FILED
Court of Appeals
Division II
State of Washington
1/23/2020 1:41 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
1/23/2020
BY SUSAN L. CARLSON
CLERK

98120-5

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

Court of Appeals Case No. 52327-2-II

JAMES L. SELLERS, Guardian ad Litem of NATHAN TONEY, a minor

Appellant,

vs.

LONGVIEW ORTHOPEDIC ASSOCIATES, PLLC

Respondent.

PETITION FOR REVIEW

By MATTHEW J. ANDERSEN
Attorney for Appellant

MATTHEW J. ANDERSEN
WSBA #30052
WALSTEAD MERTSCHING PS
Civic Center Building, Third Floor
1700 Hudson Street
Post Office Box 1549
Longview, WA 98632
Telephone: (360) 423-5220
Fax: (360) 423-1478
Email: mjandersen@walstead.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Other Authorities:

A. IDENTITY OF PETITIONER, RESPONDENT, AND THE SUBJECT COURT OF APPEALS DECISION.

Petitioner is James Sellers, the Guardian ad Litem for Nathan Toney, a minor child. Nathan Toney was injured due to the medical negligence of Respondent Longview Orthopedic Associates, LLC.

Toney seeks review of the Division II Court of Appeals decision in *Sellers v. Longview Orthopedic Associates, PLLC,* No. 52327-2-II filed on December 24, 2019. Appendix A-1.

B. ISSUES PRESENTED FOR REVIEW

1. Should *Vanderstoep v. Guthrie,* 200 Wn.App. 507, 533-34, 402 P.3d 883 (2017), be applied to the attorney-client context, thereby requiring the set aside of default orders resulting solely from the inexcuseable neglect defense of counsel?

2. Regardless of the outcome of Issue 1, once the trial court determines that a default order resulted from the inexcusable neglect of counsel, does the court retain discretion to find "good cause" to set aside that order under CR 55(c)(1)?

3. Regardless of the outcome of Issues 1 and 2, does the trial court have discretion to set aside a default order that resulted from an attorney's willful failure to file her client's answer within 20 days as required by CR 12(a)?

C. STATEMENT OF THE CASE

Toney filed suit against Longview Orthopedic on December 14, 2017, and served the summons and complaint on December 21, 2017. (CP 1, 5) Longview Orthopedic forwarded the summons and complaint to its insurance company, Physician's Insurance, on December 27, 2017. That same day, Amy Forbis, with the firm Bennett Bigelow & Leedom, P.S., was retained by Physician's Insurance to defend Longview Orthopedic. (CP 26-27)

Ms. Forbis intentionally failed to file an answer on behalf of Longview Orthopedic within 20 days as required by CR 12(a)(1). She also failed to file a notice of appearance, which would not have cured her failure to file a timely answer. It would, however, have given her the right to notice of Toney's motion for default. This would have given her the opportunity to file a late answer prior to entry of the default order, saving her client from the consequences of her decision to ignore CR 12(a)(1).

On January 16, 2018, counsel for Toney properly obtained an order of default without notice to Longview Orthopedic. (CP 8-9)

Rhianna Fronapfel, an associate attorney working for Ms. Forbis at Bennett Bigelow & Leedom, P.S., began reviewing Toney's medical records on January 21, 2018, in anticipation of preparing an answer to Toney's complaint. Longview Orthopedic's answer was already eleven days past due at that time. When Ms. Fronapfel found no notice of appearance in her file,

she went online to check the electronic court file. She discovered the default order against Longview Orthopedic. The next day, on January 22, 2018, Ms. Forbis filed Longview Orthopedic's motion to set aside the default order.[1]

In her January 22, 2018, declaration, Ms. Forbis blamed Longview Orthopedic's failure to timely appear or answer on a "clerical error" at her law office, but offered no explanation as to how that error occurred. (CP 27) Ms. Forbis also offered no explanation for why her firm waited until Longview Orthopedic's answer was eleven days late to even begin preparing her client's answer. Toney presented evidence from other cases indicating it was Ms. Forbis's practice to intentionally ignore the 20-day answer deadline imposed by CR 12(a)(1), opting instead to file a notice of appearance and wait for plaintiffs to file a motion for default. (CP 117-173)

On appeal, counsel for Longview Orthopedic also admitted that Bennett Bigelow & Leedom, P.S., attorneys and staff had failed to contact its client in the thirty-one days that followed service of process.[2]

CR 55(c)(1) provides that the court "may" set aside a default order for "good cause shown." The Division II Court of Appeals has defined "good cause" under CR 55(c)(1) as both "excusable neglect" before default and "due diligence" in seeking set aside after default. *Estate of Stevens,* 94 Wn.App. 20,

---

[1] *See* CP 27 for all factual statements in this paragraph.
[2] *Answer to Motion for Discretionary Review,* page 15.

30, 971 P.2d 58 (1999).

At the trial court level, Longview Orthopedic never denied that its attorney's neglect in failing to appear or answer was inexcusable. Instead, counsel denied the importance of excusable neglect and attempted to recast her conduct as a "mistake" under CR 60(b). (CP 18-23, 53-65)

The court rejected this argument and applied *Estate of Stevens*, finding that excusable neglect and diligence were the standard. The court went on to find that Ms. Forbis's neglect was inexcusable.[3]

However, Ms. Forbis had also argued that since she was an "outside attorney," her client could not suffer a default order due to her conduct. It was her client's conduct, not her own, that the court needed to analyze. This argument was an extension of *Vanderstoep v. Guthrie*, wherein the Division II Court of Appeals set aside a default judgment that resulted from an insurance company's failure to retain legal counsel for its insured. Since her client did nothing to cause the default, so the argument goes, the default order must be set aside. The trial court accepted this argument and extended the *Vanderstoep* holding from the insurer-insured context to the attorney-client context and set aside the default order. (CP 193-94)

In making this ruling, the court noted with dismay the lack of guidance

[3] RP, February 28, 2018, page 16, and CP 193-94.

from the Washington courts of appeal on the question of whether an order of default, when resulting solely from the inexcusable neglect of an attorney, must be set aside.[4] As such, the trial court certified the following question for appellate review under RAP 2.3(b)(4):

> The court hereby certifies under RAP 2.3(b)(4) that this order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of this litigation, namely the extension of *Vanderstoep v. Guthrie,* 200 Wn.App. 507, 533-34, 402 P.3d 883 (2017) to cases where an innocent party suffers a default order due to the inexcusable neglect of that party's counsel. (CP 193-94)

On September 10, 2018, Commissioner Aurora R. Bearse granted Toney's *Motion for Discretionary Review,* stating:

> This court agrees that the trial court properly certified its order setting aside the order of default for appellate review. Primarily, whether *Vanderstoep's* reasoning should apply to these facts, and if applied, whether Longview Orthopedic has a right to set aside the default order regardless of its attorney's inexcusable neglect is a controlling question of law on which there is substantial ground for a difference of opinion[.][5]

Division II Court of Appeals ruled on December 24, 2019, and the court bypassed the issue of *Vanderstoep* entirely, stating:

> The court in *Vanderstoep* held that when a defendant properly notifies its insurer that a complaint has been served and the insurer fails to arrange for a timely appearance or answer without a legitimate excuse, the insurer's inexcusable neglect should not be imputed to the blameless defendant. 200

---

[4] RP, February 28, 2018, pages 11 and 16.
[5] *Ruling Granting Review,* p.9, Appendix A-2

> Wn.App. at 533-34. The focus must be on the defendant's conduct, not the insurer's conduct. *See id.* At 532-34.
>
> Sellers argues that the trial court erred in setting aside the default order because defense counsel's inexcusable neglect necessarily precludes a finding of good cause under CR 55(c)(1). He claims that this court should not extend the holding in *Vanderstoep* that the inexcusable neglect of a defendant's insurer cannot be imputed to the defendant to the situation where a default order resulted from the inexcusable neglect of defense counsel rather than a defendant's insurer.
>
> We need not decide whether the *Vanderstoep* holding applies here. Instead, we conclude that a finding of excusable neglect is not always required for a trial court to find good cause to set aside a default order and hold that the trial court here did not abuse its discretion in setting aside the default order here based on the specific facts of this case.[6]

Despite the fact that the trial court relied on *Vanderstoep* in reaching its discretionary decision, that it expressed concern regarding its reliance on *Vandersteop,* and that it specifically sought help from the higher court by certifying the issue for immediate review, the Court of Appeals refused to answer the legal question before it[7] and *affirmed* the lower court ruling under

---

[6] Published Opinion, *Sellers v. Longview Orthopedic Associates, PLLC,* p.7, Appendix A.

[7] A trial court ruling under CR 55(c)(1) is reviewed under the abuse of discretion standard. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Dix v. ICT Group, Inc.,* 161 Wn.2d 826, 833, 161 P.3d 1016 (2013). However, a trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or involves the application of an incorrect legal analysis. *Id.* at 833, 161 P.3d 1016. *See also Salas v. Hi–Tech Erectors,* 168 Wash.2d 664, 669, 230 P.3d 583 (2010); *Washington State Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

As such, the abuse of discretion standard gives deference to a trial court's fact-specific determinations, while permitting reversal where an incorrect legal standard is applied. *Dix,* 161 Wn.2d at 833, 161 P.3d 1016. If a pure question of law is presented, a de novo standard of review should be applied. *Id.* at 833-34, 161 P.3d 1016.

the abuse of discretion standard. In doing so, the Court of Appeals not only left unanswered the question of whether *Vanderstoep* should be applied to attorneys, but also disrupted otherwise clear precedent that defined "good cause" under CR 55(c)(1) as both excuseable neglect and diligence.

D. ARGUMENT

I. The Supreme Court should grant review under RAP 13.4(b)(4) because the Court of Appeals, in refusing to rule on whether *Vanderstoep* applied in the attorney-client context, left unresolved a substantial issue of public interest that should be determined by the Supreme Court.

A trial court "may" set aside a default judgment for "good cause shown" under CR 55(c)(1). Washington courts have developed a robust common law regarding the definition of "good cause" under CR 55(c)(1). To show good cause, a defendant must show that its neglect was excusable before the entry of default and that it was diligent in seeking to set aside after. *Estate of Stevens,* 94 Wn.App. 20, 30, 971 P.2d 58 (1999).

No amount of diligence after a default order is entered can erase the inexcusable neglect that caused the default in the first place. While the *Estate of Stevens* court referred to excusable neglect and diligence as "factors," both factors must be proven before the court can find "good cause" under CR 55(c)(1). In fact, the *Estate of Stevens* court refused to even analyze the question of diligence in the absence of excusable neglect:

> The second factor considered under the "good cause"

> standard requires a showing of due diligence in making an appearance after the court enters the order of default. Here, the trial court made no finding as to whether Curtis acted with due diligence because it already had determined that there was no excusable neglect. **As there was no excusable neglect, we need not determine whether Curtis acted with due diligence.** 94 Wn.App. at 35, 971 P.2d 58. (Emphasis added and internal citations omitted.)

The Division II Court of Appeals in *Brooks v. Univ. City, Inc.,* 154 Wn.App. 474, 476, 225 P.3d 489 (2010), stated "A default order may be set aside upon a showing of good cause, i.e., a showing of excusable neglect *and* due diligence." (emphasis added).

The same result occurred in *Prest v. American Bankers,* where the Division II Court of Appeals dismissed the defendant's diligence arguments out of hand: "The most that can be said is that Bankers acted with due diligence after it learned that the default judgment had been entered. That does not, however, provide it with a defense or excuse its neglect." 79 Wn.App. at 100, 900 P.2d 595 (1995).

Excusable neglect is not established when a party disregards process, whether willfully or due to inattention or carelessness. *Commercial Courier Serv. Inc., v. Miller,* 13 Wn.App. 98, 106, 533 P.2d 852 (1975).

The declarations of Amy Forbis describe a breakdown of office procedure, and it has long been established that such breakdowns cannot be excusable neglect. In *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn.App. 191, 212-13, 165 P.3d 1271 (2007), the Court of Appeals summarized the law as follows:

> Judicial decisions have repeatedly held that, if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable.
>
> Citing *Johnson v. Cash Store,* 116 Wn.App. 833, 848, 68 P.3d 1099 (2003); *Beckman v. Dep't of Social & Health Servs.,* 102 Wn.App 687, 11 P.3d 313 (2000)(neglect in failing to institute office management procedure to "catch" administrative errors was inexcusable); *Prest v. Am. Bankers Life Assurance Co.,* 79 Wn.App. 93, 900 P.2d 595 (1995)(neglect inexcusable when summons and complaint were "mislaid" while general counsel was out of town).

In *TMT,* the defendant suffered a default because the legal assistant for its general counsel failed to enter the answer deadline into the calendaring system. The Court of Appeals found this neglect to be inexcusable. *Id.* at 213, 165 P.3d 1271.

This rule was reaffirmed in *Trinity Universal Insurance Company of Kansas v. Ohio Casualty Insurance Company,* 176 Wn.App. 185, 196 fn.6, 312 P.3d 976 (2013), where the Division I Court of Appeals summarily dispatched defendant's argument that a registered agent's failure to forward the complaint was "excusable neglect" without even mentioning the argument in the body of the opinion. At Footnote 6, the court wrote:

> Even if we were to consider Ohio's claim of inadvertence or excusable neglect, we find it unavailing. * * * We have repeatedly held that when a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, it is not excusable under CR 60(b). (Internal citations omitted.)

The same result occurred in *Prest v. Am. Bankers Life Assurance, Co.,*

where the defendant suffered a default because general counsel was out of town and the legal assistant who was supposed to receive and calendar pleadings "mislaid" the summons and complaint. The Division II Court of Appeals found this neglect to be inexcusable. *Id.* at 100, 900 P.2d 595.

In the case at bar, the trial court correctly found that Ms. Forbis's neglect was inexcuseable and this finding was not appealed by defendant. This, under *Estate of Stevens*, *Brooks,* and *Prest* should have been the end of the court's inquiry and the motion to set aside should have been denied.

However, the trial court disregarded Ms. Forbis's inexcusable neglect by pivoting its analysis to the conduct of Longview Orthopedic, applying by analogy *Vanderstoep v. Guthrie.* In *Vanderstoep,* the defendant's insurance company failed to retain counsel for the defendant after the defendant forwarded the summons and complaint to the adjuster. The plaintiff obtained a default judgment, and the defendant brought a motion to vacate under CR 60(b). The insurance company offered no explanation for why defense counsel was never retained. The *Vanderstoep* court saw this as dispositive of the issue of excusable neglect, stating:

> In the absence of any explanation, it appears that American Family's failure to arrange for an attorney to defend the Guthries resulted from a breakdown of its internal office procedures. The general rule is that "if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable." *TMT Bear Creek Shopping Ctr., Inc. v PETCO Animal Supplies, Inc.*, 140 Wn.App. 191, 212, 165 P.2d 1271 (2007). **Therefore, American Family's failure to arrange for a timely appearance on behalf of the**

Guthries did not result from mistake, inadvertence, surprise, or excusable neglect. *Vanderstoep,* 200 Wn.App. at 531-32, 402 P.3d 883 (emphasis added).

The *Vanderstoep* Court, however, pivoted the CR 60(b) analysis away from the conduct of the defendant's insurance company and to the conduct of the actual defendant. "The question here is which party's behavior controls: the Guthries' legitimate excuse for not appearing or American Family's inexcusable neglect." *Id.* at 532, 402 P.3d 883. The court ruled that the defendant's conduct, not that of its insurance company, controlled. The *Vanderstoep* court not only *reversed* the trial court, it found that the trial court abused its discretion in refusing to set aside the default judgment.

Stated another way, the Court of Appeals in *Vanderstoep* found that the trial court abused its discretion in considering the conduct of the insurance company as opposed to the conduct of the named defendant. This ruling, applied by analogy to the case at bar, would hold that a trial court abused its discretion by considering the conduct of the attorney, as opposed to the conduct of the attorney's client, in considering "good cause" to set aside *an attorney-caused order of default.*

This absurd result actually finds support in the *dicta* of *Ha v. Signal Electric, Inc.,* 182 Wn. App. 436, 446, 332 P.3d 991 (2014). In *Ha,* the defendant had hired an attorney named "Tracy" to represent defendant in a Chapter 11 bankruptcy. The bankruptcy trustee had also hired a financial advisor named "Tieman." When Tracy was presented with a summons, complaint, and acceptance of service, he was not sure whether he had the

authority to sign the acceptance of service. Tracy discussed the matter with Tieman. They decided that Tracy would accept service and that Tieman would forward the summons and complaint to the defendant's insurance company. Tracy accepted service and Tieman sent the complaint to the wrong insurance company. Due to this mistake, no attorney was engaged to defend the defendant and a default resulted. The defendant moved to have the default set aside and the trial court granted the motion. The Division I Court of Appeals *affirmed*, finding that the failure to defend was the result of a "mistake." *Id.* at 450, 332 P.3d 991.

On appeal, the plaintiff argued that Tracy's failure to appear and defend was inexcusable neglect, citing the court to *TMT* and *Prest*. The Division I Court of Appeals distinguished *TMT* and *Prest* because the attorneys in those cases were employees of the defending party, whereas Tracy was not an employee of the defendant, stating:

> Ha's case is readily distinguishable. As we determined above, Tracy is not Signal Electric's general counsel. Nor is he an office employee. Rather, he is an independent attorney retained for the Chapter 11 bankruptcy proceeding. The same is true of Tieman, who was retained solely as a financial advisor in the bankruptcy action. Their mistakes were not a breakdown of internal procedure, and so the rule of *TMT* does not apply. *Id.* at 451, 332 P.3d 991.[8]

---

[8] The above quote is mere *dicta* because the *Ha* court, in the end, found that Tracy and Tieman's conduct was not neglectful in the first place, making the excusable versus inexcusable question moot. "These facts demonstrate that Signal Electric's failure to respond was not deliberate or even neglectful. Rather, it resulted from Tracy's genuine misunderstanding as to whether he should accept service and Tieman's mistake in forwarding the summons and complaint to the wrong insurance company." *Id.* at 450, 332

The combination of the reasoning of *Vanderstoep* and this *dicta* from *Ha* creates the untenable outcome that clients, as principals of their attorneys, are not responsible for the conduct of their attorneys. If default orders that result from attorney neglect can only be sustained when caused by the conduct of the client, then default orders based on attorney neglect can never be sustained. It is axiomatic that a lawyer's inexcusable neglect will always be the result of that lawyer's own conduct. Any attorney, no matter how neglectful, can have a default order set aside by simply stating the obvious—"This was all my fault, my client had nothing to do with it."

While Washington has a policy in favor of judgment on the merits, but it also has a policy in favor of the fair and orderly dispensation of justice. In *Norton v. Brown,* 99 Wn. App. 118, 123, 992 P.2d 1019 (1999), the Court of Appeals stated:

> As a policy matter, our Supreme Court has stated that default judgments are not favored because "[i]t is the policy of the law that controversies be determined on the merits[.]" **On the other hand, an orderly system of justice mandates that parties comply with a judicial summons.** (Internal citations omitted and emphasis added.)

In *TMT*, the Court of Appeals pointed out how Washington's policy in favor of the orderly dispensation of justice must also be considered:

> [W]e also value an organized, responsive and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with the rules. As our Supreme Court recently noted, "litigation is inherently formal. All parties are burdened by formal time

P.3d 991.The *Ha* case was decided based on "mistake," not excusable neglect.

> limits and procedures." 140 Wn. App. at 199-200, 165 P.3d 1271. (Internal citations omitted.)

Toney acknowledges the equitable principles that are at play, but a bright line rule is necessary to protect the integrity of the civil rules and the professionalism of attorneys. If the sole consideration on every motion to set aside a default order is the policy in favor of judgment on the merits and avoidance of the hardship suffered by the defendant, no attorney-caused default order will be sustained no matter how inexcusable or intentional the conduct of the attorney. The court should use this case to make it clear that trial courts must consider the conduct of the attorney, not the client, for the purposes of "excusable neglect" once the attorney has been successfully retained to defend the case.

In the absence of such a rule, *pro se* litigants and in-house counsel are held to a higher standard than "outside attorneys," including professional litigators like Ms. Forbis and Bennett Bigelow & Leedom, P.S. The attorneys who make their living in the courtroom should be held to the highest standard with regard to compliance with the civil rules. The well-settled rule that a breakdown of internal office procedure can never be excusable neglect would apply to every kind of office in the state of Washington except law offices. A hypocritical outcome such as this cannot be endorsed by the court.

Furthermore, the default in question was not the result of a mere

clerical error. Ms. Forbis and her firm ignored Longview Orthopedic for the first three and a half weeks following their retention. This is exactly the kind of conduct that extending *Vanderstoep* will enable.

The Court of Appeals passed on the opportunity to clarify that *Vanderstoep* and *Ha* do not require trial courts to disregard the conduct of "outside counsel" when considering the issue of "good cause," and focus solely on the conduct of the named defendant. Such a weighty issue should, regardless of outcome, not be left to the combination of *dicta* from Division I and an insurance-related decision from Division II. The Supreme Court should address this issue squarely so that all public policy concerns can be fully and intentionally considered.

II. The Supreme Court should accept review under RAP 13.4(b)(2) because the decision of the Court of Appeals conflicts with the Court of Appeals decisions in *In re Estate of Stevens* and *Brooks v. Univ. City, Inc.*

Under *Estate of Stevens, Brooks,* and *Prest,* an order of default cannot be set aside in the absence of excusable neglect and diligence. These cases provided clear guidance to trial courts regarding how to apply the "good cause" standard of CR 55(c)(1). In the case at bar, the Court of Appeals acknowledged these holdings, but chose to ignore them and appears to have ruled that the "good cause" standard is no standard at all.

The Court of Appeals reliance on *Canam Hambro Systems, Inc. v. Horbach,* 33 Wn.App. 452, 456 P.2d 1182 (1982) is problematic for a number

of reasons. First, *Canam* predates *Stevens*, *Brooks*, and *Prest* by several years and, as such, has been superseded by these decisions. Second, while the partial quote that the Court of Appeals pulled from *Canam* may support its decision herein, the full quote and holding from *Canam* do not. In *Canam*, a defendant who suffered a default order sought set aside under CR 55(c)(1), "alleging by affidavit excusable neglect and a meritorious defense." 33 Wn.App. at 453, 655 P.2d 1182. The trial court found that the defendant did not have a meritorious defense and denied the motion to set aside. The trial court did not comment on the defendants excusable neglect claims. The Division I Court of Appeals reversed, holding that excusable neglect and a meritorious defense are "good cause" under CR 55(c). The full quote from *Canam* is as follows:

> While excusable neglect and a meritorious defense are not necessarily required to set aside an order of default as opposed to a default judgment, assertion of the two provides the good cause required by CR 55(c)." 33 Wn.App. at 546, 655 P.2d 1182.

The holding from *Canam* is that excusable neglect and a meritorious defense will meet the good cause standard under CR 55(c). While the *Canam* court may have stated that a party need not show both excusable neglect and a meritorious defense, it did not state that a party need not show excusable neglect at all.

Moreover, the facts of the case at bar are nothing like *Canam v. Hambro.* The appellate decision in that case was based on excusable neglect and a meritorious defense. In the current case, the trial defendant's neglect was

inexcusable and Longview Orthopedic offered no evidence of, nor did it even allege, a meritorious defense.

The clear guidance that *Stevens, Brooks,* and *Prest* provide to trial courts with regard to the definition of "good cause" under CR 55(c)(1) cannot be undone by the arcane *dicta* of the *Canam* decision which, as previously stated, bears no resemblance whatever to the case at bar. Washington's common law now provides two competing standards. On one side there is the excusable neglect and diligence standard from *Stevens, Brooks,* and *Prest.* On the other side is the nebulous, anything-goes standard created by the Court of Appeals decision in the case at bar. Because the Court of Appeals ruled in this case without expressly overruling *Stevens, Brooks,* and *Prest,* tial judges will be free to, or forced to, choose between these competing standards. The Supreme Court should grant review of this decision and provide firm guidance on the definition of "good cause" under CR 55(c)(1).

This is the first appellate case in the State of Washington where a default order or default judgment was set aside despite the inexcusable neglect of the defendant. Moreover, this is the first appellate case in the State of Washington that provides that clients are not responsible for the inexcusable neglect of their attorneys. These public policy issues should be decided by the Supreme Court under RAP 13.4(b)(4).

///

///

III. This case provides the Supreme Court with the opportunity to address the pervasive defense practice of intentionally disregarding CR 12(a)(1) and, therefore, involves an issue of substantial public interest that should be determined by the Supreme Court.

CR 12(a)(1) requires an in-state defendant to answer the plaintiff's complaint within twenty days of service. The record establishes that the attorneys at Bennett Bigelow & Leedom, P.S., had no intent to follow CR 12(a)(1). Ms. Forbis openly admitted that her firm had not even begun the process of drafting an answer until eleven days after it was due. Appellate counsel admits that Ms. Forbis's firm had never even communicated with Longview Orthopedic in the thirty-one days following service of process. The record also established that Ms. Forbis's practice of ignoring the 20-day deadline in CR 12 in favor of filing a notice of appearance and answering after the plaintiff has moved for default. (CP 117-73)

Ms. Forbis had planned to use the common defense tactic of filing a notice of appearance within twenty days instead of an answer. Doing so prevents the plaintiff from moving for default without providing notice to the defendant. The defendant uses the time lag between the service of the motion for default and the hearing on the motion to file its answer. Once the answer is filed and served, the plaintiff has no choice but to strike the motion for default. The end result is that the plaintiff does not receive the defendant's answer until long after the twenty-day deadline of CR 12(a)(1) has passed and after expending the time and resources to file and serve the motion for default. This practice also wastes the time of the court and the clerk's office as these

motions must be docketed and scheduled despite the fact that they are rarely ruled upon.

The court will not overturn a default order or judgment that was the result of willful conduct by the defendant. In *TMT,* 140 Wn. App. at 205-206, 165 P.3d 1271, the Division I Court of Appeals stated:

> [W]here the defaulting party's actions are deemed willful, equity will not afford that party relief, even if the party has a strong or virtually conclusive defense to its opponents' claims. * * * Willful defiance of the court's authority can never be rewarded in an equitable proceeding. (Internal citations omitted.)

The default order against Longview Orthopedic was the result of counsel's intentional refusal to file her client's answer within 20 days as required by CR 12. Default orders do not result from the failure to file a notice of appearance—they result from a failure to file a timely answer as required by CR 12. Ms. Forbis chose to disobey CR 12(a)(1) and planned to avoid the consequences of doing so by filing a notice of appearance. This tactic is pervasive among the defense bar and it is unprofessional, if not unethical, in that step one is the willful disobedience of CR 12(a)(1). There simply is no mechanism to force a defendant to answer with the time required by CR 12(a)(1), so they seldom do.

This case offers the Supreme Court the opportunity to provide guidance with regard to this practice. The Court should rule that if an

attorney chooses to intentionally defy CR 12(a)(1) the resulting default order must stand regardless of whether he or she intended to file a notice of appearance. RAP 13.4(b)(4).

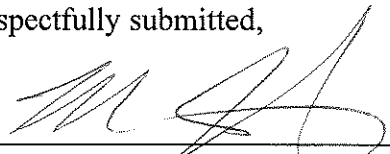
While Ms. Forbis's failure to file a notice of appearance within twenty days may not have been willful, her failure to file an answer within twenty days certainly was willful. Therefore, there was no "good cause" under CR 55(c)(1) as a matter of law. This decision is in conflict with a published decision of the court of appeals. RAP 13.4(b)(2).

E. CONCLUSION

The Supreme Court should accept review under RAP 13.4(b)(2) and (4) and reverse the trial court's order setting aside the default order against Longview Orthopedic or, in the alternative, provide the clarification sought by the trial court with regard to *Vanderstoep* and remand this matter to the trial court so that it may exercise its discretion accordingly.

DATED: January 23, 2020.

Respectfully submitted,



MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Appellant

CERTIFICATE

I certify that on this day I caused a copy of the foregoing PEITION FOR REVIEW to be mailed, postage prepaid, and e-mailed to Respondent's attorney, addressed as follows:

Rhianna M. Fronapfel
Bennett Bigelow & Leedom P.S.
601 Union Street, Suite 1500
Seattle, WA 98101
Fax No.: (206) 622-8986
Email: rfronapfel@bbllaw.com

Howard M. Goodfriend
Ian C. Carns
Smith Goodfriend, P.S.
1619 – 8th Avenue North
Seattle, WA 98109
Fax No. (206) 624-0809
Email: howard@washingtonappeals.com
ian@washingtonappeals.com

DATED this 23rd day of January 2020, at Longview, Washington.

KARA L. COPE

WALSTEAD MERTSCHING PS

January 23, 2020 - 1:41 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52327-2
Appellate Court Case Title:	James Sellers, Appellant v. Longview Orthopedic Associates, PLLC, Respondent
Superior Court Case Number:	17-2-01335-9

The following documents have been uploaded:

- 523272_Other_20200123133345D2144043_4706.pdf
  This File Contains:
  Other - Appendix
  The Original File Name was 52327 2 App to Pt for Rev.pdf
- 523272_Petition_for_Review_20200123133345D2144043_0604.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 52327 2 Pet for Review.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- cphillips@bbllaw.com
- howard@washingtonappeals.com
- ian@washingtonappeals.com
- lbutler@bbllaw.com
- rfronapfel@bbllaw.com

Comments:

Sender Name: Kara Cope - Email: cope@walstead.com
Filing on Behalf of: Matthew J Andersen - Email: mjandersen@walstead.com (Alternate Email:)

Address:
PO Box 1549
Longview, WA, 98632
Phone: (360) 423-5220

Note: The Filing Id is 20200123133345D2144043

FILED
Court of Appeals
Division II
State of Washington
1/23/2020 1:41 PM

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 52327-2-II

JAMES L. SELLERS, Guardian ad Litem of NATHAN TONEY, a minor

Appellant,

vs.

LONGVIEW ORTHOPEDIC ASSOCIATES, PLLC

Respondent.

APPENDIX TO APPELLANT'S PETITION FOR REVIEW

By MATTHEW J. ANDERSEN
Attorney for Petitioner

MATTHEW J. ANDERSEN
WSBA #30052
WALSTEAD MERTSCHING PS
Civic Center Building, Third Floor
1700 Hudson Street
Post Office Box 1549
Longview, WA 98632
Telephone: (360) 423-5220
Fax: (360) 423-1478
Email: mjandersen@walstead.com

APPENDIX

A-1	PUBLISHED OPIONION DATED DECEMBER 24, 2019
A-2	RULING GRANTING REVIEW DATED SEPTEMBER 10, 2019

CERTIFICATE

I certify that on this day I caused a copy of the foregoing APPENDIX TO APPELLANT'S PETITION FOR REVIEW to be mailed, postage prepaid, and emailed to Respondent's attorneys, addressed as follows:

Rhianna M. Fronapfel
Bennett Bigelow & Leedom P.S.
601 Union Street, Suite 1500
Seattle, WA 98101
Fax No.: (206) 622-8986
Email: rfronapfel@bbllaw.com

Howard M. Goodfriend
Ian C. Carns
Smith Goodfriend, P.S.
1619 – 8th Avenue North
Seattle, WA 98109
Fax No. (206) 624-0809
Email: howard@washingtonappeals.com
ian@washingtonappeals.com

DATED this 23rd day of January 23, 2020, at Longview, Washington.

KARA L. COPE

APPENDIX A-1

Filed
Washington State
Court of Appeals
Division Two

December 24, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMES L. SELLERS, Guardian ad Litem of NATHAN TONEY, a minor, Appellant, v. LONGVIEW ORTHOPEDIC ASSOCIATES, PLLC, Respondent.	No. 52327-2-II PUBLISHED OPINION

MAXA, C.J – James Sellers appeals the trial court's order setting aside a default order entered against Longview Orthopedic Associates, PLLC (LOA).

Sellers, as guardian ad litem for a minor child, filed a lawsuit against LOA to recover damages for alleged medical negligence in the treatment of the child. LOA forwarded the complaint to its insurer, who informed LOA that an attorney would be assigned to defend LOA. But the insurer-retained attorney failed to file a notice of appearance or an answer, and Sellers obtained an order of default against LOA. After LOA promptly filed a motion to set aside the default order, the trial court found that the failure to appear or answer resulted from defense counsel's inexcusable neglect but that LOA was blameless. As result, the court found "good cause" to set aside the default order under CR 55(c)(1).

We hold that (1) when the trial court found that the insurer-retained defense attorney's neglect in failing to answer was inexcusable but the defendant was blameless, the trial court had discretion whether or not to find good cause to vacate the default order; and (2) the trial court did not abuse its discretion under the facts of this case. Accordingly, we affirm the trial court's order setting aside the default order under CR 55(c)(1) and remand for further proceedings.

FACTS

On December 14, 2017, Sellers filed a lawsuit against LOA to recover damages for alleged medical negligence involving a minor child. LOA was served with the summons and complaint on December 21. LOA forwarded the summons and complaint to its insurer, which retained attorney Amy Forbis to represent LOA and informed LOA that defense counsel had been assigned. However, Forbis failed to file a notice of appearance on behalf of LOA or an answer to the complaint.

Sellers filed a motion for default on January 16, 2018 based on LOA's failure to file an answer within 20 days after service of the summons and complaint. The trial court entered an order of default on the same day.

On January 21, Forbis discovered that no notice of appearance had been filed and that the trial court had entered a default order. The next day, she filed on behalf of LOA a motion under CR 55(c)(1) to set aside the trial court's default order. Forbis argued that LOA's failure to appear was due to her mistake. In her supporting declaration, Forbis stated that her law firm's usual practice was to file a notice of appearance upon receipt of a case assignment. She attributed her failure to file a notice of appearance to a clerical error and her focus on preparing for an upcoming trial. In a supplemental declaration, Forbis emphasized that "[LOA] is blameless for this error, over which they had no control." Clerk's Papers (CP) at 68-69.

The trial court granted LOA's motion to set aside the default order. The court found that LOA failed to appear or answer within 20 days due to the inexcusable neglect of defense counsel. But the court also found that these "failures to answer or appear were in no way related to the conduct of [LOA], and/or its insurer, who were both blameless in this regard." CP at 193. In addition, the court found that Forbis diligently moved to have the default order set aside. Finally, the court found that Sellers would not be prejudiced by setting aside of the default order. However, the court awarded Sellers attorney fees and costs incurred in obtaining the default order and resisting LOA's efforts to have the order set aside.

In granting Forbis's motion to set aside the default order, the trial court certified under RAP 2.3(b)(4) that its order involved a controlling question of law appropriate for immediate review: whether this court's decision in *VanderStoep v. Guthrie*, 200 Wn. App. 507, 402 P.3d 883 (2017), *review denied*, 189 Wn.2d 1041 (2018), should be extended to cases where a default order is entered against a blameless defendant because of the inexcusable neglect of that party's counsel. A commissioner of this court granted discretionary review.

ANALYSIS

A. LEGAL PRINCIPLES

1. Setting Aside Default Order

The general rule is that a defendant must file an answer within 20 days after service of the summons and complaint. CR 12(a)(1). Under CR 55(a)(1), a plaintiff can move for default if the defendant fails to answer or otherwise defend within 20 days. Defendants are entitled to notice of the motion only if they have appeared in the action. CR 55(a)(3). Once a default order has been entered, a plaintiff can obtain a default judgment under certain circumstances. CR 55(b).

CR 55(c)(1) provides that a trial court may set aside a default *order* "[f]or good cause shown and upon such terms as the court deems just." CR 55(c)(1) also states that a court may set aside a default *judgment* in accordance with CR 60(b), which addresses the vacation of judgments. These are different standards. *In re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999).

The analysis for setting aside a default *judgment*, first articulated in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), is well settled:

> A party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Little v. King, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007); *see also VanderStoep*, 200 Wn. App. at 517.

The test for setting aside a default *order* is less clear. The general rule is that "[t]o establish good cause under CR 55, a party may demonstrate excusable neglect and due diligence." *Estate of Stevens*, 94 Wn. App. at 30. These two factors mirror the second and third factors in the default judgment test.[1] But unlike for a default judgment, a showing of a meritorious defense is not required to set aside a default order. *Id.*

In addressing whether to set aside a default judgment, this court in *VanderStoep* identified three guiding principles: (1) default judgments are disfavored because the preference is to resolve cases on the merits, (2) deciding whether to set aside a default judgment is a matter of

[1] Presumably, "excusable neglect" may encompass a wide range of reasonable excuses. For instance, a defendant might be able to show good cause by establishing mistake, inadvertence, or surprise in addition to excusable neglect, consistent with the second factor for setting aside a default judgment.

equity and the "primary concern is whether justice is being done," and (3) "[w]hat is just and equitable must be determined based on the specific facts of each case." 200 Wn. App. at 517-18. We believe that these same general principles apply when evaluating a motion to set aside a default order.

2. Standard of Review

Whether to set aside a default order is within the trial court's discretion, and therefore we review the trial court's decision for an abuse of discretion. *Estate of Stevens*, 94 Wn. App. at 29. "The decision to vacate an order of default is addressed to the sound discretion of the trial judge, and we will not reverse that decision absent a showing that the trial judge abused her discretion." *Brooks v. Univ. City, Inc.*, 154 Wn. App. 474, 479, 225 P.3d 489 (2010).

While acknowledging this general rule, Sellers argues that some of the issues in this case are questions of law that must be reviewed de novo. We agree that to the extent this case requires an interpretation of the meaning of "good cause" in CR 55(c)(1), our review is de novo. The interpretation of a court rule is a matter of law that we review de novo. *Dan's Trucking, Inc. v. Kerr Contractors, Inc.*, 183 Wn. App. 133, 139, 332 P.3d 1154 (2014).

However, whether a party's conduct amounts to excusable neglect and whether the party acted with due diligence in moving to set aside the default are reviewed for abuse of discretion. *See Brooks*, 154 Wn. App. at 479-80 (affirming the trial court's refusal to set aside a default order because the trial court had tenable reasons to conclude that the defendant failed to show excusable neglect); *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 271-72, 818 P.2d 618 (1991) (stating that it was within the trial court's discretion to conclude that the defendant's neglect was not excusable and that the defendant failed to exercise

equity and the "primary concern is whether justice is being done," and (3) "[w]hat is just and equitable must be determined based on the specific facts of each case." 200 Wn. App. at 517-18. We believe that these same general principles apply when evaluating a motion to set aside a default order.

2. Standard of Review

Whether to set aside a default order is within the trial court's discretion, and therefore we review the trial court's decision for an abuse of discretion. *Estate of Stevens*, 94 Wn. App. at 29. "The decision to vacate an order of default is addressed to the sound discretion of the trial judge, and we will not reverse that decision absent a showing that the trial judge abused her discretion." *Brooks v. Univ. City, Inc.*, 154 Wn. App. 474, 479, 225 P.3d 489 (2010).

While acknowledging this general rule, Sellers argues that some of the issues in this case are questions of law that must be reviewed de novo. We agree that to the extent this case requires an interpretation of the meaning of "good cause" in CR 55(c)(1), our review is de novo. The interpretation of a court rule is a matter of law that we review de novo. *Dan's Trucking, Inc. v. Kerr Contractors, Inc.*, 183 Wn. App. 133, 139, 332 P.3d 1154 (2014).

However, whether a party's conduct amounts to excusable neglect and whether the party acted with due diligence in moving to set aside the default are reviewed for abuse of discretion. *See Brooks*, 154 Wn. App. at 479-80 (affirming the trial court's refusal to set aside a default order because the trial court had tenable reasons to conclude that the defendant failed to show excusable neglect); *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 271-72, 818 P.2d 618 (1991) (stating that it was within the trial court's discretion to conclude that the defendant's neglect was not excusable and that the defendant failed to exercise

due diligence). "The trial court has broad discretion over the issue of excusable neglect." *VanderStoep*, 200 Wn. App. at 526.

In addition, we confirm the general rule that we review for an abuse of discretion the trial court's ultimate determination regarding the existence of good cause to set aside a default order. *Brooks*, 154 Wn. App. at 479; *Estate of Stevens*, 94 Wn. App. at 29. And we are less likely to find an abuse of discretion when a trial court sets aside a default order than when a trial court denies a motion to set aside a default order. *See VanderStoep*, 200 Wn. App. at 518 (applying this principle to judicial review of a default judgment rather than a default order).

3. *VanderStoep* Holding

In *VanderStoep*, the plaintiffs filed a lawsuit against the defendants relating to a car accident. 200 Wn. App. at 513. Upon being served with the complaint, the defendants notified their insurer and followed up with two telephone messages. *Id.* at 513-14. However, the insurer failed to arrange for an attorney to represent them. *See id.* at 514. No attorney appeared for defendants in the lawsuit and plaintiffs obtained a default order and default judgment. *Id.* at 514-15. The trial court denied the defendants' motion to set aside the default judgment. *Id.* at 516.

On appeal, this court noted a line of cases addressing when a defendant notifies a liability insurer of a lawsuit and the insurer without a legitimate excuse fails to arrange for defense counsel. *Id.* at 527-29. The court stated, "In this situation, the general rule is that the trial court should focus on whether the defendant, not the insurer, acted with excusable neglect." *Id.* at 528.

The court cited to *White*, 73 Wn.2d at 354, where the Supreme Court stated that an insurer's culpable neglect should not be imputed to a blameless defendant. *VanderStoep*, 200 Wn. App. at 528. Further, the court noted that " 'we would be most reluctant to hold that [the

defendant] tendered the defense of the action to the insurer at his peril.' " *Id.* (quoting *White*, 73 Wn.2d at 355).

The court in *VanderStoep* held that when a defendant properly notifies its insurer that a complaint has been served and the insurer fails to arrange for a timely appearance or answer without a legitimate excuse, the insurer's inexcusable neglect should not be imputed to the blameless defendant. 200 Wn. App. at 533-34. The focus must be on the defendant's conduct, not the insurer's conduct. *See id.* at 532-34.

B. DETERMINATION OF "GOOD CAUSE" UNDER CR 55(c)(1)

Sellers argues that the trial court erred in setting aside the default order because defense counsel's inexcusable neglect necessarily precludes a finding of good cause under CR 55(c)(1). He claims that this court should not extend the holding in *VanderStoep* that the inexcusable neglect of a defendant's insurer cannot be imputed to the defendant to the situation where a default order resulted from the inexcusable neglect of defense counsel rather than the defendant's insurer.

We need not decide whether the *VanderStoep* holding applies here. Instead, we conclude that a finding of excusable neglect is not always required for a trial court to find good cause to set aside a default order and hold that the trial court here did not abuse its discretion in setting aside the default order here based on the specific facts of this case.

1. Requirement of Excusable Neglect

Sellers argues that a defendant always must establish excusable neglect in order to show "good cause" under CR 55(c)(1), and that a trial court's finding of inexcusable neglect here necessarily precluded a finding of good cause. We disagree.

Sellers relies on this court's decision in *Estate of Stevens*, where the court affirmed a denial of a motion to set aside a default order. 94 Wn. App. at 22-23. As noted above, the court stated the general rule that a defendant may establish good cause by showing excusable neglect and due diligence. *Id.* at 30.

The court also stated that the trial court had found no excusable neglect, "without which neither an order of default nor a default judgment can be vacated." *Id.* at 30. The court concluded that although the trial court improperly considered whether the defendant had a meritorious defense, that error was harmless because the trial court concluded that there was no excusable neglect. *Id.* at 31. Finally, the court decided that it did not need to address due diligence because there was no excusable neglect. *Id.* at 35. Sellers claims that these statements indicate that the trial court's finding of no excusable neglect was determinative and that such a finding always precludes a showing of good cause.

Sellers also relies on *Brooks*, where the court affirmed a denial of a motion to set aside a default order. 154 Wn. App. at 476. The court stated, "A default order may be set aside upon a showing of good cause, i.e., a showing of excusable neglect and due diligence." *Id.* at 479. This statement seems to equate good cause with excusable neglect. The court held that the trial court did not err in refusing to set aside the default order because of the trial court's conclusion that the defendant failed to show excusable neglect. *Id.* at 479-80; *see also In re Welfare of S.I.*, 184 Wn. App. 531, 544-45, 337 P.3d 1114 (2014) (holding that the trial court did not err in denying a motion to set aside a default order when the court found no excusable neglect and no due diligence).

However, other cases establish that there can be good cause to set aside a default order without a showing of excusable neglect. In *Canam Hambro Systems, Inc. v. Horbach*, the court

reversed the denial of a motion to set aside a default order for good cause based on a reason besides excusable neglect. 33 Wn. App. 452, 456, 655 P.2d 1182 (1982). The court stated that "excusable neglect and a meritorious defense *are not necessarily required* to set aside an order of default as opposed to a default judgment." *Id.* (emphasis added). The court noted that "[a]n asserted defense to an action is good cause to set aside an order of default." *Id.* at 455. The court did not base its finding of good cause on excusable neglect.

The reference in *Canam Hambro* to the existence of a defense is consistent with the rule for setting aside default judgments. "When the defendant can demonstrate a strong or virtually conclusive defense, a default judgment generally should be set aside regardless of why the defendant failed to timely appear unless that failure was willful or the secondary *White* factors are not satisfied." *VanderStoep*, 200 Wn. App. at 518.

And in *Seek Systems*, this court stated that two factors "to be considered" in setting aside a default order are excusable neglect and due diligence. 63 Wn. App. at 271. But the court did not hold that a finding of excusable neglect was required to set aside a default order.

Tegland emphasizes that CR 55(c)(1) "is deliberately vague, in order to allow the court considerable discretion to fashion fair and reasonable results on a case-by-case basis." 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 55 author's cmt. 20, at 362 (6th ed. 2013).

We conclude that although excusable neglect often will be a key factor for a trial court to consider in determining whether good cause exists to set aside a default order under CR 55(c)(1), excusable neglect is not always required. The trial court in the exercise of its discretion and to fashion a fair and reasonable result may find good cause based on appropriate facts even if the default resulted from defense counsel's inexcusable neglect.

2. Trial Court's Exercise of Discretion

As noted above, whether to set aside a default order is within the trial court's sound discretion. *Brooks*, 154 Wn. App. at 479. And the trial court must focus on what is just and equitable under the specific facts of the case. *VanderStoep*, 200 Wn. App. at 517-18. Therefore, "good cause" under CR 55(c)(1) must be a flexible concept that involves the trial court's exercise of discretion based on the particular facts of each case.

Here, the trial court made four key factual findings: (1) LOA's failure to answer was due to defense counsel's inexcusable neglect, (2) the failure to answer was not related to LOA's conduct and LOA was blameless in that regard, (3) LOA diligently moved to set aside the default order, and (4) setting aside the default order would not prejudice Sellers.

Defense counsel's inexcusable neglect certainly is an important factor for a trial court to consider in deciding whether to set aside a default order. *See Estate of Stevens*, 94 Wn. App. at 30-31. But a trial court also can consider the defendant's conduct and whether the defendant played any role in the entry of the default order. *See Akhavuz v. Moody*, 178 Wn. App. 526, 537-38, 315 P.3d 572 (2013) (considering the defendant's inattention to the case in declining to set aside a default judgment). In addition, due diligence is an established factor that can be considered. *Estate of Stevens*, 94 Wn. App. at 30. And because a trial court must determine what is just and equitable, it is not inappropriate for a court to consider prejudice to the plaintiff.

We conclude that even though the default order here resulted from defense counsel's inexcusable neglect, the trial court had the discretion to find good cause to set aside the default order based on LOA's blameless conduct, LOA's due diligence, and the lack of prejudice to Sellers. And we hold that the trial court did not abuse that discretion under the specific facts of this case.

CONCLUSION

We hold that the trial court did not abuse its discretion in finding good cause to set aside the default order under CR 55(c)(1). Accordingly, we affirm the trial court's order setting aside the default order and remand for further proceedings.

Maxa, C.J.
MAXA, C.J.

We concur:

Sutton, J.
SUTTON, J.

Glasgow, J.
GLASGOW, J.

APPENDIX A-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED
COURT OF APPEALS
DIVISION II
2018 SEP 10 AM 11:47
STATE OF WASHINGTON
BY
DEPUTY

JAMES L. SELLERS, Guardian ad Litem of NATHAN TONEY, a minor, Petitioner, v. LONGVIEW ORTHOPEDIC ASSOCIATES. PLLC, Respondent.	No. 52327-2-II RULING GRANTING REVIEW

James Sellers, guardian ad litem for Nathan Toney, seeks discretionary review of the superior court's order setting aside an order of default against Longview Orthopedic Associates. Concluding that the superior court has appropriately certified its order for review under RAP 2.3(b)(4), this court grants discretionary review.

FACTS

Sellers filed suit against Longview Orthopedic on December 14, 2017, and served the summons and complaint on the defendant on December 21, 2017. Longview Orthopedic forwarded the complaint to its insurer, Physicians Insurance, which, in turn, assigned Amy T. Forbis as defense counsel. Forbis failed to file a timely notice of appearance or an answer to the complaint.

COPY

On January 21, 2018, Forbis reviewed the docket and saw that the trial court had entered a notice of default against her client on January 16th. The next day, she filed a notice of appearance, an answer, and a motion to set aside the default order.[1] Forbis explained that her failure to file was the result of a one-time clerical error rather than a "failure of process." Mot. for Disc. Rev., Appendix A-3 at 1. At the time, she was "very busy preparing for a multi-week trial on a complex medical malpractice matter . . . ." Mot. for Disc. Rev., Appendix A-7 at 2.

The superior court set aside the order of default, reasoning that Longview Orthopedic's failure to defend against the action was not its fault, but rather was the result of inexcusable neglect by Forbis. The trial court certified its order for review under RAP 2.3(b)(4). Specifically, the superior court sought clarification as to whether *Vandersteop v. Guthrie*, 200 Wn. App. 507, 533-34, 402 P.3d 883 (2017), *review denied*, 189 Wn.2d 1041 (2018), should be extended "to cases where an innocent party suffers a default order due to the inexcusable neglect of that party's counsel." Mot. for Disc. Rev., Appendix at A-1 at 2.

ANALYSIS

This court may grant discretionary review only when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure

[1] After being served with a complaint, a party has 20 days to file an answer. CR 12(a)(1).

> by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Sellers seeks discretionary review under RAP 2.3(b)(2) and (4).

Sellers argues that the superior court committed probable error by granting Longview Orthopedic's motion to set aside the default order because Forbis's inexcusable neglect should be imputed to her client, Longview Orthopedic. RAP 2.3(b)(2). Sellers also believes this is a question of law on which there is substantial ground for a difference of opinion and a determination of the legal question may materially advance the termination of the litigation. RAP 2.3(b)(4).

Default judgments are disfavored. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). So a superior court "may" set aside a default order "[f]or good cause." CR 55(c)(1). *In re Estate of Stevens* addressed the CR 55(c)(1) good cause standard, observing, "[t]o establish good cause under CR 55, a party may demonstrate excusable neglect and due diligence."[2] 94 Wn. App. 20, 30, 971 P.2d 58 (1999), *as*

---

[2] Although Longview Orthopedic argues that a showing of excusable neglect is not "necessarily required to set aside an order of default as opposed to a default judgment[,]'" it does not provide any other potential standards by which courts have evaluated what comprises "good cause" under CR 55. Resp. to Mot. for Disc. Rev. at 9 (quoting *Canam Hambro Sys., Inc. v. Horbach*, 33 Wn. App. 452, 456, 655 P.2d 1182 (1982)). Rather, in addition to the cases cited in the text of this ruling, myriad published and unpublished opinions reference the excusable neglect/due diligence CR 55 standard. *See, e.g., In re the Welfare of S.L.*, 184 Wn. App. 531, 544, 337 P.3d 1114 (2014), *review denied*, 183 Wn.2d 1002 (2015); *Meade v. Nelson*, 174 Wn. App. 740, 752 n.5, 300 P.3d 828, *review denied*, 178 Wn.2d 1025 (2013); *Aecon Bldgs., Inc. v. Vandermolen Const. Co., Inc.*, 155 Wn. App. 733, 739, 230 P.3d 594 (2009); *Graves v. Department of Emp. Sec.*, 144 Wn. App. 302, 311, 182 P.3d 1004 (2008); *In re the Matter of Parental Rights to E.R.D.*, No.

amended (Apr. 9, 1999) (citing *Seek Sys., Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 271, 818 P.2d 618 (1991) ("[A]lthough the requirements for setting aside an order of default are not entirely the same as those for setting aside a default judgment, two factors to be considered in each instance are excusable neglect and due diligence.")); *accord Brooks v. University City, Inc.*, 154 Wn. App. 474, 479, 225 P.3d 489 ("A default order may be set aside upon a showing of good cause, *i.e.*, a showing of excusable neglect and due diligence."), *review denied*, 169 Wn.2d 1004 (2010). Whether neglect is excusable depends on the factual circumstances of each case. *Akhavuz v. Moody*, 178 Wn. App. 526, 534-35, 315 P.3d 572 (2013). However, inexcusable neglect occurs if the defendant willfully disregards process. *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 105-06, 533 P.2d 852 (1975).

"This court reviews a trial court's decision to vacate a default judgment for an abuse of discretion." *Colacurcio v. Burger*, 110 Wn. App. 488, 494, 41 P.3d 506 (2002), *review denied* 148 Wn.2d 1003, 60 P.3d 1211 (2002). "[T]his court is less likely to find an abuse

---

33762-6-III, 2017 WL 239629, at *5, 197 Wn. App. 1042 (Jan. 19, 2017); *Mednikova v. Morse*, No. 70863-5-I, 2014 WL 4067921, at *2, 183 Wn. App. 1002 (Aug. 18, 2014).

Conversely, when considering whether to vacate a default judgment, the superior court must consider:

> (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). *See also Seek Sys., Inc. v. Lincoln Moving/Glob. Van Lines, Inc.*, 63 Wn. App. 266, 271, 818 P.2d 618 (1991) (the court considers additional factors when setting aside a default judgment versus a notice of default).

of discretion if a trial court has set aside a default judgment than if it has refused to do so." *Colacurcio*, 110 Wn. App at 494-95. The superior court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons. *Akhavuz*, 178 Wn. App. at 532. And a court abuses is discretion if it bases its decision on an erroneous view of the law or applies the incorrect legal analysis. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

Here, although the superior court concluded that Forbis's neglect was inexcusable, it nevertheless set aside the default order because her failures in no way related to her client's conduct. In so ruling, the superior court relied on *Vanderstoep v. Guthrie*, 200 Wn. App. 507, 402 P.3d 883 (2017), *review denied*, 189 Wn.2d 1041 (2018). In *Vanderstoep*, defendants' insurance company, American Family, failed to appear because of faulty internal communication, even though the insureds had properly notified the company of the suit. *Vanderstoep*, 200 Wn. App at 513-14. The court noted that "[t]he general rule is that 'if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable.'"[3] *Vanderstoep*, 200 Wn. App. at 531 (quoting *TMT Bear Creek Shopping*

[3] *See TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App 191, 212-13, 165 P.3d 1271 (2007) (affirming denial of motion to vacate claim against PETCO because it committed inexcusable neglect when the legal assistant to the in-house counsel was on vacation and did not update the calendaring system); *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 196 n.6, 312 P.3d 976 (2013) ("[e]ven if we were to consider Ohio's claim of . . . excusable neglect, we find it unavailing" because "[w]e have repeatedly held that when a company's failure to respond . . . was due to a breakdown of internal office procedure, it is not excusable under CR 60(b)."), *review denied*, 179 Wn.2d 1010 (2014); *Beckman v. Department of Soc. & Health Servs.*, 102 Wn. App. 687, 11 P.3d 313 (2000) (neglect in failing to institute office management procedures to catch administrative errors was inexcusable); *but see Showalter*, 124 Wn. App at 514) (trial court did not abuse its discretion by vacating default

Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App 191, 212, 165 P.3d 1271 (2007)). Thus, American Family's failure to appear was inexcusable. *Vanderstoep*, 200 Wn. App at 531-32.

But in holding that the superior court abused its discretion by denying the insured's motion to vacate the default judgment, this court focused on the insured's blameless conduct and not on the insurer's mistakes. *Vanderstoep*, 200 Wn. App. at 532-33. Because the defendants "did what they were supposed to do when served with the complaint," the court refused to impute America Family's "inexcusable conduct" to them. *Vanderstoep*, 200 Wn. App. at 532-33.

Sellers makes three arguments why this court's reasoning in *Vanderstoep* should not apply to the facts at hand. First, *Vanderstoep* did not establish a "blanket rule" that default orders that result from conduct of a non-party are automatically set aside. Mot. for Disc. Rev. at 10. Second, Longview Orthopedic's argument that negligence by an independent (non in-house) attorney should not be imputed to the represented party "finds little support in Washington State jurisprudence." Mot. for Disc. Rev. at 12. Third, Sellers argues that extending Vanderstoep's application to the attorney-client context is bad public policy. If an attorney can always set aside a default order or other order based

---

judgment and concluding Wild Oats did not commit inexcusable neglect where the legal department failed to forward complaint to the claims administrator); *Prest v. Am. Bankers Life Assur. Co.*, 79 Wn. App. 93, 99-100, 900 P.2d 595 (1995) (company committed inexcusable neglect when employee who received the notice and complaint failed to see that it got to the appropriate person), *review denied*, 129 Wn.2d 1007 (1996).

on his or her own negligence by saying, "[t]his was all my fault, my client had nothing to do with it," court rules lose their significance.[4] Mot. for Disc. Rev. at 16.

In response, Longview Orthopedic argues that "[t]he *Vanderstoep* court's holding that the focus must be on the conduct of the party, not that of its representatives, followed established law."[5] Resp. to Mot. for Disc. Rev. at 13. In support of its argument, Longview Orthopedic cites *Ha v. Signal Elec.c, Inc.*, 182 Wn. App. 436, 332 P.3d 991 (2014), *review denied*, 182 Wn.2d 1006 (2015). There, Division One affirmed the trial court's decision to grant a motion to vacate default judgment. The court distinguished earlier decisions in *TMT* and *Prest* (*see infra* n.3) that had found counsel's conduct inexcusable, and reasoned that the general rule that the failure to appear "due to a breakdown of internal office procedure . . . is not excusable" is inapplicable because an "*independent attorney*" made the mistake rather than defendant's "general counsel" or "office employee." *Ha*, 182 Wn. App at 450-51 (emphasis added). To deny defendant a trial because of such a counsel's "mistake" would be "unjust[]." *Ha*, 182 Wn. App at 454.

---

[4] Sellers also argues that Forbis's failure to file an answer within 20 days was willful because it was Forbis's standard practice to file a notice of appearance rather than an answer within the amount of time allowed to file an answer. In support of this argument, he cites Forbis's actions in one case initiated in 2011 and another case from 2017.

[5] Longview Orthopedic argues that the decision whether to vacate a notice of default under CR 55 is discretionary and does not present a "controlling question of law" under RAP 2.3(b)(4). But, the superior court can abuse its discretion by applying the wrong legal standard. Thus, if an order of default arguably may only be set aside if the defendant's attorney shows his or her neglect was excusable, the superior court applied the wrong legal standard when it found that Forbis committed inexcusable neglect but nonetheless applied *Vanderstoep* to set aside the default order.

Sellers responds that while the attorneys in *TMT* and *Prest* were both in-house counsel, the attorney in *Boss Constr., Inc., v. Hawk's Superior Rock, Inc.*, No. 49273-3-II, 2017 WL 5593791, 1 Wn. App. 2d 1029 (Nov. 21, 2017), decided after *Ha*, was not.[6] In *Boss*, this division affirmed the denial of a motion to vacate a default judgment. It determined that the independent defense attorney's "failure to respond to properly served court documents [was] due to a breakdown of internal office procedures" and, therefore, was not excusable neglect. *Boss*, 2017 WL 5593791, at *5.

Sellers also plays down *Ha*'s significance by arguing that its discussion of in-house and independent attorneys is *dicta* because the case turned on the court's determination that the an independent attorney hired to assist the defendant in Chapter 11 proceedings, committed an inadvertent mistake and was did not act deliberately or even neglectfully.[7] *Ha*, 182 Wn. App at 452. He adds that the superior court judge, in certifying this case for review, believed that *Ha* was inapposite because in *Ha* there was "a mistaken understanding of who was representing who," and the court "did [its] very best to avoid the whole notion of excusable neglect." Mot. for Disc. Rev., Appendix A-9 at 13 (Report of Proceedings (RP) Apr. 25, 2018 at 13); Reply to Resp. at 8.

---

[6] *See* GR 14.1 (citation to unpublished opinions).

[7] In *Ha*, the plaintiff contacted the defendant's independent Chapter 11 counsel because the defendant's registered agent was in poor health. Counsel, after consulting with the defendant's bankruptcy financial advisor, agreed to accept service and forwarded the summons and complaint to the financial advisor. The advisor then "mistakenly forwarded them on to the wrong insurance company and failed to send them to" the defendant. *Ha*, 182 Wn. App. at 451-53. In making this decision, *Ha* relied on cases that excused a party's failure to timely answer due to inadvertent confusion as to who was responsible for doing so. *Ha*, 182 Wn. App. at 451 (citing *Showalter v. Wild Oats*, 124 Wn. App. 506, 514, 101 P.3d 867 (2004), and *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987)).

This court agrees that the trial court properly certified its order setting aside the order of default for appellate review. Primarily, whether *Vanderstoep*'s reasoning should apply to these facts, and, if applied, whether Longview Orthopedic has a right to set aside the default order regardless of its attorney's inexcusable neglect is a controlling question of law on which there is substantial ground for a difference of opinion and immediate review of the order may materially advance the ultimate termination of the litigation by potentially resolving the issue of liability, a major issue here. Secondarily, the related issues whether *Ha* is distinguishable and whether, instead, the reasoning in the unpublished *Boss* opinion should apply to the conduct of independent counsel would also benefit from appellate review. Accordingly, this court grants review under RAP 2.3(b)(4).

CONCLUSION

The trial court properly certified its order for discretionary review under RAP 2.3(b)(4). Having concluded that review is appropriate under RAP 2.3(b)(4), this court does not reach Sellers's RAP 2.3(b)(2) arguments. Accordingly, it is hereby

ORDERED that Sellers's motion for discretionary review is granted. The Clerk of Court will set a perfection schedule.

DATED this 10th day of September, 2018.

Aurora R. Bearse
Court Commissioner

cc: Matthew J. Andersen
Rhianna M. Fronapfel
Howard M. Goodfriend
Ian C. Cairns
Hon. Stephen M. Warning

WALSTEAD MERTSCHING PS

January 23, 2020 - 1:41 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52327-2
Appellate Court Case Title:	James Sellers, Appellant v. Longview Orthopedic Associates, PLLC, Respondent
Superior Court Case Number:	17-2-01335-9

The following documents have been uploaded:

- 523272_Other_20200123133345D2144043_4706.pdf
  This File Contains:
  Other - Appendix
  The Original File Name was 52327 2 App to Pt for Rev.pdf
- 523272_Petition_for_Review_20200123133345D2144043_0604.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 52327 2 Pet for Review.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- cphillips@bbllaw.com
- howard@washingtonappeals.com
- ian@washingtonappeals.com
- lbutler@bbllaw.com
- rfronapfel@bbllaw.com

Comments:

Sender Name: Kara Cope - Email: cope@walstead.com
Filing on Behalf of: Matthew J Andersen - Email: mjandersen@walstead.com (Alternate Email:)

Address:
PO Box 1549
Longview, WA, 98632
Phone: (360) 423-5220

Note: The Filing Id is 20200123133345D2144043