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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

PETITION FOR REVIEW

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CORY MICHAEL HOEHN**

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INTRODUCTION

The issues cleanly presented by this case are matters of the highest Constitutional importance. A deep division has arisen in the courts of appeal as to whether there is a two-year limitation to vacate a judgment void for lack of service of the summons and complaint, depending on whether the service is shown to be void "on its face" or by extrinsic evidence. When Texas courts attempted to impose additional procedural hurdles on vacating a judgment void for lack of service of the complaint, the U.S. Supreme Court held that this did not pass Constitutional muster. [*Peralta v. Heights Medical Center, Inc*. (1988) 485 U.S. 80, 84 ("[A] judgment entered without notice or service is constitutionally infirm.")]. Remarkably, California courts of appeal, including the opinion below,[1] have now committed the same error in violation of core due process principles.

Our Legislature enacted Code of Civil Procedure section 473(d),[2] which states that courts may vacate a void judgment, without imposing any time limitation. Ignoring the plain language of this statute, one line of California appellate courts has grafted onto the statute a time limit to vacate void judgments, depending on whether the judgment is proven to be void "on its face" or by extrinsic evidence. Another line of courts rejects this time limitation, and holds—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.

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[1] *California Capitol Ins. Co. v. Hoehn*, No. C092450 (Oct. 19, 2022), Slip Opinion attached hereto as Exhibit "A."

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

This conflict—a matter of pure statutory interpretation—can be summarized as follows:

> 1. One line of cases holds that there is no time limitation under section 473(d) to vacate a void judgment;[3]
>
> 2. The conflicting line of cases hold that if the judgment is shown to be void by extrinsic evidence and is not void "on its face," then the two-year time limitation of section 473.5(a) applies to section 473(d) "by analogy."[4]

This Court has never addressed this issue, and this Court's guidance is urgently required.

The undisputed facts of this case exemplify the stark outcomes to California residents dependent on which of the two conflicting paths the trial and appellate court select:

In 2008, Petitioner Mr. Cory 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 a 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 possession had burned down.

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[3] [*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 section to section 473.5(a)'s two year limit) (Attached hereto as Exhibit "B") Unpublished cases may be cited in petitions for review to show the existence of a conflict and the need to secure uniformity. [Cal. Rules of Court, rule 8.500(b)(1)])].

[4] [*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180].

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, and 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." [Cal. Code Civ. P. § 415.20(b)]. The insurance company did not move to collect the judgment. Indeed, Mr. Hoehn was unaware that he had been sued until nine years after entry of judgment, when debt collector Sequoia—who had taken over the judgment from the insurance company—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. [Cal. Code Civ. P. § 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 void for lack of service under section 473(d)—which provides that the "court may, upon motion of the injured party . . . set aside any void judgment or order." [Cal. Code Civ. P. § 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." Nor would the Court of Appeal allow Mr. Hoehn in the alternative to attack the judgment on an equitable basis, holding that concededly improper service did not constitute actual "fraud" needed to set aside a default judgment. Thus, the questions cleanly presented by the opinion below are pure issues of law that urgently require this Court's guidance:

1. Is there a time limitation in moving to vacate a void judgment under section 473(d), depending on whether the judgment is void on its "face" or shown to be void by extrinsic evidence?
2. In the alternative, does an equitable motion to vacate a concededly void judgment for lack of service require proving intentional bad conduct in order to show extrinsic fraud?

Absent this Court's review, California courts will continue to have no clear answer as to whether a defendant who has not been served with process has a limited time period in which to move to vacate a void judgment under section 473(d). And 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. The incentives created 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 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.

Neither the trial court nor the court of appeal found that service on Mr. Hoehn was proper, and therefore the outcome turns on the statutory interpretation of section 473(d), which must be resolved by this Court. This case presents the ideal vehicle for this Court to resolve this recurring issue of law upon which our courts of appeal are starkly divided.

Petitioners pray that this Court grant review.

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]. In fact, he 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 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 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]. Then the insurance company did nothing until seven years later, when it 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" [Cal. Code Civ. P. § 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 . . ." [Cal. Code Civ. P. § 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. 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 itself does not state a time limit." [Slip. Op. at 6]. But the court of appeal elected to apply the line of reasoning 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 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.[5] [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 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 files this Petition for Review.

[5] 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.

REASONS FOR GRANTING REVIEW

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? The California Courts of Appeal are divided on this surpassingly important, frequently occurring issue.

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 was 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. [*Rochin v. Pat Johnson Manu. Co.* (1998) 67 Cal.App.4th 1228, 1239; *see also* Cal. Code Civ. P. § 473(d) (no time limit on setting aside void judgment)].

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—deepens the already entrenched conflicts in the courts of appeal. Moreover, it 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 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. Pro. Before Trial (The Rutter Group 2022) at ¶ 5:438]. The opinion below creates a conflict in the courts of appeal, by grafting on the additional requirement of showing scienter to prove extrinsic fraud, when this Court held that extrinsic fraud in the context of moving to vacate a void judgment requires only a showing of conduct that deprived "the unsuccessful party of an opportunity to present his case to the court." [*Westphal v. Westphal* (1942) 20 Cal.2d 392, 397].

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. 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 below 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 he was not at the apartment at the time the fire started, and no one identified him 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. [Cal. Code Civ. P. § 473(d)].

This Court's review is urgently required to resolve this matter of grave Constitutional importance that has created a deep division in the courts of appeal.

I. This Court's review is required to determine whether there is a time limit on vacating concededly void judgments under section 473(d).

A. There is an entrenched conflict in the courts of appeal.

Mr. Hoehn moved to vacate the judgment as void for failure to affect service under section 473(d). [AA11]. Section 473(d) has no time limit to set aside a void judgment. [Cal. Code Civ. P. § 473(d)].

Yet there has arisen a stark conflict in the courts of appeal as to whether the two-year time limitation set forth in section 473.5 should be applied "by analogy" to section 473(d).

On the one hand, the opinion below followed the *Rogers/Trackman* line of case law, which hold 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].

But ***on the other hand***, 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]. 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 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)); *see also 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))].

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]. The doctrine that allows for judgments obtained without proper service to stand after a two-year time period because of distinctions between judgments void "on their face" or

"by extrinsic evidence" has eviscerated the core protections of due process, in flagrant violation of the controlling statutes and in stark conflict with the U.S. Constitution. [U.S. Const., 5th & 14th Amends.]. The U.S. Supreme Court held in *Peralta* that it is unconstitutional to hold a defendant not properly served liable for a void judgment [*Peralta, supra*, 485 U.S. at 84]; this Court should grant review to restore due process to its rightful place for California residents.

B. The decision below is egregiously wrong, and turns principles of statutory interpretation on their head.

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 Constitutional law and 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, and the *Trackman/Rogers* line of case law it relies on, eviscerates this well-settled precedent in grafting the time limits of section 473.5 onto 473(d). This Court's review is required.

1. 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) 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*, C.C.P 473(b) (six month time limitation on vacating a judgment if there has been a mistake, inadvertence, surprise, or excusable neglect); C.C.P. 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)].

2. 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 section 397 is barred if the motion was not made in compliance with the timing requirements of section 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.")].

3. The legislative history demonstrates a purpose to grant the trial courts power to vacate any void judgment.

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 added the language in 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.")].

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 in proving 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.")].

4. Applying a two-year limitation to set aside otherwise void judgments creates the evil that the Legislature sought to prevent.

The "evil to be prevented" under section 473(d) is obtaining jurisdiction over the person absent due process. Therefore, whether the 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, 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.

The opinion below—and the *Rogers/Trackman* authority that it relies upon—sharply diverges from this Court's precedent setting forth the principles of statutory interpretation. This Court should grant review to 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, this Court's review is required to as to whether a showing of intentional bad conduct is necessary to prove extrinsic fraud.

A. Extrinsic fraud does not require proof of intentional bad conduct where the defendant has been deprived of service and notice.

In the alternative, Mr. Hoehn moved to vacate the judgment based on extrinsic fraud or mistake, 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" creates another conflict, independently warranting review. The opinion below held that showing that there was no service did not demonstrate "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.

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. Pro. 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].

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]. "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,* 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 v. Lopez* (1969) 275 Cal.App.2d 178, 182–183].

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].

B. No one disputed that Mr. Hoehn met the three requisite equitable elements of extrinsic fraud.

"[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]. It was ***uncontested*** at both the trial and appellate level that Mr. Hoehn met the three elements warranting equitable relief based on extrinsic fraud:

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 19 epidemic. Debt collector Sequoia did not argue that Mr. Hoehn did not 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)].

By expanding the meaning of "extrinsic fraud" to mean 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 grant review to clarify the meaning of extrinsic fraud in the context of seeking relief from judgments void for lack of proper service.

CONCLUSION

Petitioner prays that this Court grant this Petition, and for such other relief as to which Petitioner may be entitled.

DATED: November 28, 2022

KAZAN, McCLAIN, SATTERLEY & GREENWOOD
A Professional Law Corporation

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

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, the foregoing is proportionally spaced and contains 8,092 words, according to the word processing program used to prepare it.

DocuSigned by:
Denyse F. Clancy
99B5571DD2304AE...

Denyse F. Clancy
Attorneys for Petitioner
and Defendant

PROOF OF SERVICE

California Capital Insurance Company, et al. v. Cory Michael Hoehn
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 November 28, 2022 I served true copies of the following document(s) described as:

PETITION FOR REVIEW

on the interested parties in this action as follows:

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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.

In addition, I served said document(s) on the persons or entities listed below:

Hon. Michael Jones
Department 42
Hon. Howard G. Gibson Courthouse
10820 Justice Center Drive
Roseville, CA 95678

via the following method:

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Kazan, McClain, Satterley & Greenwood for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Oakland, California.

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

Executed on November 28, 2022, at Tracy, California.

E. A. Pawek

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
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No. SCV0026851

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Exhibit B

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

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

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Filed 02/18/2020

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

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

11/28/2022
Date

/s/Denyse Clancy
Signature

Clancy, Denyse (255276)
Last Name, First Name (PNum)

Kazan McClain Satterley & Greenwood
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