Supreme Court No. _____
Court of Appeals No. 759060

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

GLENN R. OAKES and CINDY R. OAKES,

Appellants,

v.

THE SUMMIT HOMEOWNER'S ASSOCIATION,

Respondent.

Appeal from the Superior Court of the State of Washington for King County
No. 15-2-21766-6 SEA
Honorable Palmer Robinson

PETITION FOR REVIEW

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I. IDENTITY OF MOVING PARTY

Petitioners, Glenn R. Oakes and Cindy R. Oakes, (collectively, the "Oakes"), ask this Court to accept review of the Court of Appeals' decision affirming the ruling of the trial court that the default judgment entered against the Oakes was valid.

II. INTRODUCTION

In its Opinion, the Court of Appeals cites *Sacotte Const., lnc. v. Nat'l Fire & Marine lns. Co.* 143 Wn. App. 410, 418, 177 P.3d 1147 (2008) to articulate the two primary and two secondary factors which must be shown by the moving party to set aside a default judgment as required by CR60(b). The Court of Appeals states in its Opinion that the trial court made "oral findings," and therefore they find no error with the lack of findings that the Oakes took issue with in their briefing. *See* Opinion at 8. However, the Court of Appeals is silent in its Opinion about whether there were actual findings about factors a court is required to analyze pursuant to CR 60(b). The trial record indicates clearly that these factors were not analyzed. Instead the trial court came to a cursory conclusion without making the necessary factual findings.

The Court of Appeals has consistently held that with respect to motions to vacate default judgments, the trial court "***must enter the***

necessary factual findings to support its *conclusion that the defendant has either proved by clear and convincing evidence that it was not properly served or has failed to so prove*." *Lakewest Condo. Owners Ass'n v. Tokio Marine*, 156 Wash. App. 1016, at 5.

The Court of Appeals rendered its Opinion in this matter without the necessary factual findings from the trial court. Allowing this Opinion to stand will create precedent in default judgment cases that a trial court can simply make conclusory statements without the necessary factual findings to support its conclusions. Such precedent would be contrary to existing law that mandates the trial court to make necessary factual findings.

III. STATEMENT OF RELIEF SOUGHT

The Oakes seek this Court's review of the decision of the Court of Appeals of the State of Washington, unpublished opinion, *The Summit Homeowners Association v. Glen and Cindy Oakes*, No. 75906-0-I, (Wash. Ct. App. October 2, 2017). A true copy of the Court of Appeals, Division I of the State of Washington dated October 2, 2017 is appended hereto in the Appendix.

IV. ISSUE PRESENTED FOR REVIEW

The Court of Appeals held that the trial record contains oral findings, but is silent as to whether the trial court applied the necessary

factual findings based on the four factors proscribed by the *White v. Holm* test and CR 60 (b). In the absence of the required factual findings, is reversal required because appellate courts are simply not in a position either to take evidence or to weigh contested evidence and make factual determinations?

V. STATEMENT OF THE CASE

On September 4, 2015, the Association filed its Complaint against the Oakes for declaratory relief, injunctive relief, damages, and attorney's fees. CP at 1-16. On September 9, 2015, the process server filled out an affidavit of service indicating that he served Mr. Oakes with the Complaint on September 7, 2016. CP at 17-18. A little over a month later, the trial court entered a default judgment against the Oakes in the amount of $24,967.24 ("Default Judgment"). CP at 255-62.

On March 16, 2016, the Oakes were served a foreclosure complaint referencing the Default Judgment. The Oakes immediately appeared in and defended against the foreclosure action.

On July 22, 2016, the Oakes, proceeding *pro se*, filed a Motion to Vacate Default Judgment under CR 60(b)(5) (void judgment) and CR 60(b)(1)(excusable neglect). CP at 422-46. In support of the Motion to Vacate Default, the Oakes also filed two supporting affidavits. CP at 266-84; 285-97. Therein, the *pro se* litigants included their declarations and

numerous documents in support of improper service of process, and of at least three meritorious defenses to their liability and to the damages alleged in the Complaint against them. CP at 422-46. The *pro se* Motion and Affidavits also alleged counterclaims for trespass and property damage. *See, e.g.*, CP at 434. In its Response to the Motion, the Association included three fact witness declarations and over 200 pages of exhibits.

On August 14, 2016 and September 9, 2016, the trial court held hearings on the Motion to Vacate Default and made its ruling on the record on September 9, 2016. RP 1-51.

At the hearings, Mr. Oakes, proceeding *pro se*, testified and examined Ms. Oakes and the process server without counsel. The trial court's ruling and rationale are limited to three (3) pages of the hearing transcript. RP at 49-51. Nowhere in the transcript does the court account for the Oakes' *pro se* status.

After noting it had listened to the testimony of Mr. Oakes and the process server, the court concluded as follows:

> …everybody agrees he [the process server] came to your house on that morning, he got out of the car…. that he identified himself as a process server, said he had legal papers for you, tried to give you the legal papers, which—and you left to go inside, and that he left the legal papers outside.

> So I find, weighing the credibility of the witnesses, that in fact you were served with a copy of the summons.

RP at 49-50. Contrary to the court's comments above, the Oakes never did concede that the process server identified himself. They testified that the process server never said he had papers to serve and never tried to give either of the Oakes any papers. While this Court and the Court of Appeals do not make credibility determinations, the fatal flaw here is the *court did not rule or make any findings relating to the parties' evidentiary burdens under CR 60(b)(5), whether they had met those burdens, or whether specifically, the Oakes presented sufficient evidence of improper service.*

Immediately thereafter, as to the CR 60(b)(1) relief requested by the Oakes, the trial court concluded that:

> there wasn't really reasonable diligence to get that order set aside—or to get the order of default set aside and the default judgment set aside.
>
> And … I'm not finding a meritorious defense to the fact that the money was owed and the fees were incurred.

RP at 50-51.

The trial court did not make any of the following findings or determinations: whether the Oakes had any meritorious defenses to the calculation of damages; whether the Oakes failed to appear in the action due to mistake, neglect, inadvertence, excusable or inexcusable neglect; or whether setting aside the default would prejudice the Association. Further,

the trial court did not make findings or rulings as to whether the Oakes had met their burden under CR 60(b)(1). The trial court did not examine the factors required to rule on a CR 60(b)(1) motion. For example, the court did not determine whether the Oakes were unable to present a *prima facie* showing of a meritorious defense, or a strong and conclusive defense.

Thereafter, the notice of appeal was timely filed by the Oakes, again proceeding *pro se*. After the briefing schedule, the Court of Appeals entered its opinion on October 2, 2017 ("Opinion").

As to whether the Oakes met their burden under CR 60(b)(5), the Court of Appeals first cited to *Dolan v. King County*, 172 Wn. 2d 299, 310, 258 P.3d 20 (2011) in support of its standard of review on appeal, "the substantial evidence standard." *See* Opinion at 3. The Court stated that the "essential issue on appeal is whether there was substantial evidence before the trial court to support its conclusion that service of process was valid under RCW 4.28.080(16)". *See* Opinion at 5. Relying on *United v. Pac. Ins. Co. v. Discount Co.*, 15 Wn. App. 559, 562, 550 P.2d 699 (1976), the Court of Appeals quoted the trial court's findings of fact relating to service to hold that "[s]ervice of process was sufficient under RCW 4.28.080(16). The trial court properly denied the motion to vacate on the grounds of sufficient service of process." *See* Opinion at 6. No finding of fact or conclusions of law were made relating to the

sufficiency of the Oakes' evidence or the parties' burdens' under CR 60(b)(5).

As to the issue of relief under CR 60(b)(1), the Court of Appeals also referenced *United*, 15 Wn. App at 562 this time, to support the standard of review under this rule, abuse of discretion. *See* Opinion at 7. Relying on *Sacottee Const., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wn. App. 410, 418, 177 P.3d 1147 (2008), the Court of Appeals reasoned as follows:

> When considering whether to vacate a default judgment, courts consider whether the default party has shown (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted, (2) that its failure to appeal was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was irregularity in obtaining the judgment, (3) that the party acted with due diligence after receiving notice that the default was entered, and (4) whether substantial hardship would result to the plaintiff if the judgment were set aside.

See Opinion at 7. The Court of Appeals noted the trial court's refusal to vacate the default after finding that the Oakes did not act with due diligence to set aside the default order since they were served with the Complaint on September 7, 2015, the court entered default October 7, 2015, and the Oakes filed the Motion to Vacate on July 22, 2016. *See* Opinion at 7-8. Citing to *Luckett v. Boeing Co*., 98 Wn. App. 207, 313, 989 P2d 1144 (1999), the Court reasons that it has found no abuse of

discretion where the moving party fails to put forth any good reason for delaying to bring a motion to vacate. *See* Opinion at 8. Accordingly, it finds the trial court here did not abuse its discretion. *See* Opinion at 8.

The Court of Appeals found no error in the trial court's limited oral findings at the hearing on the Motion to Vacate Default despite not making the necessary factual findings. *See* Opinion at 8. Finally, the Court of Appeals granted the Association's request for prevailing party attorneys' fees. *See* Opinion at 8-9.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

> Review is warranted under RAP 13.4(b)(l) and (2) because the Court of Appeals' acceptance of limited oral findings that fail to make necessary factual findings as required by CR 60 for setting aside a default judgment conflicts with *White v. Holm* and its progeny.

Default judgments are generally disfavored in Washington because the courts "prefer to give parties their day in court and have controversies determined on their merits." *Morin v. Burris*, 160 Wash.2d 745, 754, 161 P.3d 956 (2007). The policy of disfavoring default judgments is constrained by CR 55 and a default judgment may be entered when parties fail to appear. CR 55(b). However, CR 55 also provides that "if a judgment by default has been entered, [the trial court] may likewise set it aside in accordance with CR 60(b)." CR 55(c)(1). CR 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
> ...
> (5) The judgment is void;
> ...
> (11) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1), (2), or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

A. Under CR 60(b)(5) and RCW 4.28.080(16), The Court of Appeals' Review was Limited to Determining Whether Substantial Evidence Supported the Trial Court's Determination that The Oakes Did Not Present Clear and Convincing Evidence of Improper Service. The Trial Court Failed to Make That Finding and the Court of Appeals Erred When it did not Reverse the Trial Court's Ruling.

"Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void." *In re Marriage of Markowski*, 50 Wash.App. 633, 635–36, 749 P.2d 754 (1988) (citing *Mid–City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wash.App. 480, 674 P.2d 1271 (1984)). Where the parties against whom the judgment was entered were improperly served with the complaint and summons, the judgment is void due to lack of personal jurisdiction. *See Painter v. Olney*, 37 Wash.App. 424, 427, 680 P.2d 1066 (1984). Trial courts have a

nondiscretionary duty to grant relief from default judgments that are entered by courts without personal jurisdiction. *Capital One Bank (USA), N.A. v. Koplitz*, 186 Wash. App. 1012, No. 72764-8-I (March 2, 2015)(citing to *Leen v. Demopolis*, 62 Wash.App. 473, 478, 815 P.2d 269 (1991); *Markowski*, 50 Wash.App. at 635). Whether service of process was proper is a question of law that the appellate court reviews de novo. *Goettemoeller v. Twist*, 161 Wn.App. 103, 107, 253 P.3d 405 (2011).

On at least two occasions the Court of Appeals has held that: "On appellate review, to sustain a finding in favor of the defendant-movant [vacating a default judgment]**,** *there must be substantial evidence in the record from which a rational trier of fact could have found the necessary facts by clear and convincing evidence." See, e.g., Koplitz*, 186 Wash. App. 1012, at 8; *Lakewest Condo. Owners Ass'n v. Tokio Marine*, 156 Wash. App. 1016, No. 62852-6-I, at 5(June 1, 2010). The trial court is the trier of fact.

"[I]n determining a challenge based on an allegation that the defendant/judgment debtor was never served with the summons and complaint, the trial court must exercise its fact-finding responsibilities." *Tokio Marine*, 156 Wash. App. 1016, at *5. Appellate courts are simply "not in a position either to take evidence or to weigh contested evidence and make factual determinations." *State v. Walker*, 153 Wash.App. 701,

708, 224 P.3d 814 (2009). This is why appellate courts review issues of fact only for substantial evidence. *See Dodd v. Polack*, 63 Wash.2d 828, 829, 389 P.2d 289 (1964).

Twice again the Court of Appeals has held that, when the facts, like in the instant case, are disputed and unclear the trial court: "***must enter the necessary factual findings to support its*** *conclusion that the defendant has either proved by clear and convincing evidence that it was not properly served or has failed to so prove*." *Koplitz*, 186 Wash.App. 1012, at *5; *Tokio Marine*, 156 Wash. App. 1016, at 5. This finding is essential to enable the Court of Appeals to: "review de novo the legal conclusion of whether the defendant has shown by clear and convincing evidence that the trial court lacked personal jurisdiction at the time the default judgment was entered." *Koplitz*, 186 Wash.App. 1012, at *5; *Tokio Marine*, 156 Wash. App. 1016, at 5.

Here, the trial court failed to make the necessary factual findings whether or not the Oakes either proved by clear and convincing evidence that they were not properly served or that they failed to so prove. Instead, the trial court focused solely on the Association's burden to show valid service. Had the trial court's inquiry been, whether the Oakes proved by clear and convincing evidence they were not served, the trial court would have found in the Oakes favor. The Oakes presented their individual

declarations, the Oakes both testified before the Court, and the Oakes pointed out severe contradictions in the process server's affidavit and testimony. Meanwhile, the Oakes' testimony was consistent and remained unchanged.

The issue on appeal before the Court of Appeals should have been whether there was substantial evidence before the trial court to support its conclusion that the Oakes either proved by clear and convincing evidence that they were not properly served or that they failed to so prove. That issue was not addressed by the trial court and could not be addressed by the Court of Appeals because the trial court failed to make the necessary factual findings allowing them to do so. The Oakes respectfully requests that this Court find that the Court of Appeals erred by finding the limited, cursory findings sufficient, and reverse the trial court's order denying the Oakes' Motion to Vacate.

B. The Trial Court Failed to Make the Required Findings to Deny a Motion to Vacate Under CR 60(b)(1).

In *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), the Washington Supreme Court established the governing principles for review of a motion to set aside a default judgment pursuant to CR 60(b)(1).

> At the outset, we pause to note that a proceeding to vacate or set aside a default judgment, although not a suit in

> equity, ***is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms***.

73 Wn.2d at 352, 438 P.2d at 584 (citing to *Roth v. Nash*, 19 Wash.2d 731, 144 P.2d 271 (1943)). Therefore, the Supreme Court cautioned courts as follows:

> in passing upon an application which is not manifestly insufficient or groundless, should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.

73 Wn.2d at 352, 438 P.2d at 585 (citing *Hull v. Vining*, 17 Wash. 352, 49 P. 537 (1897). Despite the appellate court's abuse of discretion standard the *White* Court made clear that:

> where the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues.

Id. Significantly, appellate courts are more likely to find an abuse of discretion when the trial court denies a motion to set aside a default judgment than when the trial court grants such a motion.

The trial court's discretion to set aside a default judgment concerns itself with and revolves about ***two primary*** and ***two secondary factors*** which must be shown by the moving party. These factors are:

> (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

73 Wn.2d at 352, 438 P.2d at 584.

The relationship between the factors is significant. The first two are the major elements to be demonstrated by the moving party. Where the moving party is able to demonstrate a strong defense to the opponent's claim, it is less relevant to inquire why the movant failed to appear as long as the motion was timely and the failure to appeal wasn't willful. 73 Wn.2d at 352-53, 438 P.2d at 585. If the moving party is at least able to demonstrate a defense that would, *prima facie* take a decisive issue to a fact finder at a trial on the merits, "the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party." 73 Wn.2d at 353, 438 P.2d at 585.

To set aside a default judgment, a defendant generally must submit affidavits identifying specific facts that support a prima facie defense. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd &*

Hokanson, 95 Wash.App. 231, 239, 974 P.2d 1275 (1999). The defendant must present "concrete facts" that support a defense. *Ha v. Signal Elec., Inc.*, 182 Wash.App. 436, 449, 332 P.3d 991 (2014). When evaluating the facts presented by the movant support a prima facie defense, the trial court does not act as a trier of fact that weighs the evidence. *Rosander v. Nightrunners Transp., Ltd*., 147 Wash.App. 392, 408, 196 P.3d 711 (2008).

Here, the proper inquiry for the trial court was whether the Oakes were "able to demonstrate any set of circumstances that would, if believed, entitle the defendant to relief." *Ha*, 182 Wash.App. at 449, 332 P.3d 991. Once the determination is made relating to the defenses, if the court does not find a particularly strong defense to the claim, the court must then consider the second factor: Whether a defendant's failure to timely appear in an action results from mistake, inadvertence, surprise, or excusable neglect is determined based on the particular facts of each case. *Akhavuz v. Moody*, 178 Wash.App. 526, 534-35, 315 P.3d 572 (2013). Unlike for the prima facie defense factor, the trial court does not assess evidence of the second factor in the light most favorable to the defendant. *Id.* Instead, the trial court may make credibility determinations and weigh the evidence in order to determine whether the defendant can show

mistake, inadvertence, or excusable neglect. *Rosander*, 147 Wash.App. at 406, 196 P.3d 711.

Here, the trial court did not make a finding on whether the Oakes presented a *prima facie* defense as to liability or as to the damages alleged in the Complaint. The Oakes submitted a 10-page affidavit "on the merits" in support of their Motion to Vacate along with fourteen (14) exhibits in support thereof. CP at 285-95. There is no indication that trial court examined the Oakes' submissions and evidence and reasonable inferences therefrom in the light most favorable to the Oakes. *Ha*, 182 Wash.App. at 449, 332 P.3d 991. The trial court failed to determine whether the Oakes were able to demonstrate *any set of circumstances that would, if believed,* entitle the Oakes to relief. *Id. See, e.g., VanderStoep v. Guthrie*, 402 P.3d 883, 890 (2017). Likewise, the Court of Appeals' Opinion did not make any such determination and allowed the trial court's ruling to stand where the trial court's limited oral findings were silent as to the aforementioned.

Yet there is a plethora of facts and evidence presented by the Oakes, that at least "demonstrate a defense that would, *prima facie* take a decisive issue to a fact finder at a trial on the merits." 73 Wn.2d at 353, 438 P.2d at 585. Neither the trial court nor the Court of Appeals made that determination. Significantly, the trial court and appellate court completely ignored the second primary factor of the *White* test and the main basis for

vacating the default judgment under CR 60(b)(1): “whether the Oakes's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect.” 73 Wn.2d at 352, 438 P.2d at 584.

Yet it was clear that even if the Oakes were served with the Complaint as early September 7, 2015, they mistakenly or inadvertently didn’t appear to defend the action. There is no record evidence of willful neglect of their duty to appear. If anything, the following facts show otherwise: the Oakes promptly appeared in the subsequent action; the default was entered less than one month after the Complaint was filed; the Complaint was alleged to have been left on a car and could have easily been lost or destroyed; and that Mr. Oakes’ vision on the date of service was severely impaired. Neither the trial court nor the Court of Appeals made this crucial determination under CR 60(b)(1).

C. The Court of Appeals’ Reliance On Due Diligence Alone Is Misplaced Without a Determination of When Mr. and Ms. Oakes Were Notified of the Default Judgment. The Oakes Exercised Due Diligence After Learning of the Default Judgment in March and Moving to Vacate it in July.

The Court of Appeals found that the Oakes’ lack of due diligence to set aside the default judgment sufficed to deny the Motion to Vacate. However, the Court did not make a determination of when the Oakes were both made aware of the Default Judgment (not the Complaint). *see*

Suburban Janitorial Servs. v. Clarke American, 72 Wash.App. 302, 308, 863 P.2d 1377 (1993)(The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion.).

The trial court seems to have found that a letter including the Default Judgment was sent to the Oakes' address and signed by Mr. Oakes sometime in October 2015, which he does not recall. However, Ms. Oakes did not sign for the letter or receive notice and Mr. Oakes' signature and receipt of the letter and purported notice of the Default Judgment should not be imputed to her.

It is true that a major consideration in determining a motion's timeliness is "whether the moving party has good reasons for failing to take appropriate action sooner." *Luckett v. Boeing Co*., 98 Wash. App. 307, 312, 989 P.2d 1144, 1147 (1999). The Court of Appeals found that the Oakes did not present such good reason, and therefore, the trial court did not abuse its discretion.

However, the Oakes represented themselves, *pro se*, and Mr. Oakes and Ms. Oakes position was clear in their affidavits and testimony: they were not aware of the instant action before March 2016. In *Luckett*, the Court held that there was no good reason why an attorney, aware of

the judgment, should wait four (4) months to move to vacate it. *Id*. at 313, 1147. Further, in Luckett, there was no claim of improper service, like there is in the instant case. *Id.* Here, once the Oakes received actual notice of the Default Judgment, they moved to answer and defend the subsequent action and moved to vacate the default in this action in July 2016. The Oakes were not represented by counsel, and the Association had no reason to inquire into their specific efforts after notice, such that any factual evidence of due diligence was likely not adequately fleshed out or determined at the trial court level.

D. The Trial Court and Court of Appeals' Failure to Account for The Oakes' Pro Se Status Was an Abuse of Discretion or, At A Minimum Should Tilt Equitable Considerations Toward Reversal of the Trial Court's Denial of the Motion to Vacate the Default Judgment.

It is well established that concerns regarding the protection of a litigant's rights are heightened when the party held in default appears pro se. *See, e.g., White,* 73 Wn.2d at 352, 438 P.2d at 58; Further, concerns regarding the protection of a litigant's rights are heightened when the party held in default appears pro se. A party appearing without counsel is afforded extra leeway in meeting the procedural rules governing litigation, and trial judges must make some effort to protect a party so appearing from waiving a right to be heard because of his or her lack of legal knowledge. *Cf. Haines v. Kerner,* 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30

L.Ed.2d 652 (1972) (per curiam) (allegations of pro se complaint are held to less stringent standard than formal pleading drafted by lawyers). *See also Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993)("Hence, as a general rule a district court should grant a default judgment sparingly and grant leave to set aside the entry of default freely when the defaulting party is appearing pro se.")

Neither the trial court nor the Court of Appeals accounted for the Oakes' pro se status throughout these proceedings.

The Oakes' prima facie showing of defenses to the Complaint, the lack of a willful neglect finding, along with the equities favoring a trial on the merits, and leeway allowed for pro se litigants, should suffice to have this Court accept review.

VII. CONCLUSION

The decision of the Court of Appeals conflicts with existing standards in *White* for applying CR 60 to motions to set aside default judgments. The petitioners respectfully request that this Court accept review of the decision of the Court of Appeals.

Respectfully submitted this 28th day of November, 2017

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CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on November 28, 2017, I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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APPENDIX

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
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October 2, 2017

Glenn R. Oakes
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CASE #: 75906-0-I
Summit Homeowners Association, Resp vs. Glenn R. Oakes and Cindy R. Oakes, App

King County, Cause No. 15-2-21766-6SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh
Enclosure
c: The Honorable Palmer Robinson

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE SUMMIT HOMEOWNERS ASSOCIATION, a Washington state nonprofit corporation, Respondent. v. GLENN and CINDY OAKES, a Washington state marital community, Appellants.	No. 75906-0-I DIVISION ONE UNPUBLISHED OPINION FILED: October 2, 2017

APPELWICK, J. — The Oakes appeal the trial court's refusal to vacate the default judgment. They argue that the trial court erred in finding that they were properly served the summons and complaint, conferring personal jurisdiction. They also argue that the trial court abused its discretion in declining to vacate the default judgment under three meritorious defenses. We affirm.

FACTS

On September 4, 2015, The Summit Homeowners Association (Summit) brought action against Glenn and Cindy Oakes,[1] a married couple residing in the Summit community. It alleged that the Oakes were in violation of Summit's home and lot maintenance requirements and view protection requirements. In its

[1] For clarity, we will refer to a specific individual by his or her first name. No disrespect is intended.

complaint, Summit asked the court for declaratory relief, injunctive relief, and damages for assessments and attorney fees.

Dave Stout, a process server, went to the Oakes's home on September 7, 2015 to serve the Oakes with the summons and complaint. Stout testified at the motion to vacate hearing that he spoke with Glenn in the Oakes' driveway.[2] Stout stated that he placed the summons and complaint on the hood of the Oakes's vehicle after Glenn refused to accept them.[3] The Oakes failed to appear, answer, or defend against the complaint.

On October 7, 2015, a default judgment was entered against the Oakes in the amount of $24,967.24. The Oakes filed a motion to vacate the default judgment on July 22, 2016. On September 9, 2016, the trial court denied the motion to vacate, finding that service was proper, and that the Oakes did not have meritorious defenses to overcome the default judgment.

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[2] Stout states, "And then later on in that brief conversation, he ascended [sic] that he was Mr. Oakes. And I reached out, because we were close enough to where I could hand him the documents, and he refused to take them. . . . And then I said to him, 'Well, I believe that you are Mr. Glenn Oakes, and I'm serving you these legal documents.'"

[3] Stout stated,

> And so we—again, I tried to reach out to him and hand them to him, but he wouldn't take them. So I laid them on the—I think earlier in my declaration, I said on the back end, but I think it was the front. I can't remember which way the vehicle was parked, nose towards the cul-de-sac or nose toward the front. But obviously, I laid the documents on the hood—I would say the hood on the minivan.
>
> And at that time, he was still there, close by, and I turned around and left.

DISCUSSION

The Oakes argue that the trial court erred in declining to vacate the default judgment. First, they argue that the trial court did not have personal jurisdiction to find the default judgment due to improper service of the complaint and summons. Second, they argue that Summit violated RCW 64.38.035(4), because it did not obtain voter approval from the homeowners before filing suit. Third, they argue that they were not in violation of the homeowners' association act[4] or the covenants, conditions, and restrictions ("CC&Rs") of the Summit Homeowners Association. Fourth, they argue that Summit did not exhaust administrative remedies before it filed suit, violating RCW 64.38.020(11) and Summit's governing documents. Fifth, they argue that the trial court did not make a findings of fact and conclusions of law, therefore this court must reverse or remand.

The Oakes ask this court to apply a de novo standard of review to the trial court's decision not to vacate default judgment for improper service. We generally review de novo the trial court's decision not to vacate a final order for lack of jurisdiction. Delex Inc. v. Sukhoi Civil Aircraft Co., 193 Wn. App. 464, 469, 372 P.3d 797), review denied 186 Wn.2d 1027, 385 P.3d 114 (2016). However, where the trial court's finding of facts involved weighing competing documentary evidence and resolving credibility issues, the substantial evidence standard is appropriate. Dolan v. King County, 172 Wn.2d 299, 310, 258 P.3d 20 (2011).

Here, the trial court weighed documentary evidence and determined credibility of witnesses. Further, when an appellant challenges conclusions of law

[4] Ch. 64.38 RCW.

not based on the law itself, but rather claiming that the findings of fact do not support the court's conclusions, appellate review is limited to determining whether the trial court's findings are supported by substantial evidence and, if so, whether those findings support the conclusions of law. Nguyen v. City of Seattle, 179 Wn. App. 155, 163-64, 317 P.3d 518 (2014). The Oakes challenge the trial court's finding that Stout personally served the Oakes. Therefore, we look to see whether there is substantial evidence to support the trial court's finding that Stout achieved personal service.

The Oakes also assert that the trial court should have vacated the judgment for several meritorious defenses. Under CR 60(b), a party may motion the court to relieve that party of a final judgment for a number of defenses. A motion to vacate a default judgment under CR 60(b) is reviewed for abuse of discretion. United Pac. Ins. Co. v. Discount Co., 15 Wn. App. 559, 562, 550 P.2d 699 (1976).

I. Service of Process

The Oakes argue that they were not properly served with the summons and complaint under RCW 4.28.080(16) or RCW 4.28.080(17). For personal service, the summons shall be served by delivering a copy thereof to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein. RCW 4.28.080(16). After hearing the testimony of Glenn and Stout, the trial court found

that the Oakes were personally served with a copy of the summons and complaint. The court concluded.

> And I listened to the testimony of Mr. Oakes and I listened to the testimony of Mr. Stout, and it is my finding from listening to the testimony and the credibility—and kind of the context—and I don't mean credibility, Mr. and Mrs. Oakes, in the sense that I think you're lying, but Mr. Stout—everybody agrees he came to your house on that morning, he got out of the car. There was a discussion about were you Mr. Oakes, and who was he, and what was he doing there. He says he said he was there to serve you papers and tried to give them to you. . . . [I]n listening to all the testimony it's my finding that in fact that happened, that he identified himself as a process server, said he had legal papers for you, tried to give you the legal papers, which—and you left to go inside, and that he left the legal papers outside. . . .
>
> So I find, weighing the credibility of the witnesses, that in fact you were served with a copy of the summons and complaint.

The essential issue on appeal is whether there was substantial evidence before the trial court to support its conclusion that service of process was valid under RCW 4.28.080(16). There is evidence in the record that process server, Stout, took the summons and complaint to the Oakes's home on September 7, 2015, and spoke with a man whom he identified as Glenn. Further, there is evidence in the record that the process server laid the documents on Oakes's vehicle after Glenn refused to take them. Stout testified that Glenn did not touch the papers, but he explained, "I tried to reach out to him and hand them to him, but he wouldn't take them. . . I laid the documents on the hood—I would say the hood on the minivan." Substantial evidence supports the trial court's finding that Stout attempted to hand the summons and complaint to Glenn. Substantial

evidence supports the trial court's finding that after Glenn refused to accept the documents, Stout placed them on the Oakes' vehicle.

Under RCW 4.28.080, a process server accomplishes personal service if there is a clear attempt to yield possession and control of the documents to the person being served. United, 15 Wn. App. at 561-62. In United, the court held that defendant was served properly after the process server attempted to hand the documents to the defendant, but she evaded accepting them by slamming the door. 15 Wn. App. at 562. The Oakes argue that this case is similar to the situation in Weiss v. Glemp, 127 Wn.2d 726, 903 P.2d 455 (1995). There, the court found that there was insufficient service of process when the process server left the summons outside on the windowsill of where the defendant was located. Weiss, 127 Wn.2d at 732. The court noted in Weiss that the defendant had not attempted to evade process merely because he did not come to the door when the process server knocked. Id. at 734.

This case is more similar to United than Weiss, because the process server attempted to yield possession and control of the documents personally to Glenn, but Glenn affirmatively refused. Service of process was sufficient under RCW 4.28.80(16). The trial court properly denied the motion to vacate on the grounds of sufficient service of process.

II. Meritorious Defenses under CR 60

The Oakes also raise three defenses to the default judgment. First, they argue that the default judgment should be set aside because Summit

did not get the homeowners approval before filing suit. Second, they argue that they did not violate the homeowners' association act or the CC&Rs. Third, they argue Summit failed to exhaust administrative remedies prior to litigation.

A trial court may vacate a default judgment for a number of reasons, such as mistakes, inadvertence, excusable neglect, newly discovered evidence, and fraud. CR 60(b). Whether to vacate a judgment on grounds set forth in CR 60(b) lies within the discretion of the trial court. United, 15 Wn. App. at 562. When considering whether to vacate a default judgment, courts consider whether the default party has shown (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted, (2) that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was irregularity in obtaining the judgment, (3) that the party acted with due diligence after receiving notice that the default judgment was entered, and (4) whether substantial hardship would result to the plaintiff if the judgment were set aside. Sacotte Const., Inc. v. Nat'l Fire & Marine Ins. Co., 143 Wn. App. 410, 418, 177 P.3d 1147 (2008).

Here, the trial court declined to vacate the default judgment after finding that the Oakes did not act with due diligence to set aside the default order. Summit served the Oakes with the summons and complaint on September 7, 2015. The court entered the default judgment on October 7, 2015. The Oakes filed the motion to vacate the default judgment on July

22, 2016. In determining a motion's timeliness a court considers whether the moving party has good reasons for failing to take appropriate action sooner. See Luckett v. Boeing Co., 98 Wn. App. 307, 313, 989 P.2d 1144 (1999). This court has found that a trial court does not abuse its discretion in denying a motion to vacate when the moving party fails to put forth any good reason for delaying to bring a motion to vacate. See id. We do not find an abuse of trial court discretion.

III. Record of Trial Court's Findings

The Oakes assert that the trial court failed to make a findings of fact and conclusions of law, properly preserving the record for the appellate court. CR 60 is silent about whether a court is required to make written findings of fact and conclusions of law when ruling on a motion to vacate a final judgment. The Oakes do not find fault in the trial court's lack of written findings, but instead assert that it erred by failing to make any findings on the record. But, the record contains the oral findings the trial court made at the hearing on the motion to vacate the default judgment. We find no error.

IV. Attorney Fees

Summit requests attorney fees that have not yet been awarded as part of the default judgment. Summit asserts that it is entitled to attorney fees per the CC&Rs.[5] We will award attorney fees to the prevailing party

[5] The document states, "In any judicial action to enforce compliance with the Governing Documents or a Board Decision, the prevailing party, including the Association, shall be entitled to recover from the non-prevailing party, whether or not the action proceeds to judgment, its costs and a reasonable sum for attorneys'

on the basis of a private agreement, a statute, or a recognized ground of equity. Buck Mountain Owner's Ass'n v. Prestwich, 174 Wn. App. 702, 731, 308 P.3d 644 (2013). Summit is entitled to attorney fees incurred in this appeal based on the CC&Rs, subject to its compliance with RAP 14.4.

We affirm.

WE CONCUR:

fees incurred in connection with the action, in addition to taxable costs permitted by law."

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

THE SUMMIT HOMEOWNERS ASSOCIATION, a Washington state nonprofit corporation, Respondent, v. GLENN and CINDY OAKES, a Washington state marital community, Appellants.	)	No. 75906-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Glenn and Cindy Oakes, have filed a motion for reconsideration. The panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Judge

LAW OFFICE OF COREY EVAN PARKER

November 28, 2017 - 6:58 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Summit Homeowners Association, Resp vs. Glenn R. Oakes and Cindy R. Oakes, App (759060)

The following documents have been uploaded:

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