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68206-7

No. 68206-7-I

COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION ONE

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*VIET N. NGUYEN*

*Appellant*

v.

HAI TANG and JANE DOE TANG,

*Respondent*

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(The Honorable Theresa Doyle)

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OPENING BRIEF

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## I. INTRODUCTION

This case involves a motor vehicle collision that occurred on August 28, 2009. After service of process upon the respondents, a default order was entered in August 2011. A default judgment was entered over three months later, on November 28, 2011. The respondents filed a motion to vacate the judgment which was opposed by the appellant on procedural due process grounds, on the grounds of insufficient and inadmissible evidence supporting the motion, and upon substantive grounds as unwarranted because the respondents were properly served and had no sufficient excuse for failing to answer. The court issued an order on December 16, 2011 vacating the default judgment. The present appeal results from that order.

- A. The trial court erred in granting the motion when the respondent/defendant failed to follow the procedures under the Civil Rules and therefore the court lacked jurisdiction to rule upon the motion.

Respondent failed to follow the requirements of Civil Rules (CR) 59 and 60(e) in seeking relief from the court. CR 60(e) requires the moving party to provide evidence in motion sufficient for the court to issue a show cause order for a hearing on whether to vacate the judgment. Once the show cause order is issued, the moving party must secure service on the opposing party. Respondent failed to follow the

procedures and due process was not met. Further, the order vacating judgment – if issued under CR59 – failed to make appropriate findings for the basis of the order, and failed to establish the necessary elements of relief under CR59.

- B. The trial court erred in ruling on the motion when the motion was supported by inadmissible evidence including hearsay.

The trial court failed to make any findings of fact and conclusions of law supporting the basis for the order to vacate judgment on a properly served and defaulted defendant. The trial court entered the proposed order of respondent without comment, but the motion was supported on essential facts by hearsay and statements outside of personal knowledge of the declarant. As a matter of law the court abuses its discretion when it relies on inadmissible evidence to support a ruling.

- C. The trial court abused its discretion in vacating the judgment when the respondents/defendants failed to demonstrate each of the factors necessary to support excusable neglect, and failed to rebut the fact that the defendants below were properly served.

Where the moving party below fails to contest that service was made, fails to produce any evidence that the service was improper, fails to produce any evidence supporting excusable neglect, only provides inadmissible hearsay supporting the requirements of CR60, and where the evidence presented by the opposing party established service, and actual

knowledge of the lawsuit prior to entry of judgment, it is abuse of discretion to vacate such judgment.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in reaching the merits when the defendant below failed to secure proper due process in accordance with the civil rules, under CR60. The court lacked authority to vacate the judgment as a revision once judgment was issued, but was required to follow the requirements of CR 60. The failure to follow the procedure and have plaintiff/appellant served with a show cause order as predicate to vacating the judgment was a violation of due process.

2. The court erred in failing to issue findings under CR59 supporting reconsideration of the default judgment, and failed to find facts supporting the enumerated basis for relief under CR59.

3. The trial court abused its discretion in issuing the order on December 16, 2011 because it was based on inadmissible evidence and hearsay.

4. The trial court abused its discretion in vacating the judgment because the offered proof, even if admissible, was clearly contrary, the defendant below failed to produce any admissible evidence that the service of the underlying complaint was not made, and the

defendants below failed to demonstrate any evidence of excusable neglect.

5. The trial court abused its discretion in failing to award fees and costs under CR11 when it was apparent the respondents' motion was frivolous and unsupported in fact or law.

### III. FACTS

#### A. TIMELINE SUMMARY OF FACTS CENTRAL TO APPEAL

1. August 28, 2009 – Date of Accident.<sup>1</sup>
2. September 24, 2009 - First of five Letters between Plaintiff's counsel and Defendants' insurer (Geico).<sup>2</sup>
3. February 16, 2010 – Last Communication between Plaintiff's counsel and Geico.<sup>3</sup>
4. December 22, 2010 – Summons and Complaint Filed.
5. January 24 – April 14, 2010 – Attempted Service on Tangs
  - a. Tangs avoided personal service by avoiding the service agent.<sup>4</sup>
6. April 19, 2011 – Tangs served with property claim by State Farm.<sup>5</sup>

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<sup>1</sup> CP at 2.

<sup>2</sup> CP at 89-90, 94-105, Exhibits 1-5 to Declaration of McGlothlin.

<sup>3</sup> CP at 105, Exhibit 5 to Declaration of McGlothlin.

<sup>4</sup> CP at 6-10.

<sup>5</sup> CP at 75, Declaration of Morgan Wais.

7. April 20, 2011 – Order permitting service by mail on Tang’s Address at 9631 58<sup>th</sup> Avenue South, Seattle, WA 98118.<sup>6</sup>
8. May 6, 2011 – Service by Mail Effected by signed Return Receipt.<sup>7</sup>
9. May 17 – June 1, 2010 – Motion and Order Changing Case Assignment Area.<sup>8</sup>
  - a. Defendant’s Counsel admitted that the Tang’s received the Order Changing Case Assignment.<sup>9</sup>
10. August 9, 2011 – Default Order Entered by Judge Prochnau.<sup>10</sup>
11. August 11, 2011 – Tangs’ counsel (Mr. Wais) notified of claim by Mr. Nguyen in State Farm’s answers to Tangs’ discovery requests.<sup>11</sup>
12. November 28, 2011 – Default Judgment Entered by Commissioner.<sup>12</sup>
13. November 30, 2011 –Tangs’ Counsel Admitting Tang’s failed to deliver Summons and Complaint to him.<sup>13</sup>
14. December 6, 2011 – Tangs’ Counsel filed motion for reconsideration/vacation of default judgment.<sup>14</sup>

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<sup>6</sup> CP at 21-22.

<sup>7</sup> CP at 25-26, 118-121.

<sup>8</sup> CP at 27-36. The notice of this motion and the order were sent to the same address as the summons and complaint 9631 58<sup>th</sup> Avenue South, Seattle, WA 98118.

<sup>9</sup> CP at 128. Email dated November 30, 2011 from counsel for Tangs, Exhibit 9 to Declaration of McGlothlin.

<sup>10</sup> CP at 47-48.

<sup>11</sup> CP at 129-143, Exhibit 10 to Declaration of McGlothlin. CP 143 contains Declaration of Mailing to defense counsel Wais.

<sup>12</sup> CP at 62-63.

<sup>13</sup> CP at 67, Line 17-18; CP at 74, ¶5 Declaration of Wais.

<sup>14</sup> CP at 64-72.

15. December 7, 2011 – Counsel for Nguyen sends trial court a letter requesting hearing on motion and objecting to the procedure.<sup>15</sup>
16. December 13, 2011 – Nguyen files response brief to Tangs’ motion and objects to the procedure and lack of due process.<sup>16</sup>
17. December 15, 2011 – Tangs file Reply Brief on their motion.<sup>17</sup>
18. December 16, 2011 – Trial Court issues Order to Vacate Judgment without hearing and without findings of fact or conclusions of law.<sup>18</sup>

The order to vacate did not alter the August 19, 2011 default order, and applied only to the November 28, 2011 judgment.

#### B. THE ACCIDENT AND PRE-LITIGATION COMMUNICATION

The underlying judgment was for liability stemming out of an August 28, 2009 vehicle collision between the appellant/plaintiff and respondent/defendant Hai Tang. Within a month of the accident, appellant opened a claim with defendants’ insurer, Geico. This was confirmed in a letter to a Geico claims adjustor by plaintiff’s counsel in September 2009.<sup>19</sup>

Between September 24, 2009 and February 16, 2010, appellant’s counsel and the Geico adjustor exchanged approximately five or six

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<sup>15</sup> CP at 163-64.

<sup>16</sup> CP at 77-88.

<sup>17</sup> CP at 150-154.

<sup>18</sup> CP at 157-58.

<sup>19</sup> CP at 94. **Exhibit 1** to the Declaration of McGlothlin supporting opposition brief.

letters.<sup>20</sup> In each of these letters, neither Geico nor plaintiff's counsel ever indicated that the discussion was for "settlement" or that any request or offer was made to consider these communications as a request for notice in any subsequent litigation that may arise.<sup>21</sup> The purpose of the communication was for determining coverage of the claim by Geico and no "negotiations" took place.

The last communication between Geico and appellant's counsel was February 16, 2010 – well over a year before the respondents/defendants were served in the underlying case.<sup>22</sup> In that letter, Geico summarily denied any coverage for plaintiff's claim. Nowhere in that correspondence does Geico request any notice prior to plaintiff filing his complaint or other pleadings. No other communication occurred until the Summons and Complaint were served on the defendants in May 2011.<sup>23</sup>

#### C. SERVICE OF SUMMONS AND COMPLAINT

The defendants were properly served on May 6, 2011.<sup>24</sup> After the Summons and Complaint were filed several attempts were made to serve defendants, but were unsuccessful because the Tangs avoided the service

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<sup>20</sup> CP at 94-105. See **Exhibits 1-5** to Declaration of McGlothlin.

<sup>21</sup> CP at 94-105.

<sup>22</sup> CP at 105. Lawsuit filed December 22, 2010 CP 1-3.

<sup>23</sup> CP at 115-121.

<sup>24</sup> Id. Defendants did not contest this service. CP at 67, CP at 74 ¶5.

agent. The process server went to the door of the Tang home, where people could be seen inside, but when the service agent knocked on the door the lights went out and the Tang's refused to come to the door.<sup>25</sup>

A motion was brought to serve defendants by mail, and that motion was granted.<sup>26</sup> Defendants were ultimately served by U.S. Mail, return receipt, and a copy the signature card for service and proof of service were filed with the Superior Court.<sup>27</sup>

In the Tangs' motion to vacate, below, the Defendants did not contest that they were served.<sup>28</sup> Further, the Tangs produced no evidence in the motion below contradicting the fact that service was properly made on May 6, 2011, or that Tang signed for receipt of that process.<sup>29</sup>

The Declaration of Wais in support of the motion to vacate, paragraph 5, acknowledged service but merely stated that defendants failed to deliver the summons and complaint to their insurer or counsel.<sup>30</sup> The only evidence produced by respondents in the motion to vacate was

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<sup>25</sup> CP at 17-18.

<sup>26</sup> CP at 21-22.

<sup>27</sup> CP at 118-121.

<sup>28</sup> CP at 67; CP at 74 ¶5. In Footnote 1 to respondent's motion to vacate, they stated that they did not contest the service of process in that motion.

<sup>29</sup> CP at 73-76, 155-56 contains the sum total of all evidence supplied in support of the respondents' motion to vacate judgment.

<sup>30</sup> CP at 74.

the declaration of counsel, Mr. Wais, along with Geico's February 16, 2010 letter.<sup>31</sup>

D. RESPONDENTS (TANGS) KNEW OF THE LAWSUIT PRIOR TO THE DEFAULT ORDER IN AUGUST 2011

Aside from having been properly served with summons and complaint, the Tangs new about the Nguyen lawsuit because they received the motion and order changing case assignment area, which was issued June 1, 2011.<sup>32</sup> The proof of service of this motion and order was filed with the court and was served at the same address as the summons and complaint were served.<sup>33</sup> Mr. Wais admitted that the Tangs received the order and motion on change of assignment in June 2011 in his November 30, 2011 E-Mail to plaintiff's counsel. In that email Wais specifically referenced his client's knowledge of the suit because they received additional pleadings related to the case.<sup>34</sup> Respondents' counsel also admitted in his declaration, that no appearances (formal or otherwise) were made in the Nguyen case.<sup>35</sup>

E. DEFAULT ORDER ISSUED ON AUGUST 9, 2011

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<sup>31</sup> CP at 64-76.

<sup>32</sup> CP at 35.

<sup>33</sup> CP at 31-32.

<sup>34</sup> CP at 128.

<sup>35</sup> CP at 74.

A default order was entered on August 9, 2011, without further notice to the defendants as permitted by CR55.<sup>36</sup> The default order was entered by Judge Prochnau. This default order remains in effect and is not at issue here because the December 16, 2011 order to vacate only vacated the November 28, 2011 judgment.

F. RESPONDENT’S COUNSEL ALSO KNEW OF THE NGUYEN LAWSUIT PRIOR TO DEFAULT JUDGMENT IN NOVEMBER 2011

Counsel for the Tangs, Mr. Wais, received specific notice of Mr. Nguyen’s lawsuit.<sup>37</sup> On August 11, 2011, two days after the default order was entered and three months before default judgment was entered, counsel received actual notice of Mr. Nguyen’s lawsuit.<sup>38</sup> That notice was a result of a parallel proceeding by State Farm against Mr. Tang for subrogation of the property damage claim made by State Farm in the same accident as Mr. Nguyen sought relief for personal injuries.<sup>39</sup> Mr. Wais issued discovery to State Farm on May 10, 2011 seeking the scope and extent of the subrogated claim.<sup>40</sup> State Farm answered the Defendants’ discovery, and it was sent to Mr. Wais on August 11, 2011.<sup>41</sup>

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<sup>36</sup> CP at 47-48.

<sup>37</sup> CP at 129-143. The quality of the copies from the Clerk’s Papers are poor legibility and the Appellant will supplement under RAP 9.10 legible copies of these documents.

<sup>38</sup> *Id* at 143, Declaration of Service on defense counsel Morgan Wais.

<sup>39</sup> State Farm commenced its action and served defendants with their claim for property damage on April 19, 2011. CP at 75, ¶7.

<sup>40</sup> CP at 130-143.

<sup>41</sup> CP at 142-143.

In State Farm's responses to the discovery requests Tangs' counsel was specifically informed about the Nguyen lawsuit.<sup>42</sup> State Farm's responses informed Mr. Wais that their subrogation claim was for property damage, and nothing else. State Farm went on to inform Tangs' counsel that there was a personal injury claim by Mr. Nguyen, that State Farm had a PIP lien on that claim for PIP paid under their policy, and that the lien was subject to the Mahler case for recovery in litigation.<sup>43</sup> The discovery also clearly informed Tangs' counsel that the attorneys for Mr. Nguyen were Olympic Law Group, and provided address and telephone contact information for defendants to obtain more information on Mr. Nguyen's claim.<sup>44</sup> Finally, in response to a request for production, State Farm also informed Tangs' counsel that Mr. Nguyen had a "suit", and any documentation of his injury claim could be sought through that case.<sup>45</sup>

Respondents and their counsel produced no evidence in the trial court rebutting or otherwise disputing the knowledge received in the State Farm discovery responses.<sup>46</sup> Neither counsel nor the Tangs made any

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<sup>42</sup> CP at 136.

<sup>43</sup> CP at 136, Interrogatory No. 8 Answer.

<sup>44</sup> CP at 136.

<sup>45</sup> CP at 136.

<sup>46</sup> CP at 73-76, 155-56; Wais' two declarations do not contradict the facts of State Farm's substantive responses, but merely tries to explain away why it does not constitute actual knowledge.

inquiry into Mr. Nguyen's suit, and made no attempt to review the court's docket. If they had the default order from August 2011 would have been immediately noticed. Further, neither respondents' counsel nor respondents made any attempt to contact counsel for Nguyen in the three and one half months between receiving actual notice of the claim (two days after the default order) and the entry of the default judgment.<sup>47</sup>

The Tangs were properly served, Tang's counsel had notice of the claims, and the Tangs took no action on the claims by Nguyen until after default judgment was entered on November 28, 2011. Respondents filed no evidence in the court below contradicting these central facts. Instead the respondents and their counsel waited over three months – until judgment was entered – before investigating Mr. Nguyen's claims further. Under CR60, this is per se lack of diligence barring relief.

#### G. DEFAULT JUDGMENT ENTERED ON NOVEMBER 28, 2011

The judgment was entered by a superior court commissioner in the *ex parte* department on November 28, 2011 following a presentation of evidence sufficient to establish damages.<sup>48</sup>

#### H. RESPONDENTS FAILED TO FOLLOW PROPER PROCEDURE UNDER CR 60(E) AND CR59

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<sup>47</sup> CP at 89-92.

<sup>48</sup> CP at 62-63.

The procedure on a motion to vacate is quite clear and respondent failed to follow the requirements of CR 60(e). Respondents filed their motion to vacate the judgment on December 6, 2011.<sup>49</sup> That motion contained only two pieces of evidence: 1) the February 16, 2010 correspondence from Geico to Nguyen's counsel, and 2) the declaration of Mr. Wais.<sup>50</sup> The only other evidence filed by respondents was in the reply brief, and that was merely another declaration of Mr. Wais. No other evidence was ever filed in support of the motion to vacate/reconsideration. Tang failed to seek an order to show cause, and failed to personally serve plaintiff with such an order to show cause on why the judgment should not be vacated.

Counsel for Mr. Nguyen objected to the improper procedure and to the lack of evidence supporting respondent's attack on a presumptively valid judgment.<sup>51</sup> In responsive pleading in the court below, Nguyen argued that Tang had failed to present any competent, admissible evidence demonstrating that the Tangs were not served, or that the Tangs had failed to demonstrate excusable neglect.<sup>52</sup> In the reply brief below, respondents failed to produce any additional competent and admissible evidence demonstrating that the defendants were not served, or were

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<sup>49</sup> CP at 64-65.

<sup>50</sup> CP at 66-76.

<sup>51</sup> CP at 163-64, *see also* Plaintiff's Response to Motion to Vacate, CP at 77-78.

<sup>52</sup> CP at 77-88.

otherwise excused for failing to answer the complaint. The only additional evidence filed by the Tangs was Wais' second declaration.<sup>53</sup>

The trial court did not issue any order to show cause, and failed to allow a show cause hearing on the merits of the motion. The trial court also failed to allow a hearing under CR59 after plaintiff's counsel requested such, and the order issued failed to enumerate the basis for relief in fact and law. The trial court entered the proposed order prepared by counsel for the respondents without further clarification and without any findings of fact and conclusions of law.<sup>54</sup>

Finally, the motion by the Tangs was seeking relief from the judgment entered by an *ex parte* commissioner of the court, not a prior order entered by the assigned judge. The court rules specifically require an alternate procedure for motions for revision of a commissioner's order. King County Local Rule (KCLR) 7(b)(8) specifically references such procedures. The proper procedure for a revision of a commissioner's decision on entry of judgment is to follow the process set out in KCLR7(b)(8), including a set schedule of briefing, the record on entry of the judgment, and oral argument. Failure to follow the required procedure makes the order final, and the opposing parties sole remedy

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<sup>53</sup> CP at 155-56.

<sup>54</sup> CP at 157-58.

thereafter is under CR60. RCW 2.24.050; Robertson v. Robertson, 113 Wash.App. 711, 54 P.3d 708 (2002).

#### IV. ARGUMENT

##### A. SCOPE OF REVIEW AND LEGAL STANDARD OF CR60 & CR59

Respondents' motion was styled as a motion for reconsideration under CR59 or alternatively as a motion to vacate the judgment under CR60.

The scope of this review is solely as to the December 16, 2011 order vacating the default judgment entered on November 28, 2011. The motion below and the order vacating the default only applied to that judgment, and did not vacate the default order entered on August 9, 2011. That order could not have been addressed by reconsideration as the motion was beyond the time permitted. Schaefco v. Columbia River Gorge Comm'n., 121 Wash.2d 366, 367, 849 P.2d 1225 (1993), (the 10 day requirement for reconsideration is strict and cannot be expanded by the court).

Further, the order to vacate that was entered by the court (drafted by the Tangs' counsel) did not touch upon the August 9, 2011 order of default. Therefore the scope of this appeal is limited to the propriety and effect of the order to vacate the judgment entered on November 28, 2011.

## 1. STANDARD OF CR60

The only basis offered by the Tangs for relief under CR60 was CR60(b), which states:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc. On Motion and upon such terms as are just, the Court may relieve a party or his legal representative from final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

...

Respondents made no assertions in the motion below that there was any other grounds, such as fraud, or void judgment, for relief applied, other than generally alleging subparagraph (11) for “any other reason justifying relief”.<sup>55</sup>

The standard of review for a trial court’s decision on a motion pursuant to CR60 is abuse of discretion standard. Morin v. Buris, 160 Wash.2d 745, 161 P.3d 956 (2007). However, such discretion is not unlimited and the courts must view all facts and circumstances presented as may be just and equitable. Id. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Id. at 753. Likewise, discretion is abused if the decision is unsupported in the record or

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<sup>55</sup> CP at 66-72.

manifestly unreasonable. Mitchell v. Washington State Inst. Of Pub. Policy, 153 Wash.App. 803, 225 P.3d 280 (2009).

Appellant anticipates that the respondents will rely on the oft quoted language that “default judgments are not favored... prefer to give parties their day in court and have controversies determined on their merits... [and] relief should be liberally granted”. Morin at 754. Appellants also anticipate that respondents will argue – as they did in the motion below – that where a prima facie defense is demonstrated (the first factor of a motion to vacate) that the remaining factors receive scant attention.<sup>56</sup>

However, such arguments ignore the requirements of the rule and ask the court to overlook the balancing requirement that a party properly served does not delay the administration of justice. TMT Bear Creek Shopping Cet. V. Petco, 140 Wash.App. 191, 165 P.3d 1271 (2007).

The first inquiry is whether defendant was served, and then the court looks to whether a showing has been made of a meritorious defense and excusable neglect. Beckett v. Cosby, 73 Wash.2d 825, 827, 440 P.2d 831 (1968).

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<sup>56</sup> Respondents cited Suburban Janitorial Services v. Clarke, 72 Wash.App. 302, 305, 863 P.2d 1377 (1993), *citing* Shepard Ambulance v. Helsell Fetterman, Martin, Todd and Hokanson, 95 Wash.App. 231, 974 P.2d 1275 (1999) for this proposition; CP at 70.

The burden of CR60 always rests with the moving party. The defendant below had the burden of proving admissible facts supporting each of the factors weighed in motion. Rosander v. Night Runners Transport, Ltd., 147 Wash.App. 392, 196 P.3d 711(2008). *See also* Commercial Courier Services, Inc. v. Miller, 13 Wash.App 98, 103, 533 P.2d 852 (1975), and Becket at 827 (“one seeking vacation of default must allege and prove facts... and the rules will not be willfully disregarded with impunity”). A failure by the moving party to present factual evidence supporting the motion requires denial of the motion. Id. When a party has failed to appear after proper service, this is a high burden.

The four factors include “(1) substantial evidence to support, at least prima facie, a defense to the claim... (2) whether the moving party’s failure to timely appear.. 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 default judgment; and (4) that no substantial hardship will result to the opposing party.” Sheppard at 238.

The first factor, substantial evidence of a defense, requires strong and virtually conclusive defense to the claim. TMT Bear Creek, 140 Wash.App. 191. Without strong and conclusive evidence supporting the

defense, the moving party's failure to timely answer the complaint will be "*scrutinized with great care*". Sheppard at 239, *citing* White v. Holm, 73 Wash.2d 348, 352-53, 438 P.2d 581 (1968), *emphasis added*.

Likewise, it is the moving party's burden to prove by admissible evidence that the failure to timely respond was not so negligent as to be inexcusable. Commercial Courier at 107. If a moving party cannot produce substantial evidence supporting this factor, then the motion must be denied. Pfaff v. State Farm Mutual Auto Ins. Co., 103 Wash.App. 829, 834, 14 P.3d 837 (2000).

A lack of excusable neglect, mistake, or surprise requires the court to deny the motion to vacate. Little v. King, 160 Wash.2d 696, 161 P.3d 345 (2007). Excusable neglect is more than simple negligence (11 Wright & Miller Federal Practice §2846) and such arguments fail when the delay in answering is unreasonable. Three to four month delay was explicitly found to be inexcusable. Lockett v. Boeing, 98 Wash.App. 307, 989 P.2d 1144 (1999). Mistake, inadvertence, and surprise do not exist where the party merely had a breakdown in communications and failed to forward the complaint to the proper person (i.e. their attorney). Puget Sound Medical Supply v. Washington State DSHA, 156 Wash.App. 364, 234 P.3d 246 (2010), *citing* Johnson v. Cash Store, 116 Wash.App. 833, 68 P.3d 1099 (2003).

The mere fact that a party is unsophisticated, or has poor language skills, is not sufficient to support mistake, excusable neglect, or surprise. Hwang v. McMahon, 103 Wash.App. 945, 15 P.3d 172 (2000 – Division I). In that case, the court found that there was no tenable ground to find surprise, mistake or inadvertent neglect in failing to answer the complaint based on the defendant’s lack of understanding. And the courts have long held that the mere fact that the defendant is surprised by the judgment entered is not sufficient to support vacating the order. Larson v. Zabronski, 21 Wash.2d 572, 155 P.2d 284 (1944).

Although the defaults are disfavored, the courts have found ample reason to uphold the default where the moving party fails to meet its burden. The moving party’s disregard of process is given serious scrutiny, especially where the asserted defense to the underlying claim is equivocal or weak.

## 2. STANDARD OF CR59

While the Tangs cited CR59 in their motion below (in the introduction), the motion cited nothing regarding the standard for reconsideration under CR59. CR59 permits reconsideration under nine specific grounds for such a motion. CR59(a)(1-9). These include irregularity, misconduct, accident or surprise that moving party could not guard against, new evidence, excessive damages, no evidence supporting

the judgment, error of law objected to at trial, and substantial injustice. The moving party is also required to identify specific reasons in fact and law supporting the basis for the motion under one of the nine categories. CR59(b).

The rule permits any party to request a hearing be set to apply for such from the court. CR59(e). Once the hearing is held, if the court is going to provide relief from judgment and allow a trial, the court must state the reasons in fact and law supporting the granting of a trial on the merits. CR59(f).

As with CR60, the burden of supporting the motion is the moving party's burden. CR59(b), Herron v. McClanahan, 28 Wash.App. 52, 625 P.2d 707 (1981); East Fork Hills Rural Assn. v. Clark County, 92 Wash.App. 838, 965 P.2d 650 (1998).<sup>57</sup> Failure to support such a motion with admissible factual evidence is grounds for denying the motion.

#### B. PROCEDURAL DUE PROCESS

Even in reviewing a trial court decision under a motion for relief pursuant to CR60, questions of law or procedural due process are still matters that the appellate court reviews *de novo*. Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wash.2d 1, 9, 43 P.3d 4 (2002) (issued of law are reviewed *de novo*); Dobbins v. Mendoza, 88 Wash.App. 862, 947

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<sup>57</sup> Although East Forks was an appeal from an administrative agency, CR59 was held to apply and that the standard of proof remained with moving party.

P.2d 1229 (1997) (issues relating to the procedural due process and jurisdiction of the court are reviewed *de novo*).

Civil Rule 60(e) specifically requires a set procedure to invoke the trial court's jurisdiction to vacate a judgment. The rule requires:

(2) Notice. Upon the filing of the motion, the Court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding... to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action..." CR60(e)(2) & (3).

Pursuant to CR60(e)(2) the court, upon filing a motion and affidavit to set aside a default, shall enter an order setting a date for hearing and directing all parties to the action to show cause why the motion should not be granted. The motion, affidavit, and order to show cause must be served in the same manner as a summons and complaint. A failure to serve the opposing party – not just their counsel – defeats the proceeding. State ex rel Gauspeth v. Superior Court, 24 Wash.2d 371, 164 P.2d 890 (1946).

As decided in Allen v. Allen, 12 Wash.App. 795, 797, 532 P.2d 623 (1975), the failure to comply with the procedural requirements of the rule violates procedural due process principals and fails to place the motion properly before the court. Id. The respondents herein failed to

follow the procedures laid out in CR60, and that procedural defect was objected to by appellant in the motion before the trial court.<sup>58</sup>

There is no dispute that the respondents did not obtain a show cause order, nor did they personally serve appellant in bringing the motion to vacate as required by the rule. Mr. Nguyen did not personally appear, and his counsel objected to the procedure. The rule specifically requires service on the opposing party in the same manner as a summons. As the court held in Allen, the failure to provide such a hearing was a defect that undermined the ruling, and in State ex rel Hibler v. Superior Court, 164 Wash. 618, 3 P.2d 1098 (1931), the failure to serve the motion to vacate on the party (they served party's counsel) was insufficient to confer jurisdiction on the motion.

The Tangs' motion below was styled as a motion to vacate or reconsider. However, aside from mentioning CR59 in its introduction, the Tangs made no argument in the motion citing CR59 or the elements for relief under CR59. The entire brief was devoted to the standards under CR60. For this reason alone, the brief below failed to comply with CR59 and CR59 cannot be the basis for relief as a matter of law.

However, even if this Court finds that the trial court's order was pursuant to CR59, the requirements of CR59 were not met and the order

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<sup>58</sup> CP at 77-78; 163-164.

to vacate should be overturned. Under CR59, the Tangs failed to cite any factual basis for relief and failed to identify the specific enumerated basis under CR59 for that relief. In fact, contrary to Tangs' burden below, they produced no admissible evidence supporting their motion whatsoever.

Further, the trial court failed to issue any statement or ruling supporting relief under CR59. And despite Nguyen's counsel requesting a hearing on the matter, and objecting the Tang's failure to follow proper procedure under CR59, CR60 and by confusing the two motions together, the trial court did not hold a hearing.

Likewise, the failure to seek revision of the commissioner's entry of judgment under KCLR 7(b)(8) likewise deprived Nguyen of the proper method to respond and obtain hearing on the validity of the judgment.

The failure of respondents to follow proper procedure in seeking relief below deprived the court of the ability to decide the issue. The lack of proper procedure on both CR59 and CR60 basis also is error, as there is no specific record of findings supporting the trial court's order, and no evidence shown by the Tangs' supporting the granting of such a motion. The lack of proper procedure deprived Nguyen of the opportunity

afforded for hearing under both rules. This Court should reverse the trial court's order to vacate the judgment on this basis alone.<sup>59</sup>

C. THE TRIAL COURT ABUSED ITS DISCRETION IN VACATING THE JUDGMENT BASED UPON HEARSAY AND OTHER INADMISSIBLE EVIDENCE

Even if the Court avoids the issue of procedural due process and/or jurisdictional predicates for a motion to vacate/reconsideration, the evidence submitted by respondents in the motion below was legally insufficient to support the order to vacate the judgment. No affidavits of the respondents were submitted below, and the evidence supplied was impermissible hearsay, and otherwise incompetent and inadmissible. It would be abuse of discretion to permit inadmissible evidence to be used to meet respondents' burden of proof in the motion below.

1. NO EVIDENCE WAS SUBMITTED BY RESPONDENTS BELOW DEMONSTRATING A LACK OF SERVICE

The respondents produced no evidence demonstrating that they were not actually served with the summons and complaint.<sup>60</sup> The

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<sup>59</sup> The failure to use the proper method of revision of the commissioner's ruling placed the trial court in the position of having one judge entertain a CR 59 motion on the decision made by another judge. This is a potential forum shopping issue as noted in Howland v. Day, 125 Wash. 480, 490-91, 216 P. 864 (1923). The court discounted the propriety of one judicial officer reviewing the decisions of another officer under the predecessor law to CR59, when there was no reason for the first judge's incapacity to hear the motion. It is also common sense because the prior judicial officer heard/read the factual support for entry of the judgment or order. While the role of lesser judicial officers requires procedures like motions to revise, it underscores the need to follow the proper procedure to seek revision.

<sup>60</sup> CP at 66-76.

respondents made no argument in the motion below that the judgment was void for lack of jurisdiction or lack of service.<sup>61</sup> Therefore, the sole issue before the trial court was whether the Tangs had supplied sufficient evidence of a meritorious defense and sufficient evidence of excusable neglect.

The sole evidence supplied by respondents in the motion to vacate and the reply were: 1) the Declaration of Morgan Wais; 2) the February 16, 2010 correspondence from Geico; and 3) the second Declaration of Morgan Wais in Support of the Reply.<sup>62</sup> Respondents never provided their own declarations or produced any further evidence for consideration of the motion. All factual assertions supporting the motion come from Mr. Wais' declarations. No declarations from the Tangs were provided.

Mr. Wais' declaration included allegations relating to what did and did not happen in communications between Geico and plaintiff's counsel before suit was filed – to which he was not a party; the respondents' version of the facts of the accident – to which Mr. Wais had no personal knowledge; and the alleged circumstances for why the Tangs failed to provide the summons and complaint to Mr. Wais and otherwise failed to answer – also to which he has no personal knowledge.<sup>63</sup> The

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<sup>61</sup> Id.

<sup>62</sup> CP at 73-76, 155-56.

<sup>63</sup> CP at 73-76.

remainder of Mr. Wais' declarations go on to defend Mr. Wais' failure to investigate the Nguyen claim once he received notice of it in August 2011 through State Farm's answers to discovery in the subrogation claim.<sup>64</sup>

2. HEARSAY AND LACK OF PERSONAL KNOWLEDGE IS NOT ADMISSIBLE EVIDENCE OR PROOF

Hearsay is not admissible, and is not proof of any facts unless an exception under the Evidence Rules (ER) applies. Hash v. Children's Orth. Hosp. & Med. Ctr., 49 Wash.App. 130, 134-35, 741 P.2d 584 (1987). Supporting declarations should be stricken and disregarded if they fail to establish personal knowledge of the facts averred, rely on inadmissible facts or hearsay, or the declarant is otherwise incompetent to testify as to the facts. Parkins v. Colocousis, 53 Wash.App. 649, 652-53, 769 P.2d 326 (1989). Finally, the courts have held that decisions founded solely on hearsay are an abuse of discretion. In re marriage of Martin, 22 Wash.App. 295, 297, 588 P.2d 1235 (1979).

Mr. Wais' declarations as to certain key facts supporting the motion to vacate suffer from hearsay and double hearsay. First, Mr. Wais is attempting to testify to facts regarding the August 2009 accident to which he has no personal knowledge. Even by the terms of the

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<sup>64</sup> CP at 155-56.

declaration, Mr. Wais is merely reciting his clients' version of events. That is double hearsay and not from personal knowledge of the events recited. Indeed, the alleged recitations of fact in the February 16, 2010 letter from Geico also contains multiple layers of hearsay as to the events, containing summaries and restatements of alleged investigations and statements by others who never provided personal declarations of the facts constituting a potential defense. And all of these summaries are without oath or attestation. That is certainly not the substantial evidence of a meritorious defense under CR60.

Likewise, Mr. Wais' recitation of the events surrounding the service of the summons and complaint, along with the Tangs' reasons for failing to answer, are also not from personal knowledge and are hearsay without exception. In the time from filing the motion through the reply the Tang's never once offered their own declarations of the events.

### 3. THE MOVING PARTY HAS BURDEN OF PROOF

As stated above, the respondents had the burden of proving the facts raising a defense and establishing excusable neglect. The respondents' received notice of the default order in August 2011 and the judgment on November 30, 2011. They filed their motion to vacate below on

December 6, 2011, and filed their reply brief on December 15, 2011.<sup>65</sup> Yet in all that time, the respondents failed to provide any personal declarations or affidavits establishing their own defenses to the claims, or their own reasons for failing to answer the summons.

This lack of support is a far cry from the “strong and substantial” showing required to establish a right to relief under CR60. While CR 60 permits affidavits to be supplied by parties and counsel, the affidavit of counsel cannot substitute personal knowledge, and cannot rely on hearsay, but must meet all the evidentiary requirements. The rule merely contemplates that some excuses under CR 60 may be within the attorney’s knowledge, and may be sufficient on their own to support the motion. Nothing in the rule permits attorneys to recite hearsay in support of the motion, and the Court should not permit such to stand in this case.

4. THE COURT’S RELIANCE ON INADMISSIBLE EVIDENCE TO SUPPORT THE PRIMA FACIE DEFENSE ELEMENT OF CR60 IS AN ABUSE OF DISCRETION

Without the improper declaration of counsel as to the respondents’ version of the accident and reasons for the respondents’ failure to answer, the sole admissible proof offered by respondents in the motion below pertained only to certain issues of excusable neglect by

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<sup>65</sup> CP at 150-154.

counsel and whether the respondents (and Geico) were entitled to notice prior to default.

Once hearsay is stricken from the declarations, there is no evidence or proof offered by respondents that support any defense to the claims or excuse for the failure to timely answer. Without evidence of a meritorious defense, a motion to vacate judgment must be denied. Sheppard and Holm, *supra*. Therefore, the trial court's decision to grant such a motion was an abuse of discretion as a matter of law because it was based on manifest error and no evidence supported the factual requirements for relief. The trial court's order to vacate should be reversed on this basis alone.

D. THE TRIAL COURT ABUSED ITS DISCRETION IN VACATING JUDGMENT BASED UPON A COMPLETE LACK OF EVIDENCE OF EXCUSABLE NEGLIGENCE

Even if hearsay is permissible as proof of the defense element of the test under CR 60, the evidence before the trial court clearly did not support excusable neglect, and the court's granting of the motion was a manifest abuse of discretion.

1. WITHOUT STRONG EVIDENCE OF LEGAL DEFENSE, THE ELEMENT OF EXCUSABLE NEGLIGENCE REQUIRES HIGHER SCRUTINY

As the Court stated in Sheppard, where a moving party is unable to show a strong defense, but is able to demonstrate a prima facie defense

that would be sufficient to submit the issue to a jury, the reasons for failure to appear and answer the claims “shall be scrutinized with great care”. Sheppard at 239.

At best, respondents’ hearsay version of the accident (even if admissible for CR 60 purposes) would only establish the bare minimum defense for a jury question – i.e. the defendants’ version of events are merely blank denial of the plaintiff’s version of events and should go to the jury. As such, the Tangs’ reasons for failing to answer the complaint become the central issue as to whether or not CR 60 relief is properly granted and should be closely examined.

Unless the respondents established a legally cognizable excuse for failing to answer – i.e. establishing excusable neglect – then the motion to vacate was unsupported and should not have been granted. The respondents failed to contest actual service in the motion below, and the respondents failed to produce any evidence of excusable neglect, therefore the trial court’s order vacating the judgment was an abuse of discretion.

## 2. PRE-LITIGATION COMMUNICATION IS INSUFFICIENT TO ESTABLISH EXCUSABLE NEGLIGENCE

Respondents arguments for excusable neglect in the motion to vacate boiled down to three arguments. 1) failure to provide pre-default

notice to Geico; 2) Geico was surprised by the default; and 3) the respondents were confused and had minimal understanding of the litigation process. The first two arguments fail because Geico's knowledge and/or surprise are irrelevant.

Pre-litigation communications between parties is not sufficient to establish excusable neglect. Morin, 160 Wash.2d 745. While the Courts have held that communications between parties after litigation commences (this includes insurers) may evidence intent to defend the claims sufficient to establish a reasonable reliance on pre-default notice – the courts have held that such a presumption does not apply to communications that occurred prior to filing and serving a summons and complaint. Morin at 749-759.

The Tangs' motion below argued that the February 16, 2010 correspondence between Geico and plaintiff's counsel should have required plaintiff to provide some notice prior to default, even though over eighteen months elapsed between the communications, the service of the complaint, and the default order.<sup>66</sup> Further, respondents made no showing below that plaintiff attempted to conceal the court action, or otherwise obscured the process of the default to disadvantage the

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<sup>66</sup> CP at 1-3, 105.

respondents. Without such evidence, the respondents cannot support excusable neglect for failure of notice.

Geico cannot claim to have required notice prior to default. Geico could have requested such notice, but never asked for it. Geico received notice of the lawsuit three months prior to the default judgment (notice to defense counsel), but failed to take action to intervene.<sup>67</sup> Without intervening in the trial court action, the insurer is not required to receive any notice prior to default judgment. Dlouhy v. Dlouhy, 55 Wash.2d 718, 721, 349 P.2d 1073 (1960), *cited in Little v. King*, at 703.

3. FACTUALLY AND LEGALLY THE RESPONDENTS' CLAIM OF LACK OF UNDERSTANDING FAILS TO ESTABLISH EXCUSABLE NEGLIGENCE

The only argument remaining in the motion below was that somehow the respondents were unsophisticated, and didn't understand the litigation process. As a matter of law, these excuses do not create excusable neglect especially when the Tangs were actually served with the summons and complaint, at the time of the service the Tangs were represented by counsel in the parallel litigation by State Farm, and the only reason their counsel was not apprised of the Nguyen claim was their own failure to provide the documents to him.

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<sup>67</sup> CP at 136.

There can be no reasonable argument for surprise when the Tangs admit being served, and Geico/Mr. Wais cannot claim surprise after receiving State Farm's disclosure responses in State Farm's related case. Once made aware of the potential suit by Nguyen, counsel was obligated to check the docket and verify whether there was such a suit, and doing so would have resulted in addressing the recently entered default order well before default judgment was entered.

Likewise, Defendant's alleged lack of understanding, sophistication, and/or linguistic problems, cannot constitute mistake or inadvertence. Hwang v. McMahill, *supra*. Even if the Tangs' assertions – contrary to the rule in Hwang – are sufficient, they cannot claim lack of sophistication or understanding when they were already being sued by State Farm on the property damage claim (served in April 2011 almost a month prior to service of Mr. Nguyen's lawsuit), and Mr. Wais had already appeared to defend them. The Tangs could easily have brought Nguyen's lawsuit to Mr. Wais and no mistake would have occurred. A mistake cannot be claimed when there was a reasonable alternative to remaining in confusion and ignorance.

Inexcusable neglect is found where the party fails to take actions that a reasonable party would take in defending a claim and the failure to answer is through their own lack of diligence. Waiting four months from

notice of a claim was inexcusable in Luckett v. Boeing, *supra*. Failing to give a summons and complaint to your assigned counsel was inexcusable in Prest v. Am.Bankers Life Assurance, 79 Wash.App. 93 (1995), *cited* in Brooks v University City Inc., 154 Wash.App. 474 (2010). And an attorney's neglect does not provide sufficient grounds to vacate judgment. Lane v. Brown & Haley, 81 Wash.App. 102, 912 P.2d 1040 (1996).

Even if this Court accepts the hearsay as evidence, under the uncontested facts, the Tangs were served on May 6, 2011. By August 9, 2011 they had failed to give the summons and complaint to their counsel, and the time to answer had expired. All of this occurred while the Tangs were represented in a subrogation matter by counsel. This is inexcusable neglect all on its own.

However, the inexcusable neglect is compounded because for over three months after the default order was entered respondents and their counsel were on notice of Nguyen's suit because of the actual service on the Tangs, subsequent pleadings actually served on the Tangs, and because of the actual notice counsel received in State Farm's answers to discovery.

Yet they failed to investigate or take any steps to vacate the default order before the default judgment was entered. That is the

definition of inexcusable neglect, and a lack of diligence. Under these facts, it is manifestly unreasonable for the trial court to have vacated the judgment, and it flies in the face of equity to have relieved the respondents of their own neglect.

#### V. ATTORNEYS' FEES

Pursuant to RAP 18.1, Nguyen renews its motion in the court below for fees pursuant to CR11, and if the Court herein reverses the Order Vacating Default Judgment we ask for an award of fees and costs for the motion below and on appeal for the following reasons.

Civil Rule 11 requires any party or attorney to conduct a reasonable inquiry into the factual and legal basis of any pleading filed. CR11. Specifically, CR11(b) requires inquiry sufficient to determine that the motion, *“(1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”* CR11(b), Building Ind. Ass’n. of Washington v. McCarthy, 152 Wash.App. 720 (2009).

When an attorney (or party) fails to make a reasonable inquiry into the facts and law supporting a pleading, or proceeds without factual support, then CR11 sanctions are permitted. Saldivar v. Momah, 145 Wash.App. 365 (2008). To impose sanctions against counsel, the court must find that counsel ignored facts and/or law, or they failed to conduct a “reasonable, competent inquiry under an objective standard”. Ambach v. French, 141 Wash.App. 782 (2007). Any sanction is reviewed for abuse of discretion. North Coast Electrical v. Selig, 136 Wash.App. 636 (2007).

In the case below, counsel for Nguyen raised the issue of sanctions because there was ample evidence that the Tangs had no meritorious basis to seek relief in its motion to vacate. Although we are loath to bring such a request for sanctions, we believe they are warranted in this case.

Nguyen’s counsel conferred with Mr. Wais to have the motion stricken as being unsupported in the law and facts. On December 12, 2011, Mr. Gipe discussed the issue with Mr. Wais, and then memorialized that discussion in an email. Counsel for plaintiff made it clear that just because Mr. Wais’ client contested the underlying liability did not make the motion to vacate appropriate under CR11, especially when the evidence of the service on Tangs, and the August notice to

counsel, placed the Tangs and counsel on notice. Mr. Wais was given the opportunity to strike the motion as unsupported and refused to do so.<sup>68</sup>

Mr. Wais signed both the motion to vacate and his declaration in support of the motion. Mr. Wais attested and argued that the Default Judgment, entered on November 28, 2011 and received by him on November 30, 2011, was the first notice that he had of the suit by Mr. Nguyen.<sup>69</sup> This certainly could not be correct, considering the August discovery responses by State Farm and service on the Tangs. Mr. Wais also confirmed to Nguyen's counsel on December 12, 2011 that he reviewed those responses at the time they were made.<sup>70</sup> At the very least, when Mr. McGlothlin informed Mr. Wais on November 30, 2011 of the service confirmation on his clients, he had a duty to investigate that service of process before bringing this motion. Certainly, once the default was discovered and counsel found that his clients had been served but merely failed to deliver the documents put counsel on notice of the facts.

Considering the evidence that Mr. Wais received State Farm's discovery responses in August 2011, it beggars the imagination to understand how Mr. Wais' first notice of the suit could have been

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<sup>68</sup> CP at 144-49.

<sup>69</sup> CP at 73-76, Wais Declaration ¶9.

<sup>70</sup> CP at 144-49.

November 30. The State Farm responses provided a clear indication, to defendants and Mr. Wais, that Mr. Nguyen had his own suit, identified his counsel, and counsel's contact information.

If Mr. Wais failed to read the discovery responses, then that breached CR 11. If he read it and failed to address it in his motion, that violated CR 11. If Mr. Wais failed to investigate the basis for the motion to vacate, then that violated CR 11. In this case, bringing a motion to vacate when you have competent evidence that your client was served and merely failed to forward it to counsel may very well be a *per se* violation of CR 11, because the motion to vacate is arguable frivolous. It is also a violation of CR11 to continue a motion or pleading after you are made aware of the lack of factual support for the motion. Because the service documents and other materials were brought to Mr. Wais' attention, and he failed to strike an unsupportable motion, CR11 sanctions were appropriate.

Finally, if Mr. Wais had investigated the service of the Tangs in May 2011 one of two facts would have been established. Either he would have confirmed service occurred or he would have had evidence that service did not occur. Yet the motion below made no attempt to controvert service, and the conference with plaintiff's counsel revealed that at the time of the motion to vacate Mr. Wais could not confirm

whether the Tangs had been served. This failure to confirm makes the motion to vacate frivolous. If Mr. Wais had verified service was made, then there was no basis for the motion to vacate because he also admitted that the Tang's merely failed to give him the documents.<sup>71</sup> If Mr. Wais failed to verify whether service was accomplished, then the motion to vacate was in violation of CR 11 for failure to properly investigate.

If counsel had confirmed service occurred (or failed to investigate) and knew that his clients had merely failed to deliver the pleadings to him, then the motion to vacate violated CR11 because it lacked a basis in fact and law. Under these circumstances, the plaintiff/appellant is entitled to fees and costs expended responding to the frivolous motion and correcting the result of the motion on appeal.

## VI. CONCLUSION

The only issue before this Court is the effect of the trial court's order on December 16, 2011 vacating the entry of judgment on November 28, 2011. No other issue is presented, and the original order of default entered on August 9, 2011 is not before this Court.

No matter how the Court views the Tangs' motion in the trial court for relief from judgment – as motion for revision of commissioner's

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<sup>71</sup> CP at 74.

ruling, motion for reconsideration, or motion to vacate – there is no dispute in the record that the Tangs failed to follow proper procedure for relief under the court rules. The process followed deprived Nguyen of a right to be served a show cause order, and to have a hearing on the issue. The Tangs failed to serve a show cause on Mr. Nguyen, which is a predicate of the relief under CR60. And the trial court failed to provide a hearing under CR59, CR60, or KCLR 7. Finally, no findings of fact were entered detailing the basis in law and fact for granting the motion. The procedural defects warrant reversal of the order to vacate the November 28, 2011 entry of judgment.

Even if the Court gets past the procedural irregularity, the trial court abused its discretion in permitting the Tangs to rely on inadmissible evidence in supporting its motion. The Tangs had the burden of production of evidence sufficient to vacate the judgment. The issues the Tangs needed to carrying that burden on were lack of service, meritorious defense, and excusable neglect. The only evidence the Tangs provided was inadmissible hearsay. The Tangs had adequate time to prepare their own declarations as to the accident, the facts of service or the complaint, and the reason for failing to answer; but they did not do so. They relied on the declaration of their counsel – who completely lacked personal

knowledge of the facts and was restating hearsay and double hearsay. That is manifestly insufficient to grant relief and is an abuse of discretion.

Even if the Court looks past the hearsay and lack of personal knowledge, the issue of service of summons and complaint was uncontested. The Tangs were served and made no showing contrary to that fact. As such, the sole question was whether the excuse the Tangs and their counsel put forth for failing to answer the complaint was “excusable neglect”. However, even if we accept the hearsay basis for such an argument, it fails to meet “excusable neglect” as a matter of law and it was abuse of discretion to grant the relief.

The only reasons offered for the failure to answer were that the Tangs were confused, or didn’t give the documents to their counsel, or didn’t understand the proceedings. However, past decisions of the Courts have held all these offered reasons are inexcusable neglect and are insufficient basis to vacate a judgment. The Tangs’ failure to answer is made more inexcusable and unreasonable because they were represented by counsel when served, could have sought counsel’s advice on the suit, and did not. Indeed, even their counsel had actual knowledge of the suit for months prior to the November 28, 2011 judgment, but they did nothing to investigate further to avoid judgment once they had actual

knowledge of the lawsuit while there was still time to investigate and set aside the default order.

The Tangs' arguments fail in the face of the lack of reasonable steps that were available to them and their counsel, yet they repeatedly ignored the issues for over three months until faced with a judgment. That is inexcusable neglect and lack of diligence as a matter of law, and granting the motion to vacate under these uncontested facts is an abuse of discretion.

Defaults may be disfavored, but they should be enforced where the defendants failed to appear after proper notice, and they should not be vacated unless the defendant proves the facts necessary to obtain relief. There is no reasonable argument that the Tangs have met that burden below, and there is ample evidence that they merely delayed unreasonably. The order vacating judgment should be reversed.

DATED this 10<sup>th</sup> day of April, 2012.

OLYMPIC LAW GROUP, PLLP



Anthony David Gipe, WSBA No. 30491  
Olympic Law Group, PLLP  
Attorney for Appellant Nguyen

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

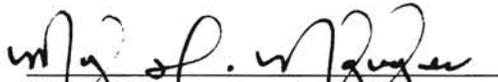
On the below written date, I caused delivery of a true copy of this Corrected Opening Brief to the following via U.S. Mail:

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DATED this 11<sup>th</sup> day of April, 2012 Seattle, Washington.

  
My K. Nguyen, Legal Assistant