costs.

We concur:

MILLER Acting P.J.

MENETREZ J.

All Citations

Not Reported in Cal.Rptr., 2020 WL 773453

Footnotes

1 Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

2 Although the California Supreme Court granted review in *Rockefeller*, its review appears to be limited to "the following issue: Can private parties contractually agree to legal service of process by methods not expressly authorized by the Hague Convention?" (*Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co.* (2018) 426 P.3d 303.) Nonetheless, we may consider *Rockefeller* as persuasive authority. (Cal. Rules of Court, rule 8.1115(e)(1).)

3 The trial court's minute order states that it granted ESL's motion to vacate "based on extrinsic fraud *or* mistake," (italics added.) but did not specify whether it found both extrinsic fraud *and* extrinsic mistake. At the hearing, however, the trial court stated that its tentative decision was to grant ESL's motion "based on extrinsic fraud *and* mistake." (Italics added.) As outlined below, the same standards apply when assessing whether a judgment should be vacated for extrinsic fraud or mistake, so the discrepancy between the trial court's minute order and its stated ruling at the hearing on the motion is immaterial.

4 The trial court did not provide a statement of decision, nor did the parties request one. We are therefore bound by the doctrine of implied findings under which "the necessary findings of ultimate facts will be implied and the only issue on appeal is whether the implied findings are supported by substantial evidence." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) Further, we infer that the trial court made all the findings necessary to support its judgment. (*Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58.)

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PROOF OF SERVICE

California Capital Insurance Company, et al. v. Cory Michael Hoehn
SUPREME COURT CASE NO. S277510
Court of Appeal, Third Appellate District Case No. C092450
Placer County Superior Court Case No. SCV0026851

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is Jack London Market, 55 Harrison Street, Suite 400, Oakland, CA 94607.

On March 27, 2023 I served true copies of the following document(s) described as:

PETITIONER'S BRIEF ON THE MERITS

on the interested parties in this action as follows:

via the following method:

BY TRUEFILING NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the True Filing system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 27, 2023 at Richmond, California.

Paula Katayanagi

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CALIFORNIA CAPITAL INSURANCE COMPANY v. HOEHN**
Case Number: **S277510**
Lower Court Case Number: **C092450**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Date

/s/Denyse Clancy

Signature

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Kazan McClain Satterley & Greenwood

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