Supreme Court No. 98651-7
Court of Appeals No. 368220-III

SUPREME COURT
OF THE STATE OF WASHINGTON

JENS RICHTER, as an individual d/b/a GLOBAL EQUINE SIRES and A-1 PERFORMANCE SIRES, Petitioner,

v.

ALLIE HELINSKI and BRENT HELINSKI, individually and the marital community thereof, Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND RESPONDENTS

Petitioner is Jens Richter, d/b/a Global Equine Sires and A-1 Performance Sires ("Richter"). Richter is the Plaintiff in Spokane County Superior Court Cause No. 18-2-03782-9 and the Appellant in Court of Appeals, Division III, Cause No. 368220-III.

Respondents are Brent Helinski ("Brent") and Allie Helinski ("Allie"). The Helinskis are the Defendants in the Spokane County Superior Court case and the Respondents in the Court of Appeals, Division III, appeal.

II. INTRODUCTION

On May 12, 2020, in an unpublished decision, the Court of Appeals affirmed the trial court's discretionary ruling vacating default orders and a default judgment against Brent and Allie (the "Decision" or the "COA Decision"). The Court of Appeals had two bases for the Decision—one that addressed only Brent and one that addressed both Brent and Allie.

First, the Court of Appeals affirmed the vacation of the default order and default judgment against Brent because Richter failed to address in his appeal certain unique facts relating to service of process on Brent and other matters relating specifically to Brent. Second, the Court of Appeals affirmed the vacation of the default orders and default judgment against *both* Brent and Allie under CR 60(b)(1) because the Helinskis presented a prima facie defense to the claims against them, and because the Helinskis' failure to timely appear and answer was due to mistake, inadvertence, surprise, and excusable neglect.

Richter does not seek review of the portion of the COA Decision addressing only Brent. Accordingly, that portion of the Decision must stand, which renders moot all other arguments relating to Brent because regardless of what happens with the remainder of this appeal, the claims against him will ultimately need to be remanded to the trial court for further litigation.

Richter only seeks review of the portion of the COA Decision affirming the vacation of the default orders and default judgment against both Brent and Allie under CR 60(b)(1). Richter seeks review of this portion of the COA Decision on two grounds.

First, Richter claims that the COA Decision conflicts with *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), which sets forth the test for showing mistake, inadvertence, surprise, and/or excusable neglect in order to vacate a default judgment under CR 60(b)(1). Although the Court of Appeals ***did*** find that the undisputed facts support a conclusion that the Helinskis are without blame and that their failure to timely appear and answer was due to mistake, inadvertence, surprise, and excusable neglect, Richter claims that the Court of Appeals improperly ignored the conduct of their attorney when reaching this conclusion.[1]

Second, Richter claims that the COA Decision conflicts with *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), which addressed the

[1] Richter does not challenge the determination that the Helinskis presented a *prima facie* defense to the claims against them, so it is undisputed at this stage that there is a legitimate dispute between the parties.

informal appearance doctrine and the entitlement to notice before entry of a default. Although the COA Decision does not address the issue of notice, Richter claims that the COA Decision nonetheless implicitly endorses conduct that the *Morin* court rejected.

For reasons discussed below, the unpublished COA Decision does not conflict with either *White*, *Morin*, or any other published decision. Therefore, this Court should deny review.

III. COURT OF APPEALS DECISION

Richter is seeking review of the unpublished COA Decision filed on May 12, 2020 by the State of Washington Court of Appeals, Division III, in Case No. 36822-0-III. A copy of the Decision is included in Appendix 1.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether the COA Decision is consistent with *White* when the undisputed facts show that the Helinskis are without blame and that their failure to timely appear and answer was due to mistake, inadvertence, surprise, and excusable neglect.

2. Whether the COA Decision is consistent with *Morin* when the COA Decision and *Morin* address entirely separate issues.

V. STATEMENT OF THE CASE

A. Substantive Facts

Allie is a former owner of A-1 Performance Sires.[2] (CP 139.) In or about March 2015, Allie entered into an agreement with Richter, owner of

[2] A-1 Performance Sires is in the business of selling horse semen. (CP 139.) Allie started the business as a general partnership with her husband, Brent. (CP 139.)

Global Equine Sires ("GES"), to receive a shipment of equine semen to sell on behalf of GES for commission. (CP 139.) This relationship expanded over the next few months to where Allie was selling a significant amount of GES semen on commission for GES/Richter, in addition to selling the semen she personally owned through A-1 Performance Sires. (CP 139.)

In spring 2016, Allie and Richter discussed the merger or sale of A-1 Performance Sires to GES because the businesses were already closely linked. (CP 139.) During this time, Allie was acting as an employee of GES doing marketing, sales, and distribution. (CP 139.)

On June 2, 2016, Richter/GES purchased some, but not all, of the assets of A-1 Performance Sires. (CP 140.) Under the agreement, A-1 Performance Sires sold all of its cryogenic storage tanks, shipping containers, customers, business licenses, websites, media, and A-1 Performance Sires documentation to Richter for $7,000, plus an additional $7,000 worth of semen to be owned by Allie outright. (CP 140, 146.) Not included in the sale was the semen inventory owned by Allie and A-1 Performance Sires, financial responsibilities, and legal obligations of A-1 Performance Sires. (CP 140, 146.) The agreement further provided that Allie would continue working for Richter as an employee for a 10% sales commission per sale and a $50 flat fee for packing and shipping the product she sold on behalf of Richter. (CP 140, 146.) The cryogenic storage tanks and shipping containers sold to Richter were to remain at Allie's residence to ease her ability to ship the semen to customers on behalf of Richter. (CP 140, 146.) Allie was also responsible for expanding Richter's foreign sales

and maintaining relationships with the customers she had while owning A-1 Performance Sires. (CP 140, 146.)

Allie worked for Richter in this capacity for some time without issue. (CP 140.) Then, on April 28, 2018, Richter travelled to Spokane to retrieve his cryogenic storage tanks, shipping containers, and semen inventory for consolidation at his residence in California. (CP 140.) Unfortunately, prior to Richter's arrival, two of his dry-shippers failed and lost the ability to properly maintain temperature during transit. (CP 140.) This resulted in the loss of a significant amount of Richter's product. (CP 140.) In addition, one of the five cryogenic storage tanks Richter kept at Allie's home in Spokane also failed. (CP 140-41.) There was nothing Allie could have done to prevent the dry-shippers or the cryogenic storage tank from failing. (CP 140-41.)

When Richter arrived in Spokane, he and Allie separated Allie's semen from the semen Richter intended to take with him to California. (CP 141.) Richter left some semen for one order that Allie was going to package and ship to Richter's customer. (CP 141.)

Unfortunately, Allie failed to tell Richter about the failure of his cryogenic storage tank. (CP 141.) Allie had placed the failed tank, which contained a considerable amount of perished and decommissioned product, in a separate location from the other tanks to prevent inadvertent use. (CP 141.) There was, and remains, no viable product in the failed tank. (CP 141.) Accordingly, Richter left Spokane without the tank. (CP 141.) Allie subsequently completed the final shipment of semen that Richter left in

Spokane, and then remained available to assist Richter with his international sales and shipping. (CP 141.)

On May 29, 2018, Allie's employment with Richter ended with the closing of outstanding orders. (CP 141.) Throughout the entire employment relationship, Allie continued to acquire and sell her personally owned semen inventory. (CP 141.) Allie did not steal any of Richter's semen or sell any of his inventory for her sole financial benefit. (CP 141.)

B. Procedural History

In August 2018, Allie received a letter asking her to stop selling GES/A-1 Performance Sires semen and to return all semen owned by Richter. (CP 141.) By then, however, Allie had already stopped selling semen on Richter's behalf because she no longer possessed any of Richter's viable product. (CP 141.) Accordingly, she did not respond to the letter. (CP 141.)

On August 29, 2018, Richter filed a Complaint against Allie and Brent. (CP 1-11.) On August 31, 2018, Richter completed service of process on Allie. (CP 13.) Richter subsequently completed service of process on Brent. (CP 24.)

1. The Helinskis Retain Attorney Robert Sargent

Allie immediately began searching for a lawyer to assist in defending against Richter's claims because they were false. (CP 142.) On September 15, 2018, Allie met with Spokane attorney Robert Sargent and retained him to defend her and her husband in this lawsuit. (CP 142, 152.) Allie provided Mr. Sargent with a copy of the Summons and Complaint, the

letter she received, and a list of the semen contained in the decommissioned tank. (CP 142.) She also paid Mr. Sargent a $1,500 retainer for his services. (CP 142.)

A few days after retaining Mr. Sargent, Allie received a letter from Richter's attorneys requesting the immediate return of semen belonging to Richter. (CP 142.) Allie contacted Mr. Sargent about the letter. (CP 142.) Mr. Sargent indicated that he was in contact with Richter's attorneys and that he would take care of the matter. (CP 142.)

Mr. Sargent contacted Allie a few weeks later stating that Richter only wished for the return of the semen, dead or alive, and that Richter was attempting to find someone who could come to Spokane and verify the tank and its contents. (CP 142.) Since legal matters can take a long time to complete and the semen was dead, Allie thought nothing of the fact that she did not subsequently hear from Mr. Sargent for several months. (CP 142.)

2. Mr. Sargent's Contacts with Richter's Attorneys

Shortly after he was retained, Mr. Sargent called Richter's attorneys to discuss the case. (CP 152.) He called several times, including once on October 5, 2018, but did not receive any response. (CP 152, 206.) He then visited Richter's attorneys' office on two occasions to speak with an attorney about this matter, but each time he was met by a secretary who simply took his business card and the reason for his visit. (CP 152, 206.)

Despite Mr. Sargent's efforts to make contact, Richter's attorneys proceeded—without notice—to obtain a default order against Allie on

September 24, 2018, and another default order against Brent on October 17, 2018. (CP 21-22, 31-32, 153.)

On October 25, 2018, one of Richter's attorneys, Victoria Johnston, finally called Mr. Sargent and they discussed the "claims alleged in this case, potential settlement, and the status of the strain inventory and whether any viable inventory existed to return to [Richter]." (CP 152.) During this call, Ms. Johnston did not tell Mr. Sargent that default orders had been entered against the Helinskis. (CP 131, 153.)

On October 30, 2018, Ms. Johnston sent an e-mail to Mr. Sargent regarding the possibility of settlement and the status of viable inventory. (CP 156.) Again, Ms. Johnston made no mention of the default orders or the fact that Richter intended to seek a default judgment. (CP 153.)

On February 22, 2019, Richter obtained—without notice—a default judgment against the Helinskis. (CP 92-95.)

3. The Helinskis Discover the Defaults

On March 9, 2019, Brent noticed that his bank account had been drained of funds pursuant to a legal order. (CP 133.) After contacting the bank, Brent immediately contacted Allie to see if she knew anything about it, which she did not. (CP 133-34.) That day while checking the mail, Allie found an envelope containing a copy of the default orders and default judgment entered in this case, along with an Application, Notice and Writ of Garnishment, and an Exemption Claim. (CP 142-43.) This was the Helinskis' first notice of the default orders and default judgment. (CP 133-34, 142-43.)

The Helinskis were in complete shock as they rightfully believed their attorney was protecting their interests in this lawsuit. (CP 133-34, 142-43.) Allie immediately contacted Mr. Sargent, told him about the paperwork she received in the mail, and that Brent's bank account had been emptied pursuant to a legal order. (CP 143.) After a few phone calls, Mr. Sargent indicated that he did not know what was going on and recommended that Brent remove all money from his bank accounts. (CP 143.) Mr. Sargent told Allie that he could get the judgement overturned, that he would go to Richter's attorneys' office in the morning on Monday, March 10, 2019, to find out what happened, and then update her. (CP 143.)

Allie did not receive a call from Mr. Sargent on Monday morning as promised, so she called him. (CP 143.) Allie asked what Mr. Sargent knew about the case and what the process was to overturn the judgement. (CP 143.) Mr. Sargent then stated that he does not usually handle these types of cases, that Allie needed to hire a different attorney, and that he would refund the retainer. (CP 143.)

4. The Helinskis File a Motion to Vacate

Allie immediately contacted the law office of Paukert & Troppmann, PLLC ("Paukert & Troppmann") and scheduled a consultation for Tuesday, March 12, 2019 at 9:00 a.m. (CP 143.) During the consultation, the Helinskis retained Paukert & Troppmann to represent them in this matter. (CP 143.)

Over the next several days, Paukert & Troppmann attorneys spoke with Richters's attorneys, who eventually released the Helinskis' bank

account from the garnishment order but refused to voluntarily vacate the default orders and default judgment. (CP 131.) Accordingly, Paukert & Troppmann attorneys immediately filed a motion to vacate the default orders and default judgment, and a hearing took place on May 10, 2019, before the Honorable Judge Julie McKay. (CP 114-129.)

5. The Trial Court's Discretionary Ruling

The Helinskis moved the trial court for an order vacating the default orders and default judgment under two main theories: (1) that Richter failed to give proper notice of the default proceedings, so the default orders and default judgment must be set aside under CR 55(a)(3); and (2) that good cause existed to set aside the default orders and default judgment under CR 55(c)(1) and CR 60(b)(1), (4), and (11). (CP 114-129.)

After listening to the argument and considering the briefs and written testimony submitted by counsel, Judge McKay focused the rationale for her decision on three cases: *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), *Meade v. Nelson*, 174 Wn. App. 740, 300 P.3d 828 (2013), and *White v. Holm*, 73 Wn. 2d 348, 438 P.2d 581 (1968). (RP 19, 26.) Recognizing that defaults are not favored and that a case should be heard on its merits, Judge McKay spent time analyzing the relevant authority prior to rendering her decision. (RP 19-20.)

Turning to *White*, the Court first discussed the defense to Richter's main claim that "semen was converted, taken, and not returned." (RP 24.) Judge McKay concluded that there is at least a prima facie defense to Richter's conversion claim based on the declaration of Allie that the "semen

wasn't converted, it was not viable." (RP 24-25.) Judge McKay found evidence of mistake, inadvertence, surprise, and excusable neglect, noting that the Helinskis had "done what they need to," and for whatever reason Mr. Sargent did not file a proper notice of appearance, but did make contact with Appellant's counsel in his own way. (RP 25-26.)

The Court went on to state: "I analyze that by looking at this case from the perspective of coming back to the purpose of and the overall liberal application of setting aside defaults, and the purpose that really is to go to resolution of cases on their merits versus defaults." (RP 25.) Judge McKay then vacated the default orders and default judgment, which gave rise to the appeal and this petition for review. (RP 26.) Prior to signing the order, however, Judge McKay stated: "Again, I want to make sure the record is very clear that I have contemplated the facts in this case, as well as the law that has been provided by counsel, to reach my decision to grant the motion to vacate the two defaults, as well as the default judgment." (RP 26.)

C. Court of Appeals May 12, 2020 Unpublished Opinion

On May 12, 2020, in an unpublished opinion, the Court of Appeals affirmed the trial court's ruling for two reasons. (Op. 1.) First, the Court of Appeals affirmed the vacation of the default order and default judgment against Brent because Richter failed to address in his appeal certain unique facts relating to service of process on Brent and other matters relating specifically to Brent. (Op. 9-10.) The Court of Appeals specifically ruled as follows:

> Although Jens Richter frames his assignments of error in terms that the trial court erred in vacating the judgment against both Allie and Brent Helinski, Richter, in his argument, focuses only on the default order and default judgment against Allie. Richter never discusses the disparate facts concerning the service on Brent Helinski and [the events that took place] before entry of the default order against Brent. For this reason alone, we affirm the vacation of the default order and judgment against Brent Helinski.

(Op. 9-10.)

Second, the Court of Appeals affirmed the vacation of the default orders and default judgment against *both* Brent and Allie under CR 60(b)(1) because "Helinski presented a prima facie defense for all factual allegations that comprise the various causes of action asserted by Jens Richter," and "[a]lthough the trial court did not expressly state that, if we look only to the conduct of Allie Helinski, mistake, inadvertence, surprise or excusable neglect would be present, the court's ruling inevitably leads to this conclusion and the undisputed facts support such a conclusion."[3] (Op. 14, 17.)

As indicated previously, Richter does not seek review of the portion of the COA Decision addressing only Brent. Richter only seeks review of the portion of the COA Decision affirming the vacation of the default orders and default judgment against both Allie and Brent under CR 60(b)(1).

VI. ARGUMENT

RAP 13.4(b) sets forth four considerations that govern acceptance of review of a decision terminating review. The rule states as follows:

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[3] The Court of Appeals noted earlier in the Decision that "[t]he analysis we perform concerning the vacations in favor of Allie Helinski would also apply to Brent."

> **(b) Considerations Governing Acceptance of Review.** A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Richter does not specify the subpart under which he is seeking review. Although Richter alleges that the COA Decision conflicts with the Supreme Court decisions in *White* and *Morin*, Richter also alleges that the COA Decision conflicts with various Court of Appeals decisions interpreting the test outlined in *White* for showing mistake, inadvertence, surprise, and/or excusable neglect. Accordingly, the Helinskis will assume that Richter is seeking review under RAP 13.4(b)(1) *and* (2).

As a preliminary matter, it is important to note that there is no Supreme Court decision or published Court of Appeals decision that *requires* courts to consider the conduct of a blameless defendant's attorney when determining whether the defendant's failure to timely appear and answer was due to mistake, inadvertence, surprise, and/or excusable neglect.[4] Richter does not cite any such decisions, and the Helinskis are not aware of any such decisions. *Therefore, as a general proposition, there is no actual conflict between the COA Decision and any published decision,*

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[4] Richter tries to place some blame on the Helinskis, arguing that Allie failed to check on the status of the litigation for several months, and she therefore is not blameless. But Richter failed to raise that issue below. The Court of Appeals noted that "Jens Richter does not contend that Helinski failed to act promptly or properly." (Op. 17.) Accordingly, Richter cannot challenge that issue at this stage of the proceedings.

thereby precluding review under RAP 13.4(b)(1) and (2). Although this alone ends the inquiry, the arguments in Richter's Petition for Review are addressed more specifically below.

A. The COA Decision Does Not Conflict With *White* or Any Decisions Interpreting *White*

Richter does not, and cannot, articulate any conflict between the COA Decision and *White*. Instead, Richter attempts to manufacture a conflict by arguing that the COA Decision conflicts with various other decisions interpreting the test set forth in *White*. Richter argues that the COA Decision conflicts with these other decisions because (1) it ignores a rule of law that the sins of a lawyer are visited on the client, (2) it ignores decisions finding that a breakdown of internal office procedure was not excusable under CR 60(b)(1), and (3) it improperly relies on cases involving blameless insureds. For reasons discussed below, however, all of Richter's arguments are misplaced.

First, although there ***is*** a rule of law that the sins of a lawyer are visited on the client, ***this rule of law does not apply to default proceedings.*** *Ha v. Signal Electric, Inc.*, 182 Wn. App. 436, 452-53, 332 P.3d 991 (2014). In *Ha*, the plaintiff referenced this exact same rule of law and argued that "the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil case." *Id.* at 452. The *Ha* court expressly rejected this argument, ruling as follows:

> This rule comes from the Washington Supreme Court's decision in *Haller*, 89 Wn.2d at 547. There, the client sought relief from a settlement that her attorney agreed to over her objections. *Id.* at 540, 542. The *Haller* court

> distinguished the equities at play in consent judgments like settlements versus default judgments. *Id.* at 544. Finality is favored in consent judgments. *Id.* As such, consent judgments may not be set aside for excusable neglect—only for fraud or mutual mistake. *Id.* Conversely, default judgments are disfavored, because courts prefer to try cases on their merits. They can be set aside under CR 60(b)(1) for excusable neglect and, as the case law demonstrates, unilateral mistake.
>
> ***Therefore, the rule from the Haller line of cases that Ha relies on here has no application to default judgments. None of those cases involved a default judgment. Rather, with respect to default judgments, "[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome."***

Id. at 452-53 (emphasis added) (some citations and footnotes omitted).

Accordingly, since the rule that Richter relies on "has no application to default judgments," there can be no conflict between that rule and the COA Decision.

Second, although some courts have found that a breakdown of internal office procedure was not excusable under CR 60(b)(1), the Court of Appeals correctly ruled that those cases are distinguishable because they apply to culpable corporate defendants, not blameless individual defendants. (Op. 17.) (holding as follows: "Richter relies on many Washington decisions when a corporate defendant, through a failure of internal procedures, failed to timely appear and answer. Richter fails to recognize that his defendant, Allie Helinski, is without blame.")

In the present case, there was no breakdown of internal office procedure, and it is undisputed that the Helinskis themselves are blameless. Their failure to appear and answer was not the result of their conduct or any

office employee's conduct. It was the result of their attorney's conduct. Therefore, the Court of Appeals correctly distinguished this case from the cases cited by Richter.

But even if those cases were not distinguishable—*though they are*—none of those decisions stands for the proposition that a breakdown of internal procedure is ***never*** excusable under CR 60(b)(1). To the contrary, it is well-established that "[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." *Akhavuz v. Moody*, 178 Wn. App. 526, 534-35, 315 P.2d 572 (2013). Therefore, the Court of Appeals was free to determine, as it did, that the conduct at issue in this case was excusable, and because of the flexibility afforded to courts in making this determination and the fact-specific nature of each inquiry, the COA Decision in this regard cannot be said to conflict with any decisions cited by Richter.

Third, the Court of Appeals correctly analogized this case to decisions where the negligence of an insurance company lead to a failure of an attorney to appear on behalf of an innocent insured. (Op. 17.) Although Richter attempts to portray the COA Decision as having enacted some sort of "innocent insured doctrine," whereby an innocent insured can vacate a default even in the absence of evidence showing some sort of mistake or misunderstanding, Richter's argument misses the mark.

The COA Decision did not enact a blanket doctrine that allows relief from default in the absence of mistake, inadvertence, surprise, or excusable neglect. The COA Decision recognized that in cases involving an innocent

insured, courts focus on whether the defendant, not the insurer, acted with excusable neglect. The Court of Appeals then stated, "we discern no reason to differentiate between a blameless defendant receiving relief from the inexcusable neglect of her insurance company and a faultless defendant getting relief from the inexcusable inadvertence of her attorney." (Op. 18.)

Based upon this reasoning, the Court of Appeals focused on the Helinskis's conduct and ultimately determined that the undisputed facts support a conclusion that the Helinskis themselves are without blame and that the Helinskis' failure to timely appear and answer was due to mistake, inadvertence, surprise, and excusable neglect. This finding does not conflict with any published decision. To the contrary, it is a logical extension of the line of decisions addressing innocent insureds.

For all of these reasons, the COA Decision does not conflict with *White* or any decisions interpreting *White*. Therefore, this Court should deny review under RAP 13.4(b)(1) and (2).

B. The COA Decision Does Not Conflict With *Morin*

The COA Decision also does not conflict with *Morin*. Richter states that *Morin* "expressly rejected adopting the informal appearance doctrine in the State of Washington." (Pet. for Rev. 17.) Thus, according to Richter, the COA Decision conflicts with *Morin* because the COA Decision implicitly endorses the type of conduct that the *Morin* court rejected. There are three problems with this argument.

First, Richter mischaracterizes the holding in *Morin*. The *Morin* court did not expressly reject the informal appearance doctrine in the State

of Washington. 160 Wn.2d at 757-60. The *Morin* court rejected the proposition that pre-litigation contacts alone may satisfy appearance requirements, but it acknowledged that a party ***can*** enter an informal appearance through conduct that occurs after litigation has commenced. *Id.* (ruling as follows: "Accordingly, we hold that parties cannot substantially comply with the appearance rules through prelitigation contacts. Parties must take some action acknowledging that the dispute is in court Before [sic] they are entitled to a notice of default judgment hearing.... We do not exalt form over substance and appearance may be accomplished informally.")

Second, the informal appearance doctrine is irrelevant to the issues before this Court. As indicated above, the informal appearance doctrine affects a party's entitlement to notice before entry of a default. *Id.* at 749. If a party enters an informal appearance, they are entitled to notice before entry of a default, and if they do not receive proper notice, they are entitled to have the default vacated. *Id.*

In the present case, the Court of Appeals did not address whether Richter needed to give notice before entry of the defaults. (Op. 10.)[5] The Court of Appeals simply affirmed the vacation of the default orders and default judgment under CR 60(b)(1). Accordingly, *Morin's* discussion of the informal appearance doctrine is inapplicable to this case.

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[5] Though it is clear in this case that Mr. Sargent made numerous attempts to contact Richter's attorneys after litigation was commenced, thereby satisfying the informal appearance rule set forth in *Morin*.

Third, the only relevant part of the *Morin* court's ruling is entirely consistent with the COA Decision. The *Morin* court ruled that in cases like this, where Mr. Sargent's lack of appearance is not at issue and Richter did not give notice, the Helinskis "may still be entitled to have default judgment set aside upon other well established grounds." 160 Wn.2d at 757. In other words, *Morin* supports the proposition that notwithstanding lack of notice, the Helinskis are entitled to have the default judgment set aside under CR 60(b)(1) if they satisfy the test set forth in *White*, which is precisely what they did. Accordingly, far from being inconsistent, *Morin* is entirely consistent with the conclusion reached by the Court of Appeals in this case.

VII. CONCLUSION

Ultimately, Richter's Petition for Review does not identify any actual conflict between the COA Decision and any Supreme Court decision or published Court of Appeals decision. Instead, it simply reiterates many of the same arguments that were properly rejected by the Court of Appeals. But this is not a forum to relitigate issues. The only issue before this Court is whether the unpublished COA Decision conflicts any published decisions, and in cases like this, where "[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome," that is a heavy burden to carry, and one that Richter falls short on. *Ha*, 182 Wn. App. at 453.

For all of the foregoing reasons, this Court should deny review under RAP 13.4(b)(1) and (2).

Respectfully submitted this 9th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on July 9, 2020, I caused a true and correct copy of the foregoing document to be filed with the Supreme Court of the State of Washington, and to be served on the following through the Washington State Appellate Courts' Secure Portal and in the manner indicated below:

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Executed this 9th day of July, 2020,
at Spokane, Washington.

APPENDIX 1

FILED
MAY 12, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JENS RICHTER, an individual d/b/a GLOBAL EQUINE SIRES and A-1 PERFORMANCE SIRES, Appellant, v. ALLIE HELINSKI an individual and BRENT HELINSKI, an individual and as husband and wife, and the marital community thereof, Respondents.	)	No. 36822-0-III UNPUBLISHED OPINION

FEARING, J. — We affirm the trial court's vacation of default orders and a default judgment entered against defendants Allie and Brent Helinski. The trial did not abuse its discretion when applying equity to vacate the orders and judgment.

FACTS

Jens Richter owns and operates Global Equine Sires (Global), which sells horse semen. Allie Helinski formerly owned A-1 Performance Sires (A-1), which also sold horse semen.

On June 3, 2016, Jens Richter purchased "the Business A-1 Performance Sires" from Allie Helinski for $7,000 cash and $7,000 in semen. A one page contract listed the

assets sold as cryo-storage tanks, shipping containers, customer lists, business license, website, media, and financial records. Paragraph 3 of the sales contract declared:

> Not included is current A-1 Performance Sire Semen inventory. A list that has been signed by both parties will be attached to that contract.

Clerk's Papers (CP) at 55. Under the sale agreement, Allie Helinski promised to work for A-1 after the sale. Her duties would include sales for A-1, expanding Jens Richter's business, and packing and shipping product of Global and A-1.

Cryo-storage tanks and shipping containers of A-1 sold to Jens Richter remained in the possession of Allie Helinski so that she could ship semen to customers of Jens Richter. Allie Helinski kept in her possession semen, over which she retained ownership, and semen owned by Jens Richter under the business names of Global and A-1. Richter owned horse semen valued at $295,550 in a container in Allie's possession. After the sale of A-1 to Richter, Helinski sold both her product and Richter's product.

On April 28, 2018, Jens Richter traveled from his residence in California to Otis Orchards to retrieve A-1's five cryo-storage tanks, shipping containers, and stock of horse semen. Two of the shipping containers failed. The failure resulted in loss of a significant amount of semen, causing anger in Richter. An old cryo-storage tank also failed. Allie Helinski insists that the containers and the tank failed not because of any fault on her behalf.

For some unknown reason, Allie Helinski did not inform Jens Richter, on his arrival in Washington State, of the failure of the cryo-storage tank. While Richter remained in Washington State, the two divided their respective inventories of semen. Richter left one pile of semen for Helinski to sell on his behalf. Helinski insists that she packaged and shipped the final inventory of semen Richter left with her. Helinski ended her work for Richter on May 29, 2018.

Jens Richter later requested that Allie Helinski forward the semen straws from the failed cryo-storage tank. The seller of horse semen delivers the product in semen straws. Richter claims Helinski denied her request. Helinski admits that she never sent to Richter the semen from the failed tank, but rejects any obligation to have forwarded the semen to Richter because of its lack of viability.

According to Jens Richter, he received concerns from customers regarding semen straw deliveries. Customers of A-1 complained to Richter that they received ineffective semen or empty semen straws. Richter concluded that Allie used the A-1's business to rid herself of empty semen straws, ineffective straws, or no straws and to pocket the profits. In Richter's declaration in support of default judgment, he testified:

> I have compiled receipts from the customers who contacted me. The receipts are attached as Exhibit B. I have personal knowledge that the following list of customers paid Allie Helinski.

CP at 49. Richter attached a typed list of seven semen straws that included dates of sale and sales totaling $24,650. Richter also attached five invoices for seven of the straws.

On August 29, 2018, Jens Richter filed a summons and complaint against Allie Helinski and her husband, Brent. Richter sued Helinski for breach of contract, tortious interference with a business expectancy, fraud, conversion, unjust enrichment, and violation of the Consumer Protection Act, chapter 19.86 RCW, stemming from Helinski's alleged unauthorized selling of semen straws to A-1 costumers. Richter alleged that Helinski had received payments and taken orders on behalf of A-1, but never fulfilled the orders. Richter also alleged that Helinski made unauthorized sales of product, knowingly sold defective product, and sold product that misprinted the name of the stallion donor. In addition to seeking damages, the complaint requested an injunction. On August 31, 2018, Allie was served the summons and complaint.

On September 15, 2018, Allie Helinski met with attorney Robert Sargent and paid a $1,500 retainer for Sargent to represent her. Helinski delivered Sargent a copy of the summons and complaint.

On September 18, 2018, Allie Helinski received a letter from Jens Richter's counsel, Chad Freebourn, requesting the return of the semen purportedly stored in the tank remaining in Helinski's possession. Helinski notified Sargent of the letter, and he told her that he had contacted Richter's attorney and would handle the matter.

In a declaration, Robert Sargent states:

> Shortly after my retention, I called Plaintiff's counsel, Roberts Freebourn, PLLC, to discuss the Helinski case. I called multiple times. Each time I called, I left a voice message identifying myself and the case

> and requesting a call back in order [to] discuss the matter. I did not receive any calls back.
>
> After not receiving any return calls, I went in person to Roberts Freebourn, PLLC, at 1325 W. 1st Ave., Ste. 303 in Spokane, Washington. I went [to] the Roberts Freebourn office twice to speak with an attorney about the Helinski matter. Each time I went in person to the law firm, I was met by a secretary, Lauren, who took my business card and the reason for my visit.

CP at 152.

As of September 24, 2018, Robert Sargent had yet to speak with Chad Freebourn. On that date, Jens Richter obtained an order of default judgment against Allie Helinski. On September 26, 2018, Brent Helinski was served the summons and complaint.

According to Chad Freebourn, he received a voicemail message from Robert Sargent, on October 5, 2018, reporting his representation of Allie Helinski. Freebourn never returned Sargent's call. On October 17, 2018, Jens Richter obtained an order of default against Brent Helinski. Between October 22 and October 25, according to Freebourn, Sargent arrived at his office and left his business card with Freebourn's assistant, but Freebourn was unavailable to speak with him.

On October 26, 2018, Victoria Johnston, an attorney at Roberts | Freebourn, PLLC telephoned Robert Sargent. The attorneys discussed the lawsuit claims, potential settlement, and the status of semen inventory. Johnston did not mention the earlier orders of default.

On October 30, 2018, Victoria Johnston sent an e-mail to Robert Sargent:

> We talked at the end of last week about Allie turning over any and all remaining semen that she has that belongs to our client Jens Richter aka Global Equine. You indicated that Allie said that all of the inventory was spoiled because of a power outage but at the very least she could give us the spoiled inventory. You were checking to see if there was any viable inventory left. You also mentioned that you might have a settlement offer. I have not heard anything back from you. Please advise as to what you found out and please clarify who you represent in this matter.

CP at 156. Robert Sargent replied to the e-mail that same day and wrote that he would respond to Johnston by the following morning. The record does not show that Sargent responded.

On January 23, 2019, Jens Richter filed a motion for entry of default judgment against Allie and Brent Helinski. On February 22, the superior court conducted a reasonableness hearing to establish the amount of damages to be awarded Richter against the Helinskis. The court awarded damages of $373,891 and entered judgment against Allie and Brent Helinski for the amount. Neither the Helinskis, nor their counsel, received notice of the hearing.

On March 9, 2019, Brent Helinski noticed his bank account drained of all funds. His bank informed him of a garnishment.

On March 9, Allie Helinski discovered an envelope containing a copy of the default orders, the default judgment, a notice and writ of garnishment, and an exemption claim form. Helinski immediately contacted Robert Sargent about the paperwork and the emptied bank account. Sargent told Allie Helinski that he would go to Roberts |

Freebourn the following Monday morning, March 10, 2019, and get the judgment overturned. On March 10, Allie Helinski received no phone call, and so she called Sargent. Sargent told her that he does not handle her type of case, that she needed to hire a different attorney, and he would refund the retainer.

Allie Helinski met with attorneys at the law office of Paukert & Troppmann, PLLC on March 12, 2019. During the consultation, Helinski retained the firm to represent them in this suit.

PROCEDURE

Allie and Brent Helinski filed a motion to vacate the two default orders and the judgment. The Helinskis argued that they were entitled to notice of the default proceedings because Robert Sargent substantially complied with the notice of appearance requirements. According to the Helinskis, because they lacked notice, the court should vacate the orders and judgment. The Helinskis also argued that, assuming Sargent made no appearance, the default orders and judgment should be vacated under subsections (1), (4), and (11) of CR 60(b).

In an oral ruling, the trial court concluded that no dispute existed as to whether Allie Helinski contacted Robert Sargent on September 15, yet Sargent had never entered a notice of appearance. Otherwise, factual disputes of other events, such as when Robert Sargent attempted to contact Chad Freebourn, existed. Regardless, the trial court

concluded that Robert Sargent did not substantially comply with notice of appearance requirements before entry of the default orders and default judgment.

Because the parties on appeal dispute the substance of other rulings by the trial court, we quote portions of the oral ruling:

> And that is really where I come back to, applying the *White* factors, because I don't know that I have sufficient facts to say that there was substantial compliance prior to those defaults being taken.
>
> . . . .
>
> I'm winding around to my review of the *White* factors, and obviously the parties are clearly opposed diametrically with regards to interpretation of those factors, whether there is a defense being made. The information outlined by Ms. Allie Helinski is there was no semen to return, it was all dead. . . .
>
> . . . .
>
> The declaration provided by Allie Helinski states the semen wasn't converted, it was not viable, and why those things weren't addressed when the plaintiff was here in Spokane, I don't know. That's not addressed with the declaration. So is there at least a prima facie defense to the issues, at least, as it appears to this Court, there is.
>
> Then evidence of mistake, inadvertence, surprise, and excusable neglect, that also gives me a bit of a pause because Mr. Sargent is the Helinskis. They've done what they need to. He— by "he" I mean Mr. Sargent—did not. Mr. Sargent is the one responsible for filing the notice of appearance, frankly, as soon as practical, at least in my experience. . . .
>
> But that factor addresses whether there is one of those bases to move forward and overset the default under these circumstances. I analyze that by looking at this case from the perspective of coming back to the purpose of and the overall liberal application of setting aside defaults, and the purpose that really is to go to resolution of cases on their merits versus defaults.
>
> The last two factors in *White* really are due diligence. I don't think there's any issue with regards to due diligence and prejudice as it is outlined. What is argued by the plaintiffs is this matter is resolved and we don't want to deal with it again. That is not sufficient for a substantial prejudice basis.

> So as I analyze this, I don't come to the conclusion that is argued by the defendant that Mr. Sargent substantially complied by the time the defaults are taken. There are no facts that establish that, at least for Allie Helinski. It's possible substantial compliance applies for Brent Helinski, based upon the message left, based upon cards, based upon visits. Those facts make my determination a little bit more difficult. Taking all of the facts into consideration regarding the factors, I am going to grant the request to set aside the default under this set of circumstances.
>
> . . . Again, I want to make sure the record is very clear that I have contemplated the facts in this case, as well as the law that has been provided by counsel, to reach my decision to grant the motion to vacate the two defaults, as well as the default judgment.

Report of Proceedings at 23-26. The trial court entered an an order vacating the two default orders and the default judgment.

LAW AND ANALYSIS

Jens Richter appeals the orders vacating the two default orders and the default judgment. The orders of vacation are not final orders in the sense of terminating litigation below. Instead the orders opened the case to further litigation. Nevertheless, under RAP 2.2(a)(10), a party may appeal from an order granting or denying a motion to vacate a judgment.

Although Jens Richter frames his assignments of error in terms that the trial court erred in vacating the judgment against both Allie and Brent Helinski, Richter, in his argument, focuses only on the default order and default judgment against Allie. Richter never discusses the disparate facts concerning the service on Brent Helinski and the fact that Robert Sargent contacted Richter's counsel and announced his representation of the

Helinskis before entry of the default order against Brent. For this reason alone, we affirm the vacation of the default order and judgment against Brent Helinski. The analysis we perform concerning the vacations in favor of Allie Helinski would also apply to Brent, however.

Jens Richter asserts that the trial court committed two errors when vacating the default orders and default judgment. First, the trial court erred when ruling that Allie Helinski showed a prima facie defense to the complaint. Second, the trial court failed to make a finding that Allie Helinski's failure to timely appear and answer the complaint was due to mistake, inadvertence, surprise, or excusable neglect in conformance with CR 60(b)(1).

On appeal, Allie Helinski does not expressly argue that Robert Sargent entered a notice of appearance before the entry of either order of default or the default judgment. Nor does she present any analysis that Sargent made an appearance by contact with Jens Richter's counsel. So we do not address whether Jens Richter needed to give advance notice to Helinski or her counsel of the entry of the defaults.

In their respective briefing, neither party distinguishes between vacating an order of default and a default judgment. Instead, both conflate the rules that apply to each. CR 55 controls vacating a default order, and CR 60 controls vacating a default judgment. Different rules apply. *Sellers v. Longview Orthopedic Associates, PLLC*, 11 Wn. App. 2d 515, 519, 455 P.3d 166 (2019) *review denied*, No. 98120-5 (Wash. Apr. 29, 2020); *Seek*

Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc., 63 Wn. App. 266, 271, 818 P.2d 618 (1991). In another case, the difference in rules between vacating a default order and vacating a default judgment might control the outcome. This is not the case in Jens Richter's appeal.

Vacation of Default Judgment

CR 60(b) addresses vacation of a default judgment. Allie Helinski relies on three subsections of CR 60(b). We quote the opening sentence of CR 60(b) and the relevant subsections:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> . . . .
>
> (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . . .
>
> (11) Any other reason justifying relief from the operation of the judgment.

(Boldface omitted.) The trial court relied on subsection (1), and so do we.

We review a trial court's decision to vacate a default judgment for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). The trial court abuses its discretion only when it bases its order on untenable grounds or untenable reasons. *Morin v. Burris*, 160 Wn.2d at 753.

Two important polices behind America's civil justice system clash in the context of a motion to vacate a default judgment. On the one hand, we prefer that courts resolve disputes on the merits. *Akhavuz v. Moody*, 178 Wn. App. 526, 532, 315 P.3d 572 (2013). On the other hand, we value an organized, responsive, and responsible judicial system wherein litigants acknowledge the jurisdiction of the court to decide cases and litigants comply with rules. *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). When balancing these competing interests, the overriding concern is to execute justice. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *DeCaro v. Spokane County*, 198 Wn. App. 638, 643, 394 P.3d 1042 (2017). Because of the strong policy of resolving disputes on the merits, Washington law disfavors default judgments. *Little v. King*, 160 Wn.2d at 703. The trial court should exercise its authority to vacate a judgment liberally. *Morin v. Burris*, 160 Wn.2d at 754 (2007); *Ha v. Signal Electric, Inc.*, 182 Wn. App. 436, 449, 332 P.3d 991 (2014).

Since 1968, Washington courts, when addressing a motion to vacate under CR 60(b)(1), have followed a four-part test found in *White v. Holm*, 73 Wn.2d 348, 352 (1968):

> These factors are: (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.

On the one hand, the *White v. Holm* test prevents those who purposely do not contest a default or do not timely do so from benefitting from their actions. *DeCaro v. Spokane County*, 198 Wn. App. 638, 645 (2017). On the other hand, the rule allows second chances for those who promptly assert their interest and show an ability to successfully contest the case. *DeCaro v. Spokane County*, 198 Wn. App. 638, 645 (2017).

Defense of Allie Helinski

The first step in the *White v. Holm* factors directs the court to consider whether the moving defendant possesses a prima facie defense to the plaintiff's claim. If the movant lacks a prima facie defense, the court will automatically deny the motion. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 583 (1979); *DeCaro v. Spokane County*, 198 Wn. App. 638, 645 (2017). If the defendant shows a prima facie defense, the court engages in a review of the defaulted defendant's reason for failing to timely appear in the action. *White v. Holm*, 73 Wn.2d 348, 353-54 (1968); *Akhavuz v. Moody*, 178 Wn. App. 526, 534 (2013).

In determining whether evidence supports a prima facie defense, the trial court must take the evidence, and the reasonable inferences therefrom, in the light most favorable to the movant. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202, 165 P.3d 1271 (2007). In other words, the defendant

satisfies its burden of demonstrating the existence of a prima facie defense if it produces evidence which, if later believed by the trier of fact, would constitute a defense to the claims presented. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. at 202. To establish a prima facie defense, affidavits supporting motions to vacate default judgments must set out the facts constituting a defense and cannot merely state allegations and conclusions. *Ha v. Signal Electric, Inc.*, 182 Wn. App. at 449 (2014).

Jens Richter argues that Allie and Brent Helinski fail to present substantial evidence to show a prima facie defense to his claims. Richter argues that the only evidence of a defense put forward by the Helinskis, the declaration of Allie, presents only self-serving statements which are insufficient to support a defense. The Helinskis respond that they have put forth evidence of a sufficient defense to liability, causation, and damages. We conclude that Helinski presented a prima facie defense for all factual allegations that comprise the various causes of action asserted by Jens Richter.

We assume that, since the movant cannot rest on mere allegations and speculation in presenting her defense, the non-moving party must also present admissible underlying facts in support of his claims. Jens Richter's declaration in support of his motion for default is weak on details. He testified to two categories of fault on the part of Allie Helinski and damage to him: (1) Helinski's converting the semen in the cryo-storage tank; and (2) Helinski's selling defective product to customers and pocketing the money.

He asserted without any supporting inventory that the semen in the tank was worth $295,550.

In his declaration, Jens Richter provided no statements from any customers who complained of product delivered or the details of the complaints. He attached to his declaration receipts from customers, but he did not expressly testify that he did not receive the payments from those customers or that Helinski failed to forward the payments to him. Most receipts lack a name of the customer. Richter indicated that he needed to shut down A-1's website to the loss of $44,421 because of the fraud of Allie Helinski, but he did not explain why he could not sell as much semen by other means, including continuing with the website and stating Helinski no longer worked for the business. He did not identify any lost sales or customers. We recognize that Jens Richter prepared his declaration in support of his motion for a default judgment when the facts were not in dispute, but he could have prepared an additional declaration in opposition to the motion to vacate in order to supply important facts controverting Allie Helinski's declaration.

In her declaration in support of the motion to vacate, Allie Helinski averred that the loss of the semen in the cryo-storage tank was not her fault because the tank failed. She also denied that she pocketed any money from sales on behalf of either A-1 or Global.

Jens Richter argues that Allie Helinski's declaration only refers to the conversion of the semen inventory and not to the other claims including the fraudulent sales, receipt of money from unauthorized sales, and fault for causing the tank to fail. As already stated, Helinski's declaration denied pocketing any of Richter's money. Richter may contend that the $295,550 in lost inventory is inventory that was never in the failed cryo-storage tank, but, if he does, the facts are confusing and we must take the facts in the light favorable to Helinski. Richter provided no evidence that Helinski was responsible for the failure of the cryo-storage tank.

Jens Richter criticizes the evidence presented by Allie Helinski as arising from a self-serving affidavit. We know of no rule that bars introduction of self-serving testimony in support of a motion to vacate a default judgment, let alone in support of one's position in any proceedings. Jens Richter's controverting evidence is equally self-serving.

Mistake, Inadvertence, Surprise or Excusable Neglect

On the one hand, Jens Richter asserts that the trial court never found that Robert Sargent's failure to appear, answer, or otherwise defend the lawsuit was the result of mistake, inadvertence, surprise, or excusable neglect. Richter further argues that the trial court affirmatively found to the contrary. On the other hand, Allie Helinski contends that the trial court found evidence of mistake, inadvertence, surprise, and excusable neglect because the court commented that Helinski took all proper steps.

Both parties are partly correct. The trial court ruled that, assuming we look only to the behavior of Robert Sargent, Allie Helinski did not show mistake, inadvertence, surprise or excusable neglect. Although the trial court did not expressly state that, if we look only to the conduct of Allie Helinski, mistake, inadvertence, surprise or excusable neglect would be present, the court's ruling inevitably leads to this conclusion and the undisputed facts support such a conclusion. On being served with lawsuit papers, Helinski quickly contacted an attorney. She paid the attorney a retainer. When she received another letter from Jens Richter's counsel, she promptly contacted the same attorney. She also quickly contacted the attorney when Richter garnished her husband's account. Jens Richter does not contend that Helinski failed to act promptly or properly.

Jens Richter argues that Robert Sargent, as the representative of Allie Helinski, failed to timely appear without excuse and a party may not escape liability simply by arguing they hired a lawyer. Richter relies on many Washington decisions when a corporate defendant, through a failure of internal procedures, failed to timely appear and answer. Richter fails to recognize that his defendant, Allie Helinski, is without blame.

Many recent Washington decisions address negligence of an insurance company that led to a failure of an attorney to appear on behalf of the insured defendant. In this context when reviewing a motion to vacate a default judgment, Washington courts focus on whether the defendant, not the insurer, acted with excusable neglect. *Sellers v. Longview Orthopedic Associates, PLLC*, 11 Wn. App. 2d at 522 (2019). An insurer's

culpable neglect should not be imputed to a blameless defendant. *White v. Holm*, 73 Wn.2d 348, 354 (1968); *VanderStoep v. Guthrie*, 200 Wn. App. 507, 528, 402 P.3d 883 (2017); *Sellers v. Longview Orthopedic Associates, PLLC*, 11 Wn. App. 2d at 522. 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, except when the insured defendant fails to follow up with the insurer or fails to cooperate with the insurer. *VanderStoep v. Guthrie*, 200 Wn. App. at 530-32.

We note that, as a general rule, the sins of the lawyer are visited on the client. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002). But this general rule contradicts the principle that default judgment is disfavored and conflicts with the goal of trying cases on the merits and doing what is just and proper under the circumstances of each case. *Ha v. Signal Electric, Inc.*, 182 Wn. App. 436, 452-53 (2014). Therefore, we discern no reason to differentiate between a blameless defendant receiving relief from the inexcusable neglect of her insurance company and a faultless defendant getting relief from the inexcusable inadvertence of her attorney.

One Washington Supreme Court decision supports a conclusion that the defendant should not be punished for the inexcusable neglect of her attorney. In *Agriculture & Live Stock Credit Corp. v. McKenzie*, 157 Wash. 597 (1930), Augusta Kalanquin was served

with an amended complaint in a livestock mortgage foreclosure suit and promptly submitted the pleading to her attorney, Husted. Husted departed the state and left an agister lien with attorney Richards, who Kalanquin eventually hired. Husted failed to inform Richards of the mortgage foreclosure or deliver Richards the foreclosure suit papers. Before Husted delivered the lien to Roberts, Kalanquin suffered an order of default and decree of foreclosure of her lien. The Supreme Court later affirmed the trial court's vacation of the order and decree on the ground of excusable neglect on the part of Kalanquin. Kalanquin relied on her attorney, and, through no fault of her own, the attorney departed Washington State. When Roberts later discovered the entry of the default, Roberts swiftly moved to vacate.

In *VanderStoep v. Guthrie*, 200 Wn. App. 507 (2017), the plaintiffs obtained a default judgment against the insured defendant because of the inexcusable neglect of the insurer. On appeal, the plaintiffs argued that, if the default judgment stands, the insurer, not the insured defendant, will have to pay the full judgment. Therefore, the insured suffers no harm and instead justice is served against the neglectful insurer. This court rejected the argument because in the meantime a large judgment remained against the insureds and because no case law supported the proposition that the identity of the payee of a default judgment is relevant to the second *White* factor.

One might argue that Allie Helinski suffers no harm by the pending default judgment, because Robert Sargent's malpractice carrier will eventually pay the judgment.

But, in the meantime, Helinski is subject to a large judgment and any malpractice suit may be fraught with delays and pitfalls.

CONCLUSION

Justice is not served with hurried defaults. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510-11, 101 P.3d 867 (2004). The trial court did not abuse its discretion when vacating the default orders and default judgment against Allie and Brent Helinski.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Lawrence-Berrey, J.

Pennell, C.J.

PAUKERT & TROPPMANN, PLLC

July 09, 2020 - 3:17 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Jens Richter, et al. v. Allie Helinski, et ux.
Superior Court Case Number:	18-2-03782-9

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