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No. 70423-1-I

STATE OF WASHINGTON COURT OF APPEALS
DIVISION I

JUDY HA,
Appellant,

v.

SIGNAL ELECTRIC, INC.,
Respondent.

On Appeal from King County Superior Court
Case No. 12-2-06911-5 SEA
The Honorable Monica J. Benton

BRIEF OF APPELLANT JUDY HA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

I. INTRODUCTION

This appeal concerns the validity of an Order of Default that was entered in August 2012 ***with the full knowledge of Signal Electric, Inc.*** ("Signal Electric"), and the validity of a Default Judgment that was entered in January 2013 ***after Signal Electric failed for more than four months to take steps to vacate or otherwise address the Order of Default.***

Appellant Judy Ha filed this lawsuit against Signal Electric and others in February 2012. While attempting service of process, Ms. Ha discovered that Signal Electric had filed for Chapter 11 bankruptcy, which imposes an automatic stay of all collection efforts against a debtor. As a result, Ms. Ha was required to obtain an order from the bankruptcy court granting her relief from the stay before she could complete service of process or otherwise proceed with her claims.

Ms. Ha obtained relief from the stay in June 2012. She then resumed her efforts to complete service of process by asking Signal Electric's attorney if he could accept service of process on Signal Electric's behalf.

Signal Electric was represented in the bankruptcy action by J. Todd Tracy of Crocker Law Group, PLLC ("Crocker Law Group"). In addition to handling bankruptcy matters, however, Signal Electric had given Mr. Tracy and Crocker Law Group express written authority to "take all actions necessary to protect and preserve [the] bankruptcy estate," and to undertake "the defense of any action commenced against [Signal Electric], negotiations concerning the litigation … and the

compromise or settlement of claims." This included the authority to accept service of process on Signal Electric's behalf, and Mr. Tracy had in fact accepted service of process on Signal Electric's behalf on at least two other occasions just a few months before he was asked to do so in this case. On both occasions, Mr. Tracy verified in writing that he was "authorized to accept service" on Signal Electric's behalf.

Mr. Tracy ultimately agreed to accept service of process in this case as well, so Ms. Ha sent him the necessary pleadings and other papers, along with a pleading entitled "Acceptance of Service of Summons and Complaint." ***Mr. Tracy executed the Acceptance of Service of Summons and Complaint, wherein he verified (1) that he represented Signal Electric in this lawsuit, (2) that he had the authority to accept and/or waive service of process on Signal Electric's behalf in this lawsuit, (3) that he did in fact accept service of process on Signal Electric's behalf in this lawsuit, and (4) that Signal Electric waived any and all defenses related to the sufficiency of process, the sufficiency of service of process, and personal jurisdiction.***

Signal Electric subsequently failed to answer the complaint, so Ms. Ha filed and served a motion for default. Signal Electric did not respond to the motion for default, so the trial court entered an Order of Default in August 2012.

Signal Electric received a copy of the Order of Default, but did not take any steps to address it. Signal Electric ignored the matter for ***more than four months***, so Ms. Ha eventually moved for entry of a Default

Judgment, and the trial court entered judgment in the amount of $2,199,501.86. Signal Electric ignored that as well.

Nearly ***two months*** after entry of the Default Judgment, Signal Electric's insurance company informed Ms. Ha that it was appointing additional counsel for Signal Electric. Signal Electric then waited approximately ***two additional months*** before filing a motion to vacate the Order of Default and the Default Judgment. So altogether, Signal Electric waited ***eight months*** before taking any steps to address the Order of Default that was entered in August 2012, and ***three months*** before taking any steps to address the Default Judgment that was entered in January 2013.

Signal Electric eventually filed a motion to vacate the Order of Default and the Default Judgment on May 2, 2013. In its motion to vacate, Signal Electric argued (1) that the trial court did not have personal jurisdiction over Signal Electric because Mr. Tracy lacked the authority to accept service of process; (2) that Signal Electric had a *prima facie* defense to Ms. Ha's claims because other parties contributed to the accident that caused Ms. Ha's injuries; (3) that Signal Electric's failure to defend was due to mistake, inadvertence, or excusable neglect; (4) that Signal Electric acted with due diligence once it learned of the default; (5) that Ms. Ha would suffer no hardship if the default were overturned; and (6) that the trial court should exercise its discretion under CR 60(b)(11) and vacate the default to prevent an injustice.

The trial court granted Signal Electric's motion without explaining the basis for its ruling and vacated both the Order of Default and the Default Judgment. Ms. Ha appealed that ruling as a matter of right under RAP 2.2(a)(10). There are six reasons why this Court must now reverse the trial court's decision and reinstate the Order of Default and the Default Judgment.

First, with regard to personal jurisdiction, there is substantial evidence demonstrating that Mr. Tracy had both express and implied authority to accept service of process on Signal Electric's behalf—including but not limited to Mr. Tracy's own written admission in the Acceptance of Service of Summons and Complaint—***and there is nothing in the record to contradict this evidence.***

When Signal Electric filed its motion to vacate, Signal Electric submitted a declaration from its President, Jerry Kittelson, and a declaration from Mr. Tracy. Each witness testified generally about various matters, *but neither one denied that Mr. Tracy had the authority to accept service of process.* Ms. Ha pointed out these deficiencies in her response, and Signal Electric did not—or more likely could not—correct them with its reply. Therefore, there is nothing in the record before this Court contradicting the evidence that Mr. Tracy had both express and implied authority to accept service of process, and this is ultimately fatal to Signal Electric's challenge to personal jurisdiction.

Second, Signal Electric failed to provide substantial evidence supporting a *prima facie* defense to Ms. Ha's claims. Signal Electric

simply blamed other parties for contributing to the accident that caused Ms. Ha's injuries, without explaining how the conduct of those parties absolves Signal Electric of all liability in this case. The fact that other parties contributed to the accident could have given rise to joint and several liability and claims for contribution, but it is not a *prima facie* defense on the merits, and in fact Signal Electric's own attorneys previously certified pursuant to CR 11 that they believe Signal Electric is responsible for some portion of Ms. Ha's injuries and resulting damages.[1]

Third, Signal Electric cannot establish mistake, inadvertence, or excusable neglect because it knowingly and willfully allowed the entry of an Order of Default and a Default Judgment.

Fourth, Signal Electric did not act with due diligence because it waited ***eight months*** before taking any steps to address the Order of Default that was entered in August 2012, and ***three months*** before taking any steps to address the Default Judgment that was entered in January 2013.

Fifth, Signal Electric failed to establish that Ms. Ha would suffer no hardship if the default were overturned. Indeed, the record contains undisputed evidence that overturning the default would substantially delay

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[1] As discussed below, Signal Electric's attorneys previously represented a different defendant ***in this exact same lawsuit.*** During the course of that representation, they signed and filed an answer to the first amended complaint, in which they specifically alleged that ***"Plaintiff's damages, if any, were the fault of other parties and entities ... including co-defendants, Signal Electric, Inc., and the City of Seattle."*** When that defendant was later dismissed, the attorneys apparently switched sides and began representing Signal Electric, but that does not mean they can ignore their own prior statements regarding Signal Electric's liability.

any resolution of this case, and it would also make it necessary for Ms. Ha to re-commence litigation against other parties who were previously dismissed without prejudice, which may require her to pay various expenses.

Sixth, Signal Electric cannot establish that there are extraordinary circumstances that warrant the exercise of discretion under CR 60(b)(11) where, as here, Signal Electric made a deliberate choice not to participate in this lawsuit.

For these and other reasons set forth below, this Court must reverse the trial court's decision and reinstate the Order of Default and the Default Judgment.

II. ASSIGNMENTS OF ERROR

The trial court erred by granting Signal Electric's motion to vacate and by vacating the Order of Default and the Default Judgment. Because the trial court failed to explain the basis for its ruling, this Court must address six different issues pertaining to this assignment of error. These issues are set forth below.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Tracy had express and/or implied authority to accept service of process on Signal Electric's behalf when (a) Signal Electric had given Mr. Tracy and Crocker Law Group express written authority to "take all actions necessary to protect and preserve [the] bankruptcy estate," and to undertake "the defense of any action commenced against [Signal Electric], negotiations concerning the

litigation ... and the compromise or settlement of claims;" (b) Mr. Tracy had accepted service of process on Signal Electric's behalf in other cases; (c) Mr. Tracy had verified in writing that he had the authority to accept service of process on Signal Electric's behalf in other cases; and (d) Mr. Tracy verified in writing that he had the authority to accept service of process on Signal Electric's behalf in the present case.

2. Whether Signal Electric failed to provide substantial evidence supporting a *prima facie* defense to Ms. Ha's claims when Signal Electric failed to explain how the conduct of other parties absolves it of all liability in this case, and Signal Electric's own attorneys previously certified pursuant to CR 11 that they believe Signal Electric is responsible for some portion of Ms. Ha's injuries and resulting damages.

3. Whether Signal Electric failed to establish that its failure to defend was due to mistake, inadvertence, or excusable neglect when Signal Electric knowingly and willfully allowed the entry of an Order of Default and a Default Judgment.

4. Whether Signal Electric failed to act with due diligence when it waited eight months before taking steps to vacate the Order of Default entered in August 2012, and three months before taking steps to vacate the Default Judgment that was entered in January 2013.

5. Whether Signal Electric failed to establish that Ms. Ha would suffer no hardship when the record contains undisputed evidence that overturning the default would substantially delay any resolution of this case, and it would also make it necessary for Ms. Ha to re-commence

litigation against other parties who were previously dismissed without prejudice, which may require her to pay various expenses.

6. Whether Signal Electric failed to establish that there are extraordinary circumstances that warrant the exercise of discretion under CR 60(b)(11) when Signal Electric made a deliberate choice not to participate in this lawsuit.

IV. STATEMENT OF THE CASE

A. The Accident

On October 28, 2010, the City of Seattle was having construction work performed at the intersection of 1st Avenue South and South Massachusetts Street in Seattle, Washington. (CP 3, 14, and 94.) The purpose of the construction project was to install a traffic signal at the intersection. (CP 3, 15, and 94.) Construction work included concrete removal and restoration of sidewalks and roadway pavement on all four corners of the intersection, and trenching and installation of pedestrian signal poles and a signal controller cabinet. (CP 3, 15, and 94.) The construction work was being performed by Signal Electric. (CP 3, 15, and 94.)

AEG Live NW, LLC, d/b/a Showbox SODO ("Showbox") is a concert venue located at the intersection where construction was taking place. (CP 4, 15, and 94.) On October 28, 2010, the Showbox hosted a concert attended by a large crowd of people, including Ms. Ha. (CP 4, 15, and 94.) When the concert ended at approximately 10:45 p.m., Ms. Ha and the rest of the crowd exited the venue. (CP 4, 15, and 94.)

After exiting the Showbox, Ms. Ha and others walked to the southeast corner of the intersection and began walking westbound across 1st Avenue South. (CP 4, 15, and 94.) While they were crossing, a vehicle driven by Juanita Mars approached the intersection, failed to stop, and struck Ms. Ha and several other people who were in the crosswalk. (CP 4, 15-16, and 94-95.)

B. Ms. Ha's Injuries

The collision caused injuries throughout Ms. Ha's body, including but not limited to bilateral femur fractures, head trauma, facial trauma, injuries to her back, injuries to her hips, and injuries to her knees, and abrasions, bruising, and swelling in these and other parts of her body. (CP 95-97 and 119-22.)

Ms. Ha spent 8 days at Harborview Medical Center, where she had multiple surgeries; she spent another 47 days in a skilled nursing facility while she regained the ability to walk; and she endured many months of physical therapy. (CP 95-97 and 119-22.) To date, Ms. Ha has incurred a total of $197,511.22 in medical expenses as a result of the accident. (CP 97.)[2]

C. The Lawsuit

On February 24, 2012, Ms. Ha filed a Complaint for Damages ("Complaint") alleging claims against Ms. Mars, the Showbox, the City of Seattle, and Signal Electric. (CP 1-9 and 97.) On March 1, Ms. Ha filed a

[2] Ms. Ha's physical injuries and resulting damages are not at issue in this appeal, so they are not described at length herein. For a more complete description of Ms. Ha's physical injuries and resulting damages, *see* CP 95-97 and 119-22.

First Amended Complaint for Damages ("First Amended Complaint") that corrected Ms. Mars's legal name and aliases, but otherwise alleged the exact same claims. (CP 12-20 and 97.)

In the Complaint and the First Amended Complaint, Ms. Ha alleged that Signal Electric acted negligently by, among other things, engaging in the following misconduct:

1. Creating an unsafe condition for Ms. Ha;
2. Failing to exercise ordinary care for the safety of Ms. Ha;
3. Failing to properly design, construct, and/or maintain the property in and around the intersection of 1st Avenue South and South Massachusetts Street in Seattle, Washington (*i.e.*, lighting, sidewalks, crosswalks, streets, signage, traffic signals, etc.);
4. Failing to properly ensure and maintain the safety of the property in and around the intersection of 1st Avenue South and South Massachusetts Street in Seattle, Washington; and
5. Failing to ensure compliance with all laws, rules, and regulations applicable to the construction work it was performing.

(CP 6, 17-18, and 97-98.)

Ms. Ha further alleged that as a direct, foreseeable, and proximate result of Signal Electric's negligence, she suffered "special, incidental, and consequential damages and injuries, including but not limited to physical injuries, pain and suffering, emotional distress, mental anguish, humiliation, embarrassment, wage loss, economic damages, and other damages and injuries in an amount to be proven at trial." (CP 7, 18, and 98.)

Based upon these allegations, Ms. Ha requested relief in the form of an order declaring that Signal Electric's conduct was unlawful, and that Signal Electric was liable for the conduct described, referred to, and/or otherwise challenged in the Complaint and the First Amended Complaint. (CP 8, 19, and 98.) Ms. Ha also requested entry of judgment against Signal Electric for damages, including but not limited to physical injuries, pain and suffering, emotional distress, mental anguish, humiliation, embarrassment, loss of consortium, wage loss, economic damages, and other damages and injuries in an amount to be proven at trial. (CP 8, 19, and 98.) Finally, Ms. Ha requested an award of costs and expenses, attorneys' fees, pre-judgment and post-judgment interest, and other penalties as allowed by law. (CP 8, 19, and 98.)

D. Relief From the Bankruptcy Stay

Shortly after filing the First Amended Complaint, Ms. Ha discovered that Signal Electric had filed for Chapter 11 bankruptcy, which imposes an automatic stay of all collection efforts against a debtor. (CP 98-99, 134, and 327.) As a result, Ms. Ha was required to obtain an order from the bankruptcy court granting her relief from the bankruptcy stay before she could complete service of process or otherwise proceed with her superior court lawsuit against Signal Electric. (CP 99, 134, and 327.)

On June 14, 2012, Ms. Ha obtained relief from the bankruptcy stay for the purpose of establishing Signal Electric's liability for the accident and collecting the proceeds of any applicable insurance policy that might satisfy a portion of Ms. Ha's claims. (CP 165-66 and 354-55.) She then

resumed her efforts to complete service of process by asking Signal Electric's attorney if he could accept service of process on Signal Electric's behalf. (CP 99, 134-35, and 327.)

E. Mr. Tracy Had Authority to Accept Service of Process

Signal Electric was represented in the bankruptcy action by Mr. Tracy and his law firm, Crocker Law Group. (CP 99, 134-35, 327, 357-61, and 363-64.) Back in March 2011, shortly after filing for bankruptcy, Signal Electric had petitioned the bankruptcy court to appoint Crocker Law Group as its counsel under § 327 of the United States Bankruptcy Code because the firm had substantial experience in both bankruptcy law and "commercial litigation." (CP 357-61.) This petition was signed by Jerry Kittelson as President of Signal Electric. (CP 357-61.)

Because of the firm's experience in both bankruptcy law and "commercial litigation," Signal Electric asked the bankruptcy court to appoint Crocker Law Group to "take ***all actions*** necessary to protect and preserve [the] bankruptcy estate," and to ***"undertake, in conjunction as appropriate with special litigation counsel, the defense of any action commenced against [Signal Electric], negotiations concerning the litigation in which [Signal Electric] is involved, ... and the compromise or settlement of claims."*** (CP 357-61 (emphasis added).) Signal Electric also wanted Crocker Law Group to ***prepare all "answers ... required from [Signal Electric],"*** wherein objections to service of process may be waived. (CP 357-61 (emphasis added).) In other words, Signal Electric wanted Crocker Law Group to defend every action brought against the

company, and Signal Electric wanted to ensure that Crocker Law Group had unusually broad authority to carry out every aspect of that representation, ***including the authority to answer complaints and waive service of process, and the authority to compromise and settle claims.*** (CP 357-61.)

The bankruptcy court ultimately approved the appointment of Crocker Law Group on these terms, and Signal Electric retained Crocker Law Group on these terms. (CP 363-64.)

There can be no question that the authority Signal Electric granted Crocker Law Group included the authority to accept service of process ***because Signal Electric subsequently allowed Crocker Law Group to accept service of process in two different state court lawsuits just months before Crocker Law Group did so in the present case.***

1. OMA Construction, Inc. v. Signal Electric, Inc.

On December 23, 2011, Mr. Tracy received a summons and complaint in a case filed by OMA Construction, Inc. against Signal Electric in King County Superior Court. (CP 395.) After corresponding with Signal Electric, Mr. Tracy executed a document entitled "Acceptance of Service on Behalf of Defendant Signal Electric, Inc." (CP 395 and 430-31.) ***In that document, he stated that he was "authorized to accept service of said pleading on behalf of the Defendant [Signal Electric]," and that he did accept service of process on behalf of Signal Electric.*** (CP 430-31 (emphasis added).)

2. Washington Industrial Coatings, Inc. v. Signal Electric, Inc.

Then, on February 3, 2012, Mr. Tracy received a summons and complaint in a case filed by Washington Industrial Coatings, Inc. against Signal Electric in Thurston County Superior Court. (CP 443.) Mr. Tracy promptly sent the documents to Signal Electric for review, and on February 13, 2013, Mr. Tracy executed a document entitled "Acceptance of Service of Complaint for Damages Against Payment Bond and Foreclosure of Lien Against Retained Percentage and Summons by Signal Electric." (CP 443 and 472-73.) ***In that document, he once again stated that he was "authorized to accept service of these pleadings on behalf of this Defendant [Signal Electric]," and that he did in fact accept service of process on behalf of Signal Electric.*** (CP 472-73 (emphasis added).)

So, in addition to the express authority that Signal Electric gave to Crocker Law Group, there was also a course of dealing between the two whereby Signal Electric impliedly authorized Crocker Law Group to accept service of process on its behalf.

These facts serve as the backdrop against which Mr. Tracy's acceptance of service in the present case must be analyzed.

F. Service of Process on Signal Electric

As indicated previously, after obtaining relief from the bankruptcy stay, Ms. Ha asked Mr. Tracy if he could accept service of process on Signal Electric's behalf. (CP 99, 134-35, and 328.) Mr. Tracy agreed, so Ms. Ha sent him a Summons, a copy of the Complaint, a copy of the First Amended Complaint, a copy of the Order Setting Civil Case Schedule,

and a pleading entitled "Acceptance of Service of Summons and Complaint." (CP 99, 134-35, 168, 328, and 475.)

On July 11, 2012, Mr. Tracy executed the Acceptance of Service of Summons and Complaint, just as he had done in other cases. (CP 88-89, 170-71, and 477-78.) The document states as follows:

> ***I, J. Todd Tracy, am one of the attorneys representing defendant Signal Electric, Inc. ("Signal Electric") in the above-captioned lawsuit, and I have the authority to accept and/or waive service of process on its behalf.***
>
> On July 11, 2012, I received a Summons directed to Signal Electric and a copy of the Complaint in the above-captioned lawsuit. ***Signal Electric hereby agrees that delivery of the Summons and the Complaint to me constitutes proper service of process, and that service of process upon Signal Electric was completed on July 11, 2012. In doing so, Signal Electric hereby waives any and all defenses related to the sufficiency of process, the sufficiency of service of process, and personal jurisdiction.***

(CP 88-89, 170-71, 477-78 (emphasis added).)

G. Order of Default Against Signal Electric

On August 1, 2012, Ms. Ha's counsel, Doug McDermott, sent Mr. Tracy an e-mail requesting an answer to the complaint. (CP 135, 173, 328, and 480.) ***Mr. McDermott did not receive any response to this e-mail.*** (CP 135 and 329.)

On August 16, 2012, Ms. Ha moved for an Order of Default against Signal Electric due to its failure to answer the complaint. (CP 64-67, 100, 135, and 329.) The motion was served on all parties, including Signal Electric, and it was noted for hearing on August 24. (CP 64-67, 100, 135, 175, 329, and 482.)

On August 24, 2012—the date the motion for default was scheduled to be heard—Mr. Tracy sent the following e-mail to Mr. McDermott asking about the motion for default:

> Did the Insurance Company ever show up in this case. We sent them everything but never heard anything from them....

(CP 135, 177, 329, and 484.) Mr. Tracy sent this e-mail at 3:25 p.m. (CP 135, 177, 329, and 484.)[3]

Although Mr. McDermott was out of the office when he received this e-mail, he responded within minutes stating "Not to my knowledge." (CP 135, 179, 329, and 486.) ***Mr. McDermott did not receive any reply.*** (CP 135 and 329.)

Mr. McDermott then forwarded Mr. Tracy's e-mail to Jeremy Bartels, a former Associate at Mr. McDermott's office, with a note stating "[s]ee below and talk to him before default pls." (CP 135, 181, 329, and 488.) Accordingly, at approximately 4:00 p.m. that afternoon, Mr. Bartels called Mr. Tracy and left him a voicemail stating that neither he nor Mr. McDermott had heard from the insurance company, and that the motion for default was scheduled for hearing that very day. (CP 130-31, 135-36, and 329.) ***Neither Mr. Bartels nor Mr. McDermott received any***

[3] Although not relevant to this appeal, the insurance company did not respond to Mr. Tracy because it apparently believed that the insurance policy had expired and that the loss therefore was not covered. Ms. Ha maintains that the insurance company violated its duty to its insured by ignoring this claim, and upon reinstatement of the Default Judgment Ms. Ha intends to pursue all available remedies to collect the Default Judgment from the proceeds of this insurance policy and any other insurance policy that might satisfy a portion of Ms. Ha's claims.

response to this voicemail or any further inquiries regarding the motion for default. (CP 131, 136, and 329.)

On August 27, 2012, the trial court signed an order granting Ms. Ha's motion for default. (CP 74-75, 183-86, and 490-93.) The Order of Default was entered on August 28, 2012. (CP 74-75, 183-86, and 490-93.)

H. Ms. Ha Served the Order of Default on All Parties

Ms. Ha's counsel received the Order of Default on or about September 4, 2012 and promptly served it on all other parties. (CP 100, 136, 188, 329, and 495.) Signal Electric received the Order of Default on September 5, 2012. (CP 100, 136, 188, 329, and 495.) ***Signal Electric, however, did nothing in response.*** (CP 136 and 330.) ***Signal Electric and its counsel took no steps to set aside or otherwise address the Order of Default. They just ignored it.*** (CP 136 and 330.)

I. Dismissal of Ms. Mars, the Showbox, and the City of Seattle

On November 20, 2012, Ms. Ha filed a Motion for Partial Voluntary Dismissal Under CR 41(a)(1)(B) seeking to voluntarily dismiss her claims against Ms. Mars, the Showbox, and the City of Seattle. (CP 77-80, 100, 136, and 330.) On December 3, 2012, the trial court granted that motion. (CP 84-87, 100, 136, 190-93, 330, 497-500.) Accordingly, Signal Electric is the only remaining defendant in this lawsuit. (CP 84-87, 100, 136, 190-93, 330, 497-500.)[4]

[4] Before the Showbox was dismissed, it was represented by Lee Smart, which now represents Signal Electric. (CP 330 and 506-12.)

J. Default Judgment

On January 11, 2013, Ms. Ha moved for entry of a default judgment. (CP 104-18 and 330.) The trial court subsequently entered judgment in the amount of $2,199,501.86. (CP 90-92 and 93-103.)

On January 29, 2013, Ms. Ha forwarded the default judgment to Signal Electric. (CP 330.) On February 25, 2013—nearly ***two months*** after entry of the Default Judgment—Signal Electric's insurance company informed Ms. Ha that it was appointing additional counsel for Signal Electric. (CP 330.) Signal Electric then waited ***two additional months*** before filing a motion to vacate the Order of Default and the Default Judgment. (CP 330.) So altogether, Signal Electric waited ***eight months*** before taking any steps to address the Order of Default that was entered in August 2012, and ***three months*** before taking any steps to address the Default Judgment that was entered in January 2013. (CP 330.)

K. Signal Electric's Motion to Vacate

Signal Electric eventually filed a motion to vacate the Order of Default and the Default Judgment on May 2, 2013. (CP 216-27.) In its motion to vacate, Signal Electric argued (1) that the trial court did not have personal jurisdiction over Signal Electric because Mr. Tracy lacked the authority to accept service of process; (2) that Signal Electric had a *prima facie* defense to Ms. Ha's claims because other parties contributed to the accident that caused Ms. Ha's injuries; (3) that Signal Electric's failure to defend was due to mistake, inadvertence, or excusable neglect; (4) that Signal Electric acted with due diligence once it learned of the

default; (5) that Ms. Ha would suffer no hardship if the default were overturned; and (6) that the trial court should exercise its discretion under CR 60(b)(11) and vacate the default to prevent an injustice. (CP 216-27.)

The trial court granted Signal Electric's motion without explaining the basis of its ruling and vacated both the Order of Default and the Default Judgment. (CP 541-43.) Ms. Ha appealed that ruling as a matter of right under RAP 2.2(a)(10). (CP 544-50.)

V. STANDARD OF REVIEW

There are several questions before this Court, and they are subject to different standards of review.

The primary question is whether the trial court had personal jurisdiction over Signal Electric, which turns on whether Mr. Tracy had express or implied authority to accept service of process on Signal Electric's behalf. This issue was the central focus of Signal Electric's motion to vacate (*see* CP 216-27), and the trial court's ruling on this issue is subject to *de novo* review.

"Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo." *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997); *see also Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 585, 225 P.3d 1035 (2010) ("We review de novo a trial court's denial of a motion to vacate a default judgment for lack of jurisdiction.").

The federal courts are in agreement that appellate courts must review *de novo* whether a default judgment is void for lack of personal jurisdiction due to insufficient service of process. *S.E.C. v. Internet Solutions for Business, Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007) ("We review de novo whether default judgment is void because of lack of personal jurisdiction due to insufficient service of process."); *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir. 1992) ("We also review de novo whether the earlier default judgment against Mason was void because the court lacked personal jurisdiction over Mason."); *Electrical Specialty Co. v. Road and Ranch Supply, Inc.*, 967 F.2d 309, 311 (9th Cir. 1992) ("The question whether the second default judgment was void for lack of personal jurisdiction is reviewed *de novo.*") (emphasis in original)).

Therefore, the central question on this appeal—whether the trial court had personal jurisdiction over Signal Electric—is subject to *de novo* review.

The other questions before the Court are (1) whether Signal Electric provided substantial evidence supporting a *prima facie* defense to Ms. Ha's claims; (2) whether Signal Electric's failure to defend was due to mistake, inadvertence, or excusable neglect; (3) whether Signal Electric acted with due diligence once it learned of the default; (4) whether Signal Electric established that Ms. Ha would suffer no hardship if the default were overturned; and (5) whether Signal Electric established that there are extraordinary circumstances that warrant the exercise of discretion under

CR 60(b)(11). The trial court's rulings on these issues are reviewed for abuse of discretion. *In re Estate of Stevens*, 94 Wn. App. 20, 29-30, 971 P.2d 58 (1999).

VI. LEGAL ARGUMENT

A. Mr. Tracy Had Authority To Accept Service of Process

As a general rule, an attorney has the authority "[t]o bind his or her client in any of the proceedings in an action or special proceeding by his or her agreement duly made." RCW 2.44.010(1); *see also Russell v. Maas*, 166 Wn. App. 885, 889-90, 272 P.3d 273 (2012). "An attorney may not, however, surrender a substantial right of a client without special authority granted by the client." *Russell*, 166 Wn. App. at 890.

"Substantial rights" include the right to service of process and the right to compromise or settle claims. *Id.* Accordingly, an attorney must have "special authority" from his or her client to accept and/or waive service of process and to compromise or settle a claim. *Id.*

"The critical inquiry in evaluating an attorney's authority to receive process is, of course, whether the client acted in a manner that expressly or impliedly indicated the grant of such authority." *In re Focus Media, Inc.*, 387 F.3d 1077, 1083 (9th Cir. 2004); *see also Vardanyan v. Port of Seattle*, No. C11-1224 RSM, 2012 WL 3278901, at *2 (W.D. Wash. Aug. 10, 2012) (*citing In re Focus Media, Inc.* for the proposition that "attorneys can have implied authority to accept service of process"); *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 58, 558 P.2d 764 (1977) ("However, it is not necessary that express authority to receive

or accept service of process shall have been conferred by the corporation on the person served. It is sufficient if authority to receive service may be reasonably and justly implied.").[5]

In the present case, Signal Electric acted in a manner that both expressly and impliedly indicated that Crocker Law Group had the authority to accept service of process on Signal Electric's behalf.

1. Express Authority

As indicated above, when Signal Electric retained Crocker Law Group, Signal Electric gave it express written authority to "take ***all actions*** necessary to protect and preserve [the] bankruptcy estate," and because of Crocker Law Group's experience in both bankruptcy law and "commercial litigation," Signal Electric gave it additional authority to engage in the following conduct:

1. To undertake the defense of ***"any action"*** commenced against Signal Electric;
2. To handle ***"negotiations"*** concerning litigation in which Signal Electric is involved;
3. To prepare all ***"answers"*** required from Signal Electric (wherein objections to service of process may be waived); and
4. To ***"compromise or settle"*** claims against Signal Electric.

[5] Although *In re Focus Media, Inc.* and *Vardanyan* are federal cases, "the authority of an agent (a lawyer is just a specialized agent) derives from state law." *Mallott & Peterson v. Director, Office of Workers' Comp. Programs, Dep't of Labor*, 98 F.3d 1170, 1173 n.2 (9th Cir. 1996) *rev'd on other grounds by Price v. Stevedoring Servs. of Am., Inc.*, 697 F3d 820 (9th Cir. 2012); *see also Anand v. California Dept. of Developmental Servs.*, 626 F. Supp. 2d 1061, 1064-68 (E.D. Cal. 2009). Therefore, the rulings in those two cases are relevant and applicable herein.

(CP 357-61.)

Given this language, there can be no dispute that Signal Electric gave Crocker Law Group extremely broad authority to handle every aspect of litigation brought against the company, and although service of process is not specifically referenced, there are three reasons why this express grant of authority did in fact include the authority to accept service of process on Signal Electric's behalf.

First, Signal Electric gave Crocker Law Group the authority to take "all actions" necessary to protect and preserve the bankruptcy estate, and to defend "any action" against the company. This essentially removed any limitation on Crocker Law Group's authority with respect to claims that could impact the estate. So when Ms. Ha came forward with a claim that could impact the estate, Mr. Tracy was expressly authorized to take "all actions" with respect to that claim, which would include accepting service of process, and he was also authorized to defend against that claim, and accepting service of process was a necessary incident to that.

Second, Signal Electric gave Crocker Law Group the authority to prepare answers to complaints, which would have included the authority to handle matters typically addressed in answers, including asserting and/or waiving affirmative defenses like service of process and personal jurisdiction. *Lybbert v. Grant County, State of Washington*, 141 Wn.2d 29, 38-40 (2008). Indeed, it would have made little sense for Signal Electric to give Crocker Law Group express authority to prepare the very documentation where affirmative defenses are addressed, while secretly

retaining for itself the right to assert and/or waive objections to service of process and personal jurisdiction.

Third, Signal Electric gave Crocker Law Group the authority to handle negotiations and, importantly, the authority to compromise and settle claims. The authority to compromise and settle claims necessarily includes the authority to waive claims, which is exactly what Mr. Tracy did when he executed the Acceptance of Service of Summons and Complaint, which states that "Signal Electric hereby waives any and all defenses related to the sufficiency of process, the sufficiency of service of process, and personal jurisdiction." Therefore, there can be no question that Mr. Tracy acted within the scope of his express authority when he accepted service of process and agreed to "compromise or settle" Signal Electric's objections relating to service of process and personal jurisdiction.

Signal Electric's intent to give Crocker Law Group express authority to accept service of process is further evidenced by the conduct of Mr. Tracy. As indicated previously, Mr. Tracy accepted service of process on Signal Electric's behalf on at least two other occasions just a few months before he was asked to do so in this case. On both occasions, Mr. Tracy verified in writing that he was "authorized to accept service." (CP 430-31 and 472-73.)

Mr. Tracy then accepted service of process in this case, he verified for the third time that he had the authority to accept service of process, and he specifically waived all of Signal Electric's defenses related to the

sufficiency of process, the sufficiency of service of process, and personal jurisdiction. So Mr. Tracy clearly believed that he had the authority to accept service of process on Signal Electric's behalf and waive certain jurisdictional defenses, and although the scope of an agent's authority cannot be determined solely by the acts and conduct of the agent, Mr. Tracy's conduct is certainly relevant to the inquiry.

Ultimately, there is a substantial amount of evidence in the record demonstrating that Signal Electric's express grant of authority to Crocker Law Group included the authority to accept service of process, and, just as importantly, ***there is nothing in the record to suggest otherwise.***

When Signal Electric moved the trial court to vacate the Order of Default and the Default Judgment, Signal Electric submitted declarations from Mr. Kittelson and Mr. Tracy, ***but neither of these declarations stated that Crocker Law Group lacked the authority to accept service of process.***

Mr. Kittelson stated in his declaration that "[d]uring July 2012, I was not asked to authorize J. Todd Tracy to accept service of a personal injury claim by Judy Ha on Signal Electric, Inc.'s behalf." (CP 321.) *But he conspicuously did not deny giving Crocker Law Group the authority to accept service of process when he hired the firm back in March 2011, and he also did not affirmatively state that Crocker Law Group lacked the authority to accept service of process. He simply dodged the issue by focusing exclusively on the events that took place in July 2012.* (CP 320-21.)

Mr. Tracy did the same, stating in his declaration that although he accepted service of process, he "did not intend to be signing as counsel for the Defendant, Signal Electric, Inc." (CP 288.) *But Mr. Tracy did not state that he lacked the authority to accept service of process.* (CP 287-88.)

Ms. Ha pointed out these deficiencies when she responded to the motion to vacate, and Signal Electric did not—or more likely could not—correct them with its reply.

If the truth had not been an obstacle, Signal Electric would have submitted a reply declaration from Mr. Kittelson clarifying unequivocally that Signal Electric *never* gave Crocker Law Group the authority to accept service of process. Signal Electric also would have submitted a reply declaration from Mr. Tracy stating that Crocker Law Group was *never* authorized to accept service of process on Signal Electric's behalf. Signal Electric obviously had access to the critical witnesses on this issue, but apparently neither of them was willing or able to testify under oath in support of Signal Electric's position.

The fact that nobody was willing to make a simple statement, under oath, that Crocker Law Group lacked the authority to accept service of process on Signal Electric's behalf completely undermines Signal Electric's position and is ultimately fatal to its argument that the trial court lacked personal jurisdiction.

2. Implied Authority

In addition to express authority, there was also a course of dealing between Signal Electric and Crocker Law Group, whereby Signal Electric impliedly authorized Crocker Law Group to accept service of process on its behalf.

When determining whether an agent has implied authority to accept service of process, "[t]he question turns on the character of the agent, and, in the absence of express authority given by the corporation, on a review of the surrounding facts and the inferences which may properly be drawn therefrom." *Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 58, 558 P.2d 764 (1977) (internal quotations and citation omitted); *see also Reiner v. Pittsburg Des Moines Corp.*, 101 Wn.2d 475, 477-78, 680 P.2d 55 (1984) (*relying on Johanson v. United Truck Lines*, 62 Wn.2d 437, 383 P.2d 512 (1963)).

"An attorney's activities on behalf of a client in proceedings in one court may indicate implied authority to receive service of process in integrally related litigation in another court." *In re Focus Media, Inc.*, 387 F.3d 1077, 1083 (9th Cir. 2004) (*quoting Luedke v. Delta Air Lines, Inc.*, 159 B.R. 385, 395 (Bankr. S.D.N.Y. 1993); *see also United States v. Bosurgi*, 343 F. Supp. 815, 817-18 (S.D.N.Y. 1972). Indeed, "the basic concept that a party's bankruptcy attorney can be authorized impliedly to accept service of process on the client's behalf in a related adversary proceeding is neither novel nor inconsistent with general principles of agency law." *In re Focus Media, Inc.*, 387 F.3d at 1082 (*citing*

Restatement (Second) of Agency § 7 cmt. c (noting that actual authority may be conferred either expressly or by implication), § 34 (stating that the nature and extent of authorization conveyed by principal to agent is "interpreted in light of all accompanying circumstances.")).

"In order to find implied authority to accept service of process, ... 'the record must show that the attorney exercised authority beyond the attorney-client relationship, including the power to accept service.'" *In re Focus Media, Inc.*, 387 F.3d at 1082 (*quoting United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997); *see also Crose*, 88 Wn.2d at 58. ***In the present case, that is precisely what Mr. Tracy did when he accepted service of process in two other superior court cases.***

Signal Electric knowingly allowed Mr. Tracy to accept service of process in two different state court lawsuits just months before Mr. Tracy did so in this case. By engaging in this course of conduct, Signal Electric gave Crocker Law Group implied authority to accept service of process in the present case as well.

All of the "surrounding facts and the inferences which may properly be drawn therefrom" support this conclusion. *Crose*, 88 Wn.2d at 58 (internal quotations and citation omitted). As indicated above, Signal Electric gave Crocker Law Group extremely broad authority to take "all actions" to protect the bankruptcy estate, to defend "any action" commenced against the company, to prepare answers to complaints, and to compromise and settle claims. Signal Electric then knowingly allowed Crocker Law Group to accept service of process, Mr. Tracy verified on

three separate occasions that he had the authority to accept service of process, and there is no evidence in the record disputing the fact that Mr. Tracy had the authority to accept service of process. Under these circumstances, there can be no question that in addition to express authority, Signal Electric also gave Crocker Law Group implied authority to accept service of process on its behalf.

Because the facts clearly demonstrate that Crocker Law Group had both express and implied authority to accept service of process, the trial court erred to the extent that it vacated the Order of Default and the Default Judgment for lack of personal jurisdiction. Accordingly, on *de novo* review, the Court must reverse the trial court's decision and issue a ruling clarifying that the trial court had personal jurisdiction over Signal Electric.

B. Signal Electric Failed to Meet the Requirements for Vacating a Default Judgment

Having determined that the trial court had personal jurisdiction over Signal Electric, the next step is to determine whether Signal Electric satisfied the requirements for vacating a default judgment.

While it is typically preferable to resolve cases on their merits, "we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). "[T]he need for a responsive and responsible legal system

mandates that parties comply with a judicial summons." *Johnson v. Cash Store*, 116 Wn. App. 833, 840-41, 68 P.3d 1099 (2003).

"Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted." *Id.* at 841. Accordingly, a court should not vacate a default judgment unless the moving party can establish the following four factors:

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

Little, 160 Wn.2d at 703-04.

These four factors are not weighted equally. Factors (1) and (2) are primary, while factors (3) and (4) are secondary. *Johnson*, 116 Wn. App. at 841. Moreover, when considering the two primary factors, "[i]f a 'strong or virtually conclusive defense' is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, *provided the moving party timely moved to vacate and the failure to appear was not willful.*" *Id.* (*quoting White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)) (emphasis added). "However, when the moving party's evidence supports no more than a prima facie defense, *the reasons for the failure to timely appear will be scrutinized with greater care.*" *Johnson*, 116 Wn. App. at 842 (emphasis added).

1. Signal Electric Failed to Provide Substantial Evidence Supporting a *Prima Facie* Defense

"A party moving to vacate a default judgment must be prepared to show ... that there is ***substantial evidence*** supporting a prima facie defense." *Little*, 160 Wn.2d at 703-04 (emphasis added). "To establish a prima facie defense, the affidavits submitted to support vacation of a default judgment must precisely set out the facts or errors constituting a defense and cannot rely merely on allegations and conclusions." *Johnson*, 116 Wn. App. at 847. If a party fails to produce substantial evidence supporting a *prima facie* defense, "the default judgment of liability must stand." *Calhoun v. Merritt*, 46 Wn. App. 616, 620, 731 P.2d 1094 (1986).

In the present case, Signal Electric did not come close to meeting this standard. Signal Electric's *entire* argument setting forth its defense is as follows:

> Signal Electric is not the cause of the plaintiff's injuries. Juanita Mars is. Ms. Mars struck Ms. Ha with her truck as the plaintiff was crossing the street in a group of people. When she pleaded guilty to vehicular assault, Ms. Mars admitted that she had been drunk while driving, had not been focusing on her driving, and had failed to slow while approaching the intersection where she struck Ms. Ha. The sole cause of the plaintiff's injuries was Ms. Mars's negligence. Signal Electric should be allowed to defend against the plaintiff's claims.

(CP 225-26.)

So Signal Electric blamed Ms. Mars for contributing to the accident, but Signal Electric did not explain—or cite any authority explaining—how Ms. Mars's conduct somehow absolves it of all liability in this case. Signal Electric at best set forth a conclusory argument that

could have given rise to joint and several liability and claims for contribution, but by no means did Signal Electric produce *substantial evidence* supporting a *prima facie* defense on the merits, let alone a strong or virtually conclusive defense.

And Signal Electric could not legitimately take the position that it bears no liability for the accident after its own attorneys certified, pursuant to CR 11, that they have a good faith belief, well-grounded in fact, that Signal Electric is responsible for some portion of Ms. Ha's damages. (CP 506-12.)

Because Signal Electric failed to produce substantial evidence supporting a *prima facie* defense, the trial court abused its discretion to the extent that it found the first factor satisfied and vacated the Order of Default and the Default Judgment on this basis. Accordingly, Court must reverse the trial court's decision and issue a ruling clarifying that Signal Electric failed to satisfy its burden of producing substantial evidence supporting a prima facie defense.[6]

Although Signal Electric's failure to produce substantial evidence supporting a *prima facie* defense technically ends the inquiry, Ms. Ha will analyze the remaining three factors as though Signal Electric had in fact produced such evidence. As a preliminary matter, however, there are several important legal principles that the Court should keep in mind while

---

[6] Even if Signal Electric had established a strong or virtually conclusive defense—though it clearly did not—the trial court's decision to vacate the Order of Default and the Default Judgment still must be reversed because Signal Electric did not timely move to vacate (*see infra* section VI.B.3), and Signal Electric's failure to appear was willful (*see infra* section VI.B.2).

analyzing the second factor (mistake, inadvertence, or excusable neglect) and the third factor (due diligence).

"Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The 'sins of the lawyer' are visited upon the client." *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002) (footnote omitted). Accordingly, "the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action." *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn. App. 819, 838, 970 P.2d 803 (1999) *aff'd,* 140 Wash. 2d 568, 998 P.2d 305 (2000).

In addition, "[k]knowledge by the attorney is imputed to the client." *Hill v. Department of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978). Therefore, [i]t is a general rule that notice to the attorney is notice to his client." *Schwabacher Bros. & Co. v. Orient Ins. Co.*, 101 Wn. 449, 452, 172 P. 568 (1918).

These legal principles are significant because Signal Electric has previously tried to distance itself from Mr. Tracy's conduct and Mr. Tracy's knowledge. Signal Electric has argued that the Order of Default and the Default Judgment should be vacated because Signal Electric's *own* conduct did not rise to the level of inexcusable neglect (the second factor), and Signal Electric *itself* was diligent in moving to vacate because it did not find out about the default until much later than Mr. Tracy (the third factor). (CP 226-27.) But these arguments are legally incorrect.

If the Court determines, as it should, that Crocker Law Group had express and/or implied authority to accept service of process, then Mr. Tracy was acting in all respects as Signal Electric's attorney in this case, his actions were binding on Signal Electric as a matter of law, and his knowledge of the default was imputed to Signal Electric as a matter of law.

With this in mind, Ms. Ha will proceed to address the remaining three factors.

2. Signal Electric's Failure to Defend Was Not Caused by Mistake, Inadvertence, or Excusable Neglect

"If a company fails to respond to a complaint because someone other than general counsel accepted service of process and then neglected to forward the complaint, the company's failure to respond is deemed due to inexcusable neglect." *Johnson*, 116 Wn. App. at 848 (*citing Prest v. American Bankers Life Assur. Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995)); *see also Brooks v. University City, Inc.*, 154 Wn. App. 474, 479, 225 P.2d 489 (2010).

In *Johnson*, the plaintiff filed a lawsuit against a store and served process on the store's manager, who in turn failed to forward the summons and complaint to the store's attorney. 116 Wn. App. at 839-40. When the store did not appear or respond, the trial court entered an order of default and a default judgment. *Id.* The store subsequently moved to vacate the default judgment and the trial court denied that motion, ruling that there

was no mistake or excusable neglect. *Id.* at 840. The Court of Appeals affirmed, ruling as follows:

> Ms. Fish's failure to forward the summons and complaint to corporate counsel or to the Cottonwood administration—and her unexplained failure to forward the notice of a default hearing—constituted at least inexcusable neglect, if not willful noncompliance.

Id. at 848-49.

The exact same thing happened in *Brooks*. The plaintiff filed a lawsuit against a company and served process on the company's registered agent, who in turn failed to forward the summons and complaint to the company's legal department. *Brooks*, 154 Wn. App. at 476-77. The company did not appear or respond, so the trial court entered a default judgment. *Id.* The trial court subsequently denied a motion to vacate the default judgment, ruling that there was no excusable neglect, and the Court of Appeals affirmed. *Id.* at 479-80.

These cases make it clear that if someone within a company accepts service of process and neglects to forward the complaint to general counsel, the company's failure to respond is "deemed due to inexcusable neglect" as a matter of law. *Johnson*, 116 Wn. App. at 848. Therefore, in cases like this one, ***where general counsel was the one who actually accepted service of process, there can be no legitimate dispute that Signal Electric's failure to appear was due to inexcusable neglect.*** *Rivers*, 145 Wn.2d at 679 ("Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity."); *M.A. Mortenson*, 93 Wn. App. at 838 ("[T]he incompetence or

neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action.")

Courts refuse to find mistake, inadvertence, and excusable neglect where, as here, the defendant simply refuses to participate in the lawsuit. For example, in *Little*, the court found that there was no mistake, inadvertence, surprise, or excusable neglect where the defendant "made the deliberate choice, after being told of the consequence by the trial judge, not to prevent default judgment by filing an answer." *Little*, 160 Wn.2d at 706. The court ruled that "[t]he decision not to participate does not meet the standard required." *Id.* This is precisely what Signal Electric did in the present case.

Signal Electric ignored a specific request by Ms. Ha to file an answer, it ignored a motion for default and allowed the entry of an Order of Default, and it ignored the Order of Default for four months and allowed the entry of a Default Judgment. Then it ignored the Default Judgment for another three to four months. Under these circumstances, Signal Electric's failure to respond cannot possibly be blamed on mistake, inadvertence, or excusable neglect. Signal Electric made a deliberate choice not to participate, and it is now stuck with the consequences of that decision.

The facts in the present case are surprisingly similar to those in *Pedersen v. Klinkert*, 56 Wn.2d 313, 314-15, 352 P.2d 1025 (1960), where the Washington Supreme Court outlined the following timeline of events:

> Respondent, an architect, brought an action alleging the 'agreed and reasonable value' of his services to be $6,589.93, of which $3,500 had been paid, and that there remained owing and unpaid the sum of $3,089.93.
>
> The order of events follows:
>
> July 1, 1957, Service of summons and complaint on appellants.
>
> July 22, 1957, Notice of appearance served on respondent's attorney. (Timely because the twentieth day, July 21, 1957, was on Sunday.)
>
> August 22, 1957, ***Letter sent to appellants' attorney requesting answer.***
>
> September 18, 1957, ***Motion and affidavit for default and notice of issue setting the hearing*** for September 23, 1957, served. (Hearing was continued for one week to September 30, 1957.)
>
> September 30, 1957, Order of default signed by the court and filed.
>
> October 1, 1957, ***Copy of order of default mailed to appellants' attorney.***
>
> October 9, 1957, Findings of fact, conclusions of law, and default judgment for $3,089.93 and costs signed and filed after the respondent had been sworn and testified after the respondent had been sworn and testified is this judgment which it is sought to vacate.)
>
> October 10, 1957, ***Copy of the judgment delivered to appellants' attorney.***
>
> May 5, 1958, Inquiry over the telephone by another attorney on behalf of the appellants regarding the judgment, which inquiry was fully answered.
>
> July 31, 1958, Proceedings instituted by appellants to set aside the default judgment of October 9, 1957. (This marks the entry of appellants' present counsel into this case.)

(Emphasis added).

Based upon these facts, the Washington Supreme Court ruled as follows:

> Clearly, there was no basis to claim mistake, inadvertence, surprise, excusable neglect, unavoidable casualty, or misfortune. There could be no claim of fraud, ***for the appellants were represented by counsel***, and, as the following record shows, ***the attorney for the respondent acted in good faith throughout and with meticulous fairness.***

Id. at 314.

As in *Pederson*, Ms. Ha acted in good faith throughout the proceedings and with meticulous fairness to Signal Electric, which was represented by counsel the entire time. Ms. Ha notified Signal Electric when the answer to the complaint was overdue, when the motion for default was filed, and when the Order of Default was entered. Ms. Ha notified Signal Electric again when the Default Judgment was entered. Ms. Ha did not act quickly or stealthily. Rather, she was very open and deliberate as she took the only legal steps available to her when Signal Electric refused to participate in the litigation.

As the above cases illustrate, Signal Electric's refusal to participate in the lawsuit must be "deemed due to inexcusable neglect" as a matter of law. And, where there is no excusable neglect, neither an order of default nor a default judgment can be vacated. *In re Estate of Stevens*, 94 Wn. App. at 30 ("But [the court] also found no excusable neglect, without which neither an order of default nor a default judgment can be vacated.").

Because there was no mistake, inadvertence, or excusable neglect, the trial court abused its discretion to the extent that it found the second

factor satisfied and vacated the Order of Default and the Default Judgment on this basis. Accordingly, the Court must reverse the trial court's decision and issue a ruling clarifying that Signal Electric's failure to defend was due to inexcusable neglect.

3. Signal Electric Did Not Act With Due Diligence

"A party must use diligence in asking for relief following notice of the entry of the default." *Gutz v. Johnson*, 128 Wn. App. 901, 919 (2005) (internal quotations and citations omitted). ***As a matter of law, "three months is not within a reasonable time to respond to an order of default."*** *In re Estate of Stevens*, 94 Wn. App. at 35 (emphasis added). Three months is also not within a reasonable time to respond to a default judgment. *Gutz*, 128 Wn. App. at 919. ***"Thus, a party that has received notice of a default judgment and does nothing for three months has failed to demonstrate due diligence."*** *Id.* (emphasis added).

In the present case, the following timeline of events is relevant to the due diligence inquiry:

1. September 4, 2012 – Ms. Ha sent Signal Electric a copy of the Order of Default.
2. January 29, 2013 – Ms. Ha sent Signal Electric a copy of the Default Judgment.
3. May 2, 2013 – Signal Electric filed a motion to vacate the Order of Default and the Default Judgment.

As indicated above, Signal Electric waited eight months before seeking relief from the Order of Default, and three months before seeking relief from the Default Judgment. As a matter of law, this was not within

a reasonable time to seek relief from default. *In re Estate of Stevens*, 94 Wn. App. at 35; *Gutz*, 128 Wn. App. at 919.

Because Signal Electric did not act with due diligence, the trial court abused its discretion to the extent that it found the third factor satisfied and vacated the Order of Default and the Default Judgment on this basis. Accordingly, the Court must reverse the trial court's decision and issue a ruling clarifying that Signal Electric did not act with due diligence in seeking to vacate or otherwise address the Order of Default and the Default Judgment.

4. Ms. Ha Would Suffer Hardship if the Default Were Overturned

The last factor for the Court to consider is the hardship that Ms. Ha would suffer if the Order of Default and the Default Judgment were overturned. The hardship factor is a secondary factor and, because Signal Electric has failed to establish the other three factors, it is of little significance in this case. Nonetheless, Ms. Ha would in fact suffer hardship if the Order of Default and the Default Judgment were vacated.

Ms. Ha has been litigating this case for more than a year, and vacating the Order of Default and the Default Judgment would force her to start that process all over again, substantially delaying any resolution of her claims.

More importantly, Ms. Ha would be required to re-commence litigation against the defendants that were previously dismissed without

prejudice (including Lee Smart's other client, the Showbox), and this may require her to pay various expenses.[7]

Because Ms. Ha would suffer hardship if the Order of Default and the Default Judgment were overturned, the trial court abused its discretion to the extent that it found the fourth factor satisfied and vacated the Order of Default and the Default Judgment on this basis. Accordingly, the Court must reverse the trial court's decision and issue a ruling clarifying that Ms. Ha would suffer hardship if the default were overturned.

C. Signal Electric Cannot Establish That There Are Extraordinary Circumstances That Warrant the Exercise of Discretion Under CR 60(b)(11)

In addition to challenging personal jurisdiction and moving to vacate the default under the standard four factor test, Signal Electric also asked the trial court to exercise its discretion under the catchall provision of CR 60(b)(11) and vacate the default to prevent an injustice. In doing so, however, Signal Electric failed to establish that there are extraordinary circumstances that warrant the exercise of discretion under CR 60(b)(11).

"CR 60(b)(11) authorizes a court to relieve a party from a final judgment, order or proceeding for '[a]ny other reason justifying relief from the operation of the judgment." *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996) (*quoting* CR 60(b)(11)). However, "[t]he use of CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of the rule."

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[7] Thus, when Signal Electric's attorneys asked the trial court to vacate the Order of Default and the Default Judgment, they requested relief that was directly adverse to the interests of their other client.

Id. (internal quotations and citations omitted). "These circumstances involve irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings." *Id.* (internal quotations and citations omitted).

While analyzing the requirements of CR 60(b)(11), the *Lane* court specifically ruled that "the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action." *Id.* Accordingly, Signal Electric cannot establish that there are extraordinary circumstances that warrant the trial court's exercise of discretion under CR 60(b)(11) where, as here, Signal Electric's attorney made a deliberate choice not to participate in this lawsuit.

As indicated above, Signal Electric cannot legally distance itself from the conduct of its attorney. Because Mr. Tracy was acting in all respects as Signal Electric's attorney in this case, his actions and inactions are binding on Signal Electric as a matter of law. *Rivers*, 145 Wn.2d at 679; *M.A. Mortenson*, 93 Wn. App. at 838.

Because Signal Electric cannot establish that there are extraordinary circumstances that warrant the trial court's exercise of discretion under CR 60(b)(11), the trial court abused its discretion to the extent that it vacated the Order of Default and the Default Judgment on this basis. Accordingly, the Court must reverse the trial court's decision and issue a ruling clarifying that the Order of Default and the Default Judgment cannot be vacated under the catchall provision of CR 60(b)(11).

VII. CONCLUSION

For all of the foregoing reasons, the Court must reverse the trial court's decision and reinstate the Order of Default and the Default Judgment.

Respectfully submitted this 2nd day of August, 2013.

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By _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on August 2, 2013, I caused a true and correct copy of the foregoing document to be filed with the Washington Court of Appeals, Division I, and to be served on the following in the manner indicated:

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Executed this 2nd day of August, 2013,
at Seattle, Washington.