

NO. 63877-7

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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WARREN WESTLUND BUICK-GMC TRUCK, INC.,

Appellant,

v.

CROW ROOFING & SHEET METAL,

Respondent.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

There is no dispute that Crow was properly served with the summons and complaint in this action. There is similarly no dispute that Crow did not appear or answer the complaint within the prescribed time period and that Westlund therefore took a default judgment.

Crow attempts to avoid the consequences of the judgment in two ways. First, it claims its failure to defend should be excused because it thought its insurance company would handle it. Second, it claims Westlund acted inequitably by not informing Crow's insurer that Crow had been served, by not informing Crow's insurer that Westlund intended to seek a default, and by expressing a willingness to negotiate a settlement.

Washington courts have rejected the arguments Crow advances. First, a policyholder can rely on its belief that its insurer is defending only if a reasonable basis exists for that belief. Where the policyholder has no way of knowing if the insurer even received the complaint – let alone agreed to defend the action – the policyholder is inexcusably neglectful by taking no action of its own.

Second, Westlund did not act inequitably in obtaining the default judgment. No Washington authority required Westlund to provide notice

to Crow's liability insurer when Westlund served Crow or moved for default.<sup>1</sup> In fact, Washington courts hold squarely to the contrary:

We do not believe that a plaintiff's failure to notify a nonparty insurer of her intention to obtain a default judgment against an insured is a basis for vacation of a default order and judgment. Martinez has cited no authority, and our research has revealed none, that stands for the proposition that it is inequitable to enter a default judgment against a defaulting party without first notifying that party's insurer.<sup>2</sup>

Moreover, the record establishes Crow was properly served and its liability insurer received courtesy notice of the filed lawsuit within days of it being filed. Crow's argument that its liability insurer was inequitably kept in the dark is meritless.

Additionally, Westlund's willingness to negotiate is neither inequitable nor a bar to proceed with litigation. Crow's claim that "negotiations" were occurring as a basis to avoid the judgment lacks any evidence whatsoever in the record and must fail. CNA's response to Westlund's request to negotiate was that it denied the claim. No negotiations ever took place.

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<sup>1</sup> Moreover, it is clear that no person or entity ever appeared on behalf of Crow formally, informally, or otherwise before the judgment was entered. Thus, Crow was not entitled to notice before the default was taken. CR 55 (a)(3) ("Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A).").

<sup>2</sup> Caouette v. Martinez, 71 Wn. App. 69, 78, 856 P.2d 725 (1993).

This case involves a party that simply failed, without excuse, to respond to a properly served summons and complaint. The record belies every argument Crow advances. No reason exists to vacate the default judgment in this case and to do so would render the civil rule governing default judgments superfluous. This Court should reverse the trial court's ruling and reinstate the default judgment.

## II. ARGUMENT

### A. **CROW'S MOTION TO STRIKE IS NOT PROPERLY BEFORE THE COURT AND MUST BE DENIED**

The Rules of Appellate Procedure bar Crow from including a motion to strike portions of Westlund's brief in its own response brief. "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits."<sup>3</sup> Thus, Crow's motion to strike must be denied.<sup>4</sup>

To that end, Crow devotes three pages of its brief as a request to have this Court act as editor, striking arguments and assertions that Crow disagrees with.<sup>5</sup> However, even if granted, Crow's motion would not preclude a hearing on the merits. Thus, it is not the type of motion

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<sup>3</sup> RAP 10.4(d); RAP 17.4(d).

<sup>4</sup> See RAP 10.4(d); RAP 17.4(d).

<sup>5</sup> See Brief of Respondent at 33-35.

allowed to be incorporated in a brief and should be denied for that reason alone.<sup>6</sup>

**B. WHETHER CROW'S ACTIONS AMOUNT TO INEXCUSABLE NEGLIGENCE IS SUBJECT TO *DE NOVO* REVIEW**

Although Crow cites in its brief to the “abuse of discretion” standard for vacation of a default judgment,<sup>7</sup> it did not respond at all to Westlund’s argument that whether Crow’s (and CNA’s) inaction amounted to excusable neglect is subject to *de novo* review.

Once a party in default has established grounds under CR 60(b)(1) to vacate a default judgment (such as excusable neglect), it is within the trial court’s discretion to either vacate or uphold the judgment after applying the four White factors.<sup>8</sup> Where, however, the party in default fails to establish excusable neglect (or other ground under CR 60(b)), the trial court necessarily abuses its discretion by vacating the judgment

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<sup>6</sup> See, e.g., Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 125, 11 P.3d 726 (2000) (“Postema’s motion, if granted, would not preclude hearing this case on the merits, and therefore *we will not consider the motion.*”); State v. Saas, 118 Wn.2d 37, 46 n.2, 820 P.2d 505 (1991) (“Granting this motion would not preclude hearing the case on the merits. The motion is therefore *not properly before the court*, and is accordingly denied.”).

<sup>7</sup> Brief of Respondent at 10-11.

<sup>8</sup> See White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (“(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.”).

because no grounds exist under which the judgment may be vacated.<sup>9</sup> Whether certain actions qualify as excusable neglect – as opposed to inexcusable neglect – is a question of law fully reviewable *de novo*.<sup>10</sup>

**C. CROW FAILED TO SHOW THAT ITS NEGLIGENCE IN NOT ANSWERING WESTLUND'S PROPERLY SERVED COMPLAINT WAS EXCUSABLE**

Crow asserts that it “took reasonable measures to effectuate an appearance by promptly faxing the summons and complaint to CNA.”<sup>11</sup> But the summons did not require Crow to inform its insurer, it specifically informed Crow that it “must respond to the Complaint by stating your defense in writing, and serve a copy upon the undersigned attorney for the plaintiffs within 20 days after the service of this Summons . . . .”<sup>12</sup> “[L]itigation is a formal process.”<sup>13</sup> Under the circumstances, merely faxing the summons and complaint to CNA while failing to inquire even

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<sup>9</sup> Hwang v. McMahill, 103 Wn. App. 945, 952, 15 P.3d 172 (2000) (trial court abused its discretion when “there was no tenable basis for the court’s finding of mistake, surprise, or excusable neglect under CR 60(b)(1)”).

<sup>10</sup> Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552 (1986) (“Although a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and will not be disturbed unless the trial court has abused its discretion, whether excusable neglect has been shown is a question of law – not of fact.”) (citation omitted); 47 Am.Jur.2d § 689 (2006) (“Whether conduct constitutes excusable neglect for purposes of the relief from-judgment-rule presents a conclusion of law, fully reviewable on appeal”); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441 n.2, 191 P.3d 879 (2008) (“This court reviews conclusions of law *de novo* whether or not they are styled as ‘findings of fact.’”).

<sup>11</sup> Brief of Respondent at 25.

<sup>12</sup> CP 1.

<sup>13</sup> Morin v. Burris, 160 Wn.2d 745, 749, 161 P.3d 956 (2007).

once if the insurer received the documents or intended to defend does not amount to “reasonable measures.”

**1. The Record Contains No Evidence of Any Contact Between Crow and CNA Between the Day Crow Faxed the Summons and Complaint to CNA and the Day Default Judgment was Entered**

To support its position that Crow’s failure to ensure its interests were being protected amounts to inexcusable neglect, Westlund pointed out that there was no contact between Crow and CNA between the time Crow faxed the summons and complaint on March 6, 2009, and the time it learned of the judgment against it on May 27, 2009.<sup>14</sup> The record contains no evidence to the contrary. The significance of this information is that no basis exists for Crow to *reasonably* believe CNA was protecting its interests when Crow (a) never confirmed CNA received the documents; (b) never received assurances from CNA that it was handling the lawsuit; and (c) never made any attempt to follow up on the progress of the lawsuit against it.

Crow’s response to this argument makes no sense. First, it claims that evidence of post-service/pre-judgment communications between itself and CNA is relevant only to “Westlund’s argument regarding insurance

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<sup>14</sup> See Brief of Appellant at 9, 20-21.

coverage law.”<sup>15</sup> This is not the case. Rather, Crow’s lack of any communication with CNA during this time period is relevant to show that Crow did not respond to being sued in a way that can be considered “excusable.”<sup>16</sup>

Even more puzzling is Crow’s implication that such communications did in fact take place, but that providing any evidence of those conversations would be improper under Heidebrink v. Moriwacki.<sup>17</sup> This attempt to explain away the communication void fails for at least two reasons.

First, Heidebrink is a case about discovery.<sup>18</sup> In that case, the court determined that statements made by a policyholder to its insurer in the anticipation of litigation qualified as work product and were protected from disclosure absent a showing of substantial need.<sup>19</sup> Here, however,

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<sup>15</sup> See Brief of Respondent at 30.

<sup>16</sup> See, e.g., BellSouth Telcoms., Inc. v. Future Communs., Inc., 293 Ga. App. 247, 249, 666 S.E.2d 699 (2008) (“Future did nothing to ensure that the complaint was received by its insurer, and it did not attempt to obtain its insurer’s assurance that it was handling the suit. Thus, the trial court was not authorized to open the default on the ground of excusable neglect.”).

<sup>17</sup> See Brief of Respondent at 30 (citing to Heidebrink v. Moriwacki, 104 Wn.2d 392, 706 P.2d 212 (1985)).

<sup>18</sup> Heidebrink, 104 Wn.2d at 394 (“Counsel for respondents requested a copy of the transcript of Mr. Moriwaki’s statement. Defense counsel objected on grounds of work product and attorney-client privilege. Respondents subsequently moved for an order compelling production.”).

<sup>19</sup> Heidebrink, 104 Wn.2d at 401 (“Therefore, we hold that a statement made by an insured to an insurer following an automobile accident is protected from discovery

discovery never even commenced because Crow never appeared to defend, so the reasoning of Heidebrink is entirely inapposite.

Second, as the party seeking to vacate the judgment, it is Crow's burden to demonstrate that it acted with *excusable* neglect for the purposes of CR 60(b)(1).<sup>20</sup> In light of overwhelming authority holding that a policyholder acts with *inexcusable* neglect in assuming its insurer is defending absent any reason to support that assumption,<sup>21</sup> Crow would be well advised to show evidence of such discussions if they ever in fact occurred. Instead, Crow has pointed to no evidence in the record of such discussions and has not moved the Court to consider additional evidence on review, choosing instead to hide behind vague suggestions that undisclosed, privileged conversations *might* have taken place.<sup>22</sup>

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under CR 26(b)(3). The question then remains whether respondents have shown substantial need.”).

<sup>20</sup> See Johnson v. Cash Store, 116 Wn. App. 833, 849, 68 P.3d 1099 (2003) (defendant “did not satisfy *its burden* of demonstrating that its failure to appear and answer was occasioned by mistake, inadvertence, surprise, or excusable neglect”) (emphasis added).

<sup>21</sup> See, e.g., Wright v. Mann, 271 Ga. App. 832, 833, 611 S.E.2d 118 (2005) (“It is well established that a defendant’s *unconfirmed belief* that her insurer had timely received suit papers and was preparing a defense on the defendant’s behalf is *not sufficient to constitute excusable neglect* that would authorize the trial court to set aside a default judgment.”) (emphasis added); Opening Brief of Appellant at 16 n.55 (collecting cases).

<sup>22</sup> Crow stops short of affirmatively stating it did communicate with CNA during the time between service of the complaint and entry of default, perhaps hoping that suggesting the possibility is enough to substitute for evidence.

Crow apparently misses the fallacy of its suggestion: if Crow and CNA actually *were* in contact after Crow was served with the summons and complaint, one of two things must have happened. Either CNA learned from Crow that Crow had been served, which would contradict the declaration of Sarah Rapolas filed in support of Crow’s motion to vacate the judgment;<sup>23</sup> or CNA and Crow somehow managed to have work-product-protected conversations about this lawsuit without CNA learning Crow had been served and without Crow learning that CNA did not get Crow’s fax. Such a conversation is not only completely implausible, but would serve to further support the conclusion that Crow’s failure to answer the complaint was due to inexcusable neglect. At any rate, this Court need not speculate regarding the effect of conversations – that according to all the evidence in the record – never occurred.

**2. The Absence of Any Evidence Crow Properly Tendered Defense of the Lawsuit to CNA Supports that Crow Acted with Inexcusable Neglect**

Crow states in its brief that “[w]hether or not Crow’s insurer accepted tender of the claim is irrelevant.”<sup>24</sup> Westlund agrees.<sup>25</sup> Westlund never argued that CNA’s acceptance or non-acceptance of

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<sup>23</sup> CP 154 ¶ 13 (“If I had known about the service of the complaint and summons upon Crow . . . I would have retained counsel to appear and defend this action.”)

<sup>24</sup> Brief of Respondent at 28.

<sup>25</sup> Whether CNA breached its duty to Crow is between CNA and Crow.

tender has any effect on the CR 60(b) analysis.<sup>26</sup> Instead, Westlund pointed out that no evidence in the record supports that Crow actually *tendered* the defense of the lawsuit to CNA, an action distinct from merely providing notice to the insurer.<sup>27</sup>

Crow responded by complaining that Westlund never made that argument to the trial court. Crow, however, misses the point. Crow's failure to tender defense of the lawsuit is not offered as a new or independent reason the trial court should have refused to vacate the judgment. Instead, Westlund simply offered Crow's failure to tender as *further support* for the argument – clearly before the trial court – that Crow acted with inexcusable neglect.<sup>28</sup> A policyholder acts with inexcusable neglect by failing to answer a complaint when it has no

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<sup>26</sup> Likewise, it does not matter that “CNA retained counsel to defend Crow.” See Brief of Respondent at 30. This occurred only *after* Crow's (and CNA's) inexcusable neglect allowed the default judgment to be entered.

<sup>27</sup> Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 426-27, 983 P.2d 1155 (1999) (“Several courts have concluded that a tender of defense is sufficient if the insured puts the insurer on notice of the claim, while others have determined that an insurer's duty to defend does not arise unless the insured specifically asks the insurer to undertake the defense of the action. In Time Oil Co. v. Cigna Property & Casualty Insurance, the United States District Court for the Western District of Washington adopted the latter theory. We agree with the federal court that an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired.”)

<sup>28</sup> Crow argued to the trial court that it “had no reason to believe its interests were not being protected after promptly forwarding legal documents to its insurer.” CP 201. Westlund responded by arguing “Crow fail[ed] to present any facts to support [its] understanding” that CNA would retain counsel and defend; “Crow provides no evidence that CNA made assurances that it would provide counsel or defend”; and “[t]hus, Crow cannot have reasonably relied on assurances of CNA . . . .” CP 219.

reasonable expectation the insurer is providing a defense,<sup>29</sup> and a policyholder can have no reasonable expectation the insurer is defending when a defense was never specifically requested.<sup>30</sup>

### **3. Crow Never Addressed the Persuasive Authority Cited by Westlund Involving Facts Just Like this Case**

Although Crow acknowledges Westlund’s “exhaustive analysis of cases from other states,”<sup>31</sup> it has no answer or argument to counter that analysis other than that those cases are “not persuasive.”<sup>32</sup> The cases are, in fact, persuasive because they involve facts virtually identical to the instant case. Wright v. Mann,<sup>33</sup> for example, is squarely on all fours with Crow’s situation: the policyholder faxed the summons and complaint to its insurer; never received a response; never took action to make sure the insurer received the documents; and merely assumed a defense was being provided.<sup>34</sup>

Multiple cases cited by Westlund follow the same formula and reach the same conclusion: the policyholder cannot vacate a default

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<sup>29</sup> BellSouth, 293 Ga. App. at 249 (“It is well settled that merely assuming that a complaint is being handled by an insurer is insufficient to establish excusable neglect as a matter of law.”).

<sup>30</sup> See Leven, 97 Wn. App. at 426-27.

<sup>31</sup> CP 28.

<sup>32</sup> CP 29.

<sup>33</sup> Wright, 271 Ga. App. 832.

<sup>34</sup> See Wright, 271 Ga. App. at 833.

judgment for excusable neglect when it had no reasonable basis to believe the insurer was defending, and absent some assurance from the insurer that it is defending, simply faxing away documents does not support a *reasonable* belief.<sup>35</sup>

Instead of addressing these cases, Crow attempts to manipulate the present facts to fit within the framework of White v. Holm.<sup>36</sup> This attempt fails. Crow did *not* promptly notify its insurer of the *lawsuit* – its attempt at notice undisputedly failed.<sup>37</sup> Though Crow states that it “diligently complied with all requests from the insurer relative to furnishing information,” its only citation to the actual delivery of any documents refers to documents sent on November 18, 2008<sup>38</sup> – *months before the lawsuit was ever filed and served*. Finally, Crow’s assertion that it “*justifiably* entertained a bona fide belief that Crow’s insurer would defend the action”<sup>39</sup> begs the question. Crow’s belief is not “justifiable” just because it says so – there must be some reasonable basis for it,<sup>40</sup> and here, there is not.

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<sup>35</sup> See Opening Brief of Appellant at 14-21 and cases cited therein.

<sup>36</sup> See Brief of Respondent at 25-26 (citing White, 73 Wn.2d 348).

<sup>37</sup> CP 154 ¶ 13.

<sup>38</sup> See Brief of Respondent at 26.

<sup>39</sup> Brief of Respondent at 26 (emphasis added).

<sup>40</sup> In White, that basis took the form of assurances from both the insurer and the policyholder’s own private counsel. White, 73 Wn.2d at 354 (“Mr. Holm was

Similarly, Crow's citation to Leavitt v. DeYoung<sup>41</sup> adds nothing to the analysis. In Leavitt, the insurer appointed an attorney who "made arrangements with the other attorney . . . to put in any necessary appearances."<sup>42</sup> Additionally, it "was further stated that during this time the office of the attorney for respondents' insurer was being readied to move to another location and in some manner the file relating to this case had been mislaid and was not recovered until after the default judgment had been taken."<sup>43</sup> Here, CNA never appointed an attorney (until *after* entry of the judgment) and no one ever alleged that files were mislaid due to moving offices.

**D. CROW'S COMPLAINTS OF INEQUITABLE CONDUCT ARE COMPLETELY WITHOUT MERIT**

Crow argues that the default judgment should have been vacated because of "inequitable conduct" on the part of Westlund. Crow argues it was inequitable for Westlund not to notify Crow and CNA prior to obtaining a default judgment and that Westlund misled Crow into not

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assured by his insurance agent, as well as the attorney he consulted, that his insurer would properly defend the action on behalf of defendants, at least until the extent of insurance coverage was ascertained."). Here, no such assurances were ever made to Crow.

<sup>41</sup> Leavitt v. De Young, 43 Wn.2d 701, 263 P.2d 592 (1953)

<sup>42</sup> Leavitt, 43 Wn.2d at 705.

<sup>43</sup> Leavitt, 43 Wn.2d at 705.

answering the complaint by expressing a willingness to discuss settlement.

Both arguments fail.

**1. Neither Crow nor CNA had a Right to Notice Before Default**

Westlund had no duty to inform Crow or CNA of its intent to seek a default judgment. Washington’s Supreme Court holds “[i]n an ordinary litigation setting, *a plaintiff has no ethical or good faith obligation to inform a defendant who has not answered or filed a notice of appearance that it will seek a default judgment.*”<sup>44</sup> Washington’s Court Rules similarly provide: “CR 55(a)(3) states, in pertinent part, ‘Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion.’”<sup>45</sup> Thus, Crow’s assertion that lack of notice is itself a ground for vacating the judgment is completely groundless.<sup>46</sup>

**2. Westlund’s Willingness to Discuss Settlement does not Excuse Crow’s Failure to Answer the Complaint**

Crow apparently believes it was not required to respond to the summons and complaint because Westlund had expressed a willingness to

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<sup>44</sup> Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 278, 996 P.2d 603 (2000) (emphasis added).

<sup>45</sup> Lenzi, 140 Wn.2d at 278. *See also* CR 5(a) (“No service need be made on parties in default for failure to appear . . .”).

<sup>46</sup> *See* Brief of Respondent at 32-33.

discuss settlement of its dispute without litigation.<sup>47</sup> This argument fails for the following four reasons.

a. Westlund's Offers to Discuss Settlement in December 2008 Could Not Have Any Bearing on Crow's Failure to Answer in March 2009

First, Crow includes citations to communications that took place on December 1 and December 15, 2008, for the proposition that those were somehow misleading with respect to Westlund's intent to pursue litigation in March 2009.<sup>48</sup> Crow fails to explain, however, how offers to engage in settlement discussions in December could possibly mislead Crow and/or CNA to believe that it need not answer the complaint filed the following March. In fact, Westlund was clear that if the parties were unable to reach a satisfactory resolution of Westlund's claims, litigation was the next step:

Westlund demands that Crow fund the necessary repairs and oversight to correct the identified issues. Westlund has received a responsive estimate for the necessary removal and replacement in the amount of \$153,599. A copy of this estimate is enclosed with this letter. Additionally, Westlund expects to be reimbursed for the cost of retaining a roofing expert to conduct the necessary investigation and to oversee necessary repairs. That cost is estimated to be \$7,500.

Westlund demands funding in the foregoing amounts within fourteen calendar days of your receipt of this letter.

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<sup>47</sup> See Brief of Respondent at 18-22.

<sup>48</sup> Brief of Respondent at 20 n.4, 23 n.5.

***If an acceptable resolution of this issue is not in place by the end of fourteen days, Westlund will have no choice but to move forward with repairs and commence legal action to enforce the terms of the agreement and warranty.***<sup>49</sup>

On December 15, 2008, Westlund through its counsel advised Crow's liability insurer that litigation against Crow would occur absent a resolution of the claim:

I am following up on my email to you of December 1, 2008. In order to mitigate damage and business interruptions, my client is at a point where a decision needs to be made with respect to addressing these roof issues at the dealership. ***But we certainly want to make every effort to try and resolve this matter directly and expeditiously with CNA before the matter gets to the point of filing suit against Crow.*** Please call me when you can.<sup>50</sup>

Neither Crow nor CNA made an offer of money or services in response to Westlund's overture.<sup>51</sup> In fact, CNA and Crow's refusal to resolve the dispute out of court is what ultimately led to the lawsuit: "As indicated in my voicemail of last week my client has become concerned with the progress of the investigation and resolution efforts and elected to file suit against Crow."<sup>52</sup> Thus, Westlund was clear in its intent to move forward with litigation.

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<sup>49</sup> CP 63 (emphasis added).

<sup>50</sup> CP 69 (emphasis added).

<sup>51</sup> CP 229 ¶4.

<sup>52</sup> CP 71.

b. Nothing in the Record Suggests Crow Failed to Answer Because it (or CNA) Relied on Offers to Negotiate

Second, Crow argues that Westlund's March 3, 2009 offer to CNA's adjuster "to attempt to negotiate a settlement of all claims," and March 4, 2009 statement that it would make more sense to try and resolve this without the litigation" somehow caused Crow's failure to answer the complaint that had been served on it.<sup>53</sup> Absolutely no support for this exists. Nothing in the record indicates that Crow was even the slightest bit aware of Westlund's communications with CNA, or that those communication played any part Crow's failure to ever inquire about the status of the lawsuit.<sup>54</sup>

Moreover, in her declaration, CNA's adjuster testified that if she had known Crow had been served with the summons and complaint, she would have retained counsel to appear and defend.<sup>55</sup> She never testified that she was relying on statements of settlement negotiations as a reason not to hire a lawyer for Crow.<sup>56</sup>

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<sup>53</sup> See Brief of Respondent at 20.

<sup>54</sup> As discussed above had CNA informed Crow of the discussions on March 3 and 4, it could no longer claim to be unaware Crow had been served.

<sup>55</sup> CP 154 ¶ 13.

<sup>56</sup> CP 152-54.

c. CNA's Actions Show Indicate it was Not Misled

Third, when Westlund suggested that the parties attempt to come to a resolution, CNA responded by denying the claim.<sup>57</sup> CNA's "denial" came the day after CNA was informed of the lawsuit. CNA cannot credibly maintain that it believed "settlement negotiations" were "continu[ing]" when it had denied the claim due to a purported "lack of liability."<sup>58</sup> Thus, Crow's argument that the judgment was entered because of alleged "ambiguous and misleading" statements by Westlund's counsel<sup>59</sup> is demonstrably false and should be rejected.

d. Cases Cited by Crow are Inapposite

Finally, the cases Crow cites in an attempt to show that Westlund's statements on March 3 and 4 were misleading do not support its position.<sup>60</sup> In Wilma v. Harsin,<sup>61</sup> the default judgment was overturned pursuant to CR 60(b)(5) as void due to a defect in the summons.<sup>62</sup> Here, however, Westlund's summons conformed to CR 4, clearly stated that a lawsuit had

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<sup>57</sup> CP 153.

<sup>58</sup> See CP 153 ¶¶ 8-9.

<sup>59</sup> See Brief of Respondent at 21-22.

<sup>60</sup> See Brief of Respondent at 19-20.

<sup>61</sup> Wilma v. Harsin, 77 Wn. App. 746, 893 P.2d 686 (1995).

<sup>62</sup> Wilma, 77 Wn. App. at 749 ("Finding the judgment void for a defect in the summons, the court granted the motion [to vacate] pursuant to CR 60(b)(5).").

been started against Crow, and informed Crow of the consequences of failure to appear.<sup>63</sup>

Golson v. Carscallen,<sup>64</sup> a pre-CR 60 case, similarly involved a defective summons.<sup>65</sup> Additionally, the plaintiff served the summons and complaint multiple times without filing it and the defendant repeatedly checked with the court clerk to see if the complaint had been filed, and was repeatedly informed it had not been.<sup>66</sup> Neither case addresses whether the defendant acts with inexcusable neglect when, after being properly served with a lawsuit, it fails to inquire whether its insurer is providing a defense.

**E. CROW AND ITS INSURER FAILED TO ACT WITH NECESSARY DILIGENCE BY IGNORING LITIGATION BOTH ENTITIES KNEW HAD BEEN FILED AND WAS PENDING**

Crow repeatedly asserts that the reason it did not appear and defend is because Westlund failed to notify CNA that it had served Crow. As stated above, however, Westlund was never under any obligation to inform Crow's insurer of its lawsuit against Crow.<sup>67</sup> Furthermore, the fact that CNA *did in fact* know the lawsuit had been filed (even if it did

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<sup>63</sup> CP 1-2.

<sup>64</sup> Golson v. Carscallen, 155 Wash. 176, 283 P. 681 (1930).

<sup>65</sup> Golson, 155 Wash. at 177-78.

<sup>66</sup> Golson, 155 Wash. at 178.

<sup>67</sup> See Caouette, 71 Wn. App. at 78.

not know it had been served) obligated it to act with diligence on behalf Crow.

Although Westlund's willingness to discuss settlement does not excuse Crow from answering the complaint, even if those discussions could be construed as "inequitable," Washington law requires more than *just* inequitable conduct on the part of the party filing for a default judgment – the party in default must also have acted with diligence.

In *Morin v. Burris*,<sup>68</sup> the Supreme Court suggested that plaintiff's counsel may have acted inequitably by attempting to conceal the litigation while a default judgment was pending: "[i]f the Johnsons' representative acted with diligence, and the failure to appear was induced by Gutzes' counsel's efforts to conceal the existence of litigation . . . then the Johnsons' failure to appear was excusable under equity and CR 60."<sup>69</sup> The Johnsons' counsel had to have "acted with diligence."<sup>70</sup> Here, Crow was served with the complaint and faxed away the documents but never inquired whether its insurer received them. Crow's insurer similarly knew the lawsuit had been filed, but failed to make any inquiries into the status

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<sup>68</sup> *Morin*, 160 Wn.2d 745.

<sup>69</sup> 160 Wn.2d at 759.

<sup>70</sup> 160 Wn.2d at 759.

of the lawsuit. Neither Crow nor CNA acted with the diligence necessary for relief under equity or CR 60.

**F. CROW MISUNDERSTANDS THE DIFFERENCE BETWEEN SHOWING A PRIMA FACIE DEFENSE AND A STRONG OR VIRTUALLY CONCLUSIVE DEFENSE**

Crow's discussion of whether it succeeded in demonstrating a *prima facie* defense to Westlund's claims largely misses the point.<sup>71</sup> Demonstration of a *prima facie* defense is a necessary – but not sufficient – step in overturning a default judgment.<sup>72</sup> Existence of a *prima facie* defense is *not enough to vacate* a default judgment when the party in default acted with inexcusable neglect.<sup>73</sup>

As a separate consideration, the court will determine whether the defense presented is strong or virtually conclusive, and if so, little time will be spent inquiring into the reasons which occasioned entry of the default.<sup>74</sup> Here is where Crow's argument becomes unintelligible because

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<sup>71</sup> See Brief of Respondent at 13-17.

<sup>72</sup> See CR 60(e) (“Application [for vacation of judgment] shall be made by motion . . . and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and *if the moving party be a defendant, the facts constituting a defense to the action or proceeding.*”) (emphasis added).

<sup>73</sup> *Cash Store*, 116 Wn. App. at 849 (“Because Cash Store *failed to establish more than a prima facie defense* to Ms. Johnson’s claims and *did not satisfy its burden of demonstrating that its failure to appear and answer was occasioned by mistake, inadvertence, surprise, or excusable neglect*, the trial court did not abuse its discretion in denying the motion to vacate the default judgment.”) (emphasis added).

<sup>74</sup> *White*, 73 Wn.2d at 352-53.

it conflates the discrete concepts of a *prima facie* defense and a “strong or virtually conclusive” defense.<sup>75</sup> While the court is to consider evidence purportedly demonstrating a *prima facie* defense in the light most favorable to the party moving to vacate the judgment,<sup>76</sup> when considering whether a defense is strong or virtually conclusive, the court properly weighs the evidence.<sup>77</sup> This is because the purpose of finding a strong or virtually conclusive defense is different from that requiring the demonstration of a *prima facie* defense.<sup>78</sup>

Without any apparent recognition of the distinction, Crow claims to have demonstrated a “strong *prima facie* defense.”<sup>79</sup> However, the conclusory findings of Crow’s expert witness – contradicted by Westlund’s expert – do not rise to the level of strong or virtually

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<sup>75</sup> See Brief of Respondent at 14-15 (“Crow presented a strong *prima facie* defense . . .”).

<sup>76</sup> TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 203, 165 P.3d 1271 (2007) (“The most reasonable method by which to conduct [the *prima facie* defense] inquiry is to view the facts proffered in the light most favorable to the defendant”).

<sup>77</sup> TMT Bear Creek, 140 Wn. App. at 203 (“[N]either Pfaff nor any subsequent decision holds that the trial court must view the evidence in the light most favorable to the defendant when determining whether the defendant is able to demonstrate the existence of a strong or virtually conclusive defense to the plaintiff’s claims. Such a rule would not be sensible.”).

<sup>78</sup> TMT Bear Creek, 140 Wn. App. at 204 (“[T]he rationale for viewing the evidence in the light most favorable to the movant in determining the existence of a *prima facie* defense is inapplicable to a determination of whether there exists a strong or virtually conclusive defense to the plaintiff’s claim.”).

<sup>79</sup> See, e.g., Brief of Respondent at 15 (“strong *prima facie* defense”), id. at 17 (“substantial *prima facie* defense”).

conclusive.<sup>80</sup> Thus, Crow cannot escape its inexcusable neglect in response to this lawsuit: “[W]here the moving party is unable to show a strong or conclusive defense . . . the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care . . . .”<sup>81</sup> In fact, when, as here, the defendant has presented no more than a tenuous, minimal, *prima facie* defense, “then the plausibility and excusability of the defaulted *defendants’ reason for failing to initially and timely appear in the action deserve grave, if not dispositive, consideration.*”<sup>82</sup>

### III. CONCLUSION

In this case it is clear that Westlund did nothing inequitable in obtaining the default judgment. The defendant simply never showed up to defend the lawsuit. It is similarly clear that Crow’s assertion that it “reasonably understood” its insurer would provide a defense is based on nothing more than mere speculation. No fact supports a reasonable expectation that the insurer was protecting Crow’s interests. Allowing the order vacating Westlund’s judgment to stand would effectively write the “excusable neglect” requirement right out of CR 60(b)(1). For these

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<sup>80</sup> See Westlund’s Opening Brief at 35-38.

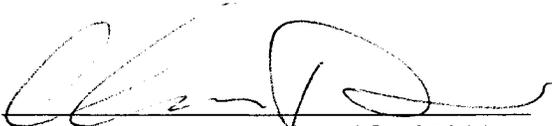
<sup>81</sup> White, 73 Wn.2d at 352-53.

<sup>82</sup> White, 73 Wn.2d at 353-54 (emphasis added).

reasons, appellant respectfully requests that this Court reverse the order vacating appellant's default judgment.

DATED this 14 day of January, 2010.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on *Monday, January 11, 2010*, I caused and true and correct copy of this document to be delivered in the manner indicated to the following parties:

**BY MESSENGER**

Steven G. Wraith  
Lee Smart PS, Inc.  
701 Pike Street, Suite 1800  
Seattle, WA 98101-3929

DATED this 11<sup>th</sup> day of January, 2010.

  
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Jessica Gardner