No. 98932-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SANDRA MERCERI, a single woman,

Petitioner,

v.

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWALT, INC. ALTERNATIVE LOAN TRUST 2006-OA19, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA19,

Respondent.

AMICUS CURIAE MEMORANDUM OF THE NORTHWEST CONSUMER LAW CENTER IN SUPPORT OF PETITIONER SANDRA MERCERI'S PETITION TO REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTEREST OF AMICUS CURIAE

Northwest Consumer Law Center (NWCLC) adopts and incorporates its statement of interest contained in its accompanying motion for leave to file this *amicus curiae* memorandum.

II. ARGUMENT

The right to a hearing to vacate a judgment under CR 60(e) is the current law in Washington, and the low- and moderate-income consumer clients NWCLC represents depend on it. CR 60(e); *see White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968) (a pre-CR 60 case held a trial court must take inferences in the light more reasonable to the CR 60 movant with only "minimal," "prima facie" and "sufficient" evidence). The language of CR 60(e)(2) requiring the court to enter an order fixing a hearing time for notice to the opposing party "to show cause" upon filing of a motion to vacate a judgment is ministerial and unequivocal and the appellate court in this case ("*Merceri II"*) did not adequately consider the "shall" language in CR 60(e)(2).

A. The Fixing of a Hearing is a Ministerial Act

The "hearing" itself is not "discretionary" and failure to issue a time for hearing so that notice can be provided directly contradicts the clear language of CR 60(e)(2). This is not an issue of the court using its

discretion to hold oral argument, which is clearly allowed, this is about failing to allow a noticed hearing, which is not permissible. CR 60(e)(2). *See Stoulil v. Edwin A. Epstein Jr., Operating Co.*, 101 Wn. App. 294, 298, 3 P.3d 764, 766 (2000).

Additionally, even if a moving party fails to make a prima facie case to vacate a judgment, a dispute of fact may be enough to require a fact-finding hearing if it is clear that facts are in dispute. *See Okanogan Cty. v. Various Parcels of Real Prop., et al.*, 13 Wn.App.2d 341, 466 P.3d 1114 (Div. 3, April 2, 2020) (holding that a CR 60 motion filed to raise an issue of fact in dispute *requires* a fact finding hearing and cannot be summarily decided by a court without a hearing). In *Okanogan Cty.*, the Court of Appeals overturned the trial court's summary determination of a material fact even while acknowledging that the moving party failed to present *any* evidence to support their claim that the opposing party Wilmington Trust National Association, as trustee for Newcastle Investment Trust 2014-MH1 ("Wilmington Trust"), did not hold the Promissory Note for a Deed of Trust on real property, and that they failed to make the required showing that Wilmington Trust was not the holder of the note in their motion to vacate with supporting affidavit. *Id.* Nonetheless, in that case, despite the trial court's discretionary opinion that the moving party failed to present prima facie evidence to support vacation of the judgment, the court still found that Wilmington Trust's

failure to refute the motion to vacate with admissible evidence supporting its claim to be the holder of the note created a disputed issue of fact that *required* an evidentiary hearing. *Id.* at 350. Thus, the factual issues in dispute *Okanogan Cty.* that arose from the nonmovant's failure to respond with competent evidence, which necessitated an evidentiary which would not have even come to light without a noticed hearing set by CR 60(e)(2). Without a hearing, the *Okanogan Cty.* court would not even have given the court enough information to know whether material issues of fact were in dispute. Thus, similarly here, the trial court's failure to even set a hearing in *Merceri II* was a clear err that should be reversed.

B. Low Income Consumers Face High Rates of Default Judgments

A 2017 report by the Consumer Financial Protection Bureau ("CFPB"), "Consumer Experiences with Debt Collection: Findings from the CFPB's Survey of Consumer Views on Debt (Jan. 2017),"[1] found that 74 percent of consumer respondents who were sued on a debt reported that they failed to attend the court hearing. Additionally, the report says that "53 percent of consumers reported receiving collections attempt that were incorrect because the debt was not theirs, was the wrong amount, or was owed by a family member." *Id.* at 24. Additionally, consumers with relatively low incomes were more likely to report having experienced debt

[1] https://files.consumerfinance.gov/f/documents/201701_cfpb_Debt-Collection-Survey-Report.pdf, retrieved November 3, 2020.

collection attempts. *Id.* at 15. When low income borrowers contact nonprofits like NWCLC for help after a default judgment has been entered, CR 60 motions to vacate default judgments are often the only means to remedy unfair debt collections that arose in connection with the lawsuit. To protect Washingtonians from debt collectors and mortgage loans in default, this state has enacted the Washington State Collection Agency Act, RCW 19.16 *et seq.* (regulating debt collection practices for defaulted debts), and the Washington State Deed of Trust Act, RCW 61.24 *et seq*. (regulating the manner in which beneficiaries of defaulted notes secured by deeds of trusts can foreclose upon real property). However, in situations where a borrower has failed to respond or appear at a court hearing on debt or a judicial foreclosure, their only remedy is to file a motion for an application to vacate the default judgment supported by an affidavit under CR 60(e) to properly bring the matter before the court.

C. Vacating Default Judgments

The Court of Appeals ruling that a hearing is not mandatory under CR 60(e)(2) also affects default judgments and this court's policies on default judgments. It is this court's policy that "controversies be determined on the merits rather than by default." *Griggs v. Averbeck Realty*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). It has always been the policy of this court that default judgments should be set aside liberally pursuant to both CR 55(c) and 60(b) for equitable reasons so that

substantial rights are preserved and justice between the parties is fairly and judiciously done. *Griggs*, 92 Wn.2d at 582, 599 P.2d 1289. Any doubts should be resolved in favor of allowing trial on the merits. *Id*. at 581. The trial court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits. *See Id.* at 581 ("Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted."). Thus, a trial court's decision is evaluated by considering the unique facts and circumstances of the case and this cannot be done without a hearing. *Id.* at 582.

In *White v. Holm*, the Washington Supreme Court delineated a four-part test for a moving party to satisfy in a motion to vacate a default judgment based on mistake, inadvertence, surprise or excusable neglect:

> (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.

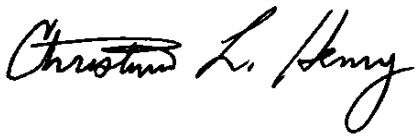
White, 73 Wn.2d 348 at 352. The test is not a "mechanical" one, as the decision about "whether or not a default judgment should be set aside is a matter of equity." *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007). The first two factors are primary, while the last two factors are secondary. *White,* 73 Wash.2d at 352. Thus, a discretionary decision on

whether to even hold a hearing would hinder a movant's rights to an equitable ruling.

III. CONCLUSION

For the reasons stated herein, NWCLC respectfully requests that this Court grant Sandra Merceri's Petition for Review.

DATED this 3rd day of November 2020.



Respectfully submitted._____

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CERTIFICATE OF SERVICE

I, Christina L. Henry, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing to be served by efiling upon the following counsel of record:

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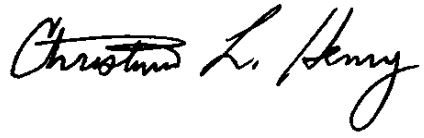

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HENRY & DEGRAAFF, P.S.

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