No. 98749-1

SUPREME COURT OF THE STATE OF WASHINGTON

TEN BRIDGES LLC,
an Oregon limited liability company,

Petitioner,

v.

F.C. BLOXOM COMPANY,
a Washington corporation, and
LEDLOW & ASSOCIATES, INC.,
a Florida corporation,

Respondents.

AMENDED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Ten Bridges LLC, an Oregon limited liability company ("**Ten Bridges**"), and was the Appellant at the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Ten Bridges respectfully requests that this Court review the decision of the Court of Appeals, Division I, in *Umpqua Bank v. Hamilton*, No. 79855-3-I (Wash. Ct. App. Jul. 8, 2020), which affirmed the trial court's denial of a motion for relief under CR 60(b)(1) and (11).[1]

III. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate where the decision of the Court of Appeals (i) is in conflict with the Supreme Court's decision in *Morrow*[2] since it does not treat interests as fixed at the time of a sheriff's execution sale, and (ii) involves an issue of substantial public interest, as it holds that homeowners are not entitled to the use and benefit of their homestead exemption funds immediately upon sale of the homestead property? Yes.

2. Is review appropriate where the decision of the Court of Appeals (i) is in conflict with the Supreme Court's prior decision in *Morin v. Burris*[3] and the Court of Appeals prior decision in *Prof'l Marine v.*

[1] Appendix, A.
[2] *Morrow v. Moran*, 5 Wash. 692, 32 P. 770 (1893).
[3] 160 Wn.2d 745, 161 P.3d 956 (2007).

Certain Underwriters[4], and (ii) involves an issue of substantial public interest, as it holds that a hearing may proceed notwithstanding an attorney's failure to disclose the existence of the pending hearing to a known party in interest that was not provided notice of the hearing? Yes.

IV. STATEMENT OF THE CASE

A. FACTUAL HISTORY

32100 32nd Ave. SW, Federal Way, Washington 98023 ("**Property**") was sold at a Sheriff's Sale ("**Sale**") held on June 8, 2018 for a purchase price of $293,000.00.[5] The Sale was confirmed by the Court on July 19, 2018.[6] The sale left $92,837.60 in surplus proceeds for distribution in accordance with RCW 6.21.110(5) ("**Surplus Proceeds**").[7]

Prior to the sale, the property was occupied by its owner, Imelda R. Hamilton ("**Hamilton**") as her residence through at least July 3, 2018.[8] On July 3, 2018, Hamilton executed a Quit Claim Deed in favor of Ten Bridges regarding the Property and Surplus Proceeds.[9]

B. PROCEDURAL HISTORY

F.C. Bloxom Co. ("**Bloxom**") filed a motion to disburse the

[4] 118 Wn. App. 694, 77 P.3d 658 (2003).
[5] CP at 44, para. 2 (Declaration in Support of Motion to Distribute Funds); CP at 30 (Order Confirming Sale).
[6] *Id.*
[7] *Id.*
[8] CP at 103, para. 4 (Declaration of Demian Heald); CP at 5, para. 2.3 (Hamilton and James D. Hamilton executed the Deed of Trust); CP at 103, para. 4; CP at 14 (Declaration of Service).
[9] CP at 103, para. 5 and Ex. A (Quit Claim Deed).

Surplus Proceeds on August 6, 2018 ("**Bloxom Motion**"), and the hearing was noted for August 24, 2018.[10] Bloxom asserted a judgment lien against the Surplus Proceeds in the amount of $111,330 ("**Bloxom Judgment**").[11]

Ledlow & Associates, Inc. ("**Ledlow**") did not file a motion to disburse the Surplus Proceeds. Instead, Ledlow filed an objection to the Bloxom Motion on August 22, 2018, and requested disbursement of $66,269 ("**Ledlow Objection**").[12] Ledlow also asserted a judgment lien.[13]

Ten Bridges was not provided notice of the Bloxom Motion or the Ledlow Objection, and was not aware of the pending hearings.[14]

On August 8, 2018, counsel for Bloxom discovered the Ten Bridges Quit Claim Deed during a title search.[15] On August 10, 2018, Grant Courtney, the attorney for Bloxom, spoke with Demian Heald, the manager of Ten Bridges, by phone regarding the Quit Claim Deed and Ten Bridges' interest in the Property *and the Surplus Proceeds*.[16] A copy of the Quit Claim Deed was emailed to Mr. Courtney on August 10, 2018 by Ten Bridges.[17] At the trial court, Mr. Courtney did not dispute that he

[10] CP at 38-42 (Motion to Distribute Funds).
[11] CP at 44, para. 3; CP at 60 (Declaration of David C. Tingstad in Support of Objection of Ledlow & Associates Inc.'s Objection to Disbursement, Ex. B).
[12] CP at 51-52.
[13] CP at 53-54, para. 2; CP at 60.
[14] CP at 104, para. 8.
[15] CP at 138, para. 3.
[16] CP at 104, para. 9.
[17] CP at 104, para. 9; CP at 112 (Ex. B).

discussed Ten Bridges' assertion of an interest in the surplus proceeds.[18]

Bloxom and Ledlow submitted a joint order regarding distribution of the Surplus Proceeds, which was entered on August 28, 2018 ("**Surplus Proceeds Order**").[19] The trial court was not advised by Mr. Courtney or any other party of Ten Bridges' asserted interest in the Surplus Proceeds.

Despite the ongoing discussions between Ten Bridges Mr. Courtney regarding the surplus proceeds, Ten Bridges did not learn of the Surplus Proceeds Order until after its entry.[20]

On November 27, 2018, Ten Bridges filed a motion seeking relief under CR 60(b)(1) and (11), and the inherent authority of the court, from the Surplus Proceeds Order based on (i) Bloxom's failure to provide notice to Ten Bridges, a known holder of an interest in the surplus proceeds, and (ii) Ten Bridges' superior interest in the Surplus Proceeds as compared to the junior judgement liens of the Respondents ("**Motion for Relief**").[21]

At the hearing the trial court[22] denied the Motion for Relief.[23]

Division I of the Court of Appeals affirmed the trial court in a

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[18] CP at 177, para. 3.
[19] CP at 86-90 (Agreed Order to Distribute Funds).
[20] CP 104, para 8.
[21] CP 91-101.
[22] The judge hearing the Motion for Relief was not the same judge that entered the agreed Surplus Proceeds Order. The hearing on the Motion for Relief was apparently her first interaction with the case.
[23] RP at 32:20-33:12, and 35:21-36:3.

published decision.[24] The Opinion held that a homeowner's post-sheriff's sale interest in exempt surplus proceeds was not sufficiently fixed to be transferable to a third party,[25] and that disbursing the surplus proceeds despite Mr. Courtney's failure to disclose the pending hearing for the disbursement of surplus proceeds to a known party in interest was not an abuse of discretion.[26]

V. ARGUMENT

A. STANDARD OF REVIEW

This case involves assignments of error regarding the denial of a motion for relief under CR 60(b)(1) and (11) and under the inherit authority of the court to modify its own judgments.[27] Relief under CR 60(b)(11) is a catchall provision intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b) applies.[28] On review, a trial court's ruling on a CR 60(b) motion will be overturned only upon a showing that the court abused its discretion.[29] Discretion is abused when it is exercised on untenable grounds or for

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[24] Appendix, A.
[25] Appendix, A, p. 6.
[26] Appendix, A, p. 7-8.
[27] *Seattle-First Nat'l Bank Connell Branch v. Treiber*, 13 Wn. App. 478, 480, 534 P.2d 1376, 1377 (1975) (citing *O'Bryan v. American Inv. & Imp. Co.*, 50 Wash. 371, 97 P. 241 (1908)).
[28] *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395, 399 (2017).
[29] *Lane v. Brown & Haley*, 81 Wn. App. 102, 105, 912 P.2d 1040, 1041 (1996) (citing *Pybas v. Paolino*, 73 Wn. App. 393, 399, 869 P.2d 427 (1994)).

untenable reasons.[30] However, issues of statutory interpretation, such as the interpretation of Chapter 6.23 RCW are reviewed de novo.[31]

B. THE DECISION IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *MORROW* AND PREVENTS HOMEOWNERS FROM RECEIVING THE BENEFIT OF THEIR HOMESTEAD EXEMPTION POST-SALE.

The Court of Appeals departed from the Supreme Court's decision in *Morrow*[32] when it held that a homeowner has no conveyable interest in exempt surplus proceeds after a sheriff's execution sale. In reaching its holding, the Court of Appeals incorrectly relied on the Supreme Court's ruling in *Sec. Sav. & Loan Ass'n v. Busch*, even though the *Busch* decision involved a ***pre-sheriff's sale*** conveyance of homestead property.[33] As the *Morrow* decision holds that all interests in real property are fixed at the time of a sheriff's sale, subject only to review for procedural irregularities, Hamilton validly conveyed her interests in the exempt surplus proceeds to Ten Bridges through her quit claim deed.

There is no dispute that Hamilton occupied the Property as her residence prior to the Sale. She was served with original process at the Property, and the Plaintiff alleged that she resided therein.[34] As she owned and used the Property as her residence, the Property automatically

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[30] *Id.* (citing *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990)).
[31] *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4, 9 (2002).
[32] *Morrow v. Moran*, 5 Wash. 692, 32 P. 770 (1893).
[33] *Sec. Sav. & Loan Ass'n v. Busch*, 84 Wn.2d 52, 523 P.2d 1188 (1974)
[34] CP at 14.

qualified as her homestead.[35] Under RCW 6.13.030, the value of Ms. Hamilton's homestead interest in the Property was $125,000.00, which exceeded the amount of the Surplus Proceeds.

Under RCW 6.13.080, the homestead exemption is not available as to certain debts, which include deeds of trust (such as the one foreclosed by Umpqua Bank, the Plaintiff herein) or association liens. However, judgment liens remain subject to the exemption. Under RCW 6.13.090, a judgment is only a lien against the "value of the homestead property in excess of the homestead exemption". As such, Bloxom and Ledlow's judgment liens were both junior and subordinate to the homestead exemption at the time of the Sale. Since the surplus proceeds did not exceed the homestead exemption of $125,000.00, neither Bloxom nor Ledlow should have received any surplus proceeds from the sale.

Hamilton's equitable interest in the Property was passed to the purchaser (Bloxom) at the Sale on June 8, 2018.[36] Therefore, Hamilton's homestead exemption interest in the Property was liquidated and reduced to the Surplus Proceeds on deposit with the court following the sale.

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[35] RCW 6.13.040(1).

[36] *Morrow v. Moran*, 5 Wash. 692, 693, 32 P. 770, 770 (1893) ("Even if the supreme court had no right to confirm the sale, it is not the confirmation that gives the equitable title to the land, but it is the purchase at the execution sale and the payment of the purchase price according to the terms of the sale. If the proceeding had been regular up to the time of and including the sale, the equitable title would pass to the purchaser. The confirmation is really only the announcement of the legal determination of these facts.") (emphasis added).

Pursuant to *Morrow*, the only role of the confirmation hearing was to verify the regularity of the procedures up to the time of the sale.[37] The confirmation order was merely the announcement of that legal determination of regularity.[38] After June 8, 2018, Hamilton's interests in the Property (other than rights of redemption) were extinguished and instead fixed in the Surplus Proceeds.

But for the Quit Claim Deed, there is no dispute that Hamilton should have received the exempt portion of the Surplus Proceeds. Neither Bloxom nor Ledlow have argued to the contrary. Her interest was converted into cash proceeds (albeit in possession of the Court). The issue then becomes what are the rights of a former homeowner to convey those cash proceeds post-sheriff's sale.

The Court of Appeals held that a homeowner's interest in surplus proceeds is ***not*** transferable until the proceeds ***are actually released*** by order of the court. Until this case, there has been no case law in Washington supporting this position, and it is contrary to the intent of the homestead statute and the Supreme Court's holding in *Morrow*.

To reach its conclusion, the Court of Appeals relied on the Supreme Court's holding in *Busch*, but that case did not involve a ***post***-

[37] *Id.*
[38] *Id.*

sheriff's sale transfer.[39] In *Busch* one homeowner, (Mr. Frisone) executed a declaration of homestead, then Mr. Frisone and his wife granted a quit claim deed of the property to third parties (Mr. and Mrs. Busch), which was subsequently transferred back.[40] After the transfer back to the Frisones, the Buschs' lender foreclosed a mortgage granted the Buschs during their ownership. Post-foreclosure the homeowner asserted a homestead based on the declaration executed prior to the quit claim deed to the Buschs. The Court held that the intervening quit claim deed (executed *prior* to foreclosure) extinguished the earlier declaration.[41] Nothing in *Busch* addresses the interest of a homeowner, with an acknowledged homestead interest at the time of a foreclosure sale, in surplus proceeds *post-foreclosure*.

By implication, the Court of Appeals opinion holds that homeowners may not use their surplus proceeds in any fashion until the funds are *actually* ordered to be disbursed, no matter how long that process takes. This contradicts the intent of the homestead statute to the detriment of homeowners. In Washington the homestead statute is to be

[39] *Sec. Sav. & Loan Ass'n v. Busch*, 84 Wn.2d 52, 523 P.2d 1188 (1974).
[40] It appears that the purchaser under a real estate contract was only added to the definition of owner under RCW 6.13.010 (formerly RCW 6.12.010) in 1981. *See* Wa. HB 599, ch.. 329, § 7.
[41] *Id.*, at 55.

liberally construed for the benefit of homeowners.[42] The purpose of the exemption is to provide shelter for a family.[43] The homestead statute does not protect the rights of creditors (such as Bloxom and Ledlow), but rather is in derogation of creditors' rights.[44]

A homeowner whose property was just sold needs the benefit of the homestead exemption funds as soon as possible. For example, if a homeowner seeks to secure a loan to acquire a new property, they should be allowed to convey their interest in the surplus proceeds as a down payment. There is nothing in the case law or Chapter 6.13, RCW indicating that homeowners' exempt interest in surplus proceeds is only fixed after a judicial determination of the exemption. To the contrary, the statute states that the exemption is ***automatic*** with respect to property occupied by the homeowners.[45] Once it is liquidated, the cash proceeds are the protected property of the homeowners for one year and may be used by the homeowners as they see fit (whether through a voluntary sale or an execution sale). The burden is on third parties to dispute the homestead exemption rather than for the homeowners to affirmatively assert it and receive the proceeds from the Court.

Once a homestead property is sold, the homeowner must start

[42] *Lien v. Hoffman*, 49 Wn.2d 642, 649, 306 P.2d 240, 244 (1957).
[43] *Bank of Anacortes v. Cook*, 10 Wn. App. 391, 395, 517 P.2d 633, 636 (1974).
[44] *Id*.
[45] RCW 6.13.040(1).

making arrangements for new housing (assuming the homeowner cannot redeem). If disbursement of the surplus proceeds is delayed more than the one year redemption/possession period due to appeals or other issues, the homeowner would not be able to benefit from the exemption when it was needed most.

For example, it is not uncommon for disputes to arise regarding liens that are not subject to the homestead exemption (deeds of trust, association liens, etc.). Even if it is undisputed that the homeowner possesses an exempt homestead interest in the sale proceeds, disbursement of the exempt funds may be withheld if the dispute affects whether there are sufficient proceeds to pay the homestead exemption. If that dispute, to include the trial and appeals, lasts longer than one year (which is common), the homeowner's right to possession during the redemption period will have expired. Yet the homeowner will not be able to utilize the potential surplus funds to secure new housing. Under the Court of Appeal's ruling, the homeowner would not be allowed to convey the homeowner's fixed and known interest to a third party (willing to accept the risk of non-payment) in exchange for immediate access to funds.

This is particularly concerning where the homeowner, already in financial distress, now has to fund litigation over the validity or availability of a homestead exemption. The facts of this case best

illustrate this risk. Bloxom and Ledlow knew that Hamilton had a homestead interest in the property. They also knew there were insufficient surplus proceeds to pay the exemption in full. Despite those facts, these judgment creditors applied for distribution of the surplus proceeds. They were hoping that Hamilton would not appear and assert her interest in the surplus proceeds (or perhaps they would contest her homestead if she did).

The Court of Appeals' ruling limits a homeowner's access to the surplus funds in a manner contrary to the intent of the homestead statute. Once a homestead exemption is liquidated, it should belong to the homeowner to allow them to move on with their lives. Instead, the Court of Appeals now requires that a homeowner appear and assert a homestead exemption ***and*** receive judicial confirmation of that right in order to possess any conveyable interest in those funds. This is an inversion of the statutory scheme.

Under *Morrow*, an interest in homestead funds are the property of the homeowner immediately upon liquidation by a sheriff's sale, as they already lost the real property as of the sale (subject only to redemption). A liberal interpretation of the statute requires that the homeowner's interest in the surplus proceeds be fixed immediately upon sale, and the homeowner should be allowed to use them (to include a conveyance while still in the registry of the court) for whatever purposes the homeowner

deems appropriate. To hold otherwise would leave homeowners without this significant asset between the sheriff's sale and final distribution by the court, which may be delayed months or even years.

C. THE DECISION IS IN CONFLICT WITH THE SUPREME COURT'S DECISION IN *MORIN* AND THE COURT OF APPEALS PRIOR DECISION IN *PROF'L MARINE*, AS IT HOLDS THAT A HEARING MAY PROCEED NOTWITHSTANDING AN ATTORNEY'S FAILURE TO DISCLOSE THE PENDING HEARING TO A KNOWN PARTY IN INTEREST.

The Court of Appeals incorrectly held that the trial court did not abuse is discretion in awarding Bloxom and Ledlow[46] the surplus funds, despite Bloxom's counsel's failure to disclose the pending hearing to Ten Bridges, a known party in interest that Bloxom knew did not receive notice of the hearing. In reaching this decision, the Court of Appeals failed to recognize the intent of the informal appearance/substantial compliance doctrines referenced in *Prof'l Marine*[47] and *Morin*.[48] As discussed above, Bloxom and Ledlow only stood to receive proceeds if Hamilton did not appear and receive her homestead exemption, as the surplus proceeds were less than $125,000.00.[49] They possessed a direct financial interest in discouraging any party from appearing at the hearing.

[46] Although the failure to disclose was by Bloxom's attorney, the relief granted to Ledlow in the Surplus Proceeds Order is based on the Bloxom Motion rather than an independent motion (with a separate twenty-day notice under RCW 6.21.110(5)(b)).
[47] *Prof'l Marine v. Certain Underwriters*, 118 Wn. App. 694, 77 P.3d 658 (2003).
[48] *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).
[49] CP at 152, para. 2-3.

Allowing Bloxom and Ledlow to benefit from their non-disclosure is contrary to the "liberal application of rules permitting equity … and substantial compliance" espoused in *Morin*.[50]

Through its motion filed on August 6, 2018,[51] Bloxom sought disbursement of the Surplus Proceeds under RCW 6.21.110. Just two days after filing its motion, Bloxom learned of the Quit Claim Deed and Ten Bridges' interest in the Surplus Proceeds.[52] At that time, Bloxom knew it had not provided notice to Ten Bridges.[53]

Bloxom had the opportunity to easily correct that issue on August 10, 2018, when its counsel, Mr. Courtney, discussed Ten Bridges' interest in the surplus proceeds with Mr. Heald, the manager of Ten Bridges.[54] During that phone call and subsequent text messages, counsel for Bloxom did not disclose the pending hearing and motion.[55] The declaration submitted by Ten Bridges to the trial court explicitly stated that Mr. Courtney and Mr. Heald discussed Ten Bridges' interest in the "surplus

[50] 160 Wn.2d at 757.
[51] CP at 38-42.
[52] CP 126, ll. 4-6 ("Bloxom learned of the transfer … on or about August 8, 2018 while securing insurance on the Property.").
[53] CP 47-50.
[54] CP at 104, para. 9; CP at 112 (Ex. B).
[55] CP at 104, para. 9; CP at 152, para. 2 ("At no point during my conversations with Mr. Courtney (to include text messages and phone calls in August and September), did Mr. Courtney state either (1) there was a pending motion for distribution of surplus proceeds, or (2) that the Surplus Proceeds Order was entered on August 27, 2018.").

proceeds".[56] This discussion of the surplus proceeds necessarily involved discussion of the pending case, as the surplus proceeds were generated from a sheriff's sale in the pending foreclosure case and deposited in the registry of that open case.

Tellingly, Bloxom offered no evidence contradicting this point.[57] Bloxom did not even suggest that it orally notified Ten Bridges of the pending hearing. Bloxom also failed to allege that the pending case was not discussed by Mr. Courtney and Mr. Heald.[58] By failing to disclose the pending hearing after receiving notice of Ten Bridges' interest, Bloxom denied Ten Bridges the opportunity to respond to the Bloxom Motion and misled Ten Bridges regarding the posture of the case.

The Court of Appeals applied *Prof'l Marine Co.*[59] and *Morin*[60] to hold that Ten Bridges failed to acknowledge that a dispute existed *in court*.[61] It also argued that a strict ruling of RCW 6.21.110(5)(b) did not require notice to a known party in interest if that party did not formally or informally appear *prior* to issuance of the notice.[62]

This decision contradicts the Supreme Court's stated "approach of

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[56] CP at 104, para. 9.
[57] CP at 135-138; CP at 174-177.
[58] *Id.*
[59] *Prof'l Marine v. Certain Underwriters*, 118 Wn. App. 694, 77 P.3d 658 (2003).
[60] *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).
[61] Appendix, A, p. 8.
[62] *Id.*

liberal application of rules permitting equity, vacation of default judgments, and application of substantial compliance" to adequately promote justice.[63] While RCW 6.21.110 does define parties entitled to notice, to include parties who have formally appeared, it is not consistent with the case law in Washington to use such a statute to intentionally omit providing notice to a known party in interest. For the purpose of motions of default, informal appearances, such as Ten Bridges' contacts with Mr. Courtney to discuss the very issue in dispute, are sufficient to prevent entry of a default judgement without notice. [64] Whether a party has informally appeared is a question of intention. An intent to appear can include the indication of a purpose to defend or request affirmative action from the court. [65]

Here there is no reasonable argument that Ten Bridges failed to informally appear. Mr. Courtney's own declaration states that on or about August 8, 2018 (sixteen days prior to the scheduled hearing) he discussed the homestead exemption, rights of redemption, and the Quit Claim Deed with Mr. Heald of Ten Bridges.[66] That conversation resulted from Mr.

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[63] *Morin*, 160 Wn.2d at 757.
[64] *Prof'l Marine v. Certain Underwriters*, 118 Wn. App. 694, 708, 77 P.3d 658, 666 (2003) ("But the methods set forth in RCW 4.28.210 are not exclusive, and informal acts may also constitute an appearance.").
[65] Id.
[66] CP at 138, para. 3 ("During these and subsequent telephone conversations with Mr. Heald we discussed the status of the matter and Bloxom's position that by executing the

Courtney's review of a Quit Claim Deed which stated:

> approximately $92,837.60 was deposited in the registry of the court as surplus proceeds from the Sheriff's Sale made on 6/8/2018, Cause # 162298842, and that [Ten Bridges] will attempt to secure the full amount, entirely for its own benefit.[67]

As the property was already sold and the court was holding surplus proceeds, the homestead exemption was obviously relevant to the issue of disbursement of surplus proceeds and Ten Bridges' interests under the Quit Claim Deed. Similarly, a discussion about redemption rights indicates an intent by Ten Bridges to request affirmative action from the court. Based on these conversations, Bloxom knew that Ten Bridges had informally appeared in this case, as permitted under Washington case law.

Despite that informal appearance, Bloxom and Ledlow essentially pursued and obtained a default judgment (without notice) against Ten Bridges by filing their agreed proposed order. By failing to notify the Court, Bloxom and Ledlow aggravated the problem by denying the Court the opportunity to rectify the lack of notice to a known, interested party. It is reasonable to believe that if the trial court was notified of Ten Bridges' interest and lack of notice that it would have continued the hearing and required additional notice to Ten Bridges.

In allowing Bloxom's non-disclosure, the Court of Appeals applied

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quitclaim deed Ms. Hamilton has surrendered any homestead exemption or rights of redemption.").

[67] CP at 107-111 (Ex. A, Quit Claim Deed).

an analysis related to default judgments in a non-sensical fashion. In a typical default judgment, a party is served with process, and the question becomes whether the defendant, after being served, informally appeared prior the plaintiff obtaining an order of default. In this case Bloxom filed a motion for relief, and subsequently discovered that a party served was not the current party in interest. Ten Bridges never received notice of the pending motion, and reasonably believed (based on Mr. Courtney's non-disclosure) that there was no motion pending. There was no way for Ten bridges to specifically acknowledge the exact motion that it was never provided notice of. However, it did discuss the subject of the motion (surplus proceeds) and its rights therein. The Court of Appeals effectively held that if a party with no notice of a motion fails to discuss the pendency of that exact motion (and not merely the subject dispute), those discussions cannot constitute an informal appearance. This is contrary to the intent of the informal appearance doctrine, and should not be allowed.

Bloxom and Ledlow had a pecuniary interest in ensuring no party appeared to assert a homestead exemption. In light of that interest, it is particularly egregious to allow their non-disclosure to Ten Bridges, a known party in interest that was not provided notice of the hearing. Prior to the hearing, Ten Bridges had informally appeared and asserted a right to the surplus proceeds, which triggered an equitable right to notice of the

hearing. Since counsel for Bloxom failed to disclose its pending motion when discussing the case with the manager for Ten Bridges, the court abused its discretion in holding that the notice was adequate. Under *Prof'l Marine Co.* and *Morin*, the decision should have been reversed.

VI. CONCLUSION

Ten Bridges requests the Supreme Court accept discretionary review of this case to (i) clarify the nature of a homeowner's interests in exempt surplus proceeds after a sheriff's sale, and (ii) to hold that an attorney may not withhold disclosure of a pending hearing when communicating with a known party in interest.

RESPECTFULLY SUBMITTED this 27th day of July, 2020.

EISENHOWER CARLSON PLLC

By: *Darren R. Krattli*
Darren R. Krattli, WSBA # 39128
Attorneys for Petitioner Ten Bridges LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2020, I caused all parties hereto to be served with the Petition for Review and this Certificate of Service by directing delivery to the following persons by the means stated:

By E-Service / E-Mail, on July 27, 2020, to the attorneys for Respondents:

Shelley N. Ripley Witherspoon Kelley Davenport & Toole PS 422 W Riverside Ave., Suite 1100 Spokane, WA 99201-0300 snr@witherspoonkelley.com	**David C. Tingstad** Beresford Booth PLLC 145 3rd Ave. S., Suite 200 Edmonds, WA 98020-3593 davidt@beresfordlaw.com
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I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of July, 2020, at Tacoma, Washington.

/s/ Jennifer Fernando
Jennifer Fernando, Legal Assistant

EXHIBIT A

FILED
6/8/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

UMPQUA BANK, an Oregon chartered bank,

Plaintiff,

v.

IMELDA R. HAMILTON, a single person; THE ESTATE OF JAMES D. HAMILTON, DECEASED; THE HEIRS AND DEVISEES OF JAMES D. HAMILTON, DECEASED; TWIN LAKES GOLF AND COUNTRY CLUB, a Washington nonprofit corporation; U.S. BANK NATIONAL ASSOCIATION N.D.; STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES; TWIN LAKES HOMEOWNER'S ASSOCIATION, INC., a Washington nonprofit corporation; STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT; SCOTT PARIS, an individual; FINANCIAL ASSISTANCE, INC., a Washington corporation; and ALL OTHER PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, LIEN OR INTEREST IN THE REAL ESTATE DESCRIBED IN THE COMPLAINT HEREIN,

Defendants,

F.C. BLOXOM COMPANY (AKA F.C. BLOXOM COMPANY, INC.), an inactive Washington corporation; LEDLOW & ASSOCIATES, INC., a Florida corporation;

Respondents,

TEN BRIDGES LLC,

Appellant.

No. 79855-3-I

DIVISION ONE

PUBLISHED OPINION

CHUN, J. — After a judicial foreclosure sale of her home, Imelda Hamilton executed a quitclaim deed in favor of Ten Bridges LLC. F.C. Bloxom Company and Ledlow & Associates, Inc. (collectively Respondents) both made claims to the surplus proceeds. The trial court entered an Agreed Order to Distribute Funds.

Three months later, Ten Bridges learned of the Agreed Order to Distribute Funds and moved for relief under CR 60(b). The trial court denied the motion. Ten Bridges claims the trial court erred by determining (1) it could not assert the homesteader's rights to claim the surplus proceeds, and (2) it was not entitled to notice of the Agreed Order to Distribute Funds. We determine that Hamilton's execution of a quitclaim deed extinguished any homestead rights she had in her home and Ten Bridges. Thus, she could not transfer her homestead interest to Ten Bridges. We also conclude that Ten Bridges failed to appear in the action, informally or otherwise. As a result, we affirm.

I. BACKGROUND

Hamilton owned real property in Federal Way (Property) and occupied it as her residence. Umpqua Bank commenced a judicial foreclosure on its deed of trust against the Property. The King County Sheriff then sold the Property to Bloxom for $293,000. After the sale, Hamilton executed a quitclaim deed in favor of Ten Bridges for her interest in the Property in exchange for $5,000. The quitclaim deed was recorded with the King County Recorder's Office.

The trial court then entered an order confirming the sale of the Property. After satisfaction of Umpqua Bank's lien, $92,837.60 remained for the court to

disburse in accordance with RCW 6.21.110(5).[1]

The next month, Bloxom asserted a lien of $111,330.26 against the property. In response, Ledlow also asserted a lien and filed an objection requesting a $66,269.81 disbursement before any payment to Bloxom.

Bloxom then conducted a title search and discovered Ten Bridges' quitclaim deed. Bloxom contacted Ten Bridges, who then e-mailed Bloxom a copy of the deed.

Later that month, the trial court entered an Agreed Order to Distribute Funds submitted by Bloxom, Ledlow, and a third party.[2] Ten Bridges did not receive notice of any pleadings seeking disbursement of the surplus proceeds before the court entered its order.

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[1] RCW 6.21.110(5) provides:

> (a) If, after confirmation of the sale and the judgment is satisfied, there are any proceeds of the sale remaining, the clerk shall pay such proceeds, as provided for in (b) of this subsection, to all interests in, or liens against, the property eliminated by sale under this section in the order of priority that the interest, lien, or claim attached to the property, as determined by the court. Any remaining proceeds shall be paid to the judgment debtor, or the judgment debtor's representative, as the case may be, before the order is made upon the motion to confirm the sale only if the party files with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale; otherwise, the excess proceeds shall remain in the custody of the clerk until the sale of the property has been disposed of.
>
> (b) Anyone seeking disbursement of surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited. Notice of the motion shall be served upon or mailed to all persons who had an interest in the property at the time of sale, and any other party who has entered an appearance in the proceeding, not less than twenty days prior to the hearing of the motion. The clerk shall not disburse such remaining proceeds except upon order of the superior court of such county.

[2] Twin Lakes Golf and Country Club was also a party to the joint proposed order. Twin Lakes had a senior lien to the surplus proceeds that none of the parties to this appeal dispute.

Three months after the court entered the Agreed Order to Distribute Funds, Ten Bridges moved to vacate it under CR 60(b)(1) and (11). It purported to assert what had been Hamilton's homestead rights to the surplus funds and argued that this interest was superior to those of Bloxom and Ledlow. The court denied Ten Bridges' motion. Ten Bridges appeals.

II. ANALYSIS

We review a trial court's ruling on a CR 60(b) motion to vacate for an abuse of discretion. Shandola v. Henry, 198 Wn. App. 889, 896, 396 P.3d 395 (2017). "A trial court abuses its discretion when its decision is based on untenable grounds or is made for untenable reasons." Shandola, 198 Wn. App. at 896.

A. Homestead Act

Ten Bridges asserts that the trial court erred by determining that a homeowner could not, post-sale, convey an interest in exempt surplus proceeds. Respondents argue the trial court properly ruled that Ten Bridges could not assert what had been Hamilton's homestead interest to obtain the surplus proceeds. We hold that a homeowner cannot transfer their homestead interest to another party through a quitclaim deed.

We review de novo issues of statutory interpretation. Nw. Cascade Inc. v. Unique Constr. Inc., 187 Wn. App. 685, 696, 351 P.3d 172 (2015).

Washington passed its first homestead law in 1895 under a constitutional mandate. See 1895 c 64 § 1; Rem. Supp. 1945 § 528; CONST. art. XIX, § 1 ("the legislature shall protect by law from forced sale a certain portion of the

homestead and other property of all heads of families."). The purpose of Washington's "Homestead Act" (Act), chapter 6.23 RCW, is to place qualifying homes, or portions of them, beyond the reach of financial misfortune and to promote the stability and welfare of the state. Clark v. Davis, 37 Wn.2d 850, 852, 226 P.2d 904 (1951). We liberally construe the Homestead Act in favor of the debtor so it may achieve its purpose of protecting homes. In re Dependency of Schermer, 161 Wn.2d 927, 953, 169 P.3d 452 (2007).

But "there can be no homestead right unless there is an existing interest of some nature." Sec. Sav. & Loan Ass'n v. Busch, 84 Wn.2d 52, 56, 523 P.2d 1188 (1974). So as a general rule, "a valid conveyance of the homestead property by the homesteader extinguishes [their] homestead rights." Busch, 84 Wn.2d at 53 n.3.

Hamilton conveyed all her interest in the Property to Ten Bridges through a quitclaim deed. This conveyance extinguished any homestead interest that she had in the property, which interest therefore could not be transferred to Ten Bridges. See Busch, 84 Wn.2d at 55-56 (holding that the homesteader's execution of a quitclaim deed extinguished his homestead rights). Thus, Ten Bridges could not make a valid claim to the surplus proceeds.

Ten Bridges contends that "[o]nce Hamilton's homestead exemption interest was liquidated at the Sale, her interest in the funds was fixed, and she was free to convey it at her discretion." But Ten Bridges cites no legal authority in support of its argument. While Ten Bridges notes that the quitclaim deed in

Busch occurred before the sheriff's sale of the home, the case does not limit its holding to that context.

We do not see how allowing a homesteader to sell their rights to surplus proceeds of potentially $125,000,[3] here in exchange for $5,000, helps promote the Homestead Act's purpose. Thus, even when liberally construing the Act, we conclude that a homeowner cannot transfer their homestead interest through a quitclaim deed. Thus, the trial court correctly determined that Ten Bridges did not have a valid claim to the surplus proceeds. Because Ten Bridges asserted no other basis for a claim to the surplus proceeds, the trial court did not abuse its discretion by denying its motion for relief under CR 60(b).

B. Notice

Ten Bridges next argues that it did not receive adequate notice of the Agreed Order to Distribute Funds. Respondents argue that Ten Bridges was not entitled to such notice because it had not appeared in the action. We agree with Respondents.

We review a trial court's determination on whether a party has appeared in an action for an abuse of discretion. Prof'l Marine Co. v. Those Certain Underwriters at Lloyds, 118 Wn. App. 694, 708, 77 P.3d 658 (2003). Thus, we "will not disturb the trial court's decision unless it was manifestly unreasonable, based on untenable grounds or untenable reasons." Prof'l Marine Co., 118 Wn. App. at 708.

[3] See RCW 6.13.030.

Under RCW 6.21.110(5)(b), a party must serve notice of a motion for disbursement of surplus "to all persons who had an interest in the property at the time of the sale, and any other party who has entered an appearance in the proceeding." Typically, "a party 'appears' in an action when it 'answers, demurs, makes any application for order therein, or gives the plaintiff written notice of [their] appearance." Prof'l Marine Co., 118 Wn. App. at 708 (quoting RCW 4.28.210). But Washington courts will also apply the doctrine of substantial compliance to determine whether a party has appeared. Morin v. Burris, 160 Wn.2d 745, 755, 161 P.3d 956 (2007). To satisfy this doctrine, "the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court.*" Morin, 160 Wn.2d at 756.

Ten Bridges contends that it appeared under the substantial compliance doctrine through communications to Bloxom's counsel. But Ten Bridges submits no evidence showing that it acknowledged a dispute in court in its communications with Bloxom. The only evidence Ten Bridges submitted of the communications was a declaration and a copy of the e-mail it sent to Bloxom's counsel. The declaration provides that "Ten Bridges did not receive notice of any pleadings seeking the disbursement of the Surplus Proceeds prior to the entry of the Surplus Proceeds Order" and that Ten Bridges' counsel "spoke with [Bloxom's] counsel on or about August 10, 2018 regarding the Quit Claim Deed and Ten Bridges' interest in the Property and the Surplus Proceeds." The redacted e-mail merely states that "[Bloxom's counsel] asked me to forward you a copy of the recorded Quit Claim Deed for this property." Neither the

declaration nor the e-mail shows that Ten Bridges acknowledged that a dispute existed in court. Thus, the trial court did not abuse its discretion by determining that Ten Bridges was not entitled to notice under the substantial compliance doctrine.

Ten Bridges also appears to argue that the court should have granted its motion for relief because Bloxom knew of Ten Bridges' quitclaim deed, but failed to notify it of its pending motion for disbursement of the surplus proceeds. RCW 6.21.110(5)(b), however, required Bloxom to serve notice only "to all persons who had an interest in the property at the time of the sale, and any other party who has entered an appearance in the proceeding." Ten Bridges does not claim that it constituted either. Thus, it fails to offer a legal theory that required Bloxom to notify it of its motion. For these reasons, we determine the trial court did not abuse its discretion by denying Ten Bridges' motion for relief on the ground that it received inadequate notice.

We affirm.

Chun, J.

WE CONCUR:

Mann, C.J.

Appelwick, J.

EXHIBIT B

Morrow v. Moran

Supreme Court of Washington

February 7, 1893, Decided

No. 692.

Reporter
5 Wash. 692 *; 32 P. 770 **; 1893 Wash. LEXIS 47 ***

VANDEVER P. MORROW, Appellant, v. THOMAS MORAN, Respondent.

Prior History: [***1] Appeal from Superior Court, Mason County.

Action by Vandever P. Morrow against Thomas Moran to quiet title to certain land. The land in controversy was bought by defendant at an execution sale, pursuant to a judgment rendered by the supreme court of the Territory of Washington against the plaintiff in this action and another. The sale was confirmed by the supreme court, and a sheriff's deed issued to the defendant herein. From a judgment in favor of defendant, plaintiff appeals.

Disposition: Judgment affirmed.

Counsel: C. W. Hartman, for appellant.

Judson & Sharpstein, for respondent.

Judges: DUNBAR, C. J. ANDERS, STILES, HOYT and SCOTT, JJ., concur.

Opinion by: DUNBAR

Opinion

[*692] [**770] The opinion of the court was delivered by

DUNBAR, C. J.--To reverse this case it would be necessary to overrule the supreme court of the Territory of Washington in *Willey v. Morrow*, 1 Wash. Terr. 474. The supreme court in that case, after a pretty thorough examination of the law, decided, both upon the hearing and petition for re-hearing, that it had jurisdiction of the case, and under the law as it then existed we are not willing to say that their decision was erroneous. At all events [***2] it must be held [*693] conclusive where attacked collaterally as in this case. And then, if the appellant's theory of law be conceded to be correct, it is cured by act of congress approved April 4, 1874. (See act entitled "An act concerning practice in territorial courts," Code of Washington, page 22.)

Even if the supreme court had no right to confirm the sale, it is not the confirmation that gives the equitable title to the land, but it is the purchase at the execution sale and the payment of the purchase price according to the terms of the sale. If the proceeding had been regular up to the time of and including the sale, the equitable title would pass to the purchaser. The confirmation is really only the announcement of the legal determination of these facts.

We have examined the whole case without specially arguing all the errors alleged by appellant, and have been unable to find any error in the rulings or judgment of the court below, and the judgment is, therefore, affirmed.

ANDERS, STILES, HOYT and SCOTT, JJ., concur.

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EXHIBIT C

Morin v. Burris

Supreme Court of Washington

May 18, 2006, Argued; June 28, 2007, Filed

NO. 77291-6, NO. 77784-5, NO. 77867-1

Reporter
160 Wn.2d 745 *; 161 P.3d 956 **; 2007 Wash. LEXIS 469 ***

SHERRI MORIN ET AL., *Petitioners*, v. BONNIE BURRIS ET AL., *Respondents*.DESIREE C. GUTZ ET AL., *Petitioners*, v. STANLEY B. JOHNSON ET AL., *Respondents*.MATIA INVESTMENT FUND, INC., *Petitioner*, v. THE CITY OF TACOMA, *Respondent*.

Prior History: Morin v. Burris, 126 Wn. App. 1057, 2005 Wash. App. LEXIS 1413 (2005).

Investment Fund v. City of Tacoma, 129 Wn. App. 541, 119 P.3d 391, 2005 Wash. App. LEXIS 2372 (2005).

Gutz v. Johnson, 128 Wn. App. 901, 117 P.3d 390, 2005 Wash. App. LEXIS 1980 (2005).

Counsel: *Thomas F. Gallagher* (of *Law Offices of Watson & Gallagher*); *Stephen H. Good, Jr.*; and *Joseph P. Wilson*, for petitioners.

Jeffrey Twersky; *Marilee C. Erickson* (of *Reed McClure*); *Robin Jenkinson*, *City Attorney*, and *Anne L. Spangler*, *Assistant*; *Thomas L. Schwanz* (of *Snook Schwanz*); and *Katina C. Thornock* (of *Cozen O'Connor*), for respondents.

Bryan P. Harnetiaux on behalf of Washington State Trial Lawyers Association Foundation, amicus curiae.

Judges: [***1] AUTHOR: Justice Tom Chambers. WE CONCUR: Justice Charles W. Johnson, Justice Susan Owens, Justice Mary E. Fairhurst, Justice Richard B. Sanders, Justice James M. Johnson. BRIDGE, J. (concurring in part/dissenting in part). WE CONCUR: Chief Justice Gerry L. Alexander, Justice Barbara A. Madsen.

Opinion by: Tom Chambers

Opinion

En Banc
[*748] [**958]

¶1 CHAMBERS, J. — In all three cases before us, the plaintiffs properly initiated lawsuits against the defendants. [*749] In all three cases before us, the defendants failed to file answers or otherwise formally appear. In two of these cases, plaintiffs successfully moved for default judgment. And in each of the cases, the Court of Appeals decided that the default judgments should be set aside.

¶2 This court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in

the interests of fairness and justice. Similarly, if default judgment is rendered against a party who was entitled to, but did not receive, notice, the judgment will be set aside. *Tiffin v. Hendricks*, 44 Wn.2d 837, 847, 271 P.2d 683 (1954). We have also held that the doctrine of substantial compliance [***2] applies to the notice requirement of CR 4 when enforcing or setting aside judgments under CR 55 and CR 60. Substantial compliance with the appearance requirement may be satisfied informally. *Cf. State ex rel. Trickel v. Superior Court*, 52 Wash. 13, 100 P. 155 (1909).

¶3 However, whether or not a party has substantially complied with the rules must be decided against the fact that litigation is a formal process. Those who are served with a summons must do more than show intent to defend; they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences. We disagree with our learned colleagues below that *pre*litigation communication alone is sufficient to satisfy a party's duty to appear and defend against a court case. Although substantial compliance [**959] with the appearance requirement can be accomplished informally, we do not adopt the doctrine of informal appearance as it has been formulated below. *See*, *e.g.*, *Batterman v. Red Lion Hotels, Inc.*, 106 Wn. App. 54, 21 P.3d 1174 (2001).

¶4 We hold that merely showing intent to defend before a case is filed is not enough to qualify as an appearance in court. Accordingly, we remand *Morin v. Burris*, [***3] noted at 126 Wn. App. 1057, 2005 Wash. App. LEXIS 598, and *Matia Investment Fund, Inc. v. City of Tacoma,* 129 Wn. App. 541, 119 P.3d [*750] 391 (2005), to the trial court for reentry of default judgment. However, we agree with the Court of Appeals in *Gutz v. Johnson,* 128 Wn. App. 901, 117 P.3d 390 (2005), that the respondent may have acted diligently and the failure to appear may have been reasonably excused by the conduct of opposing counsel. Accordingly, we vacate that default judgment and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶5 *Morin.* On November 23, 1998, Jeffrey Barth, driving a car owned by his mother, Bonnie Burris, rear-ended a car Sherri Morin was driving. Morin and her insurance provider contacted Barth's insurer, Farmers Insurance, in an attempt to recover damages. On December 16, 1998, Morin was contacted by Farmers' claim representative, Keith Haupt. At that time, Morin was given a check covering the property damage to her car. Morin also told Haupt she was seeing a doctor as a result of the accident and said she would keep in touch.

¶6 Morin and Haupt briefly spoke again in July 1999 and then again in November 1999, when Morin [***4] refused a settlement offer and retained Stephen H. Good, Jr., as her counsel. Good and Haupt had unsuccessful settlement discussions in June 2001. There was no further contact between the parties that year.

¶7 On November 2, 2001, Good filed a complaint on Morin's behalf. Burris was personally served on December 4, 2001. After several unsuccessful attempts and with permission of the court, Barth was served by publication on February 28, 2002. The defendants did not respond in any way following service. On May 24, 2002, Morin obtained a default order and on December 3, 2002, she received a default judgment against Burris and Barth. Approximately one year later, Good sent Haupt a letter demanding payment of the default judgment. On February 4, 2004, respondents Barth and Burris filed a motion to vacate the default [*751] judgment, arguing that they had informally appeared in the action and thus were entitled to notice of the plaintiffs' intention to seek an order of default. The trial court agreed and vacated the default judgment. Morin appealed. The Court of Appeals, Division One, concluded that in light of the prelitigation contact between Farmers and Morin, including the payment for property [***5] damage, the trial court had not abused its

discretion in setting aside default judgment on the ground of an informal appearance.

¶8 *Gutz.* In October 2000, Sharon Gutz, accompanied by her minor daughter, Desiree Gutz, was driving her car when it collided with a car Stanley Johnson was driving. Soon after the accident, the Gutzes filed a damages claim with Johnson's insurer, Allstate Insurance Company. Correspondence and settlement negotiations between Allstate and the Gutzes ensued for the next two and a half years. On October 2, 2003, the Gutzes filed suit against Johnson and his marital community. The Johnsons were served on October 16, 2003. It appears that Johnson promptly left a voice mail message with his Allstate claims representative about the complaint and that he assumed Allstate would take care of the suit.

¶9 The Allstate claims representative denied receiving Johnson's message, but on October 27, 2003, she called the Gutzes' counsel with an offer to settle Sharon's claim. She asserts she inquired whether the case would be litigated. However, the Gutzes' counsel denied that the settlement conversation included any discussion about litigation. On November 6, 2003, the [***6] Gutzes moved for and obtained a default order against the Johnsons without notice to Allstate or to the Johnsons. On November 12, 2003, the Allstate [**960] claims representative again called and spoke with a paralegal who reported that the action had been filed but did not mention the default order. Allstate subsequently received a copy of the lawsuit sometime in November. On December 2, 2003, Allstate learned of the default order.

¶10 The Johnsons filed a motion to set aside the default order on February 19, 2004, arguing they had informally [*752] appeared through their insurance company. The trial court denied the motion. On March 24, 2004, the Gutzes, again without notice to the Johnsons, obtained a default judgment totaling approximately $ 155,000. The Johnsons moved to set aside the default judgment and order, reasserting their informal appearance argument and, alternatively, arguing that CR 60(b) warranted vacation of the default judgment. The trial court denied the motion, and the Johnsons appealed. The Court of Appeals vacated the default order and judgment and remanded for a trial on the merits on two independent grounds. The Court of Appeals concluded there was substantial evidence that the [***7] Johnsons had informally appeared in the lawsuit through their agent, Allstate, entitling them to notice before the default order was entered. Alternatively, the Court of Appeals concluded the trial court abused its discretion by refusing to vacate the default judgment against the Johnsons under CR 60(b) and *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968).

¶11 *Matia.* Matia Investment Fund, Inc., submitted a bid to buy a parcel of property owned by the city of Tacoma (City). The selection committee recommended Matia's bid to the public utility board for approval. The board authorized Matia's purchase, and Matia entered into a purchase and sale agreement with the City. The agreement was conditioned upon final approval by the city council. When the property purchase came before the council, the council invalidated the entire bidding and selection process.

¶12 Subsequently, Matia filed a damages claim totaling $ 108,758.95 with the City, apparently the amount of money Matia had incurred in preparing its bid. The City denied Matia's claim. After the claims period had ended, Matia served a summons and complaint on the city clerk's office, which for some reason was not forwarded to the city attorney. [***8] Consequently, the City failed to answer the suit or formally appear. Without informing the City, Matia obtained both an order of default and a default judgment against the City.
[*753]

¶13 More than a year later, Matia attempted to collect the judgment. Almost immediately, the City filed a motion to vacate the default judgment, which the trial court summarily granted. Matia

appealed, and the Court of Appeals, Division Two, affirmed the trial court's vacation of the default judgment, reasoning that substantial evidence supported a finding that the City had informally appeared.

¶14 We granted review of all three cases and consolidated them to consider the issue of informal appearance. *Morin v. Burris*, 156 Wn.2d 1016, 132 P.3d 734 (2006); *Gutz v. Johnson*, 156 Wn.2d 1017, 132 P.3d 734 (2006); *Matia Inv. Fund, Inc. v. City of Tacoma*, 157 Wn.2d 1016, 141 P.3d 642 (2006).

ANALYSIS

[1-3] ¶15 We review a trial court's decision on a motion for default judgment for abuse of discretion. *Yeck v. Dep't of Labor & Indus.,* 27 Wn.2d 92, 95, 176 P.2d 359 (1947). [1] Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Braam v. State*, 150 Wn.2d 689, 706, 81 P.3d 851 (2003). We review questions of [***9] law de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). We begin here with a question of law: whether we should adopt the "informal appearance" doctrine as developed in the courts below to determine whether a defendant is entitled to notice of default.

¶16 First, the defendant-respondents argue that prelitigation contacts are [**961] sufficient to establish an appearance for purposes of CR 55(a)(3). We disagree.

¶17 This narrow question is best addressed in its larger context and requires us to consider several different civil rules and standards. Under CR 4(a)(3), a "notice of appearance" shall "be in writing, shall be signed by the defendant [*754] or his attorney, and shall be served upon the person whose name is signed on the summons." Default judgment is largely governed by CR 55, but CR 60 also sets forth when a judgment may be vacated or set aside.

[4] ¶18 A party who has appeared in an action is entitled to notice of a default judgment hearing [***10] and, if no notice is received, is generally entitled to have judgment set aside without further inquiry. *Tiffin,* 44 Wn.2d at 847. CR 55 does not define "appear" or "appeared." It provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made." CR 55(a)(1). The rule further provides, "[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)." CR 55(c)(1). CR 60 sets out specific grounds upon which a party may apply to set aside a default judgment. Much litigation focuses on whether default judgment should be set aside because of inadvertence, excusable neglect, surprise, or irregularity in obtaining the judgment or order. CR 60(b)(1).

[5] ¶19 Again, we do not favor default judgments. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). We prefer to give parties their day in court and have controversies determined on their merits. [***11] *Id.* (quoting *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Roth v. Nash,* 19 Wn.2d 731, 144 P.2d 271 (1943). Thus, for more than a century, it has been the policy of this court to set aside default judgments liberally. *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897) ("'where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice'"(emphasis omitted) (quoting ROBERT Y.

[1] We decline Division Two's invitation in *Smith v. Arnold,* 127 Wn. App. 98, 110 P.3d 257 (2005), and its progeny to abandon abuse of discretion review in favor of a substantial evidence standard of review. *See White,* 73 Wn.2d at 351-52.

HAYNE, A TREATISE ON NEW TRIAL AND APPEAL § 347, at 1046 (1884))).

[6] ¶20 [*755] Applying CR 55 and CR 60 liberally, this court has required defendants seeking to set aside a default judgment to be prepared to establish that they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice. CR 60(b); *Dlouhy*, 55 Wn.2d 718. [2] Or, alternately, defendants may set aside a default judgment if they meet the four part test set forth in *White:*

> (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted [***12] by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White, 73 Wn.2d at 352 (citing *Hull*, 17 Wash. 352). Finally, a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable. *See Trickel*, 52 Wash. 13; *cf.* CR 60(b)(4) (allowing default to be set aside based on fraud, misrepresentation, or misconduct by adverse party).

¶21 Turning to the narrower issue of what constitutes an "appearance" under the civil rules, for over a century this court has applied the doctrine of substantial compliance. *See*, *e.g.*, *Trickel*, 52 Wash. 13. We have not exalted form over substance but have examined the defendants' conduct to see if it was designed to and, in fact, did [**962] apprise the plaintiffs of the defendants' intent to litigate the cases. However, where we have applied the [***13] substantial compliance doctrine, the defendant's relevant conduct occurred after litigation was commenced. Id. at 14 (the defendant did not file a formal notice of appearance but served interrogatories upon the plaintiff); *cf. Dlouhy*, 55 Wn.2d at 722 (defendant's personal appearance in court in divorce action to oppose temporary restraining order sufficient [*756] to establish appearance); *Warnock v. Seattle Times Co.*, 48 Wn.2d 450, 452, 294 P.2d 646 (1956) (service of the demand for security for costs was sufficient to constitute appearance); *Tiffin,* 44 Wn.2d at 844 (withdrawal of defendant's counsel did not rescind appearance after written notice of appearance was served on plaintiff's counsel); *State ex rel. LeRoy v. Superior Court,* 149 Wash. 443, 271 P. 87 (1928) (defendant's appearance on a bond in an unlawful detainer action).

[7] ¶22 It appears to us that mere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court.* Respondents misread *Dlouhy* as supporting a far broader understanding of what can constitute an appearance. *Dlouhy* held [***14] that an appearance *in court* to resist a motion to convert a temporary restraining order into an injunction was a general appearance entitling the defendant to notice of the default judgment hearing. *Dlouhy*, 55 Wn.2d at 722. In effect, this court held that by actually appearing in court the defendant substantially complied with the appearance requirement. *Id.*, at 719, 724.

¶23 Respondents may have been misled by dicta in *Gage v. Boeing Co.,* 55 Wn. App. 157, 776 P.2d 991 (1989). In *Gage*, the Court of Appeals held that the defendant had appeared in the lawsuit under Washington statutory law by appearing and vigorously contesting the plaintiff's claims in the administrative hearing that led to the court case. *Id.* at 162. Although the *Gage* court mentioned in passing that other jurisdictions had recognized the concept of informal appearance, the court explicitly did not reach whether it was the law of *this* state. *Id.* Subsequently, at least two divisions of our Court of Appeals have relied upon *Gage* and its progeny

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

to adopt the informal appearance doctrine. *E.g.*, *Matia Inv. Fund*, 129 Wn. App. at 546 (Division Two); *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn. App. 40, 45, 863 P.2d 573 (1993) [***15] (Division One). In *Skilcraft*, the court also set aside [*757] default judgment on the appropriate grounds that plaintiff's counsel misled defendants. *Id.*; *see also* CR 60(b)(4).

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

¶25 We believe that our existing approach of liberal application of rules permitting equity, vacation of default judgments, and application of substantial compliance adequately promote justice. The informal appearance doctrine urged by the respondents would permit any party to a dispute, or any claims representative to a potential dispute, to simply write a letter expressing intent to contest litigation, then ignore the summons and complaint or other formal [***16] process and wait for the notice of default judgment before deciding whether a defense is worth pursuing. If a less formal approach to litigation is to be adopted, it should be by rule and not by this court's adoption of an informal appearance rule. Parties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment. Accordingly, we hold that parties cannot substantially comply with the appearance rules through prelitigation [**963] contacts. Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing, though they may still be entitled to have default judgment set aside upon other well established grounds.

¶26 Having rejected the doctrine of informal appearance as formulated below, our inquiry is not done. We must apply the existing rules to these cases. The defendants in both *Matia* and *Morin* have not substantially complied with the [*758] appearance rules. We find no action in either case acknowledging that the disputes were in court. Thus, they were not entitled to notice of the default judgment hearing. Nor has either established mistake, surprise, or [***17] excusable neglect as required by *White*, 73 Wn.2d at 352, or inequitable conduct as required by *Trickel*, 52 Wash. 13. We need go no further.

[8] ¶27 However, *Gutz* is more difficult. We agree with the Court of Appeals that the defendants were entitled to have the trial court reach the substance of their argument. *Gutz*, 128 Wn. App. at 910-11. Furthermore, in *Gutz*, the record supports an inference that plaintiffs' counsel actively concealed the fact that a summons and complaint had been filed. Under the circumstances, Johnson has made a sufficient enough showing that we remand to the trial court for further consideration of whether Johnson has met the standards of *White* and/or CR 60(b)(1), (4).

¶28 Again, the Gutzes' claim arose from a motor vehicle collision upon which the statute of limitations would run on October 6, 2003. Their counsel contacted Allstate by November 2002. The complaint was filed on October 2, 2003, the Johnsons were served on October 16, 2003, and it appears the Johnsons informed their Allstate representative of that fact by voice mail shortly afterward. While denying that she received the voice mail, it is uncontested that the Allstate claim representative called Gutzes' counsel [***18] on October 27, 2003, regarding settlement. The Allstate representative asserts that she asked Gutzes' counsel whether the case would be litigated. This assertion seems very reasonable considering that the three-year statute of limitations

had run; either the Gutzes' had not filed their suit and Allstate was not exposed to potential liability or the suit had been filed and Allstate needed to appear. Gutzes' counsel denies having any discussion about litigation, but he certainly knew that litigation had been commenced and that Allstate was still trying to settle the claim. Allstate's representative again called Gutzes' counsel's office on November 12, 2003, and spoke to a paralegal. Again, [*759] neither Gutzes' counsel nor his paralegal disclosed that litigation had been commenced or that a motion for a default judgment had been taken on November 6, 2003. [3]

¶29 Gutzes' counsel had no duty to inform Allstate of the details of the litigation. But counsel's failure to disclose the fact that the case had been filed and that a default judgment was pending when the Johnsons' claim representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation. If the Johnsons' representative acted with diligence, and the failure to appear was induced by Gutzes' counsel's efforts to conceal the existence of litigation under the limited circumstances we have described above, then the Johnsons' failure to appear was excusable under equity and CR 60. *See Trickel*, 52 Wash. at 15; CR 60(b)(4) (default judgment may be set aside for fraud, misrepresentation, or other misconduct). Since the trial judge does not appear to have reached this issue, *see Gutz*, 128 Wn. App. at 910, we remand for further consideration.

CONCLUSION

¶30 We favor resolution of disputes on the [***20] merits. We will liberally apply [**964] the civil rules and equitable principles to vacate default judgments where fairness and justice require. However, when served with a summons and complaint, a party must appear. There must be some potential cost to encourage parties to acknowledge the court's jurisdiction. Substantial compliance will satisfy the notice of appearance requirement. We do not exalt form over substance, and appearance may be accomplished informally. [*760] However, we reject the argument that prelitigation communications alone may satisfy the appearance requirements of CR 4 and CR 55, and we decline to adopted the doctrine of informal appearance as formulated by the courts below. In the cases before us, the respondents in *Morin* and *Matia* failed to appear and have not shown other cause to set aside default judgment. The Court of Appeals is reversed in those cases, and the default judgments are reinstated. In *Gutz*, we find facts that may justify vacation of the default judgment, and we remand to the trial court for further proceedings consistent with this opinion.

C. JOHNSON, SANDERS, OWENS, [***21] FAIRHURST, and J.M. JOHNSON, JJ., concur.

Dissent by: Bobbe J. Bridge

Dissent

¶31 BRIDGE, J. (concurring in part/dissenting in part) — I agree with the majority in its ultimate conclusion that the respondents in *Morin* and *Matia* failed to appear, and thus we should reverse the Court of Appeals in those cases. *Morin v. Burris*, noted at 126 Wn. App. 1057 (2005); *Matia Inv. Fund, Inc. v. City of Tacoma*, 129 Wn. App. 541, 119 P.3d 391 (2005). However, I disagree with the majority's reasoning. By rejecting the informal appearance doctrine, the majority substantially changes the law upon which all three divisions of our Court of Appeals have relied. Additionally, I

[3] Gutz argues that an insurance adjuster cannot informally appear on behalf of a defendant. Because we remand to the trial court to decide whether the default judgment should be set aside on equitable grounds and/or on the basis of CR 60(b)(4), we do not reach that argument. Gutz also argues that Johnson failed to preserve his assignments [***19] of error by not appealing the default order. We agree with the reasoning and conclusion of the court below that that argument is not well taken. *Gutz,* 128 Wn. App. at 910-11.

would affirm the Court of Appeals' ruling in *Gutz v. Johnson*, 128 Wn. App. 901, 117 P.3d 390 (2005), rather than remanding the case to the trial court to consider the CR 60 issue.

¶32 As the majority recognizes, default judgments are disfavored. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). This is so because of our long-standing preference that controversies be determined on the merits rather than by default. *Id.* (citing *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). "A proceeding to vacate a default judgment is equitable in [***22] character and relief is to be afforded in accordance with equitable principles." *Id.* Equity favors substance over form. To that end, when a trial court hears a motion to [*761] vacate, it must make its determination on a case-by-case basis.

> "Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome."

Id. at 582 (quoting *Widicus v. Sw. Elec. Coop., Inc.*, 26 Ill. App. 2d 102, 109, 167 N.E.2d 799 (1960)). Thus, principles of equity inform our consideration of what acts may constitute an appearance.

¶33 An entry of default is governed by CR 55(a)(3), which provides that "[a]ny party who has *appeared in the action* for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion." (Emphasis added.) If a party has not appeared in an action, then that party is not entitled to notice of the motion for default order or judgment. CR 55(a)(3). Conversely, where a [***23] party has appeared, failure to give notice of any motion for default requires that any resulting order or judgment be set aside as a matter of law. *Shreve v. Chamberlin*, 66 Wn. App. 728, 731-32, 832 P.2d 1355 (1992); *see Tiffin v. Hendricks*, 44 Wn.2d 837, 847, 271 P.2d 683 (1954).

¶34 Formal appearances are governed by RCW 4.28.210, but we have recognized that the statutory methods of appearance are not exhaustive and that there are other, informal ways in which a party may appear. *Dlouhy*, 55 Wn.2d at 721. Our Court of Appeals has held that a party informally [**965] appears when it manifests an intent to defend. "Whether a party has 'appeared' informally is generally a '*question* "*of intention*, as evidenced by acts or conduct, such as the indication of a purpose to defend or a request for affirmative action from the court, constituting a submission to the court's jurisdiction."'" *Smith v. Arnold*, 127 Wn. App. 98, 104, 110 P.3d 257 (2005) (emphasis added) (quoting [*762] *Gage v. Boeing Co.*, 55 Wn. App. 157, 161, 776 P.2d 991 (1989) (quoting Annotation, *What Amounts to "Appearance" under Statute or Rule Requiring Notice, to Party Who Has "Appeared," of Intention To Take Default Judgment*, 73 A.L.R.3d 1250, 1254 (1976))). [***24] An essentially unresponsive party cannot be said to have appeared. *Gage*, 55 Wn. App. at 160-61 (quoting *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 139 U.S. App. D.C. 256, 432 F.2d 689, 691 (1970)). A party is unresponsive when it allows the plaintiff to reasonably harbor illusions about whether the opposing party intends to defend a matter. *Smith*, 127 Wn. App. at 104.

¶35 The majority nevertheless concludes that the "manifested intent" test adopted by our Court of Appeals is an incorrect reading of this court's early case law concerning informal appearance. Majority at 756-57. Instead, it sets forth a "substantial compliance" test. *Id.* at 755. In order to determine whether a party informally appeared, the majority asks whether a party's actions substantially comply with the statutory appearance "requirements." *Id.*; RCW 4.28.210. Yet we have found that this statute does not set forth an exhaustive list of the ways in which one may appear. *Dlouhy*, 55 Wn.2d at 721 ("[I]t is settled law that the statutory methods of appearance are not exclusive."). It is problematic to

ask that parties who seek to informally appear substantially comply with a statute that does not offer fixed [***25] boundaries as to what constitutes an appearance. The majority's test is unworkable.

¶36 While I would endorse an equitable consideration of informal appearance based on a party's manifested intent to defend, I agree with the majority that parties must acknowledge the dispute as existing in court. The plain language of CR 55 indicates that a party must *appear in the action* at hand in order to receive notice of a default. CR 55(a)(3). Under the rule's express language, a party cannot appear, informally or otherwise, in an action that has not yet commenced. Therefore, regardless of a party's manifested intent to defend *before* a lawsuit is filed, I would hold [*763] that a party must exhibit that same intent *after* an action is commenced in order to assert that it informally appeared. *See Dlouhy*, 55 Wn.2d at 724 (explaining that a "party's acts must have some direct purpose *in the cause* to constitute an appearance; the acts cannot be wholly collateral" (emphasis added)).

¶37 In application, the equitable considerations underlying a review of default proceedings suggest that a case-by-case review is appropriate. *Griggs*, 92 Wn.2d at 582. "Abuse of discretion is less likely to be found if the default judgment [***26] is set aside." *Id.* A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds, or exercised for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

> A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'"

Id. (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990))).

¶38 Here, I would find that because the courts below did not consider that the plain language of CR 55 requires a party to informally appear *after* an action is filed, each applied an incomplete test for informal appearance, and their decisions are therefore in error. Respondents Burris, Barth, and the city of Tacoma did not have contact with [**966] their opposing parties after their respective lawsuits were filed against them. Under the plain language of CR 55, they cannot [***27] have informally appeared. Accordingly, I agree that we should reverse the Court of Appeals in *Morin* and *Matia Investment Fund*.

¶39 In the case of *Gutz*, I, like the majority, would not consider whether the Johnsons informally appeared, looking [*764] instead to whether they were entitled to have the default judgment set aside under CR 60. However, rather than remanding the case, I would affirm the Court of Appeals' vacation of the default judgment under CR 60(b). *See Gutz*, 128 Wn. App. at 916-21. A court may vacate a default order or judgment if the defaulting party can show that its failure to appear was the result of, among other things, mistake or excusable neglect. CR 60(b)(1). Under CR 60(b)(1), the party moving to vacate a default judgment must show the following: (1) there is substantial evidence to support at least a prima facie defense to the claim plaintiffs assert; (2) the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) the defendant acted with due diligence after notice of the default judgment; and (4) the plaintiffs will not suffer substantial hardship if the default judgment is vacated. [***28] *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

¶40 The majority finds that because the trial judge did not reach the CR 60 issue, we should remand the case to the trial court for further consideration. Yet the Gutzes do not dispute the Court of Appeals' conclusion that the Johnsons carried their burden of proof under CR 60(b)(1). Instead, the Gutzes

appear to argue that the Court of Appeals erroneously concluded that the trial court abused its discretion when it failed to consider the Johnsons' CR 60(b)(1) motions. The majority agrees with the Court of Appeals that the trial court should have considered this issue, but rather than deciding it here, holds that we should remand to that court. However, I believe that the Johnsons adequately carry their burden under this test. Suppl. Br. of Resp't Johnson at 12-20. In particular, I am persuaded that the Johnsons' failure to appear was the result of mistake or excusable neglect arising from a reasonable miscommunication with their insurer. *See White*, 73 Wn.2d at 354-55 (suggesting that an insured defendant may reasonably rely on his insurance agent to defend an action, including by providing counsel). Accordingly, I agree with the Court [***29] of Appeals that the trial court abused its discretion when it [*765] refused to vacate the judgment against the Johnsons under CR 60(b) and that the case should be remanded for a trial on the merits.

Conclusion

¶41 I would hold that a party in Washington may informally appear such that notice to that party is required before a default order or judgment is sought against it. Informal appearance is a matter of intent, but such intent must be manifested after an action is commenced. Because there was no contact between the parties after their respective actions were commenced, the respondents in *Morin* and *Matia Investment Fund* did not informally appear. I therefore agree with the majority that we should reverse the Court of Appeals' decisions in those cases. In the case of *Gutz*, I do not believe it is necessary to determine whether respondents Johnson informally appeared because I would conclude that the trial court abused its discretion when it failed to grant the Johnsons' CR 60(b)(1) motion to vacate the judgment against them. Therefore, I would affirm the Court of Appeals and remand *Gutz* for a trial on the merits.

[***30] ALEXANDER, C.J., and MADSEN, J., concur with BRIDGE, J.

Motions for reconsideration denied October 3, 2007.

References

Thomas V. Harris, Washington Insurance Law

Washington Rules of Court Annotated (LexisNexis ed.)

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EXHIBIT D

Prof'l Marine v. Certain Underwriters

Court of Appeals of Washington, Division One

October 13, 2003, Filed

No. 50804-1-I

Reporter
118 Wn. App. 694 *; 77 P.3d 658 **; 2003 Wash. App. LEXIS 2341 ***

PROFESSIONAL MARINE COMPANY, ET AL., *Respondents*, v. THOSE CERTAIN UNDERWRITERS AT LLOYD'S EACH FOR HIS/HER OWN PART AND NOT FOR ONE ANOTHER, SEVERALLY SUBSCRIBING POLICY NO. VM0000122-00, *Appellants*. [+]

Subsequent History: [***1] [As amended by order of the Court of Appeals February 6, 2004.]

Counsel: *Jerret E. Sale, Deborah L. Carstens,* and *Thomas D. Adams* (of *Bullivant Houser Bailey*), for appellants.

M.A. Michelle Buhler and *Randall T. Thomsen* (of *Danielson Harrigan & Tollefson*) and *Stuart P. Kastner* (of *Montgomery, Purdue, Blankinship & Austin, P.L.L.C.*), for respondents.

Judges: Written by: Schindler Concurred by: Cox, Becker.

Opinion by: Schindler

[+] This opinion was reported in the advance sheets of the Washington Appellate Reports as PROFESSIONAL MARINE COMPANY, ET AL., *Respondents,* v. UNDERWRITERS AT LLOYD'S, *Appellant.*

Opinion

[*697] [**660] Schindler, J. -- The trial court denied insurer Underwriters at Lloyd's (Lloyd's) motion to vacate a default judgment entered against it in favor of its insured, Professional Marine Company (PMC). [1] Lloyd's appeals the trial court's decision and argues that Lloyd's is not a legal entity and cannot be sued, service was improper, and because it had informally appeared, the judgment must be set aside. Lloyd's also challenges the trial court's award of attorney fees. PMC's complaint was consistent with the insurance policy and gave sufficient notice of the lawsuit to the underwriters. PMC also served Lloyd's in accordance with the policy. The trial court did not abuse its discretion in [***2] concluding that Lloyd's had not informally appeared in the declaratory judgment and damages lawsuit brought by PMC. And the trial court properly awarded fees under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and Washington's Consumer Protection Act (CPA), chapter 19.86 RCW. We affirm.

FACTS

PMC owns and operates a boatyard at the north end

[1] [**661] After the opinion was filed on October 13, 2003 the parties stipulated that the caption should be changed from Underwriters at Lloyd's to "Those Certain Underwriters at Lloyd's each for his/her own part and not for one another, severally subscribing Policy No. VM0000122-00."

of Lake Union in Seattle. In February 1999, PMC agreed to do repair work on two yachts, the M/V *Northern Lights* and the M/V *Vincent B.* Both vessels were moored at PMC's boatyard; one was docked underneath a satellite shelter that was attached to the dock and the other was adjacent to the shelter. Early in the morning of March 3, 1999, a severe [*698] windstorm ripped the shelter away from the dock and its foundation, causing damage to both vessels.

PMC was insured under a marina policy by Lloyd's. [2] [***3] On the day of the storm, PMC notified its insurance broker of the damages. The broker sent PMC a letter confirming that the reported loss had been "forwarded to the insurance carrier." [3]

On March 17, Elliston Inc., the claims management company for Lloyd's, advised PMC that it had received and was investigating the damage claims. On March 24, Elliston wrote PMC that:

> Our investigation has determined the cause of this loss was the extreme force of the windstorm. It does not appear your company is legally liable for the damages. [4]

In this letter, Elliston also told PMC that it had talked to an adjuster from Fireman's Fund Insurance Co. (Fireman's Fund) to discuss the damages to the M/V *Northern Lights.* Elliston said its investigation was continuing and requested some additional information from PMC.

A couple of weeks later, Elliston's agent informed the owner of the M/V *Northern Lights,* Lorraine Johnson, and Albany Insurance (Albany), the insurer of the M/V *Vincent B.,* that PMC was not liable for the damage to the vessels caused by the windstorm.

Fireman's [***4] Fund and Albany paid for the repairs to the damaged vessels and, in July 1999, demanded reimbursement from PMC. PMC immediately submitted these claims to Elliston. On August 3, 1999, an Elliston claims adjuster wrote to PMC to explain that it had offered Fireman's Fund the per vessel policy limit of $ 10,000 to settle the claim, but the offer was rejected. Elliston also told PMC that Fireman's Fund intended to sue PMC for the repairs and that Lloyd's did not intend to defend PMC in that lawsuit:

> [*699] Underwriters provide coverage for damages to property of others under Section II of your policy. Underwriters do not have any right or duty to defend any suit against you under Section II, for damage to property of others in your care, custody and control. Your policy does cover you for legal costs or fees incurred in the defense of a claim covered under Section II, but payment of any such expenses will reduce your $ 10,000 limit of liability accordingly. Therefore, any combination of legal costs or [judgment] against you in excess of $ 10,000 will be your personal/corporate financial responsibility. [5]

Elliston asked PMC to send copies of Fireman's Fund's civil complaint when it was [***5] served on PMC.

On August 4, 1999, Fireman's Fund and Johnson sued PMC for the costs to repair the M/V *Northern Lights. Fireman's Fund Ins. Co. v. Prof'l Marine Co.,* No. 99-2-18351-7 (King County Super. Ct. Aug. 4, 1999). [6]

On September 8, 1999, PMC sent a letter to Elliston tendering defense of this lawsuit and stating its position that Lloyd's was obligated under the policy to defend. PMC said that if Lloyd's did not respond within five days and agree to defend, PMC would "immediately commence a lawsuit seeking a declaration from the court that

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[2] The policy, No. VM0000122-00, was in effect between August 2, 1998 and August 2, 1999.

[3] Clerk's Papers (CP) at 81.

[4] CP at 83.

[5] CP at 88.

[6] About eight months after the suit was filed, in April 2000, Albany intervened in the lawsuit.

Underwriters has a duty to defend." [7]

[***6] When PMC did not receive a response, it sent another demand letter on October 13, stating that if Lloyd's did not respond to its [**662] demand for defense within two days, PMC would file suit.

On October 15, Elliston responded on behalf of Lloyd's. According to Elliston, the policy did not impose a duty to defend or indemnify PMC in the lawsuit filed against it beyond the $ 10,000 policy limit Fireman's Fund had rejected. Elliston asserted that its coverage was excess to amounts paid by other insurance. [8] Elliston also asked PMC to forward "any other information or documentation" that [*700] had not been provided "because such information could have an impact" on its "analysis and conclusions." [9]

On January 7, 2000, PMC filed a "Complaint for Declaratory Relief and Damages" against Lloyd's. *Prof'l Marine Co. v. Underwriters at Lloyds,* No. 00-2-00271-8 (King County Super. Ct. Jan. 7, 2000). [10] PMC requested a declaratory judgment that Lloyd's was obligated to defend and indemnify PMC in the lawsuit filed against it by Fireman's Fund and Johnson. [***7] The complaint also alleged that Lloyd's breached its contract with PMC, breached its duty of good faith and fair dealing, and violated the CPA.

On January 17, 2000, PMC served the summons and complaint on the agent identified in the marina policy, Mendes and Mount, a law firm in New York.

When Lloyd's did not answer or respond to the complaint, PMC filed a motion for default. On March 28, 2000, the trial court entered an order of default. [11]

In September 2000, PMC moved for entry of the default judgment. PMC argued that the policy [***8] should be construed to provide coverage to PMC for the claims made by Fireman's Fund, Johnson and Albany and that Lloyd's had a duty to defend. PMC also requested attorney fees on the grounds that Lloyd's had misrepresented the policy provisions in violation of the CPA and because it had been forced to litigate in order to obtain coverage. [12] In support of its motion, PMC submitted an affidavit in support of out-of-state service, the insurance policy and correspondence with its insurance broker and with Elliston.

On September 19, 2000, the trial court entered a default judgment against Lloyd's together with findings of fact and [*701] conclusions of law. [13] The court concluded that Lloyd's policy provided coverage for PMC's liability to Fireman's Fund, Johnson and Albany and that Lloyd's had "an absolute duty to defend Professional Marine in the Lawsuit, at Underwriters' sole cost and expense." [14] The court also concluded that Lloyd's violated the Washington Administrative Code's fair claims settlement [***9] regulations and that PMC was entitled to attorney fees under *Olympic Steamship* and the CPA. [15]

On February 1, 2001, Fireman's Fund, Albany and Johnson (collectively Fireman's Fund) and PMC entered into an "Assignment Agreement and Covenant Not to Execute." [16] PMC assigned all

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[7] CP at 173.

[8] CP at 179.

[9] CP at 180.

[10] CP at 511. On September 5, 2000, PMC filed an amended complaint which contained additional facts pertaining to the M/V *Vincent B.* after Albany intervened in the lawsuit in the spring of 2000.

[11] Neither the order of default nor the motion for the entry of default is included in the record on appeal.

[12] CP at 89.

[13] CP at 108. The default judgment was for approximately $ 25,000, which included fees incurred by PMC in the lawsuit brought by Fireman's Fund and Johnson, plus fees incurred in bringing suit against Lloyd's.

[14] CP at 106.

[15] CP at 107.

[16] CP at 115.

rights and interests under the marina policy with Lloyd's to Fireman's Fund. [17] PMC also stipulated to judgment against it in the amount of $ 199,789.54 plus costs and attorney fees incurred by Fireman's Fund and the parties agreed that payment "shall be made solely from funds recovered from Underwriters at [**663] Lloyd's of London." [18] The parties agreed "not to execute" on the judgment entered against PMC, that no party would "attempt to collect any judgment . . . before September 19, 2001," [***10] and that before any party made an attempt to collect on the judgment, it would notify all other parties. [19]

In May 2001, a "Confession of Judgment by Defendant Professional Marine Company" for $ 199,789.54 was entered. [20] [*702] The judgment against PMC included repair costs incurred by Fireman's Fund, Albany, and Johnson, prejudgment interest, and attorney fees.

[***11] On September 28, 2001, Fireman's Fund notified Lloyd's of the assignment and demanded payment for the judgment entered against PMC. [21]

In January 2002, [22] Lloyd's filed a motion to vacate the September 2000 default judgment and made two arguments: (1) that under CR 60 the judgment was void and unenforceable because it was entered against a nonlegal entity and (2) that it was entitled to notice of the motion for default under CR 55(c) because it had informally appeared in the action. [23]

[***12] The trial court denied Lloyd's motion to vacate. The court concluded that it had jurisdiction over Lloyd's and the default judgment entered against Lloyd's was not unenforceable or void. The court also concluded that Lloyd's had not informally appeared in PMC's lawsuit against it and was not entitled to notice of the default motion.

Lloyd's moved for reconsideration and for the first time, argued that "PMC may have failed to properly serve summons and complaint." [24] Lloyd's also claimed that the court erred in determining that it had not informally appeared. The trial court denied the motion for reconsideration.

Fireman's Fund then filed a motion for an award of attorney fees and costs under the CPA and *Olympic Steamship* for opposing the motion to vacate. PMC joined in the motion. The trial court awarded PMC, Fireman's Fund and [*703] Albany attorney fees of approximately $ 16,000. Lloyd's appeals.

JURISDICTION

PMC's complaint names "Underwriters at Lloyd's" rather than the specific individuals [***13] or corporations underwriting PMC's policy. Lloyd's asserts that because the association known as "Lloyd's of London" or "Underwriters at Lloyd's" is not a corporation and is a nonlegal entity, it cannot be sued. Lloyd's claims that the trial court lacked personal jurisdiction and the judgment is therefore unenforceable and void. [25]

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[17] PMC assigned all its rights to the default judgment entered against Lloyd's "except for that portion of the judgment" that "relates to attorneys' fees and expenses incurred by [PMC] prior to the date of this Agreement in connection with the defense of the Lawsuit and in pursuing the Underwriter's Lawsuit." CP at 116.

[18] CP at 115. Under this agreement, PMC was explicitly not obligated to pay any amount beyond the funds, if any, received from Lloyd's.

[19] CP at 116.

[20] CP at 124.

[21] CP at 136-38.

[22] CP at 188. This was an amended motion to vacate. The original motion is not in the record, and it is not clear when it was filed.

[23] In its motion, Lloyd's also claimed that neither Elliston nor Lloyd's had notice of PMC's lawsuit until it received demand for payment in the fall of 2001 and asserted that it had viable defenses to PMC's action.

[24] CP at 446.

[25] The entity commonly known as Lloyd's of London has been described as follows:

> The Lloyd's group is not a legal entity; rather, there is a building in London known as Lloyd's where individual underwriters, grouped together in syndicates, accept insurance risks from a group of brokers called the Lloyd's brokers. Each underwriting syndicate may be composed of as many as 200 to 300 underwriting members . . . . The day-to-day affairs of each syndicate are conducted by an underwriter who has the

The trial court rejected this argument based on the express provisions [***14] of the insurance policy, RCW 48.05.215 (authorizing suit against out of state insurers), and because

> [t]he body of the complaint, the caption, and the service of the complaint provide sufficient notice to the appropriate parties of the pendency of the lawsuit. Nothing in this Order shall prejudice Plaintiff's or [**664] Plaintiff-Intervenors' rights to amend the caption . . . . [26]

[1] A judgment is void when the court lacks jurisdiction over the parties or the subject matter or lacks the inherent power to enter the order involved. *State v. Petersen*, 16 Wn. App. 77, 79, 553 P.2d 1110 (1976) (citing *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975)). Thus, where a trial court lacks personal jurisdiction, a default order and judgment are void and must be set aside. *Vukich v. Anderson*, 97 Wn. App. 684, 691, 985 P.2d 952 (1999) (insufficiency of [*704] substitute service resulted in lack of personal jurisdiction); *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994) [***15] (where default judgment is void for lack of personal jurisdiction, court has a nondiscretionary duty to vacate).

In support of its argument on appeal, Lloyd's primarily relies on a Georgia appellate court case decided in 1959, *Underwriters at Lloyd's, London v. Strickland*, 99 Ga. App. 89, 107 S.E.2d 860 (1959). [27] In *Strickland,* an insured brought an action against "Underwriters at Lloyd's of London." The insurance policy in *Strickland* included a provision that the policy was underwritten by individual underwriters and the names and the percentages underwritten by them were on file with the agency issuing the policy and at a London office. *Strickland*, 99 Ga. App. at 91. Because the complaint named Lloyd's, and not the individual underwriters, the court concluded that the trial court erred in overruling the defendant's objection to the complaint. *Strickland*, 99 Ga. App. at 92.

[***16] [2] [3] The insurance policy in *Strickland* differs significantly from the policy Lloyd's issued to PMC. In *Strickland,* the policy put the insured on notice that the insurer was not Lloyd's, but particular underwriters. The policy specified two locations where the names of the individual underwriters could be obtained. Here, the caption and PMC's complaint conforms to the information provided in the insurance policy with PMC written by Lloyd's. The policy identifies the insurer as "Underwriters at Lloyd's of London" and refers to Lloyd's throughout as "the Company." [28] The policy provides no notice or information about the identities of the individual underwriters. [29] [***17] Moreover, the [*705] caption in this lawsuit is consistent with numerous cases, cited by Fireman's Fund, in which Lloyd's has been sued without naming the specific underwriters of the policies involved. [30]

The trial court's order denying the motion to vacate also specifically allows PMC to seek an amendment of the caption. In Washington, when a party is incorrectly named in a lawsuit, dismissal is not the automatic remedy; rather the primary consideration is whether the party has been prejudiced. *See In re Marriage of Morrison*, 26

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authority to act for and bind the syndicate.

Honey v. George Hyman Constr. Co., 63 F.D.R. 443, 446 (D.D.C.1974).

[26] CP at 375.

[27] The other cases cited by Lloyd's cite general language about the nonlegal or noncorporate status of Lloyd's of London. They do not address the issue of the status of a judgment against Lloyd's. *See, e.g.*, *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 62 F. Supp. 2d 1116, 1121 (S.D.N.Y. 1999); *Honey, 63 F.R.D. at 446.*

[28] CP at 40, 45.

[29] We further note that not only is *Strickland* different from this case, it has not been followed by more recent case law involving suits against the association, Lloyd's of London, and has been cited only twice, both times by the Georgia Court of Appeals.

[30] Fireman's Fund attaches a comprehensive list of cases as an appendix to its brief.

Wn. App. 571, 573-74, 613 P.2d 557 (1980) (if the misnaming of a party has not caused prejudice, the parties should be given an opportunity to amend the complaint).

The caption, body and service of the complaint sufficiently identify the defendant. Although the caption does not name the particular underwriters, PMC's complaint gives sufficient notice to the underwriters by identifying the policy number, type of policy, policy dates, and the insured. Because the caption of the lawsuit is consistent with the information contained in the policy, the trial court did not err in concluding that it had jurisdiction and denying the motion to vacate.

The trial court also [***18] concluded that it had jurisdiction over Lloyd's under RCW 48.05.215(1), [**665] which provides that any foreign insurer that solicits or transacts business in Washington "thereby submits itself to the jurisdiction of the courts of this state in any action." Lloyd's does not challenge this conclusion in its appeal.

SERVICE

Alternatively, Lloyd's argues that the judgment against it is void because PMC did not properly serve Lloyd's with the summons and complaint.

[*706] [4] "'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.'" *Khani*, 75 Wn. App. at 324 (quoting *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988)); *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 486, 674 P.2d 1271 (1984) (proper service of the summons and complaint is essential to invoke personal jurisdiction over a party; default judgment entered without proper jurisdiction is void).

The Lloyd's policy with PMC states:

> It is further agreed that service of process in such [***19] suit may be made upon:
>
> Mendes and Mount
> 750 Seventh Ave.
> New York, New York 10019 [31]

On January 17, 2000, PMC served Mendes and Mount with a copy of the summons and complaint. According to the out-of-state declaration of service, the summons and complaint were accepted by an employee, Melanie Crooke, "Managing Agent." [32]

Lloyd's first raised the issue of service in its motion for reconsideration. Lloyd's explained that the reason the issue was not raised in its initial motion was that Lloyd's was only recently able to locate Melanie Crooke. In Crooke's declaration, submitted with the motion for reconsideration, [33] she states that she has no recollection of accepting service of process, does not believe she would have accepted [***20] [*707] service because it was contrary to office policy, and never used the title "Managing Agent," as recorded on the declaration of service. [34]

The trial court denied the motion for reconsideration. [35]

[***21] [5] [6] We reject Lloyd's argument that service was improper. Service of the summons and complaint conformed to the express provisions of

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[31] CP at 77.

[32] CP at 520. Although the date of service was a federal holiday, Crooke was working that day.

[33] Lloyd's also submitted the declaration of Michael Karson, a claims manager for Elliston, who explains that normally when Mendes and Mount is served with a complaint, it forwards the documents to Elliston who then retains counsel to defend Lloyd's.

We grant the respondents' motion to strike Karson's declaration and do not consider it, because Lloyd's provides no reason that his declaration could not have been obtained earlier. *See* CR 59(a)(4) (newly discovered evidence which could not have been obtained earlier with "reasonable diligence" may be grounds for reconsideration).

[34] CP at 451.

[35] The court denied Lloyd's motion without requesting a response from PMC and Fireman's Fund under King County Local Rule 7(b)(5)(B).

the insurance agreement which provided for service on Mendes and Mount. Even assuming Cooke's declaration was newly discovered evidence, it does not alter the provisions of the insurance policy. And although it could have done so, Lloyd's did not designate particular employees to accept service in its policy. Policy language is strictly construed against the insurer as the drafter of the contractual language. *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 374, 917 P.2d 116 (1996); *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992); *Queen City Farms, Inc.v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 81, 882 P.2d 703, 891 P.2d 718 (1994).

The authority cited by Lloyd's does not lead to a different result. None of the cases it cites involves similar contractual provisions for service. In *French v. Gabriel*, 57 Wn. App. 217, 788 P.2d 569 (1990), the court concluded that an individual may not be served by serving an employee of that person. [**666] This is entirely different from the facts here. The [***22] other cases cited by Lloyd's are not applicable because they pertain to compliance with specific service statutes. *See Nitardy v. Snohomish County*, 105 Wn.2d 133, 134, 712 P.2d 296 (1986); *Landreville v. Shoreline Cmty. Coll. Dist. No. 7*, 53 Wn. App. 330, 331, 766 P.2d 1107 (1988).

Because Lloyd's designated Mendes and Mount to receive service, and service was in accordance with the policy, the trial court had jurisdiction.

[*708] LACK OF APPEARANCE

Lloyd's claims that the trial court abused its discretion in concluding that it failed to appear in PMC's lawsuit and therefore, was not entitled to notice of the motion for default.

CR 55(a)(3) provides that if a party has "appeared" before the motion for default has been filed, he or she is entitled to notice of the motion for default. If a defendant who has appeared in an action is not given proper notice prior to entry of the order of default, the defendant is entitled to vacation of the default judgment as a matter of right. *Shreve v. Chamberlin*, 66 Wn. App. 728, 832 P.2d 1355 (1992).

[7] [8] Ordinarily, a party "appears" in an action when it "answers, demurs, makes any application for an order [***23] therein, or gives the plaintiff written notice of his appearance." RCW 4.28.210. But the methods set forth in RCW 4.28.210 are not exclusive, and informal acts may also constitute an appearance. *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn. App. 40, 45, 863 P.2d 573 (1993).

We review the trial court's determination of whether a party has informally appeared for an abuse of discretion. *Batterman v. Red Lion Hotels, Inc.*, 106 Wn. App. 54, 59, 21 P.3d 1174, 1177 (2001). Whether a party has appeared is generally a "question 'of intention, as evidenced by acts or conduct, such as the indication of a purpose to defend or a request for affirmative action from the court, constituting a submission to the court's jurisdiction.'" *Gage v. Boeing Co.*, 55 Wn. App. 157, 161, 776 P.2d 991 (1989)(quoting Annotation, *What Amounts to "Appearance" Under Statute or Rule Requiring Notice, to Party Who Has "Appeared," of Intention to take Default Judgment*, 73 A.L.R.3d 1250, 1254 (1976)). This court will not disturb the trial court's decision unless it was manifestly unreasonable, based on untenable grounds or untenable reasons. *Hwang v. McMahill*, 103 Wn. App. 945, 949-50, 15 P.3d 172 (2000), *review denied,* 144 Wn.2d 1011, 31 P.3d 1185 (2001).

[*709] [9] [10] Relying on this court's [***24] decision in *Batterman* and Division Three's recent decision in *Ellison v. Process Systems Inc. Construction Co.*, 112 Wn. App. 636, 50 P.3d 658 (2002), *review denied,* 148 Wn.2d 1021, 66 P.3d 637 (2003) Lloyd's argues that the trial court abused its discretion in concluding that Elliston's letter, in response to PMC's tender of defense for the lawsuit filed against it by Fireman's Fund, did not constitute an informal appearance in the lawsuit PMC subsequently filed against Lloyd's.

The trial court concluded that Lloyd's contacts with PMC, Fireman's Fund, Johnson and Albany did not amount to an informal appearance. The court noted that apart from Elliston's letter of October 15, 1999, in response to PMC's tender of defense, all of the contacts between PMC and Elliston related to the claims against PMC, and not to PMC's claims against Lloyd's. The court concluded that the October 15 communication did not "manifest an intent to defend" against PMC's lawsuit it had not yet filed. [36]

In [***25] *Batterman,* this court concluded that the trial court did not abuse its discretion in setting aside a default judgment where there had been numerous and frequent contacts regarding settlement of the plaintiff's claim both before and after the complaint was filed. *Batterman*, 106 Wn. App. at 59.

In *Ellison,* the plaintiff's attorney contacted her employer's attorney about her claim for wrongful discharge and sexual harassment, and asked that Ellison be reinstated with back pay. The employer's attorney responded that Ellison had been terminated for misconduct, and not for any reason related to sexual harassment. However, the employer agreed to investigate the allegation and asked for some additional information. The [**667] employer's attorney later wrote another letter stating that the employer had taken "remedial action." *Ellison*, 112 Wn. App. at 639. Ellison filed a lawsuit against the employer two months later. Because the employer did not file an answer or otherwise take any [*710] action regarding the lawsuit, the trial court entered an order of default and a default judgment in the amount of $ 177,874.56.

More than two years after the judgment was entered, [***26] the employer moved to vacate the judgment. In the motion to vacate the employer's attorney stated that Ellison's attorney had never mentioned the lawsuit or the motion for default despite the fact that they had ongoing frequent contact over several years in another employment case. The trial court granted the motion to vacate the default judgment. The appellate court affirmed and held that the trial court's decision to set aside the default judgment was not an abuse of discretion. [37]

Neither of the cases Lloyd's relies on establishes that, as a matter of law, certain conduct amounts [***27] to an informal appearance. Rather, the decisions in *Batterman* and *Ellison* hold that the trial court did not abuse its discretion in finding that the defendant appeared. Here, conversely, the trial court did not abuse its discretion in finding that Lloyd's had not appeared. Determinations of when a party has or has not made an informal appearance are dependent on the specific facts of each case and will rarely be susceptible to determination as a matter of law:

> While some actions may be insufficient as a matter of law to constitute an appearance, the question of whether actions are sufficient to constitute an informal appearance will generally be a question of fact to be determined by the trial court. In reviewing such a determination, we will not substitute our judgment for that of the trial court.

Colacurcio v. Burger, 110 Wn. App. 488, 497, 41 P.3d 506 (2002), *review denied,* 148 Wn.2d 1003, 60 P.3d 1211 (2003) (concluding that the trial court did not abuse its discretion in finding an informal appearance where the defendant's insurance carrier [*711] had extensive contact with the plaintiff's attorney both before and after the lawsuit was filed).

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[36] CP at 374.

[37] The appellate court disagreed with Ellison's argument that the employer could not have appeared because the employer's letters were written before the lawsuit was filed, noting that in *Gage v. Boeing,* the conduct which amounted to an appearance was Boeing's defense of the employee's administrative claim before the Board of Industrial Insurance Appeals before the suit was filed. *Ellison*, 112 Wn. App. at 643-44.

In this [***28] case, the trial court found that except for the letter of October 15, all of Elliston's contacts with PMC related to the third-party claims against PMC, not PMC's claims against Lloyd's. And the court concluded that Lloyd's single letter in response to PMC's tender of defense was insufficient to indicate an intent to defend against the lawsuit PMC intended to bring. Elliston's October 15 letter did not refer to PMC's lawsuit that it indicated it would file if Lloyd's did not agree to defend, nor did it request any additional information or a copy of PMC's complaint when it was filed. The trial court's decision rests on tenable grounds, and the court did not abuse its discretion in concluding that Lloyd's did not informally appear in the action and was therefore not entitled to notice of the motion for default.

ATTORNEY FEES

The trial court awarded attorney fees under *Olympic Steamship Co. v. Centennial Insurance Co.,* 117 Wn.2d 37, 811 P.2d 673 (1991) and the CPA to PMC and Fireman's Fund for costs incurred in opposing Lloyd's motion to vacate.

Lloyd's asserts that the plaintiffs were not entitled, as a matter of law, to an award of attorney fees because neither [***29] coverage nor claims handling practices were at issue in the motion to vacate.

[11] Under *Olympic Steamship,* attorney fees are awarded whenever the insured must litigate to obtain or preserve policy benefits.

> Whether the insured must defend a suit filed by third parties, appear in a declaratory action, or as in this case, file a suit for [**668] damages to obtain the benefit of its insurance contract is irrelevant.
>
> [*712] . . . [W]e believe that an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action . . . .

Olympic S.S., 117 Wn.2d at 52-53.

[12] [13] In the default judgment Fireman's Fund and PMC obtained a declaration that the policy provided coverage and that Lloyd's had a duty to defend. Lloyd's does not address the broad language of *Olympic Steamship.* Nor does it cite any authority or fully explain why opposing a motion to vacate is not encompassed within this language. Because neither *Olympic Steamship* nor subsequent case law suggests that distinctions should be made based on the type of motion or the specific legal issues raised, we reject Lloyd's argument that *Olympic Steamship* does not provide a [***30] basis for an award of fees. [38]

Lloyd's argues that even if an attorney fee award is appropriate, PMC and Fireman's Fund are not both entitled to fees because PMC no longer has any interest in the judgment based on the assignment agreement and duplicative briefing was unnecessary. But Lloyd's cites no authority in support of its argument and under the terms of the assignment agreement, PMC retained an interest in the judgment.

The trial court did not err in awarding attorney fees and the respondents are entitled to fees on appeal under *Olympic Steamship* and RAP 18.1

.J., and Cox, A.C.J., concur.

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[38] Although Lloyd's asserts that fees were also improperly awarded under the CPA, it does not provide any argument or authority to support its assertion. Therefore, we do not address this issue. *See* RAP 10.3(a)(5); *City of Bremerton v. Sesko*, 100 Wn. App. 158, 162, 995 P.2d 1257 (2000).

EISENHOWER CARLSON PLLC

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