

No. 70413-3

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

Snohomish County Case No. 11-2-04773-1

ADAN ROSALES-GUZMAN,

Plaintiff/Respondent,

v.

SPRUCE HILLS, LLC,

Defendant,

And

LLOYD'S SYNDICATE 2112,

Intervenor/Appellant.

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I.

INTRODUCTION

Lloyd's Syndicate 2112 ("Syndicate 2112") appeals the denial of both its motion to intervene in this proceeding and to vacate the \$3,044,014.90 default judgment entered against Syndicate 2112's insured, Spruce Hills, LLC ("Spruce Hills") in favor of Adan Rosales-Guzman ("Guzman"). Plaintiff Guzman is now attempting to use the default judgment in a separate lawsuit against Syndicate 2112 to block discovery and argue that the merit of his claims (or lack thereof) and how much damage he actually suffered (if any) are irrelevant. Syndicate 2112, which was misled and lied to by Spruce Hills' attorney about the fact Spruce Hills utterly failed to defend itself and about the existence of the default, filed its motion to vacate based on new evidence showing that Guzman's attorneys also took steps to mislead Syndicate 2112. This newly discovered evidence also establishes that Spruce Hills had meritorious defenses to the judgment and the judgment amount is excessive and not factually supported. This new evidence should have caused the Superior Court to set aside the default judgment pursuant to CR 60(b) and Washington case law.

II.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Syndicate 2112's Motion to Intervene on the ground that "Syndicate 2112 failed to serve Spruce Hills LLC," because plaintiff Guzman stands in Spruce Hills' shoes and is the real party in interest due to an assignment of rights and, to the extent separate

service on Spruce Hills was required, Syndicate 2112 served both Spruce Hills and its attorney.

2. The trial court erred in denying Syndicate 2112's Motion to Intervene on the ground that "Syndicate 2112 did not attach a pleading," because Washington law does not require a separate "pleading" when the moving party states the bases for intervention in the motion itself.

3. The trial court erred in denying Syndicate 2112's Motion to Intervene on the ground that "Syndicate 2112 was involved in the prior motion to vacate," because the evidence was undisputed that Syndicate 2112's interests were *not* addressed or protected in a prior motion to vacate and Syndicate 2112 was affirmatively misled about the nature and status of the matter.

4. The trial court erred in denying Syndicate 2112's Motion to Vacate because of Spruce Hills' misrepresentations to Syndicate 2112, newly discovered evidence indicating that plaintiff Guzman was complicit in the cover-up, and Washington law holding that it is reversible error not to vacate a default judgment entered under these circumstances.

III.

STATEMENT OF THE CASE

A. Claim Giving Rise to this Case.

In Spring 2011, Guzman filed suit against Spruce Hills, contending Spruce Hills was negligent in failing to provide a safe work place. CP 1032-33. Spruce Hills was the general contractor of the construction site where Guzman alleges he fell off a ladder and sustained injuries. In his Complaint,

Guzman alleged that he was employed by Meridian Drywall, Inc. (“Meridian”), the drywall subcontractor for the project. CP 1033.

Guzman filed a worker’s compensation claim with the Washington State Department of Labor & Industries and, despite Meridian’s protestations¹, was paid time-loss compensation for a lengthy period. Meridian offered to employ Guzman in a capacity that would comply with his light-duty restrictions because doing so was less expensive than paying time-loss, but Guzman was unable to prove a right to work in this country, and he therefore was not able to accept any of Meridian’s post-accident offers of employment. CP 1030-31.

B. Spruce Hills Retains an Attorney Who Fails to Defend.

Spruce Hills retained an attorney, Kevin Hanchett, to appear on its behalf. Hanchett reported the claim to Spruce Hills’ insurer, Syndicate 2112, and was informed that the project liability policy issued by Syndicate 2112 required Spruce Hills to satisfy a \$25,000 Self-Insured Retention (“SIR”). This retention explicitly required Spruce Hills to “properly defend” itself against any claims until it satisfied the \$25,000 SIR and before any duty to defend by Syndicate 2112 could arise.²

¹ Meridian took the position that it did not employ Guzman at the time of the accident, and that he was a trespasser on the jobsite given that Meridian had fired him well before the accident for drinking on the job and actually had barred him from being on the premises. CP 1029.

² The King County Superior Court has confirmed that Syndicate 2112 had no duty to defend until exhaustion of the SIR, which did not occur until after entry of the default judgment below. CP 1032-37.

Hanchett acknowledged that he understood the SIR requirement, led Syndicate 2112 to believe he would competently defend Spruce Hills until the exhaustion of the SIR, and misrepresented to Syndicate 2112 that he was in fact doing so. CP 1110. Specifically, although Hanchett filed a Notice of Appearance, he then failed to answer either the Complaint or Requests for Admission that were served with the Complaint. CP 1929-31. When Guzman moved for default in late 2011, Hanchett neither responded nor appeared at the motion hearing. CP 1097-99. Hanchett also failed to tell either Spruce Hills or Syndicate 2112 about the motion for default. As a result, an order of default was entered against Spruce Hills on September 23, 2011. CP 1892-95.

Even after entry of default, Hanchett failed to defend the case but continued to mislead Syndicate 2112 that he was defending. On January 26, 2012, Guzman filed a motion for default judgment. As before, Hanchett failed to inform Syndicate 2112 about the motion, failed to respond to the motion, and failed to appear at the hearing. CP 1768. Consequently, default judgment was entered against Spruce Hills on February 9, 2012, in the amount of \$3,044,014.90. CP at 1038-39.³

C. Syndicate 2112 Learns of Default Judgment and Hanchett's Misrepresentations.

Despite the fact that it had no duty to defend, CP 1032-37, Syndicate 2112's claim handler, Michael Sirianni, checked with Hanchett several times

³ The default judgment is composed of Guzman's medical bills, claimed past and future lost wages, and \$2.5 million in general damages. CP 1036.

regarding the status of proceedings, and was repeatedly misled by Hanchett. CP 1110-14. Hanchett did not respond to Sirianni's repeated calls during 2011. CP 1110. Then, on January 12, 2012, Hanchett informed Sirianni that he had filed an Answer on behalf of Spruce Hills, and that the case was "now dormant." CP 1110-11. Both statements were false. Moreover, although an order of default had been entered several months earlier and a motion for default judgment was pending, Hanchett did not tell Sirianni about the default, about the motion for judgment, or about his apparent intent to do nothing in response to the motion for judgment. *Id.* Hanchett misled Syndicate 2112 again in late March, informing Sirianni that Guzman "threatened" to take a default against Spruce Hills. CP 1111. In reality, the \$3 million default judgment had already been entered against Spruce Hills six weeks earlier. *Id.*

In mid-April 2012, Guzman's counsel sent Syndicate 2112 a copy of the February 9, 2012 default judgment. CP 1111-12. This was the first time Syndicate 2112 learned of Spruce Hills' failure to defend itself and the falsity of Hanchett's representations. *Id.* In response, Syndicate 2112 immediately exercised its option to take over the defense and retained alternative counsel to represent Spruce Hills. CP 1112-13.

Spruce Hills' new counsel, Stephen Todd, immediately moved on Spruce Hills' behalf to vacate the default judgment. That motion was denied primarily because Spruce Hills (though its corporate attorney, Hanchett) failed to respond after receiving actual notice of the motions for default and default judgment. CP 1094-99. Spruce Hills' defense counsel

understandably did not present evidence concerning Hanchett's false representations to Syndicate 2112, due to the likelihood that Hanchett's misconduct would be attributed to his client, Spruce Hills.

D. Spruce Hills Assigns All Rights Against Syndicate 2112 to Guzman.

On June 21, 2012, Spruce Hills assigned all of its rights against Syndicate 2112 to Guzman. CP 97. Guzman then filed suit in King County Superior Court against Syndicate 2112, alleging (as an assignee of Spruce Hills) breach of contract and bad faith. Guzman has refused to answer discovery regarding the accident or his claimed damages, asserting that such discovery is irrelevant in light of the default judgment entered in this case. CP 1079-93.

E. Syndicate 2112 Discovers New Evidence of Guzman's Counsel's Complicity.

During discovery in the King County case, Syndicate 2112 learned that Guzman's lawyers had been complicit in the effort to mislead Syndicate 2112 about the status of Guzman's claims against Spruce Hills prior to entry of the default judgment. As evidence of this, on January 3, 2013, Syndicate 2112 obtained copies of letters Guzman's attorneys exchanged in October 2011 with the New York office of the Corporation of Lloyd's, the organization that administers insurance business at Lloyd's of London ("Lloyd's America"). Guzman's lawyers wrote to Lloyd's America:

Due to the significant injuries in this case, we are hopeful that you will consider early mediation of this matter so that this dispute can be resolved without additional litigation. Please

contact me at your first opportunity so that we can discuss resolution.

CP 1106. This letter failed to reveal that Guzman had obtained an order of default against Spruce Hills several weeks prior, inconsistently with the references to “early mediation” and “without additional litigation.” The letter also failed to mention Spruce Hills’ utter failure to defend itself. Guzman’s attorneys attached a copy of Guzman’s Complaint, but did not attach or mention any of the other pleadings that had been filed in the case up to that point—such as the Requests for Admission that had gone unanswered, the Motion for Default filed on August 22, 2011, or the default order on liability entered on September 23, 2011. The letter also did not identify which Lloyd’s of London syndicate had issued the policy to Spruce Hills, preventing Lloyd’s from forwarding the “early mediation” request because it did not even know which syndicate or syndicates issued the policy. Finally, the letter was not sent to Syndicate 2112 or its representatives—in contrast to Guzman’s post-judgment letter that Guzman’s attorneys sent directly to the proper recipients and that was acted upon immediately.

Having no reason to suspect that the case involved a critical situation caused by Spruce Hills’ inaction, Lloyd’s America responded with a letter and email informing Guzman’s lawyers that Lloyd’s America was not the correct entity to contact and suggesting that Guzman’s counsel contact the representatives of the syndicate that issued the policy to further discuss Guzman’s request for an early mediation. CP 1102-08. Lloyd’s America was not able to forward the “early mediation” request itself because

Guzman's attorneys had not identified the relevant syndicate, the policy number, or any other specific information. CP 1103. There is no evidence that counsel for Guzman heeded this advice or made any effort to contact Syndicate 2112 for another six months—until *after* they obtained the default judgment and let the 30-day appeal period run. Subsequently, Guzman's lawyers sent a demand letter directly to the correct contact for Syndicate 2112.

The evidence presented to the Superior Court established that the default judgment likely would not have been entered had Guzman's lawyers accurately represented the status of the case in their October 4, 2011, letter. If the letter had disclosed that Guzman had already obtained a default order of liability and was in the process of converting it to a multi-million dollar default judgment, Lloyd's America would have referred the matter to the London headquarters. CP 1103-04. They also would have retained their own U.S. lawyers to take the following action on an urgent basis:

- (a) Contact the attorney for the claimant and/or the insured, and take any other appropriate steps to make sure the default was not acted upon.
- (b) If necessary, oppose enforcement of the Default so that the Managing agents for the insuring underwriters could intercede and overturn the Default allowing the matter to be litigated on its merits.
- (c) Investigate with claimant's counsel which syndicate or syndicates had underwritten the policy at issue. The Managing agents for the syndicate or syndicates would have been contacted as soon as they were identified with an urgent notification of the default.

Id. These actions likely would have foreclosed Guzman's ability to obtain a default judgment.

F. Immediate Procedural Background

As soon as it discovered the relevant events, and within one year after entry of judgment, Syndicate 2112 filed motions to intervene in this action and to vacate the default judgment against Spruce Hills. CP 1182-1202. Commissioner Jacalyn Brudvik summarily denied both motions on March 5, 2013. CP 77-82. Syndicate 2112 then filed a motion for revision of the Commissioner's two rulings. CP 64-76. The Snohomish County Superior Court denied Syndicate 2112's motion to revise on May 3, 2013, CP 13-16, thus adopting the Commissioner's findings, conclusions, and rulings as its own. *J.V.G. v. Van Guilder*, 137 Wn. App. 417, 423, 154 P.3d 243 (2007) (citing RCW 2.24.050; *In re Estate of Larson*, 36 Wn. App. 196, 200, 674 P.2d 669 (1983), *rev'd on other grounds*, 103 Wn.2d 517, 694 P.2d 1051 (1985)). This timely appeal followed. CP 1-11.

IV.

ARGUMENT

The Snohomish County Superior Court erred when it denied Syndicate 2112's motion to intervene as a matter of right based on findings that were not accurate, not supported by the record, and legally insufficient to deny Syndicate 2112 its right to intervene in this action. Alternatively, the Court erred in denying Syndicate 2112's request for permissive intervention in order to protect its significant interest in the case.

The Snohomish County Superior Court also erred in denying Syndicate 2112's motion to vacate the default judgment. Under CR 60(b) and Washington case law, the default judgment should have been set aside based on misrepresentations made to Syndicate 2112 about the status of the proceedings, and based on the parties' joint and purposeful concealment about Spruce Hills' failure to defend until after the default judgment was entered. The Washington Supreme Court has held that a default judgment should be vacated under similar circumstances. Thus, the default judgment should be set aside allowing this case to be resolved on its merits.

A. The Superior Court Erred in Denying Syndicate 2112's Motion to Intervene.

A ruling denying a party's right to intervene is reviewed *de novo*. *DeLong v. Parmelee*, 157 Wn. App. 119, 163, 236 P.3d 936 (2010) ("We review rulings on intervention as a matter of right *de novo*.")) (citing *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994)). Here, this Court should rule that Syndicate 2112 has a right to intervene in order to address the irregularities in the proceeding and grounds that justify setting aside the multi-million dollar default judgment. None of the procedural grounds articulated by the Superior Court justified denying that significant legal right to Syndicate 2112. Alternatively, Syndicate 2112 should be allowed to intervene under the doctrine of permissive intervention.

1. **Syndicate 2112 Has the Right to Intervene Pursuant to CR 24(a).**

Under CR 24(a), “anyone *shall* be permitted to intervene in an action” that (1) submits a timely application, (2) “claims an interest relating to the property or transaction which is the subject of the action,” (3) “is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest,” and (4) is not “adequately represented by existing parties.” CR 24(a) (emphasis added). The requirements of CR 24(a) are liberally construed to favor intervention. *Columbia Gorge Audubon Soc’y v. Klickitat Cy.*, 98 Wn. App. 618, 629, 989 P.2d 1260 (1999). In particular, the term “interest” under CR 24 must be construed broadly. *Vashon Island Committee for Self-Government v. Washington State Boundary Review Bd. for King Cy.*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995). Indeed, “[n]ot much of a showing is required ... to establish an interest,” and furthermore, an “insufficient interest should not be used as a factor for denying intervention.” *Columbia Gorge Audobon Soc’y*, 98 Wn. App. at 629.

Here, it is clear that Syndicate 2112 satisfies the four elements granting it to the right to intervene in this action. It filed a timely application, CP 1182-1202, has an interest in the outcome of this action⁴ which is “impair[ed] or impede[d]” by the Court’s refusal to permit intervention, and the existing parties did not and do not adequately represent its interests.

⁴ Guzman even conceded to the Superior Court that Syndicate 2112 has “an interest relating to the property or transaction which is subject to the action.” CP 999.

Indeed, it would be difficult to find a more compelling case for intervention. Guzman is now attempting to collect the multi-million dollar improperly obtained default judgment against Syndicate 2112, a non-party to this case, while using the very existence of the judgment as a shield to block discovery into the bases (or lack thereof) for his claims and asserted damages. This proceeding is the only one in which Syndicate 2112 can address the improprieties that led up to entry of the default judgment and the grounds to set aside that judgment. Syndicate 2112's rights clearly are impaired by virtue of the Superior Court's refusal to allow Syndicate 2112 to intervene in this case, and Syndicate 2112 has a right to intervene in this matter. *See Kollmeyer v. Willis*, 408 S.W.2d 370, 378-79 (Mo. App. 1966) (holding that trial court properly considered non-party insurer's motion to set aside default judgment where, had it not been set aside, judgment would have bound insurer "as to all issues necessarily determined thereby, including the issues as to defendant's liability to plaintiff and the amount of damages to be awarded for plaintiff's injuries.")

2. The Superior Court's Stated Grounds for Denying Syndicate 2112's Right to Intervene Are Factually Incorrect and Legally Insufficient.

The Superior Court denied Syndicate 2112's motion to intervene on three grounds, finding Syndicate 2112: (1) "failed to serve Spruce Hills LLC," (2) "did not attach a pleading," and (3) "was involved in the prior motion to vacate." CP 13; CP 81-82. However, as explained below, each of these makeweight grounds is factually incorrect, contradicted by the record,

and not legally sufficient to support the Court's denial of Syndicate 2112's right to intervene in this proceeding.

a. Syndicate 2112 Served All Parties, Including Spruce Hills.

First, the Court's finding that "Syndicate 2112 failed to serve Spruce Hills LLC," CP 81, is simply incorrect. Rather, Syndicate 2112 served *everyone* who could possibly require service: Syndicate 2112 served Guzman, who holds an assignment of Spruce Hills' claims and stands in Spruce Hills' shoes, CP 97; Syndicate 2112 served Spruce Hills' last known attorney, Stephen Todd, CP 87-93; and Syndicate 2112 served Spruce Hill's principal, Michael Walker, CP 86.

Even if service on Spruce Hills had not been accomplished, procedural defects are not legally sufficient to deprive a party of its substantive right to intervene in the absence of prejudice. *Hockley v. Hargitt*, 82 Wn.2d 337, 346, 510 P.2d 1123 (1973) (holding that the trial court properly granted intervention despite defects in notice and service). The Supreme Court said in *Hockley*:

We do not want to encourage noncompliance with the court rules, but dismissal of the intervention on this ground would serve no purpose where the defendants have not been misled or prejudiced.... Service on the parties was not necessary in view of service upon their attorneys of record. The petitioners are correct that they were not given the 5 days' notice required by CR 6, but that procedural error was cured by petitioners' opportunity to be heard on this issue.... Again compliance with the rule would have been preferable, but in this particular instance, no prejudice is shown when petitioners were given ample time to present countervailing arguments and affidavits.").

Id. Here, all parties received service, Guzman is the only one with an interest in enforcing the default judgment, and he never even tried to claim prejudice.

The Superior Court erred in relying on an asserted lack of service to deny Syndicate 2112 its right to intervene.

b. Syndicate 2112’s Motion to Vacate Served as a “Pleading.”

The Superior Court also erred in denying Syndicate 2112’s motion on the ground that it “did not attach a pleading” as required by CR 24(c). CP 81; CR 24(c) (a motion to intervene “shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought”). As with the service issue, this alleged procedural defect is not factually accurate or legally sufficient to deny important rights to Syndicate 2112.

Sensibly, CR 24(c)’s reference to “a pleading” has been construed to require only that the grounds for intervention be adequately stated in a way that avoids prejudice. *See e.g., Olver v. Fowler*, 131 Wn. App. 135, 139, 126 P.3d 69 (2006), *aff’d*, 161 Wn.2d 655 (2007). Here, Syndicate 2112’s Motions to Intervene and to Vacate Default Judgment Entered Against Spruce Hills, LLC, CP 1182-1202, clearly served as the “pleading” required by CR 24(c) because it set forth all grounds supporting Syndicate 2112’s right to intervene. Guzman’s asserted narrow construction of “pleading” to mean only a formal Complaint or Answer is contrary to Washington authority favoring intervention and requiring **broad** construction of CR 24 (*Vashon Island Committee for Self-Government*, 127 Wn.2d at 765;

Columbia Gorge Audubon Soc'y, 98 Wn. App. at 629), and it is wholly illogical, particularly in the context of this case, in which Syndicate 2112 does not seek to intervene for the purpose of asserting a new cause of action or affirmative defense, but seeks to vacate a default judgment. Courts interpreting the parallel federal rule agree that the “pleading” requirement is met when the grounds for intervention are adequately stated in the motion to intervene itself. *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992); *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir.1943); *Raines v. Seattle Sch. Dist. No. 1*, 2009 WL 3444865 (W.D. Wash. Oct. 23, 2009) (citing *Beckman Indus., supra*) (“If the applicant ... identifies the basis for intervention in the motion with sufficient specificity to allow the court to rule, the failure to submit an accompanying pleading can be excused.”).⁵

Guzman did not and could not deny that he was fully informed of the grounds supporting Syndicate 2112’s request for intervention, and the Superior Court erred in denying its right to intervene on this basis.

c. Syndicate 2112 Was Not Involved in the Prior Motion to Vacate.

Finally, the Court erred in denying Syndicate 2112’s right to intervene on the ground that Syndicate 2112 “was involved in the prior motion to vacate.” CP 82. Rather, the prior motion to vacate was filed by Spruce Hills, not Syndicate 2112. Spruce Hills filed the motion through its defense lawyer, Stephen Todd, who is a respected and experienced specialist

⁵ Federal authority is persuasive in interpreting language of a state court rule that parallels a federal rule. *Craig v. Ludy*, 95 Wn. App. 715, 719, n.2, 976 P.2d 1248 (1999).

in defending contractors and who undoubtedly understood his role in defending his client, Spruce Hills, and not Spruce Hills' insurance company.⁶ *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 388, 715 P.2d 1133 (1986). Moreover, the prior motion to vacate was denied on the ground that Spruce Hills failed to respond despite having actual notice (through its corporate attorney, Hanchett) of Guzman's motions for default and default judgment. In stark contrast, Syndicate 2112 had no notice of the motion for default and no notice of the motion for judgment but instead received false representations that the case was being defended. Thus, the *basis* for denial of the prior motion to vacate does not even apply to Syndicate 2112, and it is clear that Syndicate 2112's interests were not protected in that proceeding. Under any reasonable interpretation, Spruce Hills' actions in standing idly by and allowing a multi-million default judgment to be entered, then its assignment of those claims to Guzman, and now its argument (through Guzman) that Syndicate 2112 must pay that judgment, without regard to its merit, hardly constitutes protecting Syndicate 2112's interests.

Second, even if this was a second motion to vacate, Guzman cited no authority for the proposition that this could support the Court's refusal to consider the merits of the motion to vacate – particularly where, as here, the motion is filed by a different party and is based on evidence that could not have been raised in the first motion. In contrast, courts routinely recognize

⁶ See <http://www.twlaw.com/attorneys/todd.shtml> (internet link to CV of Stephen Todd, Spruce Hills' defense lawyer).

that even the *same* party can file more than one motion to vacate a judgment. *See, e.g., Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 696 P.2d 28 (1985) (addressing the merit of plaintiff's argument that the trial court erred in denying his *second* motion for a new trial, brought several months after judgment); *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Service Co.*, 206 F.3d 900 (9th Cir. 2009) (considering party's *second* motion for new trial based on newly discovered evidence). Furthermore, the Court's refusal to consider the motion violates the letter and spirit of CR 60(b), which provides only that motions for default must be made "within a reasonable time," and does not preclude consideration of more than one motion.

3. Alternatively, the Court Erred in Denying Syndicate 2112's Request for Permissive Intervention.

The Court also erred in denying Syndicate 2112's alternate request for permissive intervention under CR 24(b). Permissive intervention should be granted when the party establishes that its interest that it seeks to protect through intervention has facts or law in common with the action in which it seeks to intervene. CR 24(b). The purpose of this requirement is to prevent a complete stranger to the action from intervening; but exact parallelism between the original action and the intervention action is not required. *Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767, 575 P.2d 713 (1978). Even after judgment has been entered, intervention remains within the discretion of the court if warranted by the particular circumstances. *Columbia Gorge Audubon Soc'y*, 98 Wn. App. at 629

Here, the merits clearly support permissive intervention. Claims and defenses in this action are “in common” with claims and defenses in the action filed in King County by Guzman (acting as assignee of Spruce Hills) against Syndicate 2112 – in fact, the default judgment in this case forms the basis for that action. The Court erred in refusing to permit Syndicate 2112 to intervene.

B. The Superior Court Erred in Failing to Vacate the Default Judgment.

This Court should reverse the trial court’s refusal to grant Syndicate 2112’s motion to vacate the \$3 million default judgment. A motion to vacate is reviewed for abuse of discretion, but an abuse of discretion is more likely to be found where, as here, the trial court refused to set aside the default judgment. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (citing *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)). This is because Washington courts “do not favor default judgments,” but abide by an overriding policy “to give parties their day in court and have controversies determined on their merits.” *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). “Thus, for more than a century, it has been the policy of [the Washington Supreme Court] to set aside default judgments *liberally*.” *Id.* (emphasis added).

Default judgments may be set aside under the four-part test set forth in *White, infra*, under the provisions of CR 60(b), or alternatively, “if the plaintiff has done something that would render enforcing the judgment inequitable.” *Id.* at 755.

In deciding whether to grant a motion to vacate a default judgment, the Court must view all evidence in the light most favorable to the *moving* party—here, Syndicate 2112. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 835, 14 P.3d 837 (2007), *rev. den.*, 143 Wn.2d 1021 (2001). As described below, the *White* four-part test and other alternative grounds require that the default judgment in this case be set aside.

1. Under the *White* Test, the Default Judgment Should Be Vacated.

In *White*, 73 Wn.2d at 352, the Washington Supreme Court set forth four factors to use when evaluating a motion to vacate. The two primary factors are: (1) the existence of substantial evidence to support, at least *prima facie*, a defense to the claim asserted; and (2) whether the reason for failing to appear and answer was due to mistake, inadvertence, surprise or excusable neglect. *Id.* The two secondary factors are: (3) the party’s diligence in asking for relief following notice of entry of the default; and (4) whether substantial hardship will result to the opposing party. *Id.* Here, each of these factors supports setting aside the default judgment.

a. Substantial Evidence Supports *Prima Facie* Defenses to Guzman’s Claim.

First, substantial evidence supports *prima facie* defenses to Guzman’s claim against Spruce Hills. Defenses that support setting aside a default judgment can address either the merits of the liability claim or the amount of damages awarded. *Shepard Ambulance, Inc., v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 242, 974 P.2d 1275 (1999). “Evidence

is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.*

As a threshold matter, Syndicate 2112 has not yet been able to conduct discovery into Guzman’s claims against Spruce Hills because Guzman takes the position that the default judgment entered against Guzman’s assignee, Spruce Hills, renders all information related to this litigation irrelevant and not discoverable. CP 1079–93. In *Calhoun v. Merritt*, 46 Wn. App. 616, 621, 713 P.2d 1094 (1986), the Washington Court of Appeals acknowledged the difficulty of developing a defense without the opportunity for discovery, and held that it would be “inequitable and unjust” to deny a motion to vacate on this ground alone without giving the moving party an opportunity for discovery.

Notwithstanding Guzman’s refusal to turn over relevant information, the evidence obtained to date reflects that meritorious defenses exist both on liability and damages. With regard to liability, Guzman alleged that at the time of the accident, he was employed by Meridian Drywall (a subcontractor), and that Spruce Hills as the general contractor was negligent in failing to provide a safe workplace and comply with safety regulations on the jobsite. CP 1938, ¶¶ 3.1-3.2. A general contractor, however, is not generally liable for injuries sustained by an employee of an independent contractor. *See Kelley v. Howard S. Wright Const. Co.*, 90 Wn.2d 323, 330, 582 P.2d 500 (1978) (“The general rule at common law is that one who engages an independent contractor (here, a subcontractor) is not liable for injuries to employees of the independent contractor resulting from their

work.”) Although there is a narrow exception to this rule under RCW 49.17.060, which imposes certain obligations running to employees of an independent contractor, these obligations do not exist in the absence of an actual employment relationship between the claimant and the independent contractor. *Neil v. NWCC Investments V, LLC*, 155 Wn. App. 119, 121-22, 229 P.3d 837, *rev. den.* 169 Wn.2d 1018 (2010).

Here, evidence obtained by Syndicate 2112 following entry of the judgment—which must be considered in Syndicate 2112’s favor—indicates Guzman was **not** an employee of Meridian at the time of the alleged accident. Rather, his employment at Meridian had previously been terminated for “poor workmanship” and “drinking on the jobsite.” CP 1029. On the day of the alleged accident, Guzman was present at the jobsite without Meridian’s knowledge or permission, and in fact had been expressly **banned** from being there. *Id.* Accordingly, on the day of the alleged accident, Guzman was a trespasser and should have been required to prove that Spruce Hills acted with “willful or wanton misconduct” in order to establish liability. *See Egede-Nissen v. Crystal Mountain, Inc.*, 21 Wn. App. 130, 136, 584 P.2d 432 (1978), *aff’d*, 93 Wn.2d 127 (1980). Guzman did not allege facts sufficient to establish Spruce Hills’ liability under this heightened standard.

Meritorious defenses also exist regarding the amount of the judgment. Over \$400,000 of the judgment consisted of Guzman’s claim for lost wages and “lost earning capacity.” However, Guzman never disclosed to the Court that he cannot legally work in this country. Thus, as Guzman acknowledged in a proceeding before the Department of Labor & Industries, his inability to

return to work—even in a limited capacity—was *not* because of his injuries, but “based on some issues with social security.” CP 1030-31. In addition, Guzman submitted no evidence to support his claim for \$2.5 million in general damages and, in fact, the trial court made no findings whatsoever to support such an exorbitant award. CP 1035–39.

This evidence, which was not before the Court when it entered the default judgment, establishes *prima facie* defenses to Guzman’s claims, satisfying the first primary factor of the *White* test.

b. Mistake, Inadvertence, Surprise, or Excusable Neglect.

The second primary *White* factor is whether the reason for failing to appear and answer was due to mistake, inadvertence, surprise or excusable neglect. *White*, 73 Wn.2d at 352. There is no black letter rule for determining whether a movant has established mistake, inadvertence, surprise, or excusable neglect; rather, it must be determined on a case-by-case basis. *Griggs*, 92 Wn.2d at 582; *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999). Nevertheless, as described below, the Washington Supreme Court has held that grounds exist to vacate a default judgment under circumstances very similar to those presented here.

The default judgment was entered without Syndicate 2112’s knowledge, and occasioned through no fault of Syndicate 2112. Syndicate 2112 informed Spruce Hills of Spruce Hills’ obligation under the policy to defend itself until the \$25,000 self-insured retention was exhausted, but was not aware that Spruce Hills was not in fact doing so. Under Washington law,

“[a] genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a mistake for purposes of vacating a default judgment.” *Norton*, 99 Wn. App. at 124 (internal citations omitted); *see also White*, 73 Wn.2d at 355 (holding that the trial court erred in failing to vacate a default judgment; where the defendant failed to respond because he believed his insurance company was defending the lawsuit and the insurance company believed the defendant was represented by independent counsel, the defendant’s failure to timely respond was due to a bona fide mistake, inadvertence and surprise within the contemplation of CR 60(b)); *Calhoun*, 46 Wn. App. at 620-22 (holding that the trial court erred and abused its discretion in denying motion to vacate a default judgment when the defendant presented evidence that the claim was worth far less than the amount awarded, the defendant did not answer the summons and complaint because he believed his insurer would, and the defendant acted promptly in moving to vacate).

Similarly, here, there was at minimum a genuine “mistake” about defense of the lawsuit, and certainly no intent on Syndicate 2112’s part to allow the case to go undefended. Although Syndicate 2112 had no duty to defend, CP 1032-37, the company tried to monitor the case but was falsely informed that an Answer had been filed and the case was “dormant.” CP 1110-11. In addition to the affirmative misrepresentations to Syndicate 2112, neither Guzman nor Spruce Hills or their attorneys made any effort to notify Syndicate 2112 or its representatives of the order of default or default judgment until well after the default judgment was entered. It is clear that

they had ample ability and opportunity to do so because Guzman's attorneys sent a letter directly to Syndicate 2112 and RiverStone demanding payment soon after the default judgment became un-appealable by Spruce Hills.

Furthermore, after entry of the default order but before entry of judgment, Guzman's attorneys sent a letter to Lloyd's America, misleadingly suggesting "early mediation" to resolve the claim "without additional litigation," and attaching a copy of the complaint but not the default order on liability they had obtained a few weeks before. CP 1106. If Spruce Hills, Hanchett, or Guzman's lawyers had disclosed the actual status of the case and the existence of the default order, both RiverStone and Syndicate 2112 would have handled Guzman's claim entirely differently, which would have resulted in a determination of Guzman's claim on its merits as opposed to through entry of an unjustifiably large default judgment. CP 1111-12; CP 1103-04.

According to the Washington Supreme Court, it is reversible error to refuse to vacate a default judgment under these circumstances. Specifically, in *Morin*, 160 Wn.2d at 759, under facts very similar to those involved in this case, the Washington Supreme Court held that the trial court erred and abused its discretion when it failed to consider vacating a default judgment based on plaintiff's counsel's failure to disclose the status of the litigation to the defendant's insurer. *Id.* One of the consolidated cases addressed by the Supreme Court in the *Morin* decision involved a plaintiff (Gutz) who obtained an order of default against an insured of Allstate. *Id.* The Court held that although Gutz "had no duty to inform Allstate of the details of the

litigation” against Allstate’s insured, Gutz’s attorney’s “failure to disclose” that a default order had been entered at the same time as the attorney “was calling and trying to resolve matters” appeared “to be an inequitable attempt to conceal the existence of the litigation” that would justify setting aside the default judgment. *Id.*

Similarly, here, Guzman’s attorneys – with help from the attorney for Spruce Hills – actively concealed the status of the litigation from Syndicate 2112. Washington law does not support imposing liability on the defendant’s insurer in these circumstances, but requires that the default judgment be set aside so that the case can be litigated on its merits.⁷

c. Syndicate 2112 Acted Diligently, and Guzman Will Suffer No Hardship.

The final two *White* factors are the party’s diligence in asking for relief following notice of entry of the default, and whether “substantial” hardship will result to the opposing party. 73 Wn.2d at 352. These factors also favor setting aside the default judgment.

Syndicate 2112 acted diligently in moving to set aside the default and within a one-year period. The default judgment was entered on February 9, 2012. Syndicate 2112 discovered the existence of the default in mid-April

⁷ The facts in this case are in marked contrast to the facts of a case previously cited by Guzman, *Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345 (2007), in which neither the defendant nor its insurer contested liability, the parties presented only speculation as opposed to evidence contesting damages, and the insurer was fully informed about the underlying proceeding but made a “decision not to participate.” Here, due to the misleading representations and concealment of material facts, Syndicate 2112 had no opportunity to make a “decision” whether or not to participate.

2012, and discovered Guzman’s participation in the efforts to cover-up the proceedings in January 2013. Syndicate 2112 moved to intervene and set aside the default on February 8, 2013. CP 1182-1202.

In addition, no “substantial hardship” will be imposed on Guzman if the default judgment is set aside. In this event, Guzman will have an opportunity to proceed as he should have done in the first place—by winning (or losing) his case against Spruce Hills on its merits rather than by default, with all interested parties having full knowledge of the circumstances and an opportunity to participate. Washington law is clear that having to prove one’s liability claim and right to damages does not constitute a “hardship.” *Gutz v. Johnson*, 128 Wn. App. 901, 920, 117 P.3d 390 (2005), *aff’d sub nom, Morin*, 160 Wn.2d at 745 (holding the possibility of a trial is an insufficient basis for the court to find substantial hardship on the non-moving party).

2. The Default Judgment Should Be Vacated Under CR 60(b).

Alternatively, the Superior Court should have set aside the default judgment under one of the grounds authorized by CR 60(b):

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);
- (4) Fraud ..., misrepresentation, or other misconduct of an adverse party; [or]

- (11) Any other reason justifying relief from the operation of the judgment.

In January 2013, immediately prior to moving to vacate the default judgment, Syndicate 2112 discovered that in October 2011 (after entry of the order of default but before entry of the default judgment), Guzman's lawyers wrote a letter to the Corporate of Lloyd's suggesting "mediation" while failing to disclose either the previously-entered default order or any other fact that would place Syndicate 2112 on notice that the case was not being defended. CP 1106. As described above, under *Morin, supra*, Guzman's misleading suggestions about the true status of the litigation justify setting aside the default judgment. *Morin*, 160 Wn.2d at 758-59. Just like the *Gutz* matter considered in *Morin, supra*, if Guzman's lawyers had disclosed to Syndicate 2112 or to the Corporation of Lloyd's in October 2011 that a default summary judgment order of liability had been entered, steps would immediately have been taken to make sure that the case was litigated on its merits rather than by default. CP 1103-04; CP 1112.

Finally, CR 60(b)(11) grants the Court authority to set aside a default judgment for "[a]ny other reason justifying relief." This provision "supports vacation of a default order and judgment that is based upon incomplete, incorrect or conclusory factual information." *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993). As the evidence recently obtained by Syndicate 2112 demonstrates, the default judgment is predicated on precisely such misinformation given both to Syndicate 2112 (regarding the status of the litigation) and to the Court itself (regarding Guzman's status as a

trespasser on the jobsite and inability to work in this country). Accordingly, if the Court finds the other CR 60(b) grounds insufficient to set aside the judgment, the Court should exercise its discretion to vacate the judgment pursuant to CR 60(b)(11).

3. Equity Concerns Support Vacating the Default Judgment.

Finally, a default judgment may be set aside “if the plaintiff has done something that would render enforcing the judgment inequitable.” *Morin*, 160 Wn.2d at 755. Here, Syndicate 2112 was lied to and misled by both Guzman and Spruce Hills, and Guzman failed to disclose material facts in his *ex parte* default applications that undermined both his liability and damage claims. These concealments facilitated a \$3 million default judgment that Guzman’s attorneys are claiming must be paid no-questions-asked by Spruce Hills’ insurer, Syndicate 2112. Justice most certainly has not been done here where the default judgment does not reflect a legitimate legal or factual basis for the multi-million dollar award, and the party against whom it is sought to be enforced was purposely kept in the dark about the litigation. Accordingly, under CR 60(b) and Washington case law, the Court should vacate the default judgment.

V.

CONCLUSION

The Superior Court erred in prohibiting Syndicate 2112 to intervene in this case to protect its rights. The Superior Court also erred in refusing to set aside the default judgment that was obtained by subterfuge directed both

at Syndicate 2112 and at the Court itself. Washington law and the interests of justice require that these errors be reversed, and the default judgment be vacated so that this case can be litigated on its merits.

RESPECTFULLY SUBMITTED this September 9, 2013.

MILLS MEYERS SWARTLING

A handwritten signature in black ink, appearing to read 'D. Schoeggl', written over a horizontal line.

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No. 70413-3

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

Snohomish County Case No. 11-2-04773-1

ADAN ROSALES-GUZMAN,

Plaintiff/Respondent,

v.

SPRUCE HILLS, LLC, a Washington limited liability company,

Defendant,

And

Lloyd's Syndicate 2112,

Intervenor/Appellant.

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DIVISION I
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