NO. 93400-6

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of

DAVID PATTEN,

Petitioner,

and

LESLIE PATTEN,

Respondent.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

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A. Relief Requested by Respondent.

Leslie Patten, respondent in this Court and in the Court of Appeals, asks this Court to deny David Patten's petition for review of Division One's unpublished June 6, 2016 decision. Mr. Patten fails to meet the RAP 13.4(b) criteria for review. Addressing an unusual fact pattern that is unlikely to arise again, the Court of Appeals' opinion is wholly consistent with authority from both this Court and the lower courts, and statutory law governing default judgments, and raises no issues of constitutional or substantial public interest. This Court should deny review.

B. Restatement of the Case.

Respondent Leslie Patten adopts the facts as set forth in the Court of Appeals decision (Op. 1-4)[1], which led the trial court to deny Mr. Patten's motion to vacate the default dissolution decree because he "did not demonstrate a legal basis to set aside the order," "did not demonstrate excusable neglect," "did not act with due diligence after he became aware of entry of the default orders," and "did not provide substantial evidence to support a conclusion that the trial court would make a different distribution of assets." (CP 175; 4/30 RP 37-

[1] Respondent cites to the Court of Appeal's June 6, 2016 decision as paginated in the unpublished opinion attached to Mr. Patten's petition for review.

40) The trial court also determined that "Ms. Patten would suffer a hardship if the orders were set aside at this point." (CP 175)

Division One affirmed the trial court's denial of Mr. Patten's motion to vacate, holding that the trial court did not abuse its discretion, and its findings were supported by the record. (Op. 8)

C. Grounds for Denial of Review.

This Court should deny Mr. Patten's petition for review of Division One's decision affirming the trial court's fact-based discretionary decisions, all of which were supported by substantial evidence. Review is not warranted under any of the bases in RAP 13.4(b). Division One's decision is not in conflict with any other decisions in the Court of Appeals or in this Court. RAP 13.4(b)(1), (2). Nor does Division One's decision raise any constitutional issues or involve issues of substantial public interest. RAP 13.4(b)(3), (4).

1. Division One's decision is consistent with decisions of this Court and the Court of Appeals, holding that a trial court's disposition on a motion to vacate should not be disturbed absent a clear abuse of discretion.

Division One properly held that the trial court did not abuse its discretion in denying petitioner's motion to vacate where the trial court applied the correct legal standard compelled by this Court in

White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968), and the record supported the trial court's findings.[2]

Mr. Patten contends that Division One's decision is in conflict with *White* and its progeny because Division One "should have given scant time inquiring into the reason which resulted in the entry of the default" after "he presented a very strong case on the merits." (Petition 9) But Division One's deference to the trial court's discretion is consistent with case law from this Court and in the lower appellate courts. RAP 13.4(b)(1), (2). *See White*, 73 Wn.2d at 351 (motion to vacate or set aside a default judgment is "addressed to the sound judicial discretion of the trial court"; the appellate court "will not disturb the trial court's disposition of the motion unless it be made to plainly appear that sound discretion has been abused"); *Yeck v. Dep't of Labor & Indus.*, 27 Wn.2d 92, 95, 176 P.2d 359 (1947) ("This court has long adhered to the rule that the matter of setting aside default judgments is discretionary with the trial judge and that

[2] Mr. Patten asserts that Division One erred when it "relied upon sua sponte findings that were not supported by the record" and "were not requested." (Petition 7) But Division One was not making "sua sponte findings." It properly reviewed the record to determine whether substantial evidence supported the trial courts findings. *See Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (trial court abuses its discretion only if its decision is "outside the range of acceptable choices, given the facts" or "if the factual findings are unsupported by the record").

we will not interfere with the exercise of this discretion unless a manifest abuse thereof is made to appear."); *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 403, ¶ 20, 196 P.3d 711 (2008) (trial court abuses its discretion on motion to vacate "only when its decision is manifestly unreasonable or based on untenable grounds").

Division One properly deferred to the trial court's findings, which were supported by substantial evidence, that Mr. Patten failed to satisfy his burden under *White*. In *White*, this Court held that a party seeking to vacate a default judgment under CR 60(b) must establish four factors: (1) there is substantial evidence to support a prima facie defense; (2) the moving party's failure to timely appear was occasioned by mistake, inadvertence, surprise, or excusable neglect; (3) the moving party acted with due diligence after notice of the entry of default judgment; and (4) no substantial hardship will result to the opposing party. 73 Wn.2d at 352. The first two factors are primary and, "coupled with the secondary factors[,] vary in dispositive significance as the circumstances of the particular case dictate." *White*, 73 Wn.2d at 352.

If the moving party is "able to demonstrate a strong or virtually conclusive defense," then "scant time will be spent inquiring

into the reasons which occasioned entry of the default, *provided* the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful." *White*, 73 Wn.2d at 352 (emphasis added). However, absent such a "virtually conclusive" defense, even where a moving party is able to demonstrate a prima facie defense, "the reasons for his failure to timely appear in the action before the default will be *scrutinized with greater care*, as will the seasonability of his application and the element of potential hardship on the opposing party." *White*, 73 Wn.2d at 352-53 (emphasis added).

Division One's decision affirming the trial court's denial of the motion to vacate is wholly consistent with this Court's decision in *White*. The trial court did not misapply the *White* factors by "inquiring into the reason which resulted in the entry of the default" (Petition 9) because Mr. Patten did not present any defense demonstrating that the trial court would have made a different property distribution had he appeared. (Op. 6-7) The record supported the trial court's finding that Mr. Patten's "bare assertions" of the assets and liabilities awarded in the default decree did not satisfy his burden of establishing a defense, but rather merely demonstrated his "dissatisfaction" with the distribution. (Op. 6-7)

Even if Mr. Patten *had* sufficiently established a "virtually conclusive defense," the trial court properly inquired into the reasons for the entry of the default because Mr. Patten did not timely move to vacate within one year as required by CR 60(b)(1),[3] and substantial evidence supported the trial court's finding that his failure to appear in the original proceeding was willful and not due to excusable neglect. (Op. 7) *See White*, 73 Wn.2d at 352. Similarly, even if Mr. Patten had "laid out a number of factors that indicated he had a strong prima[] facie case" (Petition 10), *White* still requires the trial court to "scrutinize[] with greater care" the other three factors when the moving party demonstrates a prima facie case on the merits. 73 Wn.2d at 352-53.

Mr. Patten cites a number of Court of Appeals decisions that he contends conflict with Division One's decision. (Petition 10) But rather than support this contention, the cited cases are all in accord with the well-established principles set forth in *White* and *Yeck*, and

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[3] Mr. Patten contends that Division One should have excused his lack of due diligence in not timely bringing the motion to vacate because he was unable to retain counsel. (Petition 8) This argument is without merit. "[T]he law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel – both are subject to the same procedural and substantive laws." *Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155, *rev. denied*, 100 Wn.2d 1013 (1983). "[A] pro se litigant is held to the same standard as an attorney." *Kelsey v. Kelsey*, 179 Wn. App. 360, 368, ¶ 20, 317 P.3d 1096, *rev. denied*, 180 Wn.2d 1017, *cert. denied*, 135 S. Ct. 451, 190 L. Ed. 2d 330 (2014).

adhered to here by Division One. *See Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 302, 863 P.2d 1377 (1993) (noting the "well established" rules under *White* and *Yeck* for vacating default judgments and affirming trial court's exercise of discretion in ruling on motion to vacate), *rev. denied*, 124 Wn.2d 1006 (1994); *Gage v. Boeing Co.*, 55 Wn. App. 157, 163, 776 P.2d 991 (citing *White* and noting that where moving party presents strong defense, courts spend "scant time" inquiring into reasons for entry of default provided failure to appear was not willful), *rev. denied*, 113 Wn.2d 1028 (1989); *Pfaff v. State Farm Mut. Auto Ins. Co.*, 103 Wn. App. 829, 14 P.3d 837 (2000) (affirming trial court's disposition on motion to vacate where all of the *White* factors were properly applied), *rev. denied*, 143 Wn.2d 1021 (2001). Because the trial court properly applied the *White* factors and the record supports its findings, Division One's decision affirming the trial court is wholly consistent with decisions of this Court and the Court of Appeals regarding motions to vacate default judgments. Review is not warranted under RAP 13.4(b)(1) or (2).

2. This Court should deny review because this is an unusual fact pattern that is unlikely to repeat itself and is not of substantial public interest.

Review is also not warranted under RAP 13.4(b)(3) or (4). Mr. Patten does not assert that Division One's decision raises any constitutional issues, RAP 13.4(b)(3), but contends that "[t]he issue of awarding all assets in a dissolution action such as this [is] of substantial public interest." (Petition 10) Notwithstanding Mr. Patten's erroneous characterization of the distribution, this is a private dispute between former spouses over property and finances. Highly unique circumstances led to the entry of this dissolution decree, and this unusual fact pattern is unlikely to repeat itself. Division One's decision does not raise any issue of substantial public interest, and review is not warranted under RAP 13.4(b)(4).

D. Conclusion.

This Court should deny review.

Dated this 22nd day of September, 2016.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 22, 2016, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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David Patten 700 NW Gilman Blvd #235 Issaquah WA 98027	___ Facsimile ___ Messenger _✓_ U.S. Mail ___ E-Mail

DATED at Seattle, Washington this 22nd day of September, 2016.

Jenna L. Sanders

SMITH GOODFRIEND, PS

September 22, 2016 - 2:34 PM

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