SUPREME COURT OF WASHINGTON
CASE NO.: 94790-2

Court of Appeals, III District Court NO. 34201- 8-III

FRANK DECARO, as personal representative for the ESTATE OF JESSICA ALVARADO;

Plaintiff-Appellant,
v.

SPOKANE COUNTY,

Defendant-Respondent.

RESPONDENT/DEFENDANT SPOKANE COUNTY'S RESPONSE TO APPELLANT'S PETITION FOR REVIEW

EVANS, CRAVEN & LACKIE, P.S.
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I. IDENTITY OF RESPONDENT

Respondent Spokane County, through their undersigned counsel, Heather C. Yakely, respectfully requests that this Court deny review of the Court of Appeals decision affirming the ruling of the trial court that the default judgment entered against the County of Spokane should be set aside and hereby timely responds to Appellant's Petition accordingly.

II. INTRODUCTION

Appellant, Frank DeCaro, as personal representative of the Estate of Jessica Alvarado ("the Estate"), seeks review by this Court of the Court of Appeals, Division III decision affirming a ruling by the Spokane County Superior Court to set aside a Default Judgment.

The Estate asserts that this review is warranted pursuant to RAP 13.4(b)(1) and (2) because the Court of Appeal's description of the standard for setting aside a default judgment conflicts with *White v. Holm* and its progeny. (Appellant's brief, p. 12)

III. STATEMENT OF THE CASE

Factual History

On August 11, 2012, Ms. Jessica Alvarado was arrested and booked into the (then) Spokane County Jail (now Spokane County Detention Services). She was arrested for an outstanding felony bench

warrant for prescription forgery out of Grant County as well as other local warrants.

On August 11, 2012, Ms. Alvarado booked into Spokane County's jail. She was housed in 2W10 with Helen Garlinghouse.(CP 227-230)

When an inmate is booked into the Spokane County Jail, the inmate is placed in a cell on 2West ("2W"). 2W is typically known as the classification floor and inmates are held there until classified onto the correct floor in general population. Rounds are completed every thirty minutes by corrections officers, more if the inmate is on a suicide or medical watch. (CP 238-247*)*

On August 12, 2012 at approximately 7:45 a.m., Officer Blair (formerly known as Shaw) had just started her shift and went to 2W10 shortly thereafter. (CP 228) Ms. Garlinghouse came to the door as requested. Ms. Alvarado did not and remained lying on the top bunk. (CP 228) Ms. Garlinghouse informed Officer Shaw that Ms. Alvarado had just been seen by the nurse but that Ms. Alvarado didn't tell the nurse that she had taken "a bunch of oxy's" On the morning of August 12, 2012 at approximately 0800 Nurse Ordaz responded to a call for an evaluation of Ms. Alvarado from Officer Blair and went to Ms. Alvarado's cell, 2W10. (CP 248-251) Officer Blair reported that Ms. Garlinghouse stated to her that Ms. Alvarado had told her that she had taken a bunch of oxys, but

didn't tell the nurse. (CP 228) Officer Blair then asked Ms. Alvarado what she was withdrawing from and first heard her say, "meth," but when she asked her to clarify Ms. Alvarado stated, "no meds." (CP 228) When Nurse Ordaz arrived at the cell he asked Ms. Alvarado to come to the door so that Nurse Ordaz could speak with her. (CP 249) Given a report of vomiting, Nurse Ordaz specifically asked Ms. Alvarado if she had used drugs or alcohol. Ms. Alvarado also denied <u>any drug use.</u> (emphasis added) (CP 249) Nurse Ordaz then checked Ms. Alvarado's vitals, which include temperature, pulse, blood pressure and oxygen saturation. (CP 250) Ms. Alvarado's temperature was 97.0, pulse was 89, blood pressure was 110/70, and oxygen saturation was 98% at room air. All of these were well within normal ranges. Ms. Alvarado exhibited no physical symptoms that gave any indication she was in need of further care, suffering from dehydration or required additional monitoring. (CP 250) Ms. Alvarado did not have any difficulty in answering Nurse Ordaz questions. (CP 250) Specifically, Ms. Alvarado refused any further medical attention, and informed Nurse Ordaz that she would notify medical if she had any concerns and went back to her bunk to lay down. (CP 250)

As with any adult who is mentally competent, when adult inmates, who do not appear to be under any mental or physical incompetence,

refuse medical care, jail staff are unable to insist that the inmate accept medical attention. (CP 250)

Nurse Ordaz confirmed with Officer Blair that Ms. Alvarado had not disclosed any drug use and that she refused any medical care and he could not place her on a drug withdrawal monitor. (CP 228) Officer Blair stated that was fine and that Ms. Alvarado would remain on 2W until she was feeling better and could be classified and moved to general population. (CP 229)

At approximately 1:00 p.m. on August 12, 2012, Officer Fishbaugh went to Ms. Alvarado's cell to obtain her personal bra, underwear and tank top. (CP 231) Ms. Alvarado was asleep when Officer Fishbaugh arrived at the cell, but was able to be awakened with voice commands (CP 232) Ms. Alvarado was able to follow Officer Fishbaugh's commands and did not exhibit any difficulty in removing her clothing items. (CP 232) Ms. Alvarado did not request any medical care. (CP 232)

During each shift change, every inmate is required to provide a verbal and/or physical response to oncoming staff. (CP 224) On August 12, 2012, at approximately 11:00 P.M., during Officer Torres' physical count, Ms. Alvarado raised her arm in the air indicating she was "okay." (CP 224)

Another round occurred at approximately 11:30 p.m., during this check Ms. Alvarado was in her bunk and appeared to be breathing normally. (CP 224) At approximately 12:02 a.m., less than thirty minutes after the 11:30 round was completed Officer Torres found Ms. Alvarado unresponsive on the floor next to her bunk. (CP 224)

There is no evidence of damages. There is no evidence of the Estate's wage loss claim provided, no income tax returns, W-2s, or expert opinions showing a future wage loss; there is no evidence of Ms. Alvarado's employment or education; there is nothing to establish other than the paternal grandfather's statement that there was any sort of a relationship with the child.

Conversely, the evidence establishes that Ms. Alvarado expired from a drug overdose, she had track marks on her neck and a history of incarcerations. (CP 217-218)

Procedural History

The Estate entered a Default Judgment on December 2, 2015. (CP 189-190) Spokane County became aware of the Default Judgment on December 3, 2015 and a Notice of Appearance was filed the next day. (CP 191-193) Spokane County filed an Answer on December 9, 2015 (CP 194-199) It also filed a Motion to Show Cause five business days later on December 10, 2015. (CP 200-202) On December 21, 2015, Spokane

County filed its Motion to Set Aside Default and Default Judgment, along with its supporting Memorandum and supporting Affidavits and Declarations. (CP 203-295)

The hearing to Show Cause was noted for December 22, 2015. (CP 200-202) The Estate stipulated to the Motion to Show Cause and the Show Cause hearing was set for Friday, January 8, 2016.

The trial court heard oral argument on January 8, 2016 and made an oral ruling on that date. The Order granting Defendant Spokane County's Motion to Set Aside Default and Default Judgment was filed on March 3, 2016. (CP 374)

The Estate filed a Notice of Appeal appealing the trial court's decision to set aside the default and vacating the default judgment on March 15, 2015. (CP 377) The Estate's Opening Appeal addressed only the first two of the four factors considered by Washington courts as set out in *White v. Holm*, et seq. It argued the trial court abused its discretion because it did not use the correct standard to set aside the verdict and thereby abused its discretion. The Estate also argued at the Court of Appeals that because the trial court found excusable neglect and only a prima facie case, that it erred in setting aside the default. Essentially, according to the Estate, under the *White v. Holm* standard the analysis is not fluid and a court may only find an "either or" scenario. Thus, because

the Estate argued that because the County made an inexcusable error and could not provide a "strong or virtually conclusive defense" that the trial court had no discretion to set aside the default.

The Court of Appeals disagreed, finding that the trial court properly considered the *White* factors. It agreed with the trial court's analysis finding excusable neglect and at least a prima facie defense, and ordered that the trial court did not abuse its discretion in setting aside the default judgment. *Decaro v. Spokane County*, 198 Wash.App 638, 646, 394 P.3d 1042, 1047 (2017).

IV. ARGUMENT

A trial court's decision to set aside a judgment must be viewed for an abuse of discretion. The issue before this Court is simply whether Spokane County has met the standard to set aside the Default entered on November 6, 2015, and the Default Judgment entered on December 2, 2015.

> A trial court abuses its discretion only when its decision is manifestly unreasonable or based upon untenable grounds, or for untenable reasons…In determining whether to grant a motion to vacate a default judgment, 'the trial court must balance the requirement that each

party follow procedural rules with a party's interest in a trial on the merits.'"

TMT Bear Creek Shopping Center v. Petco at 140 Wash.App 191, 199, 165 P.3d 1271 *citing, Showalter v. Wild Oats*, 124 Wn.App 506, 510 (2004); *Griggs v. Averbeck Realty, Inc.*, 92 Wash.2d 576, 581, 599 P.2d 1289 (1979) The primary concern of review of a trial court's decision on a motion to vacate is to determine whether that decision was just and equitable. *TMT Bear Creek Shopping Center*, 140 Wash.App at 200, *citing, Calhoun v. Meritt*, 46 Wash.App. 616, 619, 731 P.2d 1094 (1986) Further, "'what is just and proper must be determined by the facts of each case, not by a hard and fast rule…'" *Id.* (internal citations omitted); *see also, White v. Holm*, 73 Wash.2d 348, 438 P.2d 581 (1960)(where a motion is not manifestly insufficient or groundless the court should exercise its authority liberally and equitably so that substantial rights be preserved and justice between the parties be fairly and judiciously done)

Rule 13.4(b)(1) and (2) read in pertinent part that "..a petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals..." The Estate's sole issue is whether "in the absence of a 'meritless' claim, does the *White v. Holm* test allow

vacating default judgments when the neglect leading to the default judgment is not excusable." (The Estate's Opening Brief, p. 4) The Estate also conceded that the County presented a prima facie defense (factor #1), that it acted promptly to set aside the default judgment (factor #3), and that the Estate would not suffer a substantial hardship from setting aside the default (Factor #4). (Estate's Opening Brief, p. 14)

This is essentially the same argument raised by the Estate at the Court of Appeals – that is that there are only two scenarios that a trial court may consider. (The Estate's Opening Brief, p. 15) That language is simply nowhere in *White v. Holm*, or it's progeny. As the trial court and the Court of Appeals noted, "contrary to the Estate's argument, there is no requirement that one of the two primary *White* factors must be compelling.

In 1968, this Court decided *White v. Holm*. It provided four factors to consider when hearing a motion to vacate a default judgment:

> (1) that there is substantial evidence extant to support, at least prima face, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable

> neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White v. Holm, 73 Wash.2d, 352 438 P.2d at 584.

The Estate's argument is nonsensical as it focuses on individual words in an attempt to make its argument, rather than on the entire sentences and on the case in full itself. However, even with this emphasis on specific words the Estate's argument fails as the words relied upon are mis-used. Even considering the Estate's own emphasized wording in its brief, this is clear. (*See e.g.* Estate's Opening Memorandum, p. 15) There is nothing in the phrase, "will be scrutinized with greater care…;" or "…[the] excusability of the defaulted defendants' reason for failing to initially and timely appear in the action deserve grave, if not dispositive, consideration," that requires the Estate's hard and fast rule of analysis (Id.) "With greater care," means just that – that the Court should use greater care, not that *White v. Holm* mandates a hard and fast either or analysis as the Estate argues. It does not mean that the Court has no discretion simply that it should weigh the factors "with greater care" or scrutiny if there is not a strong or virtually conclusive defense.

In fact, *White* specifically held that the analysis is fluid, as the County argued at both the trial court and at the court of appeals;

> "The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors, vary in dispositive significance as the circumstances of the particular case dictate…on the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would 'prima facie at least, carry a decisive issue to the find of the facts in a trial on the merits, the reasons for failure to appear will be scrutinized with greater care…."

White, 73 Wn.2d at 352-353; 438 P.2d at 584(emphasis added); *TMT Bear Creek Shopping Center*, 140 Wash. App. at 201, 165 P.3d 1271, *citing White*, 73 Wash.2d at 352, 438 P.2d at 548; *Little v. King*, 160 Wash.2d 696, 704, 161 P.3d 345, 350(2007)(en banc)(this is not a mechanical test; whether or not a default should be set aside is a matter of equity) The overriding concern is to ensure that justice is done. *Griggs v. Averbeck Realty*, 92 Wash.2d 576, 582, 599 P.2d 1289 (1979); *Morin v.*

Burris, 160 Wash.2d 745, 754, 161 P.3d 956 (2007)(Washington has a strong preference for giving parties their day in court)

The cases following since *White v. Holm* have not deviated from this. This Court and the lower courts have been unwavering in this position; there is no "bright line" scenarios, or "either, or's." It is a spectrum, which "var[ies] in dispositive significant as the circumstances of the particular case dictate." *TMT Bear Creek Shopping Center v. Petco*, 140 Wn.App 191, 201.

As recently as 2007, in *Little v. King*, this Court, en banc, reiterated that same rule, "where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake…there is no equitable basis for vacation of a judgment." *Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345, 351 (2007)(en banc) While factually distinguishable from the facts in this case because the Court did not find a prima facie defense and that there was no mistake because the defendant decided not to respond. Neither of which exist here, the principles from *White v. Holm* remained unchanged. *Little* is also instructive in that it emphasized that there was no mistake because the Insurance Company intentionally did not respond. Again, that was the case here as evidenced by Mr. Bartel's Affidavit.

The facts in *White* also establish that a moving party at a minimum must establish a very minimal, prima facie defense; "…[that] could, when fully explored at trial on the merits… present a sufficient, although minimal, prima facie defense for purposes of their motion to vacate the judgment." *Holm*, 73 Wn.2d 353, 438 P.2d at 585.

Here, the facts are much stronger than simply establishing a minimal primal facie defense. The actual standard is "a trial court may grant vacation of a default judgment when (1) the movant is able to demonstrate that it has a strong **or** virtually conclusive defense to the claim asserted against it scant time will be spent…. On the other hand where a party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least…the reason will be scrutinized with greater care as will the seasonability of his application and the element of potential hardship…" *White,* 73 Wash.2d at 352-353, 438 P.2 at 584. This Court clearly intended in that holding to consider all four elements as was properly done by the trial court and the court of appeals.

This standard was developed for the purpose of serving principles of equity. *TMT Bear Creek Shopping Center,* 140 Wash. App. At 204-204, *citing*, *Johnson v. Cash Store*, 116 Wn.App 833, 841 (2003)('in determining whether a default judgment should be vacated, the court

applies equitable principles to ensure that substantial rights are preserved and justice is done.")(internal citations omitted) Federal Courts also permit an independent action in equity to vacate a default judgment when it can show that the judgment is "manifestly unconscionable." *TMT Bear Creek Shopping Center*, 140 Wn.App 191, fn.7, *citing Pickford v. Talbott,* 225 U.S. 651, 657-58, 32 S.Ct. 687, 56 L.Ed. 1240 (1912) (emphasis added)

"Strong," is defined in plain English as: "not mild, or weak." Webster's Ninth Collegiate Dictionary (1983) "Or" is conjunctive and defined by Black's law dictionary as: "[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things." (Black's Law Dictionary, abridged 6th Ed., 1991) Thus, Spokane County need only show that it has a strong defense, not that it is virtually conclusive that it would ultimately prevail. This "strong" defense definition is supported by the courts' holdings that, when deciding whether to set aside a default a court, need not determine the issues of fact, but only establish that if proven at the time of trial could succeed. (*TMT Bear Creek Shopping Center Supra*) (emphasis added)

Here, as is clearly established in the supporting affidavits and evidence provided by Spokane County there is very clearly a strong defense. The County would argue that it is virtually conclusive that there

will be a defense verdict if this proceeds to trial based upon the evidence provided and the law as to inmate medical care. Suffice it to say, however, the courts permit a minimal prima facie case or a "strong" or "virtually conclusive" defense. (emphasis added)

Regardless, the County clearly established - and as recognized by the lower courts – at a minimum, a prima facie case. Prima Facie Evidence is defined as:

> "evidence good and sufficient on its face. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports."

(Black's Law Dictionary, abridged 6th Ed. (1991))

Clearly the evidence presented by Spokane County in its Opening Memorandum meet the definition of prima facie. Such is the nature of "prima facie," it is a lesser threshold. Regarding the Prima Facie Case the Courts have held, "'the trial court must take the evidence, and the reasonable inferences therefrom, in the light most favorable to the movant." *TMT Bear Creek Shopping Center*, 140 Wn.App. at 202, *Pfaff v. State Farm Mutual Automobile Insurance Co.*, 103 Wn.App 829, 835 (2000)

The trial court need only determine whether the defendant is able to demonstrate any set of circumstances that would, if believed, entitle the defendant to relief. *Ha v. Signal Elec., Inc.*, 182 Wn.App 426, 449 (2014), *citing TMT Bear Creek Shopping Ctr*, 140 Wn.App at 203.

In *Ha*, defendant asserted the defense that a third party was the sole cause of Ha's injuries. In support of that defense, defendant submitted the criminal information related to the third parties criminal charge of vehicular assault. *Ha*, 182 Wn.App at 449-450. The court found that this information was sufficient holding "[defendant] needs to set forth only a prima facie defense. [Defendant] has done so based on the facts submitted." *Id.*

The *Ha* Court then moved to its next analysis relying on *TMT Bear Creek Shopping Center* and *White* and noted the rule that "where a party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merit, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care…." *Ha*, 182 Wash.App at 450(internal citations omitted)

Thus, the second element for this Court to consider is why there was a default to begin with.

A. CR 60(b) Recognizes A Mistake As A Ground For Setting Aside A Default.

Lastly, the Estate's argues that the court of appeals opinion stands in glaring contrast to *White* that a "mistake" is not sufficient on only a prima facie defense. The Estate again too narrowly reads CR 60. Unfortunately, there are no cases which deal with CR 60(b) and the language "mistake" and "inadvertence," only "excusable neglect."[1]

A mistake is defined by the English language as: "a wrong action or statement proceeding from faulty judgment, inadequate knowledge or inattention." (Websters Ninth New Collegiate Dict., 1983)(emphasis added)[2].

CR 60(b) clearly states "mistakes; inadvertence; Excusable neglect;…." (emphasis added) Semi-colons serve the purpose of setting out independent clauses of a compound sentence, thus each word is an independent clause. (Websters) There is nothing nefarious about this mistake, it was not done for the purpose of harming anyone, it was not

[1] If one goes to the notes of decision for Rule 60 on Westlaw and goes to "mistake-generally," it refers the user to "see mistake, generally, mistake inadvertence, surprise and excusable neglect. That subsection provides no applicable case law. In fact, only one case has, which involves a divorce and judgment.

[2] Mr. Bartel at no time has ever stated anything other than that it was his mistake. This is not an issue of being directed to accept fault and there were never attempts to deflect blame it was not willful or intentional (as found in *Little v. King.*).

wilful, or intentional. It was an action clearly defined by Websters dictionary and was a word specifically included in the Court Rule when it was drafted. It is not only excusable neglect and "mistake" does not have to equate to "excusable neglect" as the Estate argues.

The Estate's reading is again based upon a narrow and inflexible reading of *White v. Holm*. It does not require this rigidity. *White* requires a court to use a fluid analysis; "The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors, vary in dispositive significant as the circumstances of the particular case dictate." *White*, 73 Wn.2d at 352, 438 P.2d at 584.

Thus, a mistake is a wholly separate consideration than "excusable neglect." As was properly considered by the trial court using its discretion and as was properly found by Court of Appeals.

V. CONCLUSION

The Court of Appeals properly noted that there is no rigid requirement of the analysis, or specifically of a requirement for "showing a higher quality evidence on the second prong."

For the reasons stated above the County respectfully requests that this Court deny the Estate's Petition for Review as the Court of Appeals did not err in upholding the trial court's decision.

DATED THIS 25th day of September, 2017.

EVANS, CRAVEN & LACKIE, P.S.

By:_____s/Heather C. Yakely _____
HEATHER C. YAKELY #28848
Attorney for Respondent/Defendant

DECLARATION OF SERVICE:

On the 25th day of September, 2017, I caused the foregoing document described as Respondent's Motion for Extension of Time to File Response to Petition to be served via Electronic Delivery pursuant to the Parties electronic service agreement at the email address listed below on all interested parties to this action as follows:

Matthew Albrecht: malbrecht@trialappeallaw.com

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s/Adrien Plummer
Adrien Plummer, Legal Assistant to
HEATHER C. YAKELY

EVANS, CRAVEN & LACKIE, P.S.

September 25, 2017 - 4:10 PM

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