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72424-0

No. 72424-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NEIL RUSH.

Appellant,

v.

TOP NOTCH TOWING, a Washington company, and WILLIAM I.
BLACKBURN,

Respondents.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF REPLY

Respondent Top Notch claims that this appeal is, “about the value of an inoperable 1983 Mercedes . . .” Actually, this appeal is about, 1) Judge Doyle’s failure to apply the correct law when she vacated Appellant Rush’s default judgment based on CR 60(b)(1) more than one-year after its entry, 2) the absence of extraordinary circumstances to support the vacation of Appellant Rush’s default judgment based on CR 60(b)(11), and 3) that Judge Doyle erred when she dismissed Appellant Rush’s CPA claim because genuine issues of material fact existed.

The strikingly similar Division I case of *Friebe v. Supancheck*, 98 Wash.App. 260, 992 P. 2d 1014 (1999) is dispositive. There, despite being properly served, the Supanchecks did not appear in the action because they mistakenly believed their realtor’s attorney would represent them. The Friebes obtained a default judgment against the Supanchecks. Over a year later, the Supanchecks moved for relief from the judgment, which the trial court granted under CR 60(b)(11). The trial court subsequently granted the Supanchecks’ motion for summary judgment on all claims.

Because the Court of Appeals found no extraordinary circumstances justifying a vacation of the default judgment under CR 60(b)(11), it vacated the summary judgment, reversed the vacation of the default judgment, and reinstated in full the default judgment in favor of

the Appellants.

Appellant Rush seeks the same disposition in this appeal.

Ironically, Top Notch's insurance defense attorney contends that Appellant Rush should be denied relief because he had the audacity to retain "contingent fee attorneys" and strictly followed the Impoundment Hearing statutes, doing everything possible to recover his car.

The following three statements are true:

- 1. Appellant Rush lost the right, title and interest to his vehicle after he successfully challenged an illegal impoundment in court;**
- 2. Appellant Rush did nothing wrong;**
- 3. Fault for loss of the vehicle lies solely with Respondent Top Notch.**

The court below accepted as a verity every averment Respondent Top Notch advanced in spite of the fact that Blackburn's testimony was internally inconsistent and was directly rebutted by the District Court Clerks, the Washington State Patrol, Appellant Rush, and Top Notch's own documents.

It was Blackburn who ignored, 1) Rush's hand delivered written notice of the Impound Hearing, 2) a letter of representation by Rush's contingent fee attorneys, 3) two written notices from the District Court

Clerk of the Impound Hearing, 4) the District Court's Order to return the vehicle to Rush, 5) service of two separate Summonses and Complaints, and 6) a letter from Rush's counsel regarding payment of the default judgment, who now blames the Appellant and his attorneys, but fails to acknowledge any wrongdoing on his part.

After learning that Appellant Rush had prevailed in the Impoundment Hearing, Blackburn should have immediately transferred title and returned the car to Rush. Instead, he kept the "abandoned junk vehicle" for two years until his insurer paid \$4,000 to settle Rush's conversion claim.

II. ARGUMENT

A. **The Trial Court Abused Its Discretion When It Vacated Appellant Rush's Default Judgment Based on CR 60(b)(1) More Than One-Year After the Entry Of The Judgment.**

An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 229, 548 P.2d 558 (1976). A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite

applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.' ” *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990)).

Questions of law are reviewed de novo. *In re Firestorm 1991*, 129 Wash.2d 130, 135, 916 P.2d 411 (1996); *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054 (noting that “[a] trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law”).

A party against whom a default judgment has been entered may move for vacation of the default judgment pursuant to CR 60. Courts have traditionally taken four factors into consideration in determining whether a defendant is entitled to vacation of a default judgment pursuant to that rule. This four-part test was first articulated by our Supreme Court in *White v. Holm*, 73 Wash.2d 348, 352, 438 P.2d 581 (1968):

The discretion which the trial court is called upon to exercise in passing upon an appropriate application to set aside a default judgment concerns itself with and revolves about two primary and two secondary factors which must be shown by the moving party. These factors are: (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

The court in *White* further held that the four elements “vary in dispositive significance as the circumstances of the particular case dictate.” *White*, 73 Wash.2d at 352, 438 P.2d 581. The court elaborated:

[W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reason as which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action Before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party.

White, 73 Wash.2d at 352-53, 438 P.2d 581.

Accordingly, in determining whether Respondent Top Notch was entitled to vacation of a Appellant’s default judgment, Judge Doyle’s initial inquiry should have been whether Top Notch could demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the Plaintiff’s claims. See, *Johnson v. Cash Store*, 68 P.3d 1099, 116 Wash. App. 833 (Ct. App. 2003). The nature of the trial court’s further inquiry depends upon its determination of that question.

In this case, the trial court found that there was “substantial evidence to support at least a prima facie defense to Plaintiff’s claims for

conversion and a Consumer Protection Act violation[.]” But there is no factual support for that finding in the record.

Top Notch did not demonstrate the existence of a strong or virtually conclusive defense to Rush’s claims and was unable to show the existence of a prima facie defense.

Second, the trial court found, “Defendant Blackburn’s failure to timely appear in the action, and answer the Complaint, was due to mistake and excusable neglect arising from Plaintiff’s insurer’s agreement to compensate Plaintiff for the loss of his vehicle.” This is nonsensical and not supported by the pleadings filed with the court below.

The trial court next inquired into the reasons for the Defendant’s failure to timely appear, and found that “Defendant Blackburn acted with due diligence after learning about the entry of the default judgment . . .” ruling that Blackburn’s neglect in failing to appear was excusable. This finding is not supported by the evidence and violates the explicit language of CR 60(b).

The court below applied the wrong legal standard when it granted Top Notch relief under CR 60(b)(1) and that ruling must be overturned.

CR 60(b)(1) provides in relevant part:

(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 a final judgment, order, or proceeding for the following reasons: . . .

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

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken . . . (emphasis added)

CR 60(b) is clear. The court below committed reversible error when it granted Respondent's Motion to Vacate based on excusable neglect more than one-year after entry of the judgment.

B. The Trial Court Abused Its Discretion When It Vacated Appellant Rush's Default Judgment Based on CR 60(b)(11).

As noted above, a discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts. And lower court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take."

The court below relied on facts demonstrating mistake, inadvertence, or excusable neglect when it granted Top Notch relief under CR 60(b)(11) and is therefore based on untenable grounds.

In her Order vacating Appellant's default judgment based on CR 60(b)(11) Judge Doyle stated:

The Court further finds that there are existing sufficient extraordinary circumstances to warrant relief under CR 60(b)(11).

CP 443-446, 445-446.

CR 60(b)(11) is, like Rule 60(b)(6) of the Federal Rules of Civil Procedure, the “catch-all” provision by which the courts may vacate judgments for reasons not identified in the rule's more specific subsections. Washington courts turn to federal courts for guidance in determining the scope of the catch-all provision when faced with a circumstance not previously addressed in Washington decisions. *Barr v. MacGugan*, 119 Wash.App. 43, 47, 78 P.3d 660 (2003) (looking to federal decisions on lawyer mental illness or disability as a basis for relief from judgment under the catch-all provision). As with its federal counterpart, subsection (b)(11) of CR 60 applies only in situations involving “extraordinary circumstances” relating to “irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” *Flannagan*, 42 Wash.App. at 221, 709 P.2d 1247 (internal quotation marks omitted) (quoting *State v. Keller*, 32 Wash.App. 135, 141, 647 P.2d 35 (1982)).

However, the record is devoid of any “extraordinary circumstances” upon which to base a CR 60(b)(11) vacation of the default judgment.

As noted in the introduction, this case is identical to the scenario in *Friebe v. Supancheck*, 992 P.2d 1014, 98 Wash. App. 260 (1999). The Supanchecks, like Top Notch, did not appear in the action after being properly served. They later claimed in their Motion to Vacate that they did not appear or defend because they mistakenly believed their realtor's attorney would represent them. Top Notch claimed in its Motion to Vacate that he did not appear or defend because he mistakenly believed Appellant Rush's attorney would resolve the case.

The Friebes, like Appellant Rush, obtained a default judgment against the defendants. Over a year later, the Supanchecks, like Top Notch, moved for relief from the judgment, which the trial court granted under CR 60(b)(11). The trial court, as did Judge Doyle, subsequently granted the defendants' motion for summary judgment on all claims.

The Supancheck trial court entered almost the identical findings that Judge Doyle entered in this case:

1. Good cause exists for setting aside the default order and judgment under CR 60(b)(11);
2. Defendants Supancheck have alleged a meritorious defense to the plaintiff's [sic] claim;
3. Defendants Supancheck acted with due diligence after notice of entry of the default judgment against them; and,
4. Plaintiffs will not suffer substantial hardship if the

default judgment is set aside and defendants Supancheck are permitted to enter a defense in this action.

The Appellate Court found no extraordinary circumstances existed for the vacation of the default judgment under CR 60(b)(11), vacated the summary judgment, reversed the vacation of the default judgment, and reinstated in full the default judgment in favor of the Friebes.

The Court of Appeals found that the trial court had abused its discretion in vacating the Default Judgment under CR 60(b)(11) stating:

We find no extraordinary circumstances in this case to justify the vacation of the default judgment under CR 60(b)(11). The Supanchecks' failure to appear may be attributed only to mistake, inadvertence, or excusable neglect under CR 60(b)(1), and relief under that section is precluded due to the one-year time limit. CR 60(b)(11) may not be used to circumvent the time limit imposed in CR 60(b)(1). The Supanchecks suggest that the Friebes attempted a "legal sleight-of-hand" in waiting over one year to collect on the default judgment. But waiting more than a year to execute a judgment is not characterized as unfair or deceptive. See *Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wash.App. 280, 285-86, 673 P.2d 634 (1983). (emphasis added)

Top Notch is attempting to use the catchall provisions of CR 60(b)(11) to circumvent the one-year time limit applicable to CR 60(b)(1). But it cannot. In *Bergren v. Adams County*, 8 Wash.App. 853, 855, 509 P.2d 661 (1973), the plaintiff obtained a default judgment against the county when it failed to appear. Fourteen months later, the county moved

to vacate the default judgment. *See id.* The trial court correctly refused to vacate the judgment under CR 60(b)(1) because the motion was more than a year after the judgment. *See id.* at 856, 509 P.2d 661. The county alternatively contended that the judgment should be vacated under CR 60(b)(11), arguing that it had a meritorious defense, namely that the accident underlying the cause of action did not occur in Adams County. *See id.* at 857, 509 P.2d 661. The court disagreed that the judgment could be properly vacated under CR 60(b)(11), stating:

Defendant seeks to argue a question of fact that comes too late. Its tardiness is explained only by the argument of excusable neglect or mistake by its auditor and attorney. This does not constitute an “other reason” within CR 60(b)(11); rather, it falls within CR 60(b)(1) and cannot be asserted after 1 year from the date of judgment.

Id.

C. The court improperly dismissed Rush’s CPA claim on Partial Summary Judgment.

1. Standard of Review for Summary Judgment.

Appellate review of a trial court’s decision on summary judgment is de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002).

On June 20, 2014 the court granted Top Notch’s Motion for Partial Summary Judgment stating:

“After due consideration of the matter, the Court finds that,

as to Plaintiff's Consumer Protection Act Claim, there is no genuine issue as to any material fact and that Defendant is entitled to judgment as a matter of law. NOW, THEREFORE,

IT IS ORDERED that Defendant's Motion for Partial Summary Judgment against Plaintiff be, and it is granted and that partial summary judgment be entered in favor of Defendant Blackburn, dismissing Plaintiff's Consumer Protection Act Claim with prejudice."

CP 778-780.

a. Top Notch' conduct had the capacity to affect the public.

"[W]hether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed." *Hangman Ridge*, 105 Wn.2d at 789-90. Although the factors applicable vary and can depend on whether the situation involves a public transaction or a private dispute, no one factor is dispositive, nor is it necessary that all be present. *Id.* at 790-911. Instead, "[t]he [exemplar] factors . . . represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact." *Id.* at 791 (emphasis added).

Under these guiding principles, the public interest element is satisfied here as a matter of law. The numerous factors that support such a conclusion include that: (i) the misconduct was performed in the course of the business activities of Top Notch/Blackburn; (ii) their acts are part of a pattern of conduct, as illustrated by the fact that on the day of the Rush

transaction Top Notch auctioned 11 other cars to itself for \$1.00; (iii) they engaged in similar activities against other members of the Washington public, both before and after the Rush transaction; (iv) there is a great likelihood of continued repetition; (v) substantially the same “auctions” were conducted after impounds of other Washington citizens’ vehicles, thus affecting a great many people; and (vi) Top Notch/Blackburn each holds a substantially superior position because there is no cost for ignoring impound hearings in the past or in the future.

While each of the foregoing constitutes “indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact,” *Hangman Ridge*, 105 Wn.2d at 791, the requisite public interest is clearly established through the one unlawful transaction.

During his deposition Blackburn was untruthful. He indicated under oath that he had not been cited for violations of the towing statutes. Shortly before the Respondent’s Motion for Summary Judgment was to be heard, Appellant Rush received documents from the Washington State Patrol, pursuant to a Public Records Act request, showing that Blackburn had been cited numerous times for violations of the towing statutes. More importantly, Respondent Top Notch signed Stipulated Findings of Fact, Conclusions of Law and Agreed Orders with the state of Washington for violations for RCW 46.55.130. CP 650 – 762.

Appellant Rush moved on shortened time to supplement his summary judgment response to include the material received from the State Patrol, but Judge Doyle denied Rush's request. CP 650 – 762.

D. Top Notch/Blackburn was not denied due process because the judgment was consistent with Appellant's prayer in the Second Amended Complaint.

Respondent cites CR 54(c):

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

Respondent then goes on to state on page 31 of his Response:

Rush's demands for relief against Blackburn set forth in the Second Amended Complaint did not mention punitive damages or attorney's fees under the CPA.

This is not true. After alleging a Consumer Protection Act violation by Top Notch, Rush's prayer stated:

VIII. DAMAGES [Top Notch / Blackburn]

As the proximate result of the foregoing acts and omissions by defendants Top Notch / Blackburn, plaintiff has suffered, and continues to suffer, special and general damages in an amount to be proven at trial.

WHEREFORE, plaintiff Rush prays for the following relief:

- A. Judgment against defendants Top Notch / Blackburn for conversion;
- B. Judgment against defendants Top Notch / Blackburn in an amount to fairly compensate plaintiff for all special and general damages caused

by the wrongful acts and omissions of the defendant;

C. Judgment against defendants Top Notch / Blackburn for attorney fees and costs as allowed by law;

**D. For such other relief as the Court deems just and equitable.
(emphasis added)**

RCW 19.86.030 sets forth the damages allowed by law:

Any person . . . may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars . . .

Reading the Second Amended Complaint as a whole put Top Notch on notice of Appellant Rush's intent to seek, "judgment against defendants Top Notch / Blackburn for attorney fees and costs as allowed by law. Respondent cites no authority to support his claim that the words "punitive damages" must be stated in the prayer. Those words do not appear in the statute.

III. CONCLUSION

For the foregoing reasons, Rush's default judgment against top Notch/Blackburn should be reinstated. The court below erroneously vacated the judgment based on CR 60(b)(1) in violation of the express

language of the rule finding Top Notch's failures to appear was excusable neglect. The court's vacation of the Rush default judgment based on "extraordinary circumstances" is also untenable.

In the alternative, the dismissal of Rush's CPA claim against Top Notch should be reversed and remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 13th day of March, 2015.

LAW OFFICES OF MICHAEL T. WATKINS

The image shows two handwritten signatures in black ink. The signature on the left is a stylized, cursive signature that appears to be 'M. Watkins'. The signature on the right is a more fluid, cursive signature that also appears to be 'M. Watkins'. Both signatures are written over a horizontal line.

Michael T. Watkins, WSBA No. 13677
Counsel for Appellant

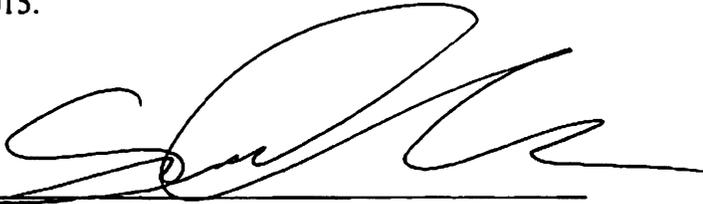
DECLARATION OF SERVICE

I certify that on March 13, 2015, I caused to be filed with the Court of Appeals, Division I, via messenger, the foregoing Reply Brief of Appellant (and copy), and caused to be delivered, via messenger, true and accurate copies to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Mountlake Terrace, Washington, this 13th day of March, 2015.



Sonia Chakalo

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