NO. 99858-2

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

MILWAUKIE LUMBER CO., a Washington corporation,

Respondent,

vs.

VERISTONE FUND I, LLC; et. al.,

Appellant/Petitioners.

MILWAUKIE LUMBER'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

Veristone Fund I, LLC ("Veristone") seeks review of an unpublished opinion that upheld a discretionary order refusing to set aside three default judgments because Veristone's failure to respond to the summons and complaint was willful. In its Petition, Veristone attempts to make this case about anything other than its own failure to appear. Veristone's arguments overlook established law that equity never supports vacating a judgment following a willful default. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 206, 165 P.3d 1271 (2007) (even where a conclusive defense is presented, "equity will not allow for vacation of the judgment if the actions leading to default were willful.").

Veristone has not shown any basis for review under RAP 13.4(b). Accordingly, Milwaukie Lumber Company ("MLC") respectfully requests that the Court decline review.

II. COUNTERSTATEMENT OF ISSUES

Should review be denied where the trial court's finding that Veristone willfully ignored the summons and complaint is supported by substantial evidence and, as a result, the Court of Appeals found that it

was not an abuse of discretion to decline to set aside the default judgments?

III. COUNTERSTATEMENT OF THE CASE

Emerald Valley Development, LLC ("Emerald") hired MLC to supply materials for residential construction projects on three lots in Camas, Washington (referred to as "Lot 2," "Lot 3," and "Lot 4," respectively). CP 852 (Lot 2); 101 (Lot 3); 1541 (Lot 4). MLC supplied materials to Lot 2 from December 2016 to July 2017, and to Lots 3 and 4 from September 2017 to December 2017. CP 853 (Lot 2); 102 (Lot 3); 1542 (Lot 4).

Emerald failed to pay MLC for its materials. Accordingly, on September 29, 2017, MLC recorded a lien in the principal amount of $38,027.95 against Lot 2. CP 853. On February 22, 2018, MLC recorded liens in the principal amount of $29,584.54 against Lot 3, and $15,143.63 against Lot 4. CP 102 (Lot 3); 1542 (Lot 4).

A. Veristone Recorded $7.5 Million in Security Against Three Undeveloped Residential Lots.

On July 26, 2017, more than seven months after MLC began supplying materials to Lot 2, Veristone recorded twelve separate deeds of trust, reflecting nearly $7.5 million in security against the three, undeveloped residential lots. CP 891-938. Veristone recorded deeds of

trust in the amount of $640,159.98, $618,472.31, $657,921.97 and $537,223.22 against Lot 2. CP 891-906. It recorded nearly identical deeds of trust against both Lots 3 and 4. CP 907-938. Each of the deeds recites an agreement by the grantor that it is to be in a "first lien position," without any reference to the other three deeds recorded against each lot on the same day. CP 124-170.

B. Veristone Was Served With Six Complaints and Failed to Respond to a Single One.

MLC filed lawsuits to foreclose its relatively small material liens on May 11, 2018. CP 742-750 (Lot 2); 1-9 (Lot 3); 1447-1455 (Lot 4). Veristone was named as a party in each of the three actions, its name appears in the caption in each of the three complaints, and in each action MLC alleged that Veristone's deeds of trust "are inferior in priority to [MLC's] claim of construction lien." MLC sought an order establishing its liens "as valid and superior to the interests of all other interested parties." *Id.*

MLC hired Nationwide Process Servers ("Nationwide") to personally serve Veristone. CP 177-179. On May 30, 2018 at 3:13pm, professional process server Tim Hedgpeth went to Veristone's office and asked for Meghann Good, the registered agent for Veristone. CP 823-826 (Lot 2); 75-77 (Lot 3); 1630-1633 (Lot 4). A receptionist told Mr.

Hedgpeth to have a seat and she would tell Ms. Good that he was there. *Id*. Mr. Hedgpeth sat for a few minutes waiting when a woman walked toward him and identified herself as Meghann Good. *Id*. Mr. Hedgpeth estimated that she was about 40 years old, roughly 5'5" tall, weighed approximately 140 pounds, and had brown hair. *Id.* Mr. Hedgpeth advised Ms. Good that he had three sets of legal documents for her as registered agent for Veristone Fund I, LLC. *Id*. Mr. Hedgpeth handed Ms. Good the process papers and she acknowledged receipt. *Id*.

Mr. Hedgpeth has been a professional process server for 10 years and has served upwards of 10,000 documents. *Id*. at ¶ 3. He made hand written notations on his work order immediately following service of Ms. Good, noting his estimate of her age, height, weight, and hair color. *Id*. at ¶ 4, Ex. A. Service was uneventful and Ms. Good was cooperative. *Id*. Yet, Veristone did not appear or answer.

Following MLC's personal service on Veristone, on June 12, 2018, MLC filed amended complaints in each of the three actions. CP 756 (Lot 2); 15 (Lot 3); 1461 (Lot 4). The amended complaints similarly named Veristone as a party, contained its name in the caption, and alleged that Veristone's deeds of trust "are inferior in priority to [MLC's] claim of construction lien." Like the original complaints, the amended complaints

sought orders establishing MLC's liens "as valid and superior to the interests of all other interested parties." *Id*.

MLC sent Veristone copies of each of the three amended complaints by first class mail, addressed to Ms. Good as its registered agent. CP 947. Veristone admits receiving the amended complaints, but later argued that they believed they were provided "merely as a courtesy copy." CP 218 at ¶ 26; CP 984. Even after receiving the amended complaints, Veristone did not appear or answer.

MLC moved for orders of default and default judgment against Veristone. CP 773 (Lot 2); 32 (Lot 3); 1478 (Lot 4). The trial court granted the motions. CP 775 (Lot 2); 34 (Lot 3); 1480 (Lot 4). Over a month later, on August 7, 2018, Ms. Good emailed MLC requesting copies of the default papers. CP 186-187. During the exchange, Ms. Good never claimed that Veristone had not been properly served. CP 99-100. The following week, counsel for Veristone contacted MLC to discuss the case. *Id.* He explained that Veristone would be moving to vacate the default, but never stated or indicated that Veristone had not been properly served. *Id.* MLC's 90-day window to serve Veristone under RCW 60.04.161 passed without any indication from Veristone that it intended to contest service.

C. The Trial Court Found That Veristone's Failure to Answer Was Willful and the Court of Appeals Affirmed.

Rather than simply paying off MLC's lien and foreclosing on its own deeds,[1] 104 days after MLC filed the actions, Veristone filed motions to vacate the three default judgments. CP 813 (Lot 2); 66 (Lot 3); 1512 (Lot 4). Veristone's motions to vacate were based on a declaration from Megann Good stating that she "[did] not recall ever being personally served with the Summons and Complaint" and had "no records that [she] or anyone else at Veristone, received the Summons and Complaint on May 30, 2018." CP 58. Ms. Good's initial declaration was silent as to Veristone's receipt of the three amended complaints and contained no corroborating evidence disputing proper service. MLC opposed the motions and pointed out that Veristone's new-found service defense would deprive MLC of any ability to recover on its modest liens, because its 90 day service window had just closed and Veristone's purported $7.5

[1] Veristone's deeds give it the right to pay off other senior lienholders and add those amounts to its own claim, which can then be foreclosed via a nonjudicial foreclosure sale. *See, e.g.*, CP 126 at ¶ 7 ("Should Grantor fail to pay when due any . . . encumbrances or other charges against the property . . . Beneficiary may pay the same, and the amount so paid, with interest at the rate set forth in the note secured hereby, shall be added to and become a part of the debt security in this Deed of Trust"). Nothing prevented Veristone from pursuing this option, which would have eliminated the need for either party to incur further attorney fees disputing what were relatively small liens.

million in security left no room for second place finishers. CP 831.

After reviewing briefing and affidavits from both sides, the trial court found that Veristone had been personally served with the three original summonses and complaints and had also received copies of the three amended complaints via mail, which the court found should have served as a "wake-up call." VR at 30:15-31:6; 32:11-14. The trial court further found that Veristone had failed to respond to these six complaints for "strategic reasons." VR 34:6-10 ("I think there's a strategic reason why [Veristone] waited to bring this motion to set aside so that [MLC] could not cure"). Finally, the trial court found that Veristone's defenses based on the recording dates were inconclusive. VR 40:7-9 ("I think there were questions of fact with regard to your defense"). The trial court denied Veristone's motions to vacate. CP 966 (Lot 2); 197 (Lot 3); 1641 (Lot 4).

The Court of Appeals upheld the trial court's decision with respect to the default judgments, explaining that "[b]ecause Veristone willfully failed to appear, the court did not abuse its discretion by denying Veristone's motions to vacate the default judgments." Pet. App'x Ex. A (hereinafter "Opinion") at pg. 13.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Veristone seeks to shift blame for its own defaults with previously rejected arguments that the judgments are inequitable because, for Lots 3 and 4 only, Veristone's deeds of trust were recorded first. In so doing, Veristone ignores both the impact of its own willful default and the trial court's uncontested finding that Veristone's defenses as to priority were inconclusive. Veristone fails to identify any conflict between the Court of Appeal's unpublished decision in this case and another published appellate decision, or any substantial public interest at stake. RAP 13.4(b). The Court should deny Veristone's Petition.

A. The Court Applied Settled Law in Finding that Veristone Willfully Failed to Respond to the Summons and Complaint and Upholding the Default Judgments.

The law with respect to default judgments is well settled. CR 60(b)(1) permits a trial court to relieve a party from a default judgment due to "mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." A motion to vacate a default judgment pursuant to CR 60(b) is addressed to the sound discretion of the trial court. *Prest v. American Bankers Life,* 79 Wn. App. 93, 97, 900 P.2d 595 (1995).

A party seeking to vacate a default judgment must show: (1) substantial evidence to support a *prima facie* defense; (2) that its failure to appear and answer was occasioned by mistake, inadvertence, surprise or

excusable neglect; (3) it acted with due diligence after notice of the default judgment; and (4) no substantial hardship will result to the opposing party. *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007) (citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)). The first two factors are "primary" and the second two are "secondary." *Id.* However, the test is not mechanical and ultimately "whether or not a default judgment should be set aside is a matter of equity." *Id.*

Courts do not countenance a willful disregard of process by granting a motion to vacate where the record supports such a finding. There is no "balancing" of the factors where a party has defaulted for strategic reasons. Indeed, even a conclusive defense cannot carry the day where the failure to appear was intentional. *TMT Bear Creek Shopping Ctr., Inc.*, 140 Wn. App. at 206 (even where a conclusive defense is presented, "equity will not allow for vacation of the judgment if the actions leading to default were willful."); *White*, 73 Wn.2d at 352-353 (explaining that the test applies "provided . . . the failure to properly appear . . . was not willful"); *Bishop v. Illman*, 14 Wn.2d 13, 17, 126 P.2d 582 (1942) ("The courts will seldom relieve one who has willfully disregarded the command of a summons duly served . . ."; reversing and remanding with instructions to reinstate default); *Thomas v. Green*, 32 Wn. App. 29, 31, 645 P.2d 732 (1982) (upholding default judgment where

the record indicated the failure to appear was deliberate); *Commercial Courier Serv. v. Miller,* 13 Wn. App. 98, 106, 533 P.2d 852 (1975) (upholding default judgment; "[t]his court will not relieve a defendant from a judgment taken against him due to his willful disregard of process").

The Court of Appeals applied this settled law when it upheld the finding that Veristone willfully ignored a properly served summons and complaint and affirmed the trial court's discretionary decision to deny setting aside the default judgments. The Court explained that "equity will not allow for vacation of [a default] judgment if the actions leading to default were willful." Opinion at pg. 4. Veristone's Petition provides no grounds under RAP 13.4(b) to review this unremarkable conclusion.

B. Substantial Evidence Supported the Finding of Willfulness.

Veristone goes on to argue that the trial court got it wrong on the facts, and that Veristone did not willfully ignore the summons and complaint. As the Court of Appeals explained, however, Veristone did not challenge the trial court's finding that it was properly served, making it a verity on appeal. Opinion at pg. 5.

The court also found—and Veristone admitted—that it received the three amended complaints. Yet still, Veristone failed to appear and

answer. The trial court found this "interesting," and noted that at the very least, receipt of the amended complaints should have "triggered something." VR at 30:14-31:6.

It was not until August 7, 2018 (more than 2 months after service of the original complaints) that Veristone emailed MLC requesting copies of the three default judgments. Not once during this exchange did Veristone claim that it was never properly served. CP 954. On August 13, 2018, counsel for Veristone contacted MLC to discuss the case and at no point during that conversation did counsel state that Veristone was not properly served. CP 851. Veristone's motion to vacate, filed on August 23, 2018, was the first time that MLC learned that Veristone disputed service. *Id*. By that point, 104 days had expired since MLC filed its three actions.

A lien foreclosure action is void against a fellow lienholder unless the foreclosing party completes service within 90 days of filing. *Bob Pearson Constr. v. First Cmty. Bank*, 111 Wn. App. 174, 43 P.3d 1261 (2002); s*ee also Queen Anne Painting v. Olney & Assoc.*, 57 Wn. App. 389, 393, 788 P.2d 580 (1990) (mechanic's lien action void where plaintiff failed to serve all parties with recorded lien interests within 90 days); RCW 60.04.141 ("No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the

claim of lien has been recorded unless an action is filed by the lien claimant within that time . . . and service is made upon the owner of the subject property within ninety days of the date of filing the action"). If Veristone could successfully argue that it was not properly served within 90 days, MLC could not cure a service defect, and MLC's liens would be invalid against Veristone's purported $7.5 million in security. *Bob Pearson*, 111 Wn. App. at 174. This was the basis for the trial court's conclusion that Veristone's defaults were "strategic."

For the first time during oral argument, Veristone argued that its multiple defaults could not have been strategic because RCW 60.04.141 provides "eight months and ninety days" from the date the lien was filed to serve all parties. This argument is both inaccurate and immaterial. It is inaccurate because the plain language of the statute requires that service be made "within ninety days of filing the action," not eight months and ninety days. And, even if the plain language of the statute did not foreclose Veristone's argument, the eight-month clock had already run on MLC's lien against Lot 2 by the time Veristone raised its service defense, so that matter could not have been refiled.

Veristone's statutory interpretation argument is also immaterial. The issue before the court was whether Veristone was properly served and willfully failed to respond. Notwithstanding the statutory interpretation or

whether Veristone had a motive, the record amply supported the trial court's finding that the default was willful. As the Court of Appeals noted, "a finding of willfulness is not limited to when a party has a strategic reason for not appearing." Opinion at n. 37. Whether the 90-day service window provided a motive for Veristone to default or not, the fact that Veristone had been properly served multiple times and chose not to appear supported the finding of willfulness.

Veristone could have raised its service defense after receiving the three amended complaints, but it did not. Veristone also could have raised the service defense when it contacted counsel and requested copies of the three default judgments on August 7, 2018, but it did not. If Veristone had timely raised the service issue, MLC could have cured any alleged deficiencies. When "an informed judge, aware of the [facts], exercised his discretion with the facts and theory of the defense known to him," there was no error. *Griggs v. Averbeck Realty*, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979) (upholding denial of motion to vacate default judgment because it could not be said that no reasonable person would take the position adopted by the trial court); *Roth v. Nash*, 19 Wn.2d 731, 740, 144 P.2d 271 (1943) (upholding default judgment where the trial judge credited one side's testimony over the other; "[t]he evidence was certainly sufficient to support the court's conclusion, and we are in no position to

say, from the record before us, that the court erred in that respect"). Further challenge to the trial court's factual findings is not grounds for review under RAP 13.4(b).

C. There Were No Procedural Irregularities Under CR 60(b)(1) That Merit Review.

Without any legal authority, Veristone asserts that "[w]illfulness has no bearing on a motion to vacate for procedural irregularities." Petition at pg. 10. That is not an accurate statement of the law. It is well established that proceedings to vacate judgments are equitable in nature. *Griggs,* 92 Wn.2d at 581. It is equally well established that equity "will not allow for vacation of [a default] judgment if the actions leading to default were willful." *TMT Bear Creek,* 140 Wn. App. at 206. Veristone points to no case holding that this equitable principle does not apply to motions to vacate due to alleged irregularities under CR 60(b)(1).

Nevertheless, Veristone puts forward two arguments for why the trial court should have set aside the default judgments under CR 60(b)(1). First, it argues (in more incendiary terms) that MLC did not plead sufficient facts to prove that its materialmen's liens had priority over Veristone's multiple deeds of trust. Second, it argues that the trial court erred by declining to hold an evidentiary hearing on the issue of whether Veristone

willfully failed to respond to proper service. The Court of Appeals properly dismissed both arguments.

An "irregularity" within the meaning of CR 60(b)(1) "has been defined as the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner." *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). An error of law is not an irregularity for purposes of vacating a judgment under CR 60(b). *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118 (1990) (citing *Burlingame v. Consol. Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986)).

Veristone's citation to *Taylor v. State*, 29 Wn.2d 638, 642, 188 P.2d 671 (1948), for the proposition that not pleading the various recording dates requires reversal under CR 60(b)(1) is unavailing. *Taylor* is not a willful default case. In fact, *Taylor* is not even a default judgment case. *Taylor* involved a claim by a national society of composers against the state seeking a declaratory judgment that the society had complied with a particular Washington statute that required them to file a catalogue of their repertory with the state for copyright purposes. 29 Wn.2d at 642. The court examined the evidence put forward by the society to prove compliance and held that the society "has not complied with the statute

and has not attempted to do so in good faith, in view of its encroachment on the public domain. It is not entitled to a declaratory judgment that it has done so." *Id.* at 649. The case says nothing about CR 60(b)(1) or proof requirements in default judgment situations alleging priority of liens.

Veristone also relies on *Mosbrucker v. Greenfield Implement, Inc*, 54 Wn. App. 647, 652, 774 P.2d 1267, 1270 (1989), and *People's State Bank v. Hickey*, 55 Wn. App. 367 (1989), to argue that Milwaukie's failure to specifically plead the recording date of Veristone's deeds was an irregularity requiring set aside of the default judgments. Neither case is on point. Unlike Veristone, the defendant in *Mosbrucker* did not willfully fail to appear. The *Mosbrucker* plaintiff sought judgment on a lease guarantee, while withholding from the court the underlying lease in which the guarantor's liability had been deleted. This was a procedural error that affected the very integrity of the proceedings, resulting in the equities favoring vacating the default judgment. *Mosbrucker* is not apt in this case, where the trial court found Veristone's defenses based on its recording dates questionable, not dispositive.

Hickey similarly did not involve a willful default, and the court ultimately *upheld* the denial of a motion to set aside a default judgment in that case. The same attorney representing the plaintiff bank in *Hickey* had, in a previous family law matter, arranged for the defaulting defendant to

have the lien against the property that was at issue. 55 Wn. App. at 368-369. Despite this insider knowledge, when later representing the bank, the lawyer alleged that the defendant's lien was subordinate. *Id.* The defendant moved to set aside for fraud under CR 60(b)(4), not for an irregularity under CR 60(b)(1). *Id.* at 370. *Hickey* does not support Veristone's campaign to set aside its default judgments where Veristone willfully defaulted.

Moreover, unlike *Hickey*, the trial court judge in this case was well aware of the recording dates of Veristone's twelve deeds of trust. It carefully considered them and found the cross collateralization argument and the $7.5 million in security on the three residential lots "disturbing," despite knowing that the deeds on Lots 3 and 4 were recorded prior to MLC providing materials to those two lots. VR 33:14-34:10. The trial court found that there were factual issues concerning Veristone's defenses to MLC's priority claim. *Id.* These uncontested findings undermine Veristone's suggestion that the default judgments would not have been entered if the trial court were aware of the recording dates of its deeds.

Washington is a notice pleading state. CR 8 ("Washington follows notice pleading rules and simply requires a 'concise statement of the claim and the relief sought'"). MLC's complaint pleaded all of the facts showing that it had valid liens against the property and put Veristone on

notice that MLC was claiming priority over Veristone's deeds of trust. That was all that the law required.[2]

The trial court's discretionary decision to decide the service issue on affidavits, without an evidentiary hearing, is also not a procedural irregularity under CR 60(b)(1). Veristone did not challenge MLC's affidavit of service, making it presumptively correct. *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010) (citing *Woodruff v. Spence*, 75 Wn. App. 207, 210, 883 P.2d 936 (1994)). Nor did Veristone appeal the trial court's finding of fact that it was properly served.

The trial court's decision to decide the motion on affidavits was "purely discretionary." *Rivard v. Rivard*, 75 Wn.2d 415, 419, 451 P.2d 677 (1969). Although, a court may abuse this discretion by refusing an evidentiary hearing where issues of fact can only be resolved by assessing credibility, that was not the case here. MLC submitted detailed, contemporaneous evidence confirming that Veristone was personally served with copies of all three summonses and complaints on May 30, 2018. Veristone's response consisted of a self-serving affidavit stating

[2] CR 60(b)(1) is addressed to procedural errors, not errors of law. The Court of Appeals did not misquote *Kim v. Lee*, 145 Wn.2d 79, 85-86, 31 P.3d 665 (2001), for the proposition that lien priority is a question of law. *Kim* supports the court's statement. *Id.* at 86.

that Ms. Good did "not recall" being served. Having no recollection of being served is a very different thing than not being served. There was no reason to call an evidentiary hearing because Veristone failed to submit clear and convincing evidence that service was improper and gave no other explanation for its failure to appear. *Leen v. Demopolis*, 62 Wn. App. 473, 479-480, 815 P.2d 269 (1991) (equivocal affidavits did not adequately rebut affidavit of service and did not require a hearing); Opinion at 8 ("Good's general denial of having been served and bare assertion about Veristone's record-keeping system do not compel an evidentiary hearing."). The court's discretionary decision not to vacate the default judgments in these circumstances does not merit review.

V. REQUEST FOR FEES

MLC respectfully requests an award of its attorney fees incurred on appeal under RCW 60.04.181(3) and RAP 18.1.

VI. CONCLUSION

Veristone's Petition alleges no grounds for review under RAP 13.4. The Court should deny the Petition and award MLC its fees for having to respond.

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Dated: July 6, 2021

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CERTIFICATE OF SERVICE

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

That on the 6th day of July, 2021, I served the foregoing MILWAUKIE LUMBER'S ANSWER TO PETITION FOR REVIEW on the following parties and/or counsel of record via *Electronic Court E-Service* as follows:

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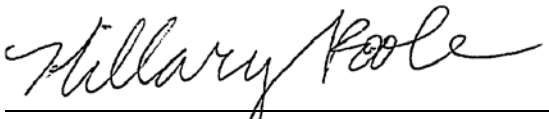

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July 06, 2021 - 3:13 PM

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Appellate Court Case Title:	Milwaukie Lumber v. Veristone Fund I, LLC
Superior Court Case Number:	18-2-01115-2

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