No. 98120-5

SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES L. SELLERS, Guardian ad Litem of NATHAN TONEY, a minor,

Petitioner,

v.

LONGVIEW ORTHOPEDIC ASSOCIATES, PLLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

Division Two affirmed the trial court's exercise of its discretion in finding good cause to vacate an order of default under CR 55(c)(1) on the ground that respondent Longview Orthopedic Associates, PLLC "was blameless," its counsel who failed to timely appear and answer "diligently moved to have [the default order] set aside" within days of its entry and before a default judgment had been entered, and petitioner James Sellers, who was awarded over $14,000 in fees, could show no prejudice in having the default order set aside. The Court of Appeals followed settled law in holding that the "good cause" standard of CR 55(c)(1) is committed to the trial court's equitable discretion based on the facts and circumstances of the particular case. This Court should deny the petition for review of its well-reasoned decision.

Petitioner's argument for review relies on inapposite authority addressing the CR 60 standard for vacating a final judgment, not the standard for vacating an interlocutory order of default under CR 55. His contention that counsel's failure to timely and appear and answer precludes as a matter of law a finding of "good cause" conflicts with policies in favor of resolving disputes on the merits and presents no issue of substantial public interest.

B. Restatement of Issue Presented for Review.

Did the trial court's unchallenged findings 1) that the defendant was blameless in its failure to timely appear and answer, 2) that defense counsel diligently moved to set aside the default order less than a week after its entry, and 3) that an award of over $14,000 in terms alleviated any potential prejudice to plaintiff in setting aside an order of default before judgment had been entered provide a tenable basis for the trial court's exercise of discretion to find "good cause" to vacate an order of default under CR 55(c)(1)?

C. Restatement of the Case.

The Court of Appeals decision accurately recites the facts underlying the trial court's discretionary decision to vacate the order of default at issue in this case. Those facts are summarized here:

Sellers served a complaint for medical negligence on Longview Orthopedics on December 21, 2017. (CP 18, 193; Slip Op. 2) On December 27, Longview sent the complaint to its liability insurer, which promptly assigned the case to defense counsel Amy Forbis at Bennett Bigelow & Leedom. (CP 18-19; Op. 2) Distracted by preparation for a complex, multi-week, medical malpractice trial scheduled to begin in less than three weeks, Ms. Forbis failed to

timely appear or answer the complaint against Longview. (CP 19; Op. 2)

On Tuesday, January 16, 2018, 26 days after service (and the first day of Ms. Forbis' scheduled trial), Sellers obtained an ex parte order of default. (CP 8-9; Op. 2) On Sunday, January 21, Ms. Forbis realized her mistake, and the next day, Monday, January 22, filed a notice of appearance on behalf of Longview, answered the complaint, and moved to set aside the order of default. (CP 10, 13, 18-19, 193; Op. 2)

The trial court found "good cause" under CR 55(c)(1) and exercised its discretion to vacate the order of default, conditioned on payment of terms of $14,263.10. (CP 193-94; Op. 3) While finding counsel's neglect "inexcusable," the trial court expressly found that "[t]he failures to answer or appear were in no way related to conduct of Longview Orthopedic, LLC, and/or its insurer, who were both blameless in this regard." (CP 193; Op. 3) It also found that once defense counsel "discovered the default order . . . [counsel] diligently moved to have it set aside." (CP 193; Op. 3; *see also* RP 16: "There's no argument about the due diligence. That occurred.") The trial court further ensured that "Plaintiff will not be prejudiced by setting aside the default order" and pursuing his claim on the merits,

awarding over $14,000 "to compensate Plaintiff for the attorney fees and costs incurred by Plaintiff in obtaining the default order and resisting Defendant's efforts to have that order set aside." (CP 193-94; Op. 3)

Accepting the trial court's certification of its order for discretionary review under RAP 2.3(b)(4), the Court of Appeals affirmed. (Op. 3, 10-11) The Court of Appeals rejected Sellers's argument that the trial court applied the wrong legal standard and his contention that the standard of "good cause" under CR 55(c)(1) is the same as that for vacating a final judgment under CR 60(b)(1). (Op. 7-9) It held that the trial court had a tenable basis to find it just and equitable on these specific facts to find "good cause" and that defense counsel's neglect, even if inexcusable, did not as a matter of law deprive Longview of the opportunity to have Sellers's claim resolved on the merits. (Op. 10)

D. Argument Why Review Should Be Denied.

1. The Court of Appeals properly applied the abuse of discretion standard of review to the trial court's decision to vacate an order of default under CR 55(c)(1).

The Court of Appeals properly interpreted the plain language of CR 55(c)(1), which provides that "[f]or good cause shown and upon such terms as the court deems just, the court may set aside an

entry of default." Sellers erroneously treats the trial court's decision that Longview established "good cause" to vacate the order of default as subject to de novo review by the appellate court. (Pet. 7-10) To the contrary, "'[t]he decision to vacate a default is addressed to the sound discretion of the trial court judge, and we will not reverse that decision absent a showing that the trial judge abused her discretion.'" (Op. 5, quoting *Brooks v. Univ. City, Inc.*, 154 Wn. App. 474, 479, 255 P.3d 489, *rev. denied*, 169 Wn.2d 1004 (2010))

The Court of Appeals decision follows settled law. *See, e.g., Brooks,* 154 Wn. App. at 479, ¶ 13; *Estate of Stevens,* 94 Wn. App. 20, 30, 971 P.2d 58 (1999) (trial court's discretionary decision on a motion to vacate an order of default "is a decision upon which reasonable minds can sometimes differ") (quoted source omitted); *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 818 P.2d 618 (1991); *Canam Hambro Sys., Inc. v. Horbach,* 33 Wn. App. 452, 453, 655 P.2d 1182 (1982) ("decision to set aside an order of default is generally within the discretion of the trial court, subject to the good cause requirement of CR 55(c)").

Because "courts can reasonably reach different conclusions" under the abuse of discretion standard, Sellers erroneously relies on intermediate appellate court cases that *affirm* the trial court's

exercise of discretion in deciding that the moving party failed to establish "good cause" under CR 55(c).[1] But the fact that an appellate court has affirmed a decision . . . does not, of course, necessarily mean that the trial court erred" in making a different decision. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 353, 333 P.3d 388 (2014) (quoted case omitted). The Court of Appeals properly affirmed here because the trial court's unchallenged findings of fact provided a tenable basis for its discretionary, equitable determination of good cause. (Op. 10)

Where a trial court fairly exercises its direction based on articulated, indisputable facts, its decision must be affirmed unless "no reasonable judge would have ruled as the trial court did." *State v. Arredondo*, 188 Wn.2d 244, 256, ¶ 22, 394 P.3d 348 (2017) (internal quotation omitted). This Court should deny review because the appellate court's affirmance of the trial court's discretionary decision based on the particular facts of this case does not conflict

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[1] *Estate of Stevens* 94 Wn. App. at 34-35 (affirming refusal to vacate a default order because party waited three months after receiving notice of entry before moving to vacate the order); *Seek Systems*, 63 Wn. App. at 271 (affirming refusal to vacate default order when defendant "made one phone call, then did nothing else for 14 months"); *Brooks*, 154 Wn. App. at 479-80, ¶¶ 14-15 (affirming refusal to vacate default order because the defendant's own agent failed to forward the summons to counsel for two years); *see* Pet. 7-10.

with any of this Court's or Court of Appeals' decisions and presents no issue of substantial public concern.

2. The Court of Appeals properly refused to equate the "good cause" standard to vacate an interlocutory order of default under CR 55 with the more rigorous standard for vacating a final judgment under CR 60.

Sellers' contention that the Court of Appeals misinterpreted the "good cause" standard of CR 55 relies exclusively on cases that instead address the standard for vacating a default judgment for "excusable neglect" under CR 60(b)(1). Sellers then misapplies the very standard he erroneously advocates by focusing on the neglect of defense counsel and ignoring the finding that Longview itself was "blameless."

The Court of Appeals correctly held that "good cause" is a flexible concept that turns not on any single factor, but on the "particular facts of each case." (Op. 10) Its holding that the trial court in exercising its discretion may consider the defendant's conduct, its diligence, and the prejudice to the plaintiff (Op. 10) is consistent with Washington law, *Estate of Stevens,* 94 Wn. App. at 30 (Pet. 7-8), as well as cases interpreting the parallel federal rule, which also establishes a "good cause" standard. Fed. R. Civ. P. 55(c). *See Matter of Dierschke,* 975 F.2d 181, 183 (5th Cir. 1992) (term

"good cause" in Rule 55(c) is a flexible concept that "is not susceptible to a precise definition"); *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1338 (11th Cir. 2014) ("[T]he 'good cause' standard applicable to setting aside a default [under Rule 55(c)]" differs from the "more rigorous, 'excusable neglect' standard." (quoted source omitted)); *Dassault Systemes, SA v. Childress*, 663 F.3d 832, 839 (6th Cir. 2011) ("[T]he standard [applying] to a motion to set aside a final default judgment under Rule 60(b) is more demanding than [the standard applying] to a motion to set aside an entry of default under Rule 55(c) . . . A *default* can be set aside under rule 55(c) for 'good cause shown,' but a default that has become final as a *judgement* can be set aside only under the stricter rule 60(b) standards for setting aside final, appealable orders." (quoted sourced omitted)); *Central Ill. Carpenters Health and Welfare Trust Fund v. Con-Tech Carpentry, LLC*, 806 F.3d 935, 937 (7th Cir. 2015) ("The requirements under that rule [Rule 60(b)] are steeper [than Rule 55(c)]" because "relief under Rule 60(b)(1) depends on excusable neglect."). The Court of Appeals thus correctly determined that even if defense counsel's "inexcusable" failure to timely answer is imputed to Longview, the trial court was well within its discretion to consider

other factors in balancing the equities and finding "good cause" to vacate the order of default. (Op. 10)

Sellers's contention that a trial court has no discretion to find "good cause" unless it makes a threshold finding of "excusable neglect" is unsupported by Washington law. Sellers relies on the statement in *Estate of Stevens* that "[t]o establish good cause under CR 55, a party *may* demonstrate excusable neglect and due diligence." 94 Wn. App. at 30 (emphasis added). (Pet. 7-8) *Stevens*, in turn, cites Judge Morgan's statement in *Seek Systems*, 63 Wn. App. at 271, that "two factors to be considered in each instance [under both CR 55(c)(1) and CR 60(b)(1)] are excusable neglect and due diligence overall." But neither *Stevens* nor *Seek Systems* hold that these are the *only* factors that may be considered, or that a trial court cannot as a matter of law find good cause unless it makes specific findings establishing both diligence and excusable neglect, to the exclusion of any other factors. The Court of Appeals' interpretation of CR 55 to allow the trial court to consider the lack of prejudice to the plaintiff, the circumstances that resulted in entry of the order of default, and to weigh the equities under the particular facts of the individual case, conflicts with neither these cases, nor any

other decision of this Court or the Court of Appeals. RAP 13.4(b)(1), (2).

Recognizing that an interlocutory order of default lacks the finality of a final judgment, the Court of Appeals correctly rejected Sellers' insistence that a party seeking to vacate a default order must establish "excusable neglect" as a threshold condition to relief, as required by the specific language of CR 60(b)(1). (Op. 7-9) While CR 60(b) has specific criteria for vacating a final judgment of default, the first of which requires the moving party to establish "inexcusable neglect," CR 55(c)(1) adopts the more flexible "good cause" requirement. As this Court has recognized, "CR 55(c)(1) sets forth a rather lenient rule for setting aside defaults." *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 278 n.8, 996 P.2d 603 (2000). Sound policy supports that "rather lenient" standard. Because our courts favor resolution of disputes on the merits, the "good cause" required to vacate an order of default under CR 55(c)(1) is less onerous than that required to vacate a judgment under the criteria of CR 60(b). *Canam Hambro Sys.*, 33 Wn. App. at 453; *Estate of Stevens,* 94 Wn. App. at 30.

CR 60 applies to final judgments that terminate the litigation. "A judgment is the final determination of the rights of the parties in

the action . . ." CR 54(a). A judgment becomes res judicata, foreclosing any claims that were, or could have been, asserted in the action. *See, e.g., Lenzi,* 140 Wn.2d at 280. The law accords a default judgment all the attributes of a final judgment entered following a trial. *Graham v. Yakima Stock Brokers, Inc.*, 192 Wash. 121, 125, 72 P.2d 1041 (1937) (quoted source omitted). That is why a party seeking to vacate a default judgment on the basis of "mistake, inadvertence or excusable neglect" must meet the specific standards of CR 60(b)(1) *and* establish a bona fide defense. *See, e.g., White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

By contrast, an order of default is an interlocutory order. *See Graham v. Yakima Stock Brokers, Inc.*, 190 Wash. 269, 270-71, 67 P.2d 899 (1937) (distinguishing between final judgments and interlocutory orders of default).[2] Entry of default for failure to appear and defend may establish the allegations in the plaintiff's complaint, but does not, by itself, terminate the case. CR 55(b). In this case, for instance, Sellers still had to establish his damages before the trial court could have entered a final judgment. "The goal

[2] For instance, unlike an order vacating a judgment, an order vacating a default order is not an appealable order. RAP 2.2(a)(10). As Sellers had not obtained a default judgment, discretionary review of the trial court's order vacating the default order in the Court of Appeals was on the trial court's certification of its order under RAP 2.3(b)(4).

of finality is not relevant to a motion for relief from a default entry, which is another reason for the greater discretion and leniency shown with respect to setting them aside." Wright & Miller, 10A *Fed. Prac. & Proc. Civ.* § 2693 (4th ed. 2018).

Sellers' petition fails to acknowledge this significant distinction, both in language and policy, between vacating an order of default under CR 55(c) and vacating a final default judgment under CR 60(b). That distinction, however, was not lost on the Court of Appeals, which carefully distinguished between cases addressing the flexible standard for CR 55(c)(1) and those relied upon by Sellers addressing the more rigorous criteria of CR 60(b). (Op. 7-9)

For instance, in *Prest v. Am. Bankers Life Assur. Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995), *rev. denied*, 129 Wn.2d 1007 (1996) (Pet. 8), Division Two affirmed as within the trial court's discretion its refusal to vacate a default judgment for "inexcusable neglect" under CR 60(b)(1) where the defendant insurance company, whose business was "to respond to legal process that is served upon it," inexcusably failed to answer. In *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 200, ¶¶ 19-20, 165 P.3d 1271 (2007) (Pet. 8-9), Division One affirmed the denial of CR 60(b)(1) relief to a corporate tenant who had no excuse for its

failure to forward the complaint to counsel following service. *See also Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 195, ¶ 15, 312 P.3d 976 (2013) (affirming refusal to vacate judgment under CR 60(b)(1) for excusable neglect more than one year after judgment was entered), *rev. denied*, 179 Wn.2d 1010 (2014) (Pet. 10). None of these cases involve or even mention the "good cause" standard of CR 55(c)(1).

Sellers's misguided reliance on the standard for "excusable neglect" under CR 60(b)(1) is also manifest in his discussion of *VanderStoep v. Guthrie*, 200 Wn. App. 507, 533-34, ¶ 79, 402 P.3d 883 (2017), *rev denied*, 189 Wn.2d 1041 (2018) (Pet. 10-11). *Vanderstoep* reversed the denial of relief under CR 60(b)(1) because the inexcusable neglect of a liability insurer in failing to arrange for counsel to appear and answer should not have been imputed to an innocent defendant. The Court of Appeals correctly held here that *Vanderstoep* was not controlling (Op. 7), but it is certainly compelling justification for the relief granted below. Sellers asks this Court to accept review to reverse not just the decision in this case, but also the result in *Vanderstoep* and other default judgment cases, such as *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 332 P.3d 991 (2014), *rev. denied*, 182 Wn.2d 1006 (2015), that have consistently

held that an attorney's negligent failure to timely appear and answer does not prevent an innocent client from establishing excusable neglect to vacate a judgment under the more onerous standard of CR 60(b)(1).

Vanderstoep and *Ha* both held that a court's focus in evaluating "excusable neglect" under CR 60(b)(1) should be on the conduct of the party seeking to vacate a default judgment, rather than on the conduct of the party's representatives. Those cases support the trial court's decision here in light of the more "lenient rule for setting aside defaults" under CR 55(c)(1). *Lenzi*, 140 Wn.2d at 278 n.8. The Court of Appeals decision is thus consistent with a long line of cases holding that the policy of resolving disputes on the merits favors vacating even a default judgment where the neglect in failing to timely answer is that of counsel, not the client.[3]

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[3] The federal courts routinely vacate orders of default entered due to the neglect of an attorney if other equitable factors support a finding of "good cause." *See, e.g., Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 420 (4th Cir. 2010) (district court "relied too heavily" on fault of defendant's registered agent; reversing refusal to vacate default "in light of overwhelming evidence supporting 'good cause'" under FRCP 55(c)); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987) (reversing refusal to vacate default where "the defendants are blameless. There has been no prejudice to the plaintiff. Any dilatory action was on the part of the attorney, not the defendants."); *Leshore v. County of Worcester*, 945 F.2d 471, 473 (1st Cir. 1991) (district court order vacating default where attorney failed to respond "is not the kind of judgment call an appellate court should normally second-guess").

This Court long ago held that the trial court's focus under CR 60(b)(1) must be on the conduct of the party, not that of its representative, in the seminal case of *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). In *White*, as in *Vanderhoef*, the trial courts abused their discretion in refusing to vacate a default judgment by imputing a liability insurer's "inexcusable" neglect to the defendants. As the defendants themselves were "blameless," the "circumstances do not warrant an imputation of any such fault to defendants." 73 Wn.2d at 354.[4]

The Court of Appeals here properly applied the "good cause" standard of CR 55(c)(1) rather than the "excusable neglect" standard of CR 60(b)(1). If the "Court of Appeals passed on the opportunity to clarify . . . *Vanderstoep* and *Ha"* (Pet. 15), it is for the simple reason that those cases were decided under a different rule than the one at issue in the instant case. The Court of Appeals decision is consistent

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[4] *Accord Gutz v. Johnson*, 128 Wn. App. 901, 919, ¶¶ 56-57, 117 P.3d 390 (2005) (reversing trial court's refusal to vacate default judgment where defendant had "promptly left a message" with the insurer and his failure to confirm receipt of the message "is not an equitable and just reason to deny him the opportunity for a trial on the merits"), *aff'd*, 160 Wn.2d 745, 161 P.3d 956 (2007); *Norton v. Brown*, 99 Wn. App. 118, 125, 992 P.2d 1019 (1999) (reversing trial court's refusal to vacate default judgment; the trial court "focused more on the insurance company's failure to contact [the defendant] than it did on any excusable neglect on [defendant]'s part"), *opinion amended by* 3 P.3d 207, *rev. denied*, 142 Wn.2d 1004 (2000).

with Washington law interpreting CR 55(c)(1), consistent with case law interpreting the more rigorous standard of "excusable neglect" under CR 60(b)(1) and provides no grounds for further review under RAP 13.4(b)(1) or (2).

3. The application of CR 55's "good cause" standard to specific facts based on the trial court's determination of what is just and equitable presents no issue of substantial public interest.

That the Court of Appeals affirmed the trial court's exercise of discretion here does not mean that trial courts must vacate defaults in every case in which an attorney fails to appear and answer, and thus presents no issue of substantial public interest. To the contrary, the Court of Appeals confirmed that neglect, whether it be of the party, its counsel or other representative, is an appropriate factor for the trial court to weigh in exercising its discretion to vacate an order of default, but also wisely recognized that it is not the exclusive factor. (Op. 9) Sellers' argument that the Court of Appeals decision holds "pro se litigants and in-house counsel . . . to a higher standard than 'outside attorneys'" (Pet. 14) is baseless. The lower courts interpreted CR 55(c)(1) to recognize that trial courts have discretion to excuse mistakes by anyone if they are promptly corrected and there is no prejudice.

In particular, there is no support in this record (or elsewhere) for Sellers's hyperbole that the order of default here was the result of defense counsel's routine "practice of ignoring deadlines," failing to communicate with clients, or deliberate gamesmanship, as opposed to a simple mistake. (Pet. 18) The contention that lawyers (be they "defense counsel" or not) would deliberately place their clients in legal jeopardy by subjecting them to default judgments, thereby exposing themselves to claims of legal malpractice on the hope and prayer that a superior court judge may later vacate the default, conditioned upon payment of thousands of dollars in terms, is ludicrous. Sellers's interpretation of CR 55 would ascribe finality to interlocutory orders and spawn collateral malpractice litigation with no corresponding benefit to the courts, the parties, or the bar. To the extent Sellers takes issue with CR 55(a)(3), which provides that a defendant may forestall a default without further notice by appearing within 20 days of service, he should address his complaint to the Court in its rule-making capacity, rather than to ask this Court to interpret CR 55(c)(1) to remove the trial court's discretion to find "good cause" to vacate a default order under the facts and circumstances of each case.

E. Conclusion.

This Court should deny the petition for review and allow this case to proceed to resolution on its merits.

Dated this 9th day of March, 2020.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 6, 2020, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 6th day of March, 2020.

Sarah N. Eaton

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March 06, 2020 - 10:12 AM

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