Appeal No. 312160

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON, DIVISION III

CAPITAL ONE BANK (USA), N.A.

Respondent

V.

CHARMON WALLACE

Appellant

APPEAL FROM SPOKANE CASE NO. 10-2-04750-1

RESPONDENT'S BRIEF

CAPITAL ONE BANK (USA), N.A.
c/o SUTTELL & HAMMER, P.S.
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A. RESPONDENT'S COUNTER STATEMENT OF THE FACTS

The Appellant was personally served with a copy of the Summons and Complaint on May 11, 2010. CP 1-5, 6. No Notice of Appearance or communication or response to the Summons and Complaint was received by Respondent's counsel. CP 167 paragraph 4. When the Appellant failed to Appear in the action or respond to the Summons and Complaint, a Default Judgment was entered on November 16, 2010 in the total amount of $5247.70 which included costs and prejudgment interest. CP 7-15 & CP 16. After the entry of the Default Judgment, the Appellant was mailed a copy of the Default Judgment at her address of 1506 E Desmet Ave, Spokane, WA 99202-2724. CP 160 paragraph 3. The letter was not returned to Respondent's counsel as an undeliverable and no response was made to the letter. CP 160 paragraph 3.

The Respondent then noted a Supplemental Proceeding for March 31, 2011. CP 18-20. The Appellant was served and appeared and claimed that she had responded to the underlying Summons and Complaint by letter. CP 167-168 paragraphs 4 & 5. At the Supplemental Proceeding on March 31, 2011, Respondent's counsel advised the Appellant that he would agree to strike the Supplemental Proceeding to further investigate the matter. CP 168 paragraph 6. During the discussion between Respondent's counsel and the Appellant at the Supplemental Proceeding

on March 31, 2011, the Appellant admitted that she owed the debt and stated that it was her desire to resolve the matter. CP 168 paragraph 7. The parties tentatively agreed on a figure that Respondent's counsel agreed to confirm with his client. CP 168 paragraph 7. Respondent's counsel did not agree to vacate the Judgment at the meeting with the Appellant on March 31, 2011 nor any time thereafter. CP 168 paragraph 6. After returning to his office and reviewing the file, Respondent's counsel confirmed that Respondent's law firm had no record of receiving the Appellant's letter dated June 30, 2010. CP 168 paragraph 6.

On April 6, 2011, Respondent's counsel sent a letter to the Appellant agreeing to settle the matter for $3,500.00, payable either in a lump sum or at $250.00 a month. CP 168 paragraph 8 & CP 172. If Appellant elected the monthly payment arrangement, payments were to begin May 1, 2011, and continue on the first day of each month thereafter until the settlement amount of $3500.00 was paid. CP 168 paragraph 8 & CP 172. This letter advised the Appellant that her failure to adhere to the terms of the Settlement Agreement would result in other collection activity. CP 168 paragraph 8 & CP 172. The Appellant made the first four payments in May, June, July, and August of 2011. CP 168 paragraph 9 & 174. All of these payments were received after their respective due dates. CP 168 paragraph 9 & CP 174. The Appellant then failed to make the

payment due in September of 2011, and only made a partial payment of $100, which was also received late, in October of 2011. CP 168 paragraph 9 & 174. In September 2011, a reminder letter was sent to the Appellant for the missed payment. CP 168 paragraph 10. Appellant failed to respond to the September, 2011 letter about her missed payment or to make payments pursuant to the terms of the Agreement. CP 168 paragraph 10. On February 22, 2012, the Appellant made her last voluntary payment in the amount of $1,000.00. After these payments, there was still $400.00 needed to cure the default under the payment plan. CP 168 paragraph 10. When no payments were received in March or April 2012, Respondent's counsel issued a Writ of Garnishment. CP 168 paragraph 10.

After the Garnishment was served on the Appellant's bank account, Respondent's counsel received a voicemail from the Appellant regarding the Garnishment. CP 168 paragraph 11. A letter was sent to her in response explaining that Appellant had failed to meet the terms of the Settlement Agreement and the Respondent's position regarding the Garnishment. CP 168-169 paragraph 11 & CP 178-179. In a subsequent phone call with Respondent's counsel, Mark Case, the Appellant admitted to being very behind on the deal. CP 169 paragraph 11 Respondent's counsel then again explained his client's position and advised her that

once the Garnishment was complete, the parties could again discuss a new arrangement on any remaining balance. CP 169 paragraph 11.

On May 16, 2012, Respondent's counsel received an e-mail from Judicial Assistant Tracy Pilkington of the Spokane County Superior Court advising Respondent's counsel that the Appellant had noted a Motion on the Garnishment for May 18, 2012. CP 169 paragraph 12. Respondent's counsel was e-mailed the Pleadings by the Judicial Assistant, because these documents had not been delivered or served on the Respondent's counsel by the Appellant. CP 169 paragraphs 12 & 13, CP 43-47 & 66-75.

At the hearing on May 18, 2012, Respondent's counsel Nicholas Filer appeared telephonically on behalf of the Respondent and Appellant's counsel Kirk Miller appeared on behalf of the Appellant through the volunteer lawyer program. CP 169 paragraph 12. The Honorable Ellen Clark ultimately struck the hearing for being untimely and due to the fact that it was unclear as to what relief was being sought by the Appellant. CP 169 paragraph 12.

The exemption claim that had been filed, listed only student loans as being exempt. However, the exemption claim failed to list an amount being claimed as exempt and did not contain any documentation in support of her position that funds were exempt or to establish that the

alleged exempt funds had not been comingled with other funds in her bank account. CP 169 paragraph 13, CP 43-47 & 66-75.

After Appellant's May 18, 2012 had been stricken, pursuant to RCW 6.27.160, Respondent's counsel noted a Request for Denial of the Exemption Claim for June 1, 2012. CP 169 paragraph 14. The day of the hearing Appellant's Counsel, Kirk Miller, filed a Notice of Appearance on behalf of the Appellant and provided documents showing the exempt status of certain funds. CP 169 paragraph 14. Appellant's counsel, Kirk Miller and Respondent's counsel, Mark Case, agreed to vacate the Garnishment Judgment and release $1,301.26 to the Appellant, the amount being claimed as exempt. CP 169 paragraph 14. Appellant's Counsel, Kirk Miller, also agreed that the Garnishment was proper and that the Respondent was entitled to the remaining funds. CP 169 paragraph 14. An Agreed Order Re: release of funds was entered on June 1, 2012, that stated in part:

> ". . . The sum of $1301.26 is exempt . . .
> IT IS ORDERED that: Garnishment Judgment entered on 5/15/2012 is vacated. Plaintiff may move the Court for garnishment judgment in an amount excluding exempt funds. The clerk shall immediately release the sum of $1301.26 to the defendant. . . . " CP 110.

A Judgment and Order to pay was then entered on June 26, 2012, for the non exempt garnishment funds being held in the amount of $2639.56. CP 116-117.

Following the entry of the Order on Garnishment, Respondent's counsel attempted to contact Mr. Miller on multiple occasions to try to discuss settlement. CP 169 paragraph 15. None of the overtures were successful. CP 169 paragraph 15. Subsequent to that, Attorney Michael Kinkley associated in the case as co counsel for the Appellant and joined Appellant counsels' Motion to Vacate the Default Judgment under CR 60 and to Quash the Garnishment. CP 118. A Motion for Order to Show Cause was filed and issued by the Spokane Superior Court on July 25, 2012 CP 158-159. Appellant's counsel then served the Order to Show Cause to Vacate the Judgment and Quash the Garnishment and supporting documents on the Respondent, by serving the Respondent's registered agent.

No documents regarding the Motion to Vacate the Judgment under CR 60 and to Quash the Garnishment were sent to Respondent's counsel, Suttell & Hammer, P.S. despite the fact that Respondent's counsel had appeared in the action and had been representing the Respondent, had been actively dealing with Appellant's counsel on the resolution of the garnishment issue, and despite the fact that Appellant's Motions not only

involved a Motion to Vacate under CR 60 but also a Motion to Quash the Garnishment. See CR 5(b)(1). CP 170 paragraph 17.

Respondent's counsel first became aware of the August 17, 2012 Order to Show Cause hearing on Monday, August 13, 2012, after Capital One Bank, the Respondent, e-mailed a copy of the Appellant's Motions to its attorneys. CP 170 paragraph 17. Upon receiving notice of the hearing, Respondent's counsel immediately contacted Appellant's counsel and asked Appellant's counsel Michael Kinkley to continue the hearing one week to the day the following week when Respondent's counsel was scheduled to be in Spokane, so Respondent' counsel could be able to be present in Spokane County Superior Court for oral argument and could have an opportunity to timely respond. CP 170 paragraph 17, CP 186 and RP August 17, 2012 pages 9-10. Appellant's counsel Michael Kinkley refused the request. CP 170 paragraph 17.

When the request for a continuance was denied, Respondent's counsel Mark Case prepared a response to the motions and served it the following day. RP August 17, 2012 9-10. Appellant's counsel then prepared a Reply to the Respondent's response to the motion, and Respondent's counsel prepared a sur reply.

The request of Appellant's counsel to strike the Respondent's Response to the Motion to Vacate was denied, and in hearing and deciding

the Motion, the Trial Court refused to consider the reply of the Appellant as well as the sur reply of the Respondent. RP August 17, 2012 pages 2-3 and CP 247-248.

After considering the evidence presented in support of the Motion and in opposition to the Motions and following oral argument, the Honorable Salvatore Cozza denied the Appellant's Motion to Vacate the Judgment and Quash the Garnishment. Following the Court's oral ruling, Appellant's counsels exited the court room and, therefore, the Order could not be entered at that time because Appellant's counsels were not present. A notice of presentation of a proposed order was noted and scheduled and was ultimately heard by Judge Cozza on September 18, 2012. CP 244-246. The proposed order included language which stated:

". . . The Court finds that Plaintiff's Default Judgment against the Defendant was properly entered November 16, 2010. Defendant was not entitled to notice of entry of the judgment. Defendant was on notice that the judgment had been entered for more than one year before bringing this motion as evidence by the parties' agreement and the Defendant's partial performance of said judgment. . . ." CP 247-248

At the time of the presentation, Appellant's counsel objected to the finding in the order. Judge Cozza stated in response to Appellant's argument:

> ". . . I think that I am going to do; I am going to go ahead and leave the next to the last paragraph as is. I think that that is a correct statement at this point. So I will go

> ahead, then, and ask Mr. Miller to go ahead and note his objection on here, and we will enter this at this point. . . ."
> RP September 18, 2012 pages 3-4

Following an interlineation on the Order and Appellant's counsel's Approval of the form of the Order ". . . with objection to finding with respect to entitlement to Notice of Entry of Judgment" the Order Denying Appellant's Motion to Vacate Judgment and Motion to Quash Garnishment was entered by Judge Cozza. Appellant's filed a Notice of Appeal. CP 247-248.

B. COUNTER STATEMENT OF THE CASE

The Respondent obtained a Default Judgment ex parte and without notice to the Appellant after proper service of the Summons and Complaint, after waiting more than 20 days. The Respondent's attorneys received no Notice of Appearance or communication of any kind from the Appellant prior to moving for default and a Default Judgment. The Default Judgment was properly entered. Despite having notice of the entry of the Judgment by letter in January 2011 and at the Supplemental Proceeding hearing, the Appellant waited over a year and half to bring her Motion to Vacate the Judgment. The Appellant only acted after she had repeatedly defaulted on the discounted payment plan she had been offered and after she had been garnished. After considering the evidence presented and having heard argument of counsel for both Appellant and Respondent, the

trial court made a factual determination that no notice of appearance had been made and the Appellant was not entitled to notice of the entry of the Default Judgment. The motion to vacate was not filed within 1 year of the entry of the Default Judgment and was not timely. The trial court's finding is supported by substantial evidence and the trial court did not abuse its discretion in denying the Appellant's Motions to vacate the Default Judgment and quash the writ of garnishment.

C. ARGUMENT

STANDARD OF REVIEW

A trial court's decision on a motion to vacate a Default Judgment will not be disturbed on appeal unless the trial court has abused its discretion. Morin v. Burris, 160 Wash. 2d 745, 753, 161 P. 3rd 956 (2007); Yeck v. Dep't of Labor & Industries, 27 Wash. 2d 92, 95, 176 P.2d 359 (1947). An Appellate Court reviews the denial of a motion to vacate under CR 60(b) for abuse of discretion. Vance v. Offices of Thurston County Comm'rs, 117 Wash.App. 660, 671, 71 P.3d 680 (2003). "Discretion is abused when it is exercised on untenable grounds or for untenable reasons' Luckett v. Boeing, 98 Wn.App. 307, 309–10, 989 P.2d 1144 (1999) (*quoting Lane v. Brown & Haley*, 81 Wash.App. 102, 105, 912 P.2d 1040 (1996); see also, Griggs v. Averback Realty, Inc., 92 Wn. 2d 576, 582, 599 P.2d 1289 (1979); State v. Santos, 104 Wn.2d 142, 145,

702 P.2d 1179 (1985); Braam v. State, 150 Wash.2d 689, 706, 81 P.3d 851 (2003); Lane v. Brown & Haley, supra and only the propriety of the denial, not the impropriety of the underlying Judgment, is before the reviewing court. Barr v. MacGugan, 119 Wash.App. 43, 78 P.3d 660 (2003).

Appellate Courts review questions of law de novo Department of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 9, 43 P.3d 4 (2002), and will not overturn the findings of fact by the trial court if supported by substantial evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wn. 2d 570, 343 P.2d 183 (1959). "Substantial evidence" does not mean uncontradicted evidence, but rather that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. see, Arnold v. Samstol, 43 Wn. 2d 94, 98, 260 P.2d 327 (1953). An Appellate Court will not ordinarily substitute its Judgment for that of the trial court even though it might have resolved the factual dispute differently. Beeson v. Arco, 88 Wn.2d 499, 563 P. 2d 822 (1977). The trial court is generally free to believe or disbelieve a witness in reaching factual determinations. State v. Chapman, 78 Wn.2d 160, 469 P. 2d 883 (1970).

THE APPELLANT'S MOTION TO VACATE THE DEFAULT JUDGMENT AND MOTION TO QUASH THE WRIT OF GARNISHMENT WERE PROPERLY DENIED

The Appellant did not appear in this action and was not entitled to notice prior to entry of the order of default and the Default Judgment. The Court's opinion in Morin v. Burris, supra and its analysis of the Court rules that are applicable are clearly relevant to the present case: The Court stated beginning at page 753:

> ". . . This narrow question is best addressed in its larger context and requires us to consider several different civil rules and standards. Under CR 4(a)(3), a "notice of appearance" shall "be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons." Default judgment is largely governed by CR 55, but CR 60 also sets forth when a judgment may be vacated or set aside.
>
> A party who has appeared in an action is entitled to notice of a default judgment hearing and, if no notice is received, is generally entitled to have judgment set aside without further inquiry. *Tiffin*, 44 Wash.2d at 847, 271 P.2d 683. CR 55 does not define "appear" or "appeared." It provides that, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made." CR 55(a)(1). The rule further provides, "[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)." CR 55(c)(1). CR 60 sets out specific grounds upon which a party may apply to set aside a default judgment. Much litigation focuses on whether default judgment should be set aside because of inadvertence, excusable neglect,

surprise, or irregularity in obtaining the judgment or order. CR 60(b)(1).

Again, we do not favor default judgments. *Griggs v. Averbeck Realty, Inc.*, 92 Wash.2d 576, 581, 599 P.2d 1289 (1979). We prefer to give parties their day in court and have controversies determined on their merits. *Id.* (quoting *Dlouhy v. Dlouhy*, 55 Wash.2d 718, 721, 349 P.2d 1073 (1960)). A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Roth v. Nash*, 19 Wash.2d 731, 144 P.2d 271 (1943). Thus, for more than a century, it has been the policy of this court to set aside default judgments liberally. *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897) (" 'where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice.' ") (quoting Robert Y. Hayne, New Trial and Appeal § 347).

Applying CR 55 and CR 60 liberally, this court has required defendants seeking to set aside a default judgment to be prepared to establish that they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice. CR 60(b); *Dlouhy*, 55 Wash.2d 718, 349 P.2d 1073.[FN2] Or, alternately, defendants may set aside a default judgment if they meet the four part test set forth in *White:*

FN2. The other grounds set forth in CR 60(b) are not before us.

(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 Wash.2d at 352, 438 P.2d 581 (citing *Hull*, 17 Wash. 352, 49 P. 537). Finally, a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable. *See Trickel*, 52 Wash. 13, 100 P. 155; *cf.* CR 60(b)(4) (allowing default to

be set aside based on fraud, misrepresentation, or misconduct by adverse party).

Turning to the narrower issue of what constitutes an "appearance" under the civil rules, for over a century, this court has applied the doctrine of substantial compliance. *See, e.g.,* *Trickel,* 52 Wash. 13, 100 P. 155. We have not exalted form over substance but have examined the defendants' conduct to see if it was designed to and, in fact, did **962 apprise the plaintiffs of the defendants' intent to litigate the cases. However, where we have applied the substantial compliance doctrine, the defendant's relevant conduct occurred after litigation was commenced. *Trickel,* 52 Wash. at 14, 100 P. 155 (the defendant did not file a formal notice of appearance but served interrogatories upon the plaintiff); *cf.* *Dlouhy,* 55 Wash.2d at 722, 349 P.2d 1073 (defendant's personal appearance in court in divorce action to oppose temporary restraining order sufficient to establish appearance); *Warnock v. Seattle Times Co.,* 48 Wash.2d 450, 452, 294 P.2d 646 (1956) (service of the demand for security for costs was sufficient to constitute appearance); *Tiffin,* 44 Wash.2d at 844, 271 P.2d 683 (withdrawal of defendant's counsel did not rescind appearance after written notice of appearance was served on plaintiff's counsel); *State ex rel. LeRoy v. Superior Court,* 149 Wash. 443, 271 P. 87 (1928) (defendants appearance on a bond in an unlawful detainer action).

It appears to us that mere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court.* Respondents misread *Dlouhy* as supporting a far broader understanding of what can constitute an appearance. *Dlouhy* held that an appearance *in court* to resist a motion to convert a temporary restraining order into an injunction was a general appearance entitling the defendant to notice of the default judgment hearing. *Dlouhy,* 55 Wash.2d at 722, 349 P.2d 1073. In effect, this court held that by actually appearing in court the defendant substantially complied with the appearance requirement. *Dlouhy,* 55 Wash.2d at 719, 724, 349 P.2d 1073.

Respondents may have been misled by dicta in *Gage v. Boeing Co.*, 55 Wash.App. 157, 776 P.2d 991 (1989). In *Gage,* the Court of Appeals held that the defendant had appeared in the lawsuit under Washington statutory law by appearing and vigorously contesting the plaintiff's claims in the administrative hearing that led to the court case. *Id.* at 162, 776 P.2d 991. Although the *Gage* court mentioned in passing that other jurisdictions had recognized the concept of informal appearance, the court explicitly did not reach whether it was the law of *this* state. *Id.* Subsequently, at least two divisions of our Court of Appeals have relied upon *Gage* and its progeny to adopt the informal appearance doctrine. E.g., *Matia Inv. Fund,* 129 Wash.App. at 546, 119 P.3d 391 (Division Two); *Skilcraft Fiberglass v. Boeing Co.*, 72 Wash.App. 40, 45, 863 P.2d 573 (1993) (Division One). In *Skilcraft,* the court also set aside default judgment on the appropriate grounds that plaintiff's counsel misled defendants. *Id.; see also* CR 60(b)(4).

Certainly, there is appeal to the concept of less formal forms of dispute resolution; under some circumstances, less formal forums are available. *See, e.g.,* ch. 7.04A RCW (uniform arbitration act). But litigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.

We believe that our existing approach of liberal application of rules permitting equity, vacation of default judgments, and application of substantial compliance adequately promote justice. The informal appearance doctrine urged by the respondents would permit any party to a dispute, or any claims representative to a potential dispute, to simply write a letter expressing intent to contest litigation, then ignore the summons and complaint or other formal process and wait for the notice of default judgment before deciding whether a defense is worth pursing. If a less formal approach to litigation is to be adopted, it should be by rule

> and not by this court's adoption of an informal appearance rule. Parties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment. Accordingly, we hold that parties cannot substantially comply with the appearance rules through prelitigation **963 contacts. Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing, . . . "

Here, there was conflicting factual evidence about whether the Appellant had appeared in the action prior to entry of the Order of Default and Default Judgment. CP 120 paragraphs 5 & 6. The Appellant contended that she sent a letter to Respondent's counsel approximately 1 ½ months after she was personally served and Appellant contended that this letter with its text constituted an appearance. CP 120 paragraphs 5 & 6. Other than the Appellant's contention that she sent it she had no proof that it was received. The letter that was attached to her Declaration which she stated was a reproduction of the letter she allegedly mailed was not signed and did not contain the attachments referred to in the letter. CP 124.

Respondent's counsel denies that the Appellant's June, 2010 letter was received. CP 167-168 paragraphs 4 & 5. Respondent's counsel stated in his Declaration in Opposition to the Motion that after reviewing all electronic notes and records on this file, he stated that his office received no communication or response from the Appellant to the Summons and

Complaint personally served on her on May 11, 2010 CP 167-168 paragraphs 3 & 4 and his office did not received the June 30, 2010 letter attached to the Appellant's Declaration until she presented it to Respondent's counsel, Mark Case, at the Supplemental Proceeding on March 31, 2011. CP 167 paragraph 5. He also stated in his Declaration that his office received no response to the demand letter sent to the Appellant on or about March 4, 2010. CP 167 paragraph 4.

After considering the evidence presented and after hearing oral argument, the trial court made a factual determination and found that the Default Judgment was properly entered and the Appellant was not entitled to notice of entry of the Default Judgment. CP 247-248, RP September 18, 2012 page 2 line 20 to page 3 line 8 and page 4 lines 17-23. Based on the evidence considered by the trial court, and the factual determination the trial court made, the trial court did not abuse his discretion in finding "that Respondent's Default Judgment against the Appellant was properly entered November 16, 2010. Appellant was not entitled to notice of entry of the Judgment."

Here based on the trial courts factual determination, the Appellant was not entitled to notice of the entry of the Judgment and the trial court did not abuse its discretion in denying the Motion to Vacate the Default

Judgment. The trial court's finding is supported by substantial evidence and should not be disturbed on appeal.

APPELLANT'S MOTION TO VACATE UNDER CR 60 DID NOT SET FORTH A PRIMA FACIE DEFENSE, WAS MADE MORE THAN TWENTY (20) MONTHS AFTER ENTRY OF THE DEFAULT JUDGMENT AND WAS NOT TIMELY AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO VACATE

The standard applied by a court in deciding whether to vacate Default Judgment is set forth in CR 60(b). Under CR 60(b), there must be a showing of (1) excusable neglect, (2) due diligence, (3) a meritorious defense, and (4) no substantial hardship to the opposing party. White v. Holm, 73 Wn. 2d 348, 438 P.2d 581 (1968); Estate of Stevens, 94 Wn.App. 20, 30-31, 971 P.2d 58 (1999), see also, Norton v. Brown, 99 Wn.App. 118, 992 P.2d 1019 (1999). All four elements must be established. Furthermore pursuant to CR 60(b):

> . . . The motion shall be made within a reasonable time and for reasons (1) (Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order), (2) For erroneous proceedings against a minor or person of unsound mind when the condition of such defense does not appear in the record, nor the error in the proceedings) or (3) Newly discovered evidence which by due diligence could not have been discovered in time to move fore new trial under rule 59(b) **not more than 1 year after the judgment, order or proceeding was entered or taken**. . . . (emphasis ours)

Here, the Default Judgment was entered November 16, 2010 CP 16-17 and the Appellant's Motion to Vacate and Motion to Quash the

April 12, 2012 writ of garnishment were filed on July 25, 2012. CP 152-153 & CP 150. The Motion to Vacate was not made within 1 year of the date the Judgment was entered and the April 4, 2012 writ of garnishment had been completed approximately 30 days prior to the date the Motion to Quash was filed. CP 110 and CP 116-117Appellant tries to avoid the application of the rule by contending that she thought that Respondent was going to vacate the Judgment. CP 121 paragraph 15. Respondent's counsel denies that there was any agreement to vacate the Judgment. His letter to the Appellant confirming the terms of the Settlement makes no mention of vacating the Default Judgment. CP 168 paragraph 6 and CP 172. The motion should be denied on the basis the motion was not made within a year of the entry of the Judgment and was not made within a reasonable period of time. see Luckett v. Boeing, supra, (4 months delay was unreasonable); Estate of Stevens, supra. (3 months delay was unreasonable). The Motion to Quash the April 12, 2012 writ of garnishment had been completed approximately 30 days earlier and was therefore moot and Appellant's Motion was properly denied.

Secondly, the Declaration of the Appellant in support of her Motion does not set forth any facts that form the basis for a meritorious defense. The apparent basis of her Defense is that she is "disputing the debt claimed in the complaint." CP 124. Her letter that was never received

by Respondent's counsel, only contends that "The account balance, fees and interest applied to this account are unjust." CP 124. She offers no facts in her Declaration as to why she might be disputing the debt or why she believes certain amounts are unjust. CP 120-122 & CP 124.

Third, the Appellant has not established mistake, excusable neglect or irregularity in obtaining the judgment or any other reason outlined in the Court Rules and has not satisfied any of the elements of CR 60(b) necessary to support the motion to vacate.

The Appellant did not satisfied the elements of the 4 prong test set out in White v. Holm, supra and she delayed nearly 20 months after the Judgment was entered and more than 1 year after she claims she first discovered a Judgment was entered against her as a result of the Supplemental Proceedings was served in her in March, 2011. The Appellant filed her Motion to Vacate only after she had repeatedly defaulted on the discounted payment plan she had been offered, ignored reminder letters from Respondent's counsel and after she had been garnished. CP 168 paragraphs 8, 9 & 10. The decision of the trial court denying Appellant's Motion to Vacate the Judgment under CR 60 and Motion to Quash the Garnishment should be affirmed.

EVIDENCE WAS PROPERLY ADMITTED IN SUPPORT OF THE DEFAULT JUDGMENT

The Appellant contends that the "default proceeding was irregular because it was granted without the sufficient documentation required by local court rule. . ." and contends that the "Respondent included no properly authenticated 'statement of account'" and the "proof of the factors necessary for computation of the accrued interest" was not set out in the Motion for the Default Judgment.

This is not a proper basis to vacate the Default Judgment. First, if Appellant is contending that the entry of the default Judgment was irregular, then in order for Appellant to request relief under CR 60(b)(1, the Appellant still had to move to vacate the Judgment within 1 year of entry. The Motion to Vacate in this case was not made until the Judgment was well over 1 year old.

Secondly, a trial court's ruling admitting or excluding such records is given considerable weight and will not be reversed absent a manifest abuse of discretion. *State v. Kreck,* 86 Wash.2d 112, 542 P.2d 782 (1975); Cantrill v. American Mail Line, 42 Wn. 2d 590, 257 P. 2d 179 (1953).

The hearsay exception for business records, RCW 5.45.020 expressly states that the Trial Court may take into consideration: ". . . the

sources of information, method and time of preparation were such as to justify its (the record') admission."

The Court must review the admission of the evidence and affidavits under an abuse of discretion standard. see, Cantrill v. American Mail Line, supra; State v. Emmanuel, 42 Wn. 2d 799, 259 P. 845 (1953); Choate v. Robertson, 31 Wn. 2d 118, 195 P. 2d 630 (1948). Here the Default Judgment was supported by the Affidavit of Margaret Parton CP 10-13 that was properly admitted containing facts contained in the Respondent's business records which satisfied the requirements of CR 55 (b)(1) for entry of a Default Judgment for a sum certain.

Washington permits the introduction of business records that were prepared by someone other than the witness who is testifying at trial. In State v. Ben-Neth, 34 Wn. App. 600, 663 P. 2d 156 (1983), Division I of the Court of Appeals upheld the introduction of bank computer records that were introduced through a bank supervisor who did not prepare the records. In affirming the Trial Court, the Court of Appeals stated at pages 602-606 as follows:

> Ben-Neth first contends that the trial court erred in admitting the bank's computer records of his account transactions. [FN2] Computer-generated evidence is ****159** hearsay but may be admitted as a business record provided a proper foundation is laid under RCW 5.45.020, which provides:

FN2. Ben-Neth does not contend that the computer records of his account are inaccurate. He argues in his brief that the bank officials who testified "did not supervise tellers who make the account records" ... or "supervise copying of the records [and] had no idea of the responsibilities of the persons who actually copied bank records at the computer center."
Whether business records are stored in a computer or in a traditional fashion the likelihood of and nature of possible error are the same. These include arithmetic error, incorrect posting of charges, credits, or debits, entry of information onto the wrong account, and numerous other potential mistakes caused by human fallibility or by mechanical or electronic failure. Given the complexity of modern institutions one cannot expect routine record-keeping to be completely error-free. Where actual error is suspected the challenge should be to the accuracy of the business record, not to its admissibility.

Business records as evidence. A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.
***603** If the statutory requisites are met, computerized records are treated the same as any other business records. *Seattle v. Heath,* 10 Wash.App. 949, 520 P.2d 1392 (1974).

[4][5] Ben-Neth challenges the qualifications of the two bank officials as proper foundation witnesses. The statute does not require examination of the person who actually made the record. *Cantrill v. American Mail Line, Ltd.,* 42 Wash.2d 590, 257 P.2d 179 (1953). Testimony by one who has custody of the record as a regular part of his work or has supervision of its creation ("other qualified witness" under the statute) will suffice. *Cantrill.* The rule is disjunctive, not conjunctive. *Cf. State v. Smith,* 16 Wash.App. 425, 558 P.2d 265 (1976), *review denied,* 88

Wash.2d 1011 (1977) (misinterpreting *Cantrill* as requiring testimony by both the custodian and supervisor). Admissibility hinges upon the opinion of the trial court that "the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020; K. Tegland, 5A. *Wash.Prac.* § 372, at 240 (2d ed. 1982). A trial court's ruling admitting or excluding such records is given considerable weight and will not be reversed absent a manifest abuse of discretion. *State v. Kreck,* 86 Wash.2d 112, 542 P.2d 782 (1975); *Cantrill.*

Reviewing courts have broadly interpreted the statutory terms "custodian" and "other qualified witness." In *State v. Smith,* 55 Wash.2d 482, 348 P.2d 417 (1960), the court held that the owner of a chain of clothing stores provided adequate foundation testimony for the introduction of business records of a branch store because, in a general sense, all the chain's business records were prepared under the owner's general supervision. In ***Cantrill*** the court ruled that a supervising physician and a medical records librarian were proper foundation witnesses for the introduction of the clinic's medical records. In both *Kreck* and *State v. Rutherford,* 66 Wash.2d 851, 405 P.2d 719 (1965), the supervisor of the person who conducted tests was allowed to produce the results as business records.

Washington courts have taken a similar approach to ***604** foundation testimony in cases dealing with computer-generated business records. In *Heath* the trial court admitted teletype printed material from a teletype printer connected to a central computer as a business record. Foundation testimony was furnished by an assistant director of the Traffic Violations Bureau of the Seattle Municipal Court, although the computer was located in Olympia. The assistant director identified two exhibits as abstracts of driving records stored in the computer, described how the records are retrieved, and testified that a clerk under his supervision had obtained the records for him. He was custodian of the printouts after they came from the teletype but not the custodian for the entire department.

Two cases concerning computerized bank records are instructive. In *State v. Smith,* 16 Wash.App. 425, 558 P.2d 265 (1976), the trial court admitted an exhibit prepared by a bank employee from computer printouts. A bank vice-president and not the employee furnished the foundation testimony. The vice-president was considered to have supervised the preparation and recordation of all the bank's records, and therefore to be a qualified foundation witness. In *State v. Kane,* 23 Wash.App. 107, 594 P.2d 1357 (1979), a bank branch officer who had prepared a trial exhibit from computer printouts of account records was considered to be their custodian and therefore a qualified foundation witness. *See also* 7 A.L.R. 4th 8 (1981) and cases cited therein.

Here the records of Ben-Neth's account were produced by the supervisor of the customer service department of that branch office and by its operations officer. The customer service supervisor had opened Ben-Neth's account, and testified to being familiar with the bank's record keeping procedures. He was not a records custodian or supervisor of record-keeping, but was able to describe the method for retrieving monthly account statements from the computer. Although the court found that the customer service supervisor was a qualified foundation witness, his superior also testified. As operations officer she supervised record-***605** keeping at that branch but did not supervise and was not familiar with procedures at the bank's central computer center, located elsewhere. Neither she nor the customer service supervisor had been to the computer center.

Ben-Neth contends that neither of the bank officials was a proper foundation witness because neither created or supervised creation of the computer records, understood how the records were assembled at the computer center, or had ever been to the computer center. In *Smith* and *Kane,* however, bank officers were allowed to produce exhibits based on computerized records despite their lack of detailed understanding of the bank's computer system. Each was

> regarded as a supervisor of record-keeping or a custodian of the records, and therefore qualified to testify. In *Heath* a Seattle traffic violations bureau official who was responsible for teletype computer printouts was a proper foundation witness despite his distance from the computer center in Olympia.
>
> Admissibility hinges on the trial court's discretionary determination that the computer records are reliable. RCW 5.45.020. They may be produced by one who either has custody of or has supervised the creation of the record. *Cantrill.* Although additional foundation from an employee familiar with operations at the bank's computer center would have been helpful, the testimony of Paulson and Landrum was sufficient under *Smith, Kane,* and *Heath.* The statutory elements were met and the trial court concluded that the evidence was reliable. **We find no abuse of discretion to justify reversal.** (emphasis ours)

In this case, just as in State v. Ben-Neth, supra the affidavit is admissible and sufficient evidence to enter a Default Judgment under CR 55(b)(1).

REQUIREMENTS UNDER THE COURT RULES FOR DEFAULT JUDGMENT ON A SUM CERTAIN

The requirements for entry of a Default Judgment are set forth in CR 55. CR 55(b)(1) provides that a motion and affidavit/certification is the only necessary proof that must be submitted to the Court to support a Default Judgment. CR 55(b)(1) specifies in relevant part:

> ... (b) **Entry of Default Judgment.** As limited in rule 54(c), judgment after default may be entered as

follows, if proof of service is on file as required by subsection (b)(4):

> (1) *When Amount Certain.* When the claim against a party, whose default has been entered under section (a), if for a sum certain or for a sum which can be made certain, the court upon motion and affidavit of the amount due shall enter judgment for that amount and costs against the party in default, if he is not an infant or incompetent person. (Underline emphasis ours).

The Court rule is clear that when the sum is certain, the amount due only needs to be proven by an affidavit/certification and once submitted by the Respondent, the Court shall enter the Default Judgment. The Court Rule does not require that documentary evidence even needs to be submitted. If the authors of the Superior and District Court rules believed that more specific proof or documentary evidence was required to support a Default Judgment, then the quantum of proof would have been included in the rules. Here, an affidavit from Respondent was submitted stating under penalty of perjury the amount due from the party in default. CP 10-13. The Certification submitted by the Respondent in this action was properly admitted and satisfies the requirements of CR 55(b)(1) and the Court was mandated by the court rule to enter a Default Judgment.

Here the Appellant was sued on the account, and was served with a summons and a complaint. CP 6. The amount sought by Default Judgment does not exceed the prayer in the complaint that had been served on the

Appellant. The Complaint sought a Judgment "for the sum of $4439.74 together with interest thereon at the highest legal rate . . . " CP 4.

Here the Respondent submitted the statutorily required proof for a sum certain and the Court Rule mandates that the Court shall enter the Default Judgment. The Default Judgment was properly entered and the trial court properly denied the Appellant's motion to vacate the Default Judgment and the trial court's denial of the Appellant's Motion was not an abuse of discretion.

COURT MAY NOT PASS LOCAL RULES INCONSISTENT WITH GENERAL CIVIL RULES

Next, the Appellant contends that the evidence submitted to the trial court in support of the Default Judgment did not comply with the evidence required by Spokane Local rules LCR 55(b) and LCR 55(b)(9).

The trial court did not abuse its discretion by failing to vacate the Judgment on these grounds. First, as outlined above, the evidence was sufficient to support the Default Judgment. CR 55(b)(1). Secondly, Appellant's argument is at best an argument that there was an irregularity in entered the Judgment. Again, raising such an argument under CR 60(b)(1) well over a year after the entry of the Default Judgment is not timely under CR 60(b).

Third the Spokane Local Rule LCR 55 on the quantum of evidence conflicts with the general Court Rules for Default Judgments under CR 55(b). For purposes of CR 83(a), Courts may adopt local civil rules that are not inconsistent with the statewide civil rules. King County v. Williamson, 66 Wn.App.10, 830 P.2d 392 (1992), Fernandes v. Mockridge, 75 Wn.App. 207, 877 P.2d 719 (1994). In Williamson, the Court considered whether a local court rule that required a motion for reconsideration to be made within 5 days of the court oral decision conflicted with the general court rule that permitted motions for reconsideration be made within 10 days of the entry of the Judgment. The Court found that the local rule conflicted with the general court rule. The Court in Williamson stated at page 13:

> "We have held that local rules must not be inconsistent with rules adopted by this court... the same principal negates a local rules which conflicts with a statute. The statute grants a valuable right to a litigant; a local rule cannot restrict the exercise of that right by imposing a time requirement different from the statute."

Here, any local rule or requirement that requires a quantum of proof in excess of what is specifically required in the general court rules conflicts with the general court rules and, therefore, must be ignored. Here, the general court rule CR 55 (b)(1) requires proof by affidavit or certification and as long as an affidavit or certification is submitted in

support of the Default Judgment, the Default Judgment must be granted. A local court rule cannot require added proof such as documentary evidence because such a requirement is inconsistent with the general court rule.

The Respondent submitted the statutorily required proof for a sum certain for entry of the Default Judgment. CP 10-13 The Default Judgment was properly entered and the trial court properly denied the Appellant's motion to vacate the Default Judgment and did not abuse its discretion in failing to vacate the Default Judgment.

D. CONCLUSION

The trial court found that the Default Judgment was properly entered and the trial court made a factual determination that the Appellant was not entitled to notice of entry of the Default Judgment. The Appellant has not set out any basis to establish that the trial court abused its discretion in failing to vacate the Default Judgment. The Appellant has not satisfied the elements of the 4 prong test set out in White v. Holm, supra. The Appellant delayed more than 1 year after she claims she first discovered a Judgment was entered against her, which resulted in her not filing any motion to vacate more than 20 months after the Default Judgment was entered. Further, the Appellant only acted after she had repeatedly defaulted on the discounted payment plan she had been offered

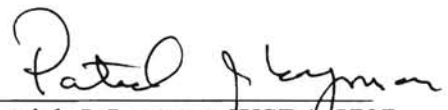
and after she had been garnished. Appellant's Motion to Vacate was not timely and did not set forth a prima facie defense.

Here the Respondent submitted the statutorily required proof for a sum certain and the Court Rule mandates that the Court shall enter the Default Judgment. The Default Judgment was properly entered and the trial court properly denied the Appellant's motion to vacate the Default Judgment

The decision of the trial court denying Appellant's Motion to Vacate the Judgment under CR 60 and Motion to Quash the Garnishment should be affirmed.

Dated this 12 day of June, 2013

SUTTELL & HAMMER, P.S.



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

CAPITAL ONE BANK (USA), N.A. Respondent vs. CHARMON WALLACE Appellant	APPELLATE COURT No. 312160-III CERTIFICATION OF MAILING

TO: Clerk of the Court

AND TO: Appellant & her Attorneys

I certify that on June 12, 2013 I mailed, postage prepaid, a copy of the Respondent's Brief to:

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