

NO. 70565-2-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

STATE FARM FIRE AND CASUALTY COMPANY,

Appellant,

vs.

TRISTAN APPLEBERRY, a single man;

Respondent

and

DEBRA SULLIVAN, Personal Representative of the Estate of Aaron J. Sullivan,

Defendant.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Jean Rietschel, Judge

BRIEF OF RESPONDENT

LEPLEY LAW FIRM

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ORIGINAL

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## I. INTRODUCTION

State Farm insured Tristan Appleberry under a homeowners policy because he was a resident of his parents, Jim Appleberry and Susan Nevins; household.

On July 22, 2009, Tristan was in possession of an AK47 rifle owned by Teo Shantz. Without intending to harm anyone specifically or engage in malicious conduct, the weapon discharged one round which tragically killed Aaron Sullivan.

As a consequence of the events of July 22, 2009, Tristan later made an Alford plea to Second Degree Murder.

A wrongful death action was filed by Sullivan's Estate against Teo Shantz and Tristan. State Farm has provided a defense to Tristan under a Reservation of Rights, and then filed a declaratory action on March 6, 2013 seeking an order relieving State Farm of any policy obligation to provide defense or indemnity.

On March 11, 2013, State Farm through Appleberry's prison counselor arranged for delivery of a written Acceptance of Service of Process form for the Summons and Complaint in the declaratory action.

Taking full advantage of the fact that Tristan was incarcerated, State Farm immediately on the 22<sup>nd</sup> day after return of the Acceptance of

Service form filed a motion for an order of default along with an order of default judgment.

In their haste to default Tristan, State Farm failed to comply with CR 55(b)(2), and actually when the Summons and Complaint was provided to Tristan, State Farm failed to comply with King County Local Rule (LCR) 4(c)(1) which requires service of a case schedule upon a party.

Legal counsel was eventually retained for Tristan and a motion to set aside the default and to vacate the default judgment was made after State Farm refused to voluntarily set aside its default and vacate its default judgment.

On May 31, 2013, the trial court granted Tristan's motion, setting aside the default and vacating the default judgment.

## **II. ASSIGNMENT OF ERROR**

With respect to this appeal, State Farm claims that the trial court erred in granting the plaintiff's motion to motion to set aside the default and to vacate the default judgment. CP 224-26.

## **III. STATEMENT OF THE CASE**

Tristan took an Alford plea, a fact and not an assertion as State Farm characterizes it in their brief [State Farm brief at p.3] CP 50-54, CP 122 because of the tragic events of July 22, 2009.

Tristan was incarcerated when State Farm filed its declaratory action, CP 1-5, and when Tristan signed an Acceptance of Service, CP 32, he was serving a 20-year sentence as a consequence of this tragedy.

Eventually, Tristan via his father James (Jim) Appleberry was able to arrange for an attorney who could represent his personal interests and defend him with respect to the declaratory action filed by State Farm. Unfortunately, before counsel could be arranged for Tristan, even though State Farm had knowledge of the fact that Tristan and his parents were seeking to arrange legal counsel for him, State Farm went ahead and took a default and a default judgment against him. CP 77-80, CP 96-103, CP 117-118.

Since State Farm had taken not only a default but also a default judgment as well against Tristan, CP 77-80, it was necessary for counsel on behalf of Tristan to request that the Court set it aside. CP 83-95.

After State Farm had an opportunity to offer the same arguments made in this appeal, CP 131-143, CP 146-149, the trial court granted Tristan's motion and specifically noted:

- (1) That the defendant had established excusable neglect, CR 60(b)(1) and the existence of a prima facie defense.

The court also found that the defendant Tristan acted with due diligence, and that State Farm would not suffer a substantial hardship in having the default and default judgment vacated. CP 224-226.

#### IV. ARGUMENT

##### A. DEFAULT ORDERS AND JUDGMENTS ARE DISFAVORED

Default judgments are disfavored by courts because it is the policy of the law that controversies be determined on the merits rather than by default. *Colacurcio v Burger*, 110 Wn. App. 488, 41 P.3d 506, *reconsideration denied* and *review denied*, 148 Wn.2d 1003, 60 P.3d 1211 (2002).

Ordinarily, default judgments are proper only when the adversary process has been halted because of an essentially unresponsive party. *Lloyd Enterprises, Inc. v. Longview Plumbing and Heating Company, Inc.*, 91 Wn. App. 697, 958 P.2d 1035, *review denied*, 137 Wn.2d 1020, 980 P.2d 1281 (1998).

In fact, the entry of a default and a default judgment is a drastic remedy. It ordinarily is set aside by a court whenever necessary to accomplish justice. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

**B. THERE WAS NO COMPELLING CIRCUMSTANCE  
REQUIRING ENTRY OF A DEFAULT JUDGMENT  
AGAINST TRISTAN.**

The remedy of a default or default judgment exists to penalize opponents who refuse to recognize the authority of the legal system over their dispute. There is absolutely no evidence that was the case here. Tristan Appleberry was operating under a significant handicap, the fact that he was incarcerated.

There is no general rule in existence to measure the reasonableness of an excuse. It necessarily depends on the facts of each case. *Griggs*, 92 Wn.2d at p. 582.

In this case, State Farm knew that Sullivan's counsel was trying to arrange for an attorney to put in an appearance to represent Tristan. CP 121-127. A party is ordinarily entitled to notice prior to the entry of a default if they have actually appeared or have indicated an intent to defend after a suit has been filed. *City of Des Moines v. Personal Property identified as \$81,231 in U.S. Currency*, 87 Wn. App. 689, 696, 943 P.2d 669 (1997); *Sacotte Construction, Inc. v. National Fire and Marine Insurance Company*, 143 Wn. App. 410, 419, 177 P.3d 1147 (2008). In *Sacotte*, it was noted that an informal telephone call between attorneys was sufficient to constitute or at least apprise the plaintiff of the defendant's intent to litigate the case.

**C. THE COURT DID NOT ABUSE ITS EQUITY POWER**

There is no specific requirement that the court make a finding of excusable neglect, and State Farm fails to cite any case to the contrary. It is obvious that Tristan was operating under a significant handicap while incarcerated. Nevertheless, the amount of time that elapsed between the Acceptance of Service of Process and State Farm's first attempt to enter a default judgment, CP 67-68 and CP 69-70, was barely outside the 20 days allowed by rule and statute for an attorney to appear and provide an answer to State Farm's complaint.

State Farm offers no argument that would show that the court abused its discretion setting aside the default. Accordingly, if a party in default can provide a reasonable excuse for its failure to appear and/or defend, an entry of default is set aside. *Johnston v Medina Improvement Club, Inc.*, 10 Wn.2d 44, 116 P.2d 272 (1941). State Farm has argued that the facts of this case are similar to the circumstances of *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 196 P.3d 711 (2008). In *Rosander*, negotiations between an accident victim and an insurer for the truck driver's employer were held to not constitute or amount to an appearance, and thus an employer, which did not make a court appearance at any time nor did its insurer, was not entitled to notice before a default

judgment or order was taken, and the court noted that a party who does not receive a required notice is entitled as a matter of right to have a default judgment set aside and vacated.

None of the facts in this proceeding and, most importantly, the fact that State Farm is seeking an adjudication of rights under a policy of insurance distinguishes this case from the facts and circumstances of *Rosander*.

The vacation and setting aside of a default judgment is governed by a judicially-created standard. The factors that are weighed by a court in granting vacation and setting aside of a default judgment are:

- 1 The existence of a valid defense to the asserted claim,
- 2 The movant's reasons for failing to appear.

*Morin v. Burris*, 160 Wn.2d 745, 755, 161 P.3d 956 (2007).

A proceeding to set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms.

Additionally, and it is important to note, the actual entry of a default judgment is likewise discretionary and involves an equity determination by the court. *Paine-Gallucci, Inc. v. Anderson*, 35 Wn.2d 312, 212 P.2d 805 (1949); *Brown v. Fleischauer*, 53 Wn.2d 419, 334 P.2d 174 (1959).

On the one hand in this matter, State Farm complains that the court abused its equity power by setting aside the order of default judgment, but on the other hand, the court did not abuse its discretion in entering a default and default judgment in the first instance.

**D. THE COURT MADE A SPECIFIC FINDING OF A PRIMA FACIE DEFENSE**

It appears from the briefing in this matter that State Farm wants to try its case on an appeal regarding the setting aside and vacating of a default judgment, rather than filing a motion for summary judgment, a proceeding where evidence and affidavits could be placed properly before a court. A similar requirement is not necessary regarding the setting aside and vacating of a default judgment. *Morin v. Burris*. The proceeding to set aside and vacate a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. In cases where a default judgment resolves liability, the party seeking to have it set aside and vacated must assert a meritorious defense. *Soratsavong v. Haskell*, 133 Wn. App. 77, 84, 134 P.3d 1172 (2006). If a party can present a meritorious defense as to only one of several claims, the court still has discretion to vacate its default order as to the single claim. *Fowler v. Johnson*, 167 Wn. App. 596, 605, 273 P.3d 1042 (2012).

In measuring whether or not a party has a prima facie defense, courts have noted that evidence of such is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Shepard Ambulance, Inc. v. Helsell Fetterman, Martin, Todd and Hawkinson*, 95 Wn. App. 231, 242, 974 P.2d 1275 (1999).

This case involves a request by State Farm for declaratory relief pursuant to RCW 7.24.

In order to file and maintain a declaratory judgment proceeding, State Farm is required to make an affirmative declaration that there is a “justiciable” controversy between the parties. In order to satisfy that statutory requirement, there must be an actual existing controversy between parties having opposing interests, which interests must be direct and substantial and involve an actual (as distinguished from a “possible” or “potential” dispute). *Seattle First-National Bank v. Crosby*, 42 Wn.2d 234, 254 P.2d 732 (1953).

By its very nature as a declaratory judgment proceeding, Tristan has a potential defense to the asserted claims made by State Farm. If not, there would be no justiciable controversy between the parties sufficient to invoke the jurisdiction of the court under the Declaratory Judgments Act in the first instance.

State Farm's declaratory judgment complaint raised the issues of whether or not the bodily injury that was inflicted on Aaron Sullivan was either "expected or intended", or was the result of "willful and malicious acts". When Tristan was deposed in the wrongful death action by Sullivan's lawyer, he was asked about his intent, CP 120, CP 129-130. The reasonable inference from the deposition testimony is that he did not intend to cause bodily harm to Sullivan, nor was he acting out of any "willful and malicious" conduct that was expected to cause harm to Sullivan specifically.

State Farm's declaratory action, CP 1-5, also raises two other questions:

- (1) Whether or not what took place meets the definition of "occurrence" and
- (2) Whether the event that was an "occurrence" was "an accident", which in cases of this nature always raise issues of fact regarding intent, motive, and the means by which the bodily injury was caused.

Given these factors, the court had more than sufficient reason and factors before it to reach its conclusion that as a preliminary matter, Tristan had a prima facie defense regarding the declaratory judgment proceeding filed by State Farm.

**E. STATE FARM'S ENTRY OF THE DEFAULT JUDGMENT WAS IRREGULAR**

State Farm has maintained that the default judgment was properly entered [Brief of Appellant, p. 8-11]. CR 52(c) requires notice of presentation to parties in any proceeding that have appeared. As noted, in Tristan's motion to set aside the default and to set aside and vacate the default judgment, CP 83-95, Debra Sullivan at the very least would have been entitled to notice of presentation before entry of any order of judgment in the case. That did not occur and is an uncontroverted fact.

Likewise, CR 55(b)(2) required findings of fact and conclusions of law before entry of a default judgment.

That section of the rule governs relief when the amount of monetary relief is uncertain or involves establishment of the truth of any averment by evidence or to make an investigation of any other matter.

Whether the proceeding to obtain a default judgment in the first place was appropriate or not, in those instances where a party moving to vacate and set aside a default judgment is unable to show a strong or conclusive defense, but is at least able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of facts in a trial on merits, reasons for the party's failure to timely appear in the action before the default are scrutinized by the court and the trial court has

broad discretion to vacate and set aside judgments which are addressed to the sound discretion of the court and not ordinarily second-guessed by an appellate court. *Shepard Ambulance, Inc. v. Helsell Fetterman, Martin, Todd and Hawkinson*, supra; *Fowler v. Johnson*, supra; *Green v. Normandy Park*, 137 Wn. App. 665, 151 P.3d 1038, amended on reconsideration, review denied, 163 Wn.2d 1003, 180 P.3d 783 (2007).

## V. CONCLUSION

State Farm sued Tristan Appleberry because they wished to terminate an obligation to defend him under a Reservation of Rights flowing from an incident where a gun in his possession discharged, killing Aaron Sullivan.

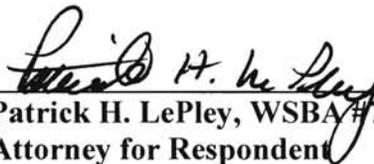
After arranging for a prison counselor to deliver legal papers to Tristan while he was incarcerated, State Farm took an Order of Default and Default Judgment even though State Farm was aware of efforts taking place to arrange for a personal lawyer to appear on behalf of Tristan and defend the declaratory action.

When counsel was finally obtained, Tristan's lawyer quickly moved to set aside the default and vacate the default judgment. The court, using its inherent power of equity, considered the circumstances and specifically found that Tristan had established excusable neglect as well as the existence of a prima facie defense.

In its appeal from that decision, State Farm has offered no evidence or argument that the court in any way abused its equitable powers setting aside the default and vacating the default judgment.

DATED this 14<sup>th</sup> day of October, 2013.

**LePLEY LAW FIRM**

By   
Patrick H. LePley, WSBA #7071  
Attorney for Respondent  
Tristan Appleberry



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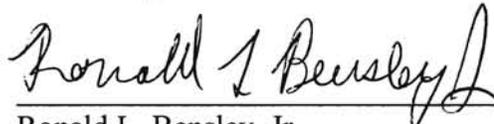
1. Brief of Respondent; and
2. This Affidavit of Service By Mail,

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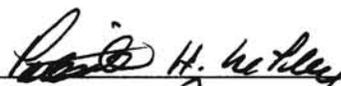
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Seattle WA 98101-4161

DATED this 14<sup>th</sup> day of October, 2013.

  
Ronald L. Bensley, Jr.

SIGNED AND SWORN to (or affirmed) before me on October 14, 2013 by Patrick H. LePley.

  
Print Name: PATRICK H. LEPLEY  
NOTARY PUBLIC in and for the State of  
Washington, residing at Bellevue, WA  
My commission expires: 6/9/15