

FILED
COURT OF APPEALS
DIVISION II
2012 JUN 11 PM 1:12
STATE OF WASHINGTON
BY 
DEPUTY

No. 43284-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NATALIYA MAKARENKO,

Respondent/Plaintiff,

vs.

CIS DEVELOPMENT FOUNDATION, INC.,
a New Jersey non-profit corporation,

Appellant/Defendant.

OPENING BRIEF OF APPELLANT
CIS DEVELOPMENT FOUNDATION, INC.

STERNBERG THOMSON OKRENT & SCHER, PLLC
Terry E. Thomson, WSBN # 5378
500 Union Street, Suite 500
Seattle, WA 98101
Tel.: (206) 386-5313

Attorneys for Appellant CIS Development Foundation, Inc.

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
D.	STATEMENT OF THE CASE	5
	1. The Parties	5
	2. The Proceedings	5
E.	ARGUMENT	13
	1. <u>Standard of review on appeal.</u>	13
	2. <u>The trial court erred in declining to vacate the Default Judgment pursuant to Civil Rule 60(b)(5) and RCW 4.28.185(4).</u>	13
	3. <u>The trial court erred in declining to vacate the Default Judgment for insufficient notice under Civil Rule 55.</u>	17
	4. <u>The trial court erred in disregarding CISDF'S Answer and Counterclaim, for purposes of determining whether it had appeared and the notice requirements of Civil Rule 55 had been triggered.</u>	19
	5. <u>The trial court erred in accepting Makarenko's belated objections to CISDF's pro se answer and counterclaim, and in rejecting CISDF's related defenses of waiver and estoppel.</u>	26

6.	<u>The trial court erred in declining to vacate the default and default judgment for misconduct under Civil Rule 60(b)(4) .</u>	32
7.	<u>Alternatively, the trial court erred in declining to vacate the default and default judgment under Civil Rule 60(b)(1) for CISDF’s mistake, inadvertence, and/or excusable neglect in not filing its answer and counterclaim.</u>	34
8.	<u>The trial court erred in declining to vacate the default and default judgment under Civil Rule 60(b)(11).</u>	40
9.	<u>The trial court erred in declining to grant CISDF leave under Civil Rule 15(a) to amend its answer concurrently with the requested vacation of the Default Judgment.</u>	42
10.	<u>The trial court erred in failing to strike inadmissible hearsay replete throughout the answering declarations of Makarenko and her two attorneys.</u>	43
11.	<u>The trial court erred in not awarding CISDF its reasonable attorneys’ fees and costs under RCW 4.28.185(5), concurrently with the requested vacation of the default judgment.</u>	46
F.	<u>RAP 18.1(a) REQUEST FOR AWARD OF FEES AND COSTS ON APPEAL</u>	47
G.	<u>CONCLUSION AND RELIEF REQUESTED</u>	48
	CERTIFICATE OF SERVICE	50

TABLE OF AUTHORITIES

Table of Cases

<u>Ashmore v. Estate of Duff</u> , 165 Wn.2d 948, 205 P.3d 111 (2009)	33
<u>Barr v. Interbay Citizens Bank of Tampa, Florida</u> , 96 Wn.2d 692, 649 P.2d 827 (1982)	16
<u>Biomed Comm. v. Department of Health, Board of Pharmacy</u> , 146 Wn.App. 929, 930, 193 P.3d 1093 (Div. One 2008)	28, 29
<u>Bowman v. Webster</u> , 44 Wn.2d 667, 269 P.2d 960 (1954)	32
<u>Braam v. State</u> , 150 Wn.2d 698, 81 P.3d 851 (2003)	13
<u>City of Des Moines v. Personal Property Identified as \$81,231 in U.S. Currency</u> , 87 Wn.App. 689, 943 P.2d 669 (Div. One 1997)	24
<u>CLD Const., Inc. v. City of San Ramon</u> , 16 Cal.Rptr.3d 555, 120 Cal. App. 4 th 1141(Cal.App.1st Dist. 2004)	29
<u>Cottringer v. State of Washington</u> , 162 Wn. App.782, 257 P.2d 667 (Div. One 2011)	28
<u>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 (2002)	13
<u>Finn Hill Masonry, Inc. v. Department of Labor and Industries</u> , 128 Wn.App. 543, 545, 116 P.3d 1033(Div. Two 2005)	28, 32
<u>Griggs v. Averbeck Realty, Inc.</u> , 92 Wn.2d 576, 599 P.2d 1289 (1979)	36
<u>Hatch v. Princess Louise Corporation</u> . 13 Wn.App. 378, 534 P.2d 1036 (Div. One 1975)	17
<u>In re Marriage of Maddix</u> , 41 Wn.App. 248, 703 P.2d 1062 (Div. Three 1985)	35

<u>Lybbert v. Grant County</u> , 141 Wn.2d 38, 1 P.3d 1124 (2000)	32
<u>Morin v. Burris</u> , 160 Wn.2d 745, 161 P.3d 956 (2007)	13, 22, 25, 36
<u>Morris v. Palouse River and Coulee City Railroad, Inc.</u> , 149 Wn.App. 361, 203 P.3d 1069 (Div. Two 2009), <u>review denied</u> 166 Wn.2d 1033, 217 P.3d 782 (2009)	15
<u>Old Republic National Title v. Law Office of Robert E. Brandt, PLLC</u> , 142 Wn.App. 71, 174 P.3d 133 (Div. Two 2008)	23, 24
<u>Olympic Forest Prods., Inc. v. Chaussee Corp.</u> , 82 Wn.2d 418, 422, 511 P.2d 1002 (1973)	31
<u>Operating Engineers Local 139 v. Rawson Plumbing, Inc.</u> , 130 F.Supp.2d 1022 (E.D. Wis.2001)	29, 30
<u>Quackenbush v. State</u> , 72 Wn.2d 670 , 434 P.2d 736 (1967)	44
<u>Rosander v. Nightrunners Transport, Ltd.</u> , 147 Wn.App. 392, 196 P.3d 711 (Div. Two 2008)	19
<u>Roth v. Nash</u> , 19 Wn.2d 731, 739, 144 P.2d 271 (1943)	13
<u>Sacotte Construction, Inc. v. National Fire & Marine Ins. Co.</u> , 143 Wn.App. 410, 177 P.3d 1147 (Div. One 2008)	23
<u>Seek Systems, Inc. v. Lincoln Moving</u> , 63 Wn.App. 266, 818 P.2d 618 (Div. Two 1991)	23
<u>Schell v. Tri-State Irrigation</u> , 22 Wn.App. 788, 591 P.2d 1222 (Div. Three 1979)	16, 17
<u>Sharebuilder Securities v. Hoang</u> , 137 Wn. 330, 153 P.2d 222 (Div. One 2007)	14, 15, 16
<u>State ex rel. Trickel v. Superior Court</u> , 52 Wn. 13, 100 Pac. Pac. 155 (1909)	22, 23
<u>State of Washington v. A.N.W. Seed Corp.</u> , 44 Wn.App. 604,	

722 P.2d 815 (Div. Three 1986)	36
<u>State of Washington v. Chambers</u> , 134 Wn.App. 853, 142 P.2d 668 (Div. Two 2006)	46
<u>Willapa Trading Co. v. Muscanto, Inc.</u> , 45 Wn.App. 779, 727 P.2d 687 (Div. One 1986)	27

Regulations and Rules

Civil Rule 6(e)	18
Civil Rule 11	40, 42, 44
Civil Rule 12(a)	21
Civil Rule 15(a)	1, 5, 38, 40, 43, 44, 45, 50
Civil Rule 54(b)	48
Civil Rule 55	2, 3, 9, 13, 17, 18, 20, 21, 24, 26, 32, 34
Civil Rule 55(a)	20
Civil Rule 55(a)(3)	18, 19, 20
Civil Rule 55(c)	36
Civil Rule 60(b)	1, 34, 38, 40
Civil Rule 60(b)(2)	4, 35, 36, 41
Civil Rule 60(b)(4)	3, 32, 33, 34, 35
Civil Rule 60(b)(5)	2, 13
Civil Rule 60(b)(11)	4, 41
Evidence Rule 401	47

Evidence Rule 403	47
Evidence Rule 801	45, 47
Evidence Rule 803	46
RAP 18.1(a)	49

Other Authorities

Washington State Constitution, Section 3	30
RCW 4.28.210	21
RCW 4.28.185(4)	2, 13, 14, 15, 16, 17
RCW 4.28.185(5)	2, 5, 48, 49, 50
4 Tegland's <u>Washington Practice Series</u> (5 th Ed. 2006), at CR 55, p. 329 9	21, 22
<u>9 Washington Practice</u> , Rule 4, at Section 4.52 (2000)	16

Appellant/defendant CIS Development Foundation, Inc. (“CISDF”) respectfully submits its opening brief on appeal.

A. ASSIGNMENTS OF ERROR

No. 1: The trial court erred and abused its discretion in entering its March 22, 2012 decision (the “Order”) (CP 377), denying CISDF’s Civil Rule 60(b) motion to vacate the November 7, 2011 “Order Re: Plaintiff’s Motion for Order of Default and Default Judgment” (hereinafter “the Default Judgment”) (CP 42).

No. 2: The trial court erred and abused its discretion in entering the Order (CP 377), further denying CISDF’s related Civil Rule 15(a) motion for leave to amend, file, and serve, a proposed, amended answer herein. (See Amended Answer at CP 86-102)

No. 3: The trial court erred and abused its discretion in entering its March 22, 2012 Order (CP 377), further denying CISDF’s motion to strike the hearsay portions of respondent Nataliya Makarenko’s (“Makarenko”) answering declarations in opposition to CISDF’s motion to vacate the Default Judgment. (See motion to strike at CP 355-356)

No. 4: The trial court erred and abused its discretion in entering its March 22, 2012 Order (CP 377), further denying CISDF’s motion for fees and costs under the State’s long arm jurisdiction statute,

RCW 4.28.185(5).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

This case presents the following issues:

(1) Did the trial court err in declining to vacate the Default Judgment (CP 42), pursuant to Civil Rule 60(b)(5) and RCW 4.28.185(4), in light of Makarenko's defective "statutory affidavit" which deprived the court of personal jurisdiction over CISDF and rendered the judgment void as a matter of law. (See CP 12, Declaration of Ronald T. Adams, dated August 8, 2011)

(2) Did the trial court err in declining to vacate the Default Judgment (CP 42), pursuant to Civil Rule 60(b)(5), in light of Makarenko's failure to provide the required notice under Civil Rule 55, which denied procedural due process to CISDF and rendered the Default Judgment void as a matter of law?

(3) Did the trial court err in the rejection of CISDF's October 3, 2011 answer and counterclaim (CP 65-72) as constituting, at the very least, "substantial compliance" with the requirements for a general appearance, thus triggering its right to notice under Civil Rule 55?

(4) Did the trial court err, and violate CISDF's right to due process of law, in treating CISDF's pro se answer and counterclaim (CP

65-72) as in effect a nullity for purposes of determining Makarenko's notice requirements for a motion for default under Civil Rule 55, without providing any prior notice or opportunity to CISDF to correct its technical failure to retain independent legal counsel?

(5) Did the trial court err in allowing Makarenko to object after entry of the Default Judgment to CISDF's October 3, 2011 pro se answer and counterclaim (CP 65-72), despite Makarenko's contrary efforts before entry of the Default Judgment to have CISDF file an appearance or an answer? And, did the trial court err in rejecting CISDF's related defenses of waiver and estoppel to Makarenko's belated objection to the pro se answer and counterclaim?

(6) Did the trial court err in declining to vacate the Default Judgment under Civil Rule 60(b)(4) on grounds of misconduct, due to Makarenko's counsel presenting an incomplete, and misleading, account of CISDF's answer and counterclaim in her motion for default? (See Makarenko's Motion for Order of Default at CP 15, Declaration of Ronald T. Adams at CP 19, and Declaration of Nataliya Makarenko at CP 36)

(7) Alternatively, did the trial court err in declining to vacate the Default Judgment, under Civil Rule 60(b)(1), on grounds of mistake,

inadvertence, and/or excusable neglect on CISDF's part in failing to file its otherwise timely served answer and counterclaim? (CP 65-72)

(8) Alternatively, did the trial court err in declining to vacate the Default Judgment under Civil Rule 60(b)(11) and to allow this dispute to be adjudicated on the merits, on grounds of fundamental fairness and equity, when: (i) Makarenko's claim against non-profit corporation CISDF involved irregular and suspect allegations relating to her and her representative's own conduct, (ii) CISDF timely delivered over \$1,300,000 in donated clothing to the Ukrainian charity in exchange for Makarenko's \$46,500 cash donation, (iii) CISDF has suffered and will suffer substantial prejudice to its good reputation and name as a longstanding and well-recognized charity if the Default Judgment remains and it is not allowed a hearing on the merits of Makarenko's claim, and (iv) Makarenko will suffer little or no prejudice by allowing this matter to be tried on the merits.

(9) Did the trial court err in declining to grant CISDF's Civil Rules 15(a) motion for leave to amend its answer and counterclaim, concurrently with the vacation of the Default Judgment?

(10) Did the trial court err in declining to award CISDF its reasonable attorneys' fees and costs under RCW 4.28.185(5), in conjunction with the requested vacation of the Default Judgment?

C. STATEMENT OF THE CASE

1. The Parties.

Respondent Makarenko is a resident of Clark County, Washington. (CP 36 at Par. 2) Appellant CISDF is a New Jersey non-profit corporation. (CP 47 at Par. 1)

CISDF is a longstanding charitable organization, with IRC 501(c)(3) status, which since its formation in 1994 has received donations of clothing and other humanitarian aid, which are stored in its warehouse and then shipped to non-profit organizations throughout the world, including for example the Ukraine, Georgia, and the Russian Federation. (CP 48-49 at Pars. 3-6)

CISDF has worked for many years with some of the largest charitable organizations in the United States, including Gifts in Kind International, World Vision, Matthew: 25 Ministries, Feed the Children, Operation Compassion, International Aid, and Gleaning for the World. (CP 48-49 at Par. 4) For fiscal year 2009-2010, CISDF re-distributed over 123 containers of humanitarian aid to non-profit organizations

within 14 countries, including the Ukraine, Estonia, Lithuania, Kyrgyzia, and Moldava. (CP 49 at Par. 5) CISDF has worked hard to establish and maintain its excellent reputation as a charitable organization (CP 49 at Par. 6), and has always intended to vigorously defend any allegations against it bearing on its reputation and conduct, including the allegations made by Makarenko in this lawsuit. (CP 53 at Par. 19; CP 65-72)

2. The Proceedings.

CISDF was served with the summons and complaint in this matter by service on its registered agent in New Jersey on about August 19, 2011. (CP 53 at Par. 17) In support of the out-of-state service, Makarenko's counsel filed a jurisdictionally defective statutory declaration on August 8, 2011 (CP 12, CP 171-172) that vaguely and non-descriptively stated, without any attachment(s):

We cannot personally serve this document within Washington state.

[Emphasis added]

In her complaint, Makarenko claims that she made a donation of \$46,500 to CISDF in May 2010 specifically for the purchase and shipment of clothing to a charity (St. Nicholas) in the Ukraine; that she selected the specific clothing to be purchased and shipped; and, that once

shipped, her brother (Sasha) would ultimately receive the goods from the charity for re-distribution. (CP 5) She further claims that the clothing delivered by CISDF to St. Nicholas was not the clothing she allegedly had selected. (CP 5)

CISDF, acting pro se, timely served a detailed, line item by line item, answer, which responded to Makarenko's complaint. (CP 53 at Par. 18; CP 65-72) This was received by Makarenko's counsel by mail on or about October 3, 2011, forty-five (45) days after service on CISDF's registered agent. (CP 20 at Par. 5) In its answer, CISDF vigorously denied Makarenko's allegations, asserting that it had done everything it had promised to do, or was required to do, when it timely shipped three containers of its own previously donated clothing (with a value of over \$1,300,000) to the St. Nicholas charity in the Ukraine in May 2010. (CP 70 at Par. 25, and CP 72 at Pars. 35, 36) CISDF further asserted in its answer that it only receives donations of cash or humanitarian aid (such as clothing) (CP 68 at Par. 16), that it has never purchased clothing to be subsequently donated (CP 68 at Par. 16), that it only distributes clothing to reliable charitable institutions with which it has established a contractual relationship (CP 68-69 at Pars. 17 and 19, and CP 71 at Par. 30), and that it has no knowledge of and never

participated in any additional or contrary arrangements involving the Ukrainian charity's alleged re-distribution of humanitarian aid (i.e., clothing) to an unapproved third-party, as alleged by Makarenko. (Id.)

CISDF's pro se answer not only denied the allegations of misconduct made in Makarenko's complaint, but also asserted a counterclaim for "moral damages" against Makarenko for the assertion of what CISDF contends is a baseless claim. (CP 72) Item # 3 of CISDF's "Wherefore" clause, on the last page of its answer, specifically states:

CISDF rejects charge in fraud and puts forward the counterclaim to Ms. Nataliya Makarenko in the amount of \$1.00 for the moral damage of the CISDF's fair name .and any other relief deemed just, equitable or appropriate by this court, if Ms. Nataliya Makarenko will not [be] satisfied by [these] allegations.

[Emphasis added]

(Id.)

CISDF believed it had done everything required of it, in the timely serving of its answer and counterclaim on Makarenko's attorney. (CP 53-54 at Pars. 18-21)

CISDF next received from Makarenko's counsel an October 24, 2010 letter, which enclosed a proposed, but unsigned motion for default,

along with proposed, but unsigned, supporting declarations of attorney Ronald T. Adams and Nataliya Makarenko. (CP 53 at Par. 20; CP 184-189) Mr. Adams' October 24 letter stated that he would file a motion for default "within five days from the date of this letter" if CISDF did not "file" its answer by that time (emphasis added). (CP 184)

Makarenko's unsigned motion further asserted on pages 1, 2, and 3 that CISDF had failed to file its answer or otherwise appear (CP 185-187), and failed to make any reference to her counsel's receipt three weeks earlier of CISDF's answer and counterclaim. The declaration of Makarenko's counsel even more disingenuously asserted at Paragraph 5 that counsel had received on October 3, 2011 a mere "letter" which "generally denied my client's allegations in the complaint, but did not state that CISDF intended to file an appearance or otherwise defend against this action." (CP 189)

Makarenko's counsel next mailed to the trial court and CISDF a signed motion for default on November 2, 2011. (CP 218) The signed motion was not noted for hearing, nor was proper CR 55 notice (5 days' plus 3 days for service by mail) provided to CISDF. (CP 15, 19, 36) The motion for default provided the same, curious focus (as did the unsigned copy forwarded a week earlier) on CISDF's failure to file an answer or

appearance, and again failed to disclose to the trial court timely service by CISDF of an answer and counterclaim on Makarenko's counsel. (CP 15-17) The accompanying, now signed, declaration of Makarenko's counsel tracked the unsigned copy forwarded to CISDF a week earlier, again grudgingly but vaguely referencing receipt of a "letter" on October 3, 2011, while misleadingly asserting that CISDF has shown no intent to appear and defend. (CP 19)

Meanwhile, the daughter of the principals of CISDF worked as an assistant in a law firm in New York City, and brought the October 24, 2011 letter and enclosures from Makarenko's counsel to Alex K. Ross, one of the lawyers in that office. (CP 77 at Par. 2-3) Mr. Ross contacted one of Makarenko's counsel on his own initiative on November 2, 2011, and discussed the impropriety of obtaining a default judgment when an answer had been served. (CP 78 at Par. 4) But, despite this admonition, Makarenko's counsel, Caitlin Wong, stated that: the motion had been filed the day before with the trial court; in her opinion the October 3, 2011 constituted a letter and not an answer; and, the letter had never been filed with the trial court. (CP 78 at Pars. 4 - 5)

The default judgment was entered on November 7, 2011. (CP 42)

After the daughter of CISDF's principals reported back to them, CISDF diligently attempted to obtain defense counsel in the State of Washington, retaining counsel on November 21, 2011. (CP 54 at Par. 22; CP 81 at Par. 3) Defense counsel futilely attempted over the course of a month to negotiate a vacation of the default judgment. (CP 81 at Pars. 3 – 4) During this prolonged series of negotiations, Makarenko's counsel agreed that any time required for their negotiations would not be used against CISDF, if a motion to vacate were ultimately necessary. (Supra at Par. 3)

CISDF's efforts failed, and its motion papers in support of an order to show cause why the judgment should not be vacated, for leave to amend the October 3, 2011 answer and counterclaim, and for attorneys' fees, were filed with the trial court on December 23, 2011. (CP 46, 73, 80, 105, 130) These included Declarations of Alexander Bondarev, President of CISDF, and Maria Bondareva, Logistic Manager, of CISDF, which refuted the allegations in Makarenko's complaint, and attached supporting documentation to demonstrate that CISDF had fully performed its obligations to Makarenko. (CP 47-72; 74-76)

Makarenko answered CISDF's motion to vacate with three declarations of Makarenko, and her two lawyers (Ronald T. Adams and

Caitlin Wong), which were replete with patently inadmissible hearsay allegations. (CP 150, 147, 156) A subsequent cross-motion to strike the hearsay portions of Makarenko's answering papers was filed by CISDF, along with its reply and supplemental declarations of attorney Terry E. Thomson, Alexander Bondarev, and New York attorney Alex Ross, as well as additional briefing in further support of the motion to vacate. (CP 307, 310, 316, 340, 342, 354)

The trial court entered its "Court's Decision" on March 22, 2012, denying all of CISDF's motions and allowing the Default Judgment to stand. (CP 377) The trial court's decision adopted Makarenko's line, stating that CISDF's President "posted a letter to plaintiff's attorney" that "was never filed with the court," and asserting on page three that its "failure to timely appear was inexcusable neglect." (CP 377, 379) The trial court's decision further stated "there may be prima facie evidence of a defense; however, it is not a conclusive defense," but without explanation of why the existence of a complete defense was in the slightest doubt on this record. (CP 379) The trial court's decision further alleged that "substantial hardship" would accrue to Makarenko if the Default Judgment was vacated, but again without further explanation of what that hardship might be based on this record. (CP 379) The trial

court did acknowledge that Makarenko's counsel, Caitlin Wong, was advised by New York City attorney on November 2, 2011 that "he was looking for local counsel since he was not licensed to practice law in Washington." (CP 378)

CISDF filed its Notice of Appeal, seven days later after the trial court's decision, on March 29, 2012. (CP 381)

D. ARGUMENT

1. Standard of Review on Appeal.

A trial court's decision on a motion to vacate a default judgment is reviewed for abuse of discretion. Roth v. Nash, 19 Wn.2d 731, 739, 144 P.2d 271 (1943). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." Braam v. State, 150 Wn.2d 698, 706, 81 P.3d 851,860-861 (2003).

Questions of law are reviewed de novo, including questions relating to adequacy of notice and Constitutional law. Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956, 960 (2007); Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

2. The Trial Court Erred in Declining to Vacate the Default Judgment Pursuant to Civil Rule 60(b)(5) and RCW 4.28.185(4).

First and foremost, the November 7, 2011 default judgment is void as a matter of law, due to Makarenko's non-compliance with the

“statutory affidavit” requirements of RCW 4.28.185(4). The trial court’s decision ignores this issue completely in its March 22, 2012 decision. (CP 377)

RCW 4.28.185(4) provides that:

Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

[Emphasis added]

A mere recitation of the language in RCW 4.28.185(4) has been held to be jurisdictionally insufficient. In Sharebuilder Securities v. Hoang, 137 Wn. 330, 153 P.2d 222, 224 (Div. One 2007), the Court of Appeals addressed this issue and held:

In addition to incorporating the language of RCW 4.28.185(4), the affidavit should describe the circumstances that prevent in-state service. Substantial, rather than strict, compliance with RCW. 4.28.185(4) is permitted. However, substantial compliance means that, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state

[Emphasis added]

In Sharebuilder Securities, supra at 153 P.2d 224, the appellate court found insufficient under RCW 4.28.185(4) a pre-judgment

affidavit of service which stated, without anything more, that defendants had been served at their home in California:

The above language does not substantially comply with RCW 4.28.185(4). The mere statement that Hoang was served at her California residence does not lead to the logical conclusion that she could not be served within the state. She might also have a residence in Washington, or frequent Washington for business purposes.

Similarly, in Morris v. Palouse River and Coulee City Railroad, Inc., 149 Wn.App. 361, 203 P.3d 1069, 1071 (2009), review denied 166 Wn.2d 1033, 217 P.3d 782 (2009), Division Two held two pre-judgment affidavits of service - attesting to Idaho service - insufficient under RCW 4.28.185(4):

Mr. Morris' two affidavits of service in our record do not explain why service could not be made on any of PCC's stations, freights, tickets or agents within Washington.

Because the process server served Mr. Morris' summons and complaint on an individual at PCC's Idaho office without explanation why service could not be made in Washington as required under RCW 4.28.080(4), service was invalid. Thus, the trial court did not have personal jurisdiction over PCC. The judgment was, therefore, void. The court abused its discretion in denying PCC's motion to vacate under CR 60(b)(5).

In contrast, in Barr v. Interbay Citizens Bank of Tampa, Florida, 96 Wn.2d 692, 696, 649 P.2d 827 (1982), the plaintiff's pre-judgment affidavit was held sufficient under RCW 4.28.185(4), where:

In fact, affidavits were submitted on behalf of defendant which stated defendant was not licensed to do business in Washington, had no officers, agents or employees in Washington, transacts no business in Washington of any sort and that all of its employees are citizens of Florida. . . . The logical conclusion from the language in the affidavits is that there were no authorized personnel in Washington for plaintiff to serve. The affidavits are thus, in the language of the statute, "to the effect that service cannot be made within the state."

A proposed jurisdictionally acceptable, statutory affidavit form is set forth in the Civil Procedure Forms and Commentary in 9 Washington Practice, Rule 4, at Section 4.52 (2000). This recognized treatise consistently notes, in the commentary to the form of the affidavit, that the attorney should "set forth facts showing that service cannot be made within the State" (emphasis added).

Failure to comply with RCW 4.28.185(4) deprives the trial court of personal jurisdiction over a defendant, violates due process, and renders the judgment void. Sharebuilder Securities v. Hoang, *supra* at 153 P.3d 224; Schell v. Tri-State Irrigation, 22 Wn.App. 788, 791, 591 P.2d 1222 (Div. Three 1979); Hatch v. Princess Louise Corporation, 13 Wn.App. 378, 380, 534 P.2d 1036 (Div. One 1975).

In Makarenko's case, her statutory declaration does not even quote verbatim from RCW 4.28.185(4), let alone explain why service of

process was not possible. The August 9, 2011 declaration of her counsel anemically asserts that “this document”, without further explanation, cannot be personally served within the State. (CP 12; CP 171 – 172) Nor is there any clarification of “which” document cannot be served, and there is no attachment to the declaration.

This pronounced failure to comply with RCW 4.28.185(4) rendered the November 7, 2011 default judgment void as a matter of law. The trial court abused its discretion in refusing to vacate the judgment on this ground alone.

The irony (and fundamental unfairness) cannot be overlooked here, in Makarenko’s strenuous argument for the most liberal interpretation of RCW 4.28.185(4) and benevolent treatment of its statutory affidavit (even when patently deficient), while at the same time demanding a draconian, strict, and unforgiving application of the law and equity to CISDF’s detailed, comprehensive October 3, 2011 answer and counterclaim, and general appearance.

3. The Trial Court Erred in Declining to Vacate the Default Judgment for Insufficient Notice under Civil Rule 55.

The trial court further erred in refusing to vacate the default judgment for insufficient notice under Civil Rule 55. This issue was also ignored by the trial court in its March 22, 2012 decision. (CP 377)

It is undisputed that Makarenko mailed her motion for default and default judgment to the trial court by letter dated November 2, 2011, without service of a proper Note for Hearing. (See CP 218) The trial court's docket shows that Makarenko's counsel's correspondence and motion papers were received by the Court on about November 4, 2011, and the default and default judgment were entered shortly thereafter. (CP 15, 19, 36)

While CISDF was copied on the November 2, 2012 motion papers which Makarenko's counsel sent to the Court, there was no hearing set for the motion for default, no note for hearing, and CISDF was provided less than the required eight (8) days notice for service of the motion by mail addressed to it in New Jersey. See Civil Rules 6(e) and 55(a)(3).

Makarenko's failure to provide formal notice of her Civil Rule 55 motion for default and default judgment, and note for hearing, rendered the November 7, 2011 default judgment void on due process grounds. Division Two recently applied longstanding precedent to this effect in

Rosander v. Nightrunners Transport, Ltd., 147 Wn.App. 392, 196 P.3d

711, 714 (Div. Two 2008):

A trial court has no authority to enter a default judgment against a party who has appeared but did not receive proper notice. CR 55(a)(3); *Shreve v. Chamberlin*, 66 Wash.App. 728, 731, 832 P.2d 1355 (1992), review denied, 120 Wash.2d 1029, 847 P.2d 481 (1993). As a result, a party who did not receive required notice is entitled as a matter of right to have a default judgment set aside. *Tiffin v. Hendricks*, 44 Wash.2d 837, 847, 271 P.2d 683 (1954); see also *Ware v. Phillips*, 77 Wash.2d 879, 884-85, 468 P.2d 444 (1970) (holding a lack of notice voids a judgment on due process grounds).

The trial court abused its discretion in refusing to vacate the judgment on this record, when there was an undisputed failure on Makarenko's part to comply with the formal, jurisdictional, notice requirements of Civil Rule 55.

Nor was any authority cited by Makarenko to support the argument that her counsel's mailing of his October 24, 2011 letter, and unsigned pleadings, to CISDF (CP 184-189), constituted a satisfactory substitute for the required mailing of a formal note for hearing and signed pleadings, with the required five days' notice and three additional days for service by mail, under Civil Rule 55.

4. The Trial Court Erred in Disregarding CISDF'S Answer and Counterclaim, for Purposes of Determining Whether It Had Appeared and Whether he Notice Requirements of Civil Rule 55 Had Been Triggered.

In resisting CISDF's motion to vacate, Makarenko has sought to justify her failure to comply with the notice requirements of Civil Rule 55 by treating CISDF's unfiled October 3, 2011 answer and counterclaim as a nullity, a non-event, which she could (and did ignore) with impunity. The trial court erred in adopting the same approach, making its seminal determination that CISDF's "failure to timely appear was inexcusable neglect." (CP 379)

Makarenko fails to cite to a single case, or legal authority, in support of her proposition that a filing is a prerequisite to a general appearance.

Makarenko's form Summons does not even prescribe that a defendant's appearance or answer be filed, in order to avoid the possibility of a default. (CP 1, 3) The Summons states on page 1 (CP 1) that CISDF must timely respond "by servicing a copy upon the person signing this summons" (emphasis added) The Summons further states, on page 2 (CP 2), that "[i]f you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered" (emphasis added).

Civil Rule 55 similarly does not mandate that a defendant's appearance be filed, as a condition precedent to avoiding a default or entitlement to notice of a motion for default. Civil Rule 55(a) only addresses the situation where a defendant has "failed to appear, plead, or otherwise defend as provided by these rules." And, Civil Rule 12(a) states that a defendant "shall serve his answer" (emphasis added) within the prescribed period of time, without conditioning its effectiveness on a filing with the Court.

RCW 4.28.210 provides that a defendant appears in a case in a number of ways, including but not limited to "when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance." Again, a filing is not identified as a condition precedent to a proper appearance.

4 Tegland's Washington Practice Series (5th Ed. 2006), at CR 55, p. 329 similarly notes:

A written notice of appearance need not be filed with the clerk of court to constitute an effective appearance; proper service of the notice is sufficient to entitle the appearing party to notice of all subsequent proceedings in the cause. [Citations omitted]

[Emphasis added]

Nor do our State's appellate court decisions require a filing of an appearance with the court, to avoid a default. In the seminal case, Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956, 961-962 (2007), the Washington State Supreme Court re-assessed and re-defined what constitutes a general appearance, but with respect to actions taken by a defendant after the commencement of a lawsuit re-affirmed the concept of an informal appearance. It further cited in support of its holding to a 1909 case, State ex rel. Trickel v. Superior Court, 52 Wn. 13, 100 Pac. 155 (1909), where a defendant had not filed a formal notice of appearance in court, but had served interrogatories upon the plaintiff:

Substantial compliance with the appearance requirement may be satisfied informally. Cf. State ex rel. Trickel v. Superior Court, 52 Wash. 13, 100 P. 155 (1909).

Turning to the narrower issue of what constitutes an "appearance" under the civil rules, for over a century, this court has applied the doctrine of substantial compliance. See, e.g., Trickel, 52 Wash. 3, 100 P. 155. We have not exalted form over substance but have examined the defendants' conduct to see if it was designed to and, in fact, did apprise the plaintiffs of the defendants' intent to litigate the cases. However, where we have applied the substantial compliance doctrine, the defendant's relevant conduct occurred after litigation was commenced. Trickel, 52 Wash. at 14, 100 P. 155 (the defendant did not file a formal notice of appearance but served interrogatories upon the plaintiff)

[Emphasis added]

Supra.

In Old Republic National Title v. Law Office of Robert E. Brandt, PLLC, 142 Wn.App. 71, 174 P.3d 133, 135 (2008), Division Two again held that “substantial compliance with the appearance requirement may be satisfied informally,” and that even a “telephone call can constitute a notice of appearance.” In Sacotte Construction, Inc. v. National Fire & Marine Ins. Co., 143 Wn.App. 410, 177 P.3d 1147, 1150 (2008), Division One of the Court of Appeals similarly held that even one telephone call is sufficient to constitute an appearance, where the defendant “has shown intent to defend in court,” and it would be inequitable to enter a default judgment in such circumstances. See also Seek Systems, Inc. v. Lincoln Moving, 63 Wn.App. 266, 270, 818 P.2d 618 (Div. Two 1991).

In sum, our Courts have continued to liberally apply the concept of an “appearance” under Civil Rule 55 for purposes of preventing inequitable default judgments being entered by overzealous plaintiffs (such as Makarenko) against defendants. City of Des Moines v. Personal Property Identified as \$81,231 in U.S. Currency, 87 Wn.App. 689, 696 - 697, 943 P.2d 669 (Div. One 1997). “Substantial compliance” remains the rule, and even “informal acts” (i.e., actions other than a formal filing)

may constitute an “appearance”. Morin v. Burris, 160 Wn.2d 745, 755, 161 P.3d 956 (2007); Old Republic Title v. Law Offices of Robert E. Brandt, PLLC, 142 Wn.App. 71, 174 P.3d 133 (Div. Two 2008).

In sum, whether we apply the applicable court rules, statutory law, or judicial precedent, on what constitutes an appearance, CISDF satisfied all of them with its timely served October 3, 2011 answer and counterclaim. The trial court erred in holding otherwise.

But, there is a related, and even more disturbing, element to Makarenko’s motion for default, and the trial court’s entry of a Default Judgment. This is the highly disingenuous nature of the representations and omissions used to obtain the Default Judgment in the first place. Makarenko’s counsel, in support of her original motion for default: (i) failed to attach a copy of CISDF’s October 3, 2011 answer and counterclaim (CP 65-72), (ii) disparaged CISDF’s answer and counterclaim as a mere “letter”, and (iii) quixotically asserted that this document “did not state that CISDF intended to file an appearance or otherwise defend against this action.” (CP 19 – 20)

The only things about CISDF’s October 3, 2011 answer (CP 65 – 72) that have the characteristics of a “letter” are the presence of CISDF’s letterhead, Makarenko’s counsel as addressee, and the introductory

statement “Dear Sir” on page one. However, everything else about this document is entirely consistent with that of a formal answer to a complaint. The case caption and case # are identified up front. The document utilizes the paragraph numbering in Makarenko’s complaint. It provides a line by line answer or denial to the allegations in the complaint. It ends with a “wherefore” clause, which identifies the relief sought by CISDF from the trial court.

For a pro se party, in particular, the format and language utilized in CISDF’s seven-page, single-spaced, document are far removed from a mere letter. It has all the formality and gravity of a formal pleading.

Moreover, CISDF’s intent to appear and defend could not have been more clear. This is true, even if the declaration of Makarenko’s counsel, in support of her motion for default, was correct to the extent that CISDS did not use the precise words “it intends to file an appearance” and “it intends to defend against this action”. But, the introductory statement reads: “Please accept our allegations for each point of your complaint.” (CP 65) And, the closing paragraph (CP 72) is entitled “WHEREFORE” (emphasis in original) and reads in pertinent part:

CISDF rejects charge in fraud and puts forward the counterclaim to Ms. Natalia Makarenko in the amount of

\$1.00 for the moral damage of the CISDF's fair name (plus prejudgment interest; and any other relief deemed-just, equitable, or appropriate by this court, if Ms. Nataliya Makarenko will not be satisfied by [these] allegations.”

Logically, the very assertion of a counterclaim and demand for relief “by this court” (CP 62), without more, is enough to evidence CISDF's intent to appear, defend, and pursue its own claim against Makarenko. How else can one reasonably interpret this language?

5. The trial court erred and denied CISDF's right to due process of law in accepting Makarenko's belated objections to CISDF's pro se answer and counterclaim, and in rejecting CISDF's related defenses of waiver and estoppel.

The trial court looked the other way when it came to (i) Makarenko's deficient statutory affidavit, (ii) her lack of formal notice under Civil Rule 55, and (iii) her counsel's questionable assertions about CISDF's answer and intent to appear and defend. Yet, at the same time, the trial court took the most severe and almost punitive approach possible to CISDF's timely served, but unfiled answer. This inconsistent approach can only be explained by the trial court's tacit acceptance of Makarenko's belated argument, after the entry of judgment, that CISDF's pro se answer was a nullity and could be ignored altogether.

Makarenko cited to no Washington authority which supported her position that a pro se party's appearance is a nullity. Nor does the impropriety of one party appearing pro se logically lead to the result that the other party can unilaterally and silently disregard the pro se party's appearance in its entirety, in particular for purposes of a CR 55 motion for default judgment. In fact, in Willapa Trading Co. v. Muscanto, Inc. , 45 Wn.App. 779, 727 P.2d 687 (Div. One 1986), the Court of Appeals held that it was not an abuse of discretion for the trial court to permit the president of a corporation to appear on his own behalf and on behalf of the corporation in a shipping dispute.

Irrespective of the procedural irregularity in a pro se appearance, a party should as a matter of due process and fundamental fairness (and in furtherance of judicial policy favoring adjudication of claims on their merits) be given a reasonable amount of time to correct this error. In Biomed Comm. v. Department of Health, Board of Pharmacy, 146 Wn.App. 929, 932-933, 193 P.3d 1093 (Div. One 2008), an administrative appeal was improperly filed by a pro se corporation and then dismissed at the Superior Court level. The Court of Appeals reversed the dismissal, on the grounds the Superior Court had failed to

give the corporation a reasonable time to hire counsel and cure the error, holding at 146 Wn.App. 929:

In an appeal of an administrative agency decision, a court may strike a pleading of a corporation that is not signed by an attorney, provided that the court gives the corporation a reasonable time to correct the error.

[Emphasis added]

In Cottringer v. State of Washington, 162 Wn. App. 782, 257 P.2d 667, 669 (Div. One 2011), a pro se petition for review by a corporate appellant was stricken, but again only after the appellant had failed to retain counsel within a 30-day period established by the trial court.

Division Two's holding in Finn Hill Masonry, Inc. v. Department of Labor and Industries, 128 Wn.App. 543, 545, 116 P.3d 1033, 1034 (Div. Two 2005), where a corporation's representation of itself in Superior Court proceedings and on appeal was permitted, is to the same effect:

Had the Department raised the matter in superior court, we assume that the court would have struck the pleadings and allowed Finn Hill time to obtain counsel. As well, if the Department had appropriately raised the issue before us, we would probably have struck the brief and allowed Finn Hill time to obtain counsel.

Appellate courts in other jurisdictions have similarly recognized a pro se pleading as a curable defect (see, e.g., CLD Const., Inc. v. City of San Ramon, 16 Cal.Rptr.3d 555 (Cal.App.1st Dist. 2004)), and that a party appearing pro se must be provided reasonable notice that it is required to appear with legal counsel. Operating Engineers Local 139 v. Rawson Plumbing, Inc., 130 F.Supp.2d 1022 (E.D. Wis.2001)

A well-reasoned decision in Operating Engineers Local 139 v. Rawson Plumbing, Inc., supra at 1023-1024, not only followed this line of authority, but also held that the failure to provide notice and an opportunity to cure an improper appearance may constitute a violation of the pro se party's right to due process under the 5th Amendment to the U.S. Constitution:

Plaintiffs' preferred remedy is to enter default and default judgment immediately. This would require treating defendant's attempted answer as a nullity, rather than merely a defectively-signed pleading. Plaintiffs cite no authority to treat an attempted answer as a nullity, and I am unable to find any. Moreover, Rule 55(b)(2) requires that before default judgment may be entered, a party that has "appeared in the action" must be given notice. This requirement is satisfied "where that party has actually made some presentation or submission to the district court in the pending action," Zuelzke Tool & Engineering Co. v. Anderson Die Castings, Inc., 925 F.2d 226, 230 (7th Cir.1991) (emphasis omitted), and thus appears to be satisfied by a defective pleading. Moreover, there is a

strong policy favoring the adjudication of cases on their merits over default judgment. Sec. Ins. Co. of Hartford v. Schipporeit, Inc., 69 F.3d 1377, 1381 (7th Cir.1995). In addition, it is not obvious to a layperson that a non-attorney corporate officer may not appear pro se on a corporation's behalf. Given the significance of summary default or dismissal, a corporation attempting to proceed pro se must be provided notice that it is required to appear by counsel, just as a pro se plaintiff must be provided notice of the serious consequences of failing to submit affidavits in response to a motion for summary judgment. Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir.1982). Imposing a default judgment, without advance notice or warning, upon a corporation that attempted to answer a complaint might well violate the Fifth Amendment's due process requirements. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) ("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause").

CISDF has been deprived of the same right to due process of law under Section 3 of the Washington State Constitution, which guarantees that "No person shall be deprived of life, liberty, or property, without due process of law." Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wn.2d 418, 422, 511 P.2d 1002 (1973)

Ironically, Makarenko's counsel conceded in her answering memorandum (CP 261, at p. 10, ll. 6-7) that she "could have moved" to have the pro se answer stricken and, then, requested a default judgment.

In fact, this is precisely what Makarenko should have done, so that the trial court would have been fully apprised of the circumstances, and CISDF would have been provided a reasonable period of time to correct any defects relating to its pro se status.

It was also unfair for the trial court to allow Makarenko to object for the first time after the entry of the Default Judgment, and solely for purposes of defeating CISDF's motion to vacate, to its pro se status. This objection was inconsistent with the October 24, 2011 letter and draft motion papers Makarenko's counsel sent to CISDF, purportedly to encourage it to file an appearance or answer with the trial court. Makarenko's objection was further inconsistent with its November 2, 2011 motion for default judgment, where the thrust of the argument for default was CISDF's failure to file something with the Court. Prior to the entry of the Default Judgment, no objection had been made by Makarenko about CISDF's pro se communications.

Makarenko's untimely objection to CISDF's pro se status was also mooted by the fact CISDF had by then retained independent legal counsel to appear and prosecute its motion to vacate, and to amend the pro se answer. Any possible defect in CISDF's earlier pro se appearance and answer had already been cured by the time of its motion to vacate.

In Finn Hill Masonry, supra, Division Two of the Court of Appeals held that the Department of Labor and Industries had waived its objection to Finn Hill Masonry's pro se appearance, by failing to assert a timely objection. In an analogous situation, the Supreme Court held in Lybbert v. Grant County, 141 Wn.2d 38-39, 1 P.3d 1124 (2000) that a waiver of the defense of insufficient service of process can occur (i) if a party's assertion of that defense was inconsistent with its previous behavior, or (ii) if the party was dilatory in asserting his defense. A waiver may be established by express agreement, or be inferred from circumstances indicating an intent to waive. Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). On this record, the trial court should have found that Makarenko had by her conduct waived any objection to CISDF's pro se status, at least for purposes of determining the merits of its motion to vacate, and Makarenko's compliance with the formal notice requirements of Civil Rule 55.

The doctrine of judicial estoppel should have further been applied by the trial court to reject Makarenko's post-judgment objection to CISDF's prior pro se status. Makarenko's belated objection was made for one purpose only – to overcome her counsel's failure to comply with the formal notice requirements of Civil Rule 55. Her

objection had nothing to do with maintaining the integrity of the court proceedings, inasmuch as CISDF had retained counsel by this point. And, Makarenko's objection was inconsistent not only with her October 24, 2011 letter to CISDF (which attempted to get it to file something with the trial court), but also with her subsequent November 2, 2011 motion for default (which was premised solely on CISDF's failure to do so). "Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage." Ashmore v. Estate of Duff, 165 Wn.2d 948, 951-952, 205 P.3d 111 (2009).

The trial court erred in rejecting CISDF's defenses of waiver and estoppel to Makarenko's untimely objections to its earlier pro se status.

6. The trial court erred in declining to vacate the default and default judgment for misconduct under Civil Rule 60(b)(4).

The trial court should have been loath to condone the half-truths and omissions in Makarenko's motion for default and default judgment, and vacated the Default Judgment under Civil Rule 60(b)(4) on grounds of misconduct alone. See In re Marriage of Maddix, 41 Wn.App. 248, 703 P.2d 1062 (Div. Three 1985)

Full disclosure by Makarenko to the trial court, at the time of submission of its motion for default and default judgment, about

CISDF's appearance and answer would have avoided entry of the Default Judgment, and the costly and burdensome motion practice and appeal that have followed.

Makarenko's questionable assertions and omissions in her original pleadings in support of her motion for default judgment include the following:

1. Failure to provide a copy of CISDF's October 3, 2011 answer and counterclaim to the trial court, along with her other motion papers. Providing a copy would have exposed Makarenko's inaccuracies, and alerted the trial court to the existence of a general appearance, if not an answer and counter claim, to Makarenko's complaint.
2. The misleading description of CISDF's comprehensive 7-page, single-spaced, October 3, 2011 answer as a mere "letter", when it was much more. (CP 20, at Par. 5)
3. The misleading claim that CISDF had shown no intent of appearing or defending itself, when in fact it had timely served its answer, asserted a counterclaim against Makarenko, sought "moral damages" on its counterclaim, and sought other relief as the trial court

deemed appropriate. (CP 20, at Par. 5)

4. The misleading and confusing assertions in her motion papers to CISDF's failure "to file" as the sole basis for entry of a default and default judgment without proper notice under CR 55, when no legal authority conditions the right to notice on the physical filing of an answer or appearance. (CP 15 – 17)

The trial court erred in declining to vacate the default and default judgment on this record for misconduct, pursuant to Civil Rule 60(b)(4).

7. Alternatively, the trial court erred in declining to vacate the default and default judgment under Civil Rule 60(b)(1) for CISDF's mistake, inadvertence, and/or excusable neglect in not filing its answer and counterclaim.

Even if we put aside Makarenko's defective statutory affidavit, lack of formal notice under Civil Rule 55, and less than full disclosures to the trial court, the trial court further erred in refusing to vacate the defaults pursuant to Civil Rule 60(b)(1) due to at worst mistake, inadvertence, and/or excusable neglect on CISDF's part.

The gist of Makarenko's position (and the one adopted by the trial court) is that the default judgment should be sustained, due to the technical failure of a pro se defendant to physically file with the trial

court an otherwise timely served answer and counterclaim. This position runs contrary to longstanding judicial policy favoring the adjudication of claims on the merits. Numerous appellate court decisions have held that default judgments should be “liberally set aside” under Civil Rule 60 (b) and Civil Rule 55(c), “for equitable reasons in the interest of fairness and justice.” Morin v. Burris, *supra* at 160 Wn.2d 749.

It is well recognized that “[d]efault judgments are not favored in the law and are considered one of the most drastic actions a court may take to punish disobedience to its commands.” State of Washington v. A.N.W. Seed Corp., 44 Wn.App. 604, 607 722 P.2d 815 (Div. Three 1986) (citing to Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 581-582, 599 P.2d 1289 (1979)) . “The fundamental guiding principle in the area of defaults is to do justice.” State of Washington v. A.N.W. Seed Corp., *supra* at 44 Wn.App. 607.

CISDF, acting pro se, served Makarenko’s counsel with its detailed, line item by line item, answer to the complaint, on the 45th day after service on its registered agent, well within the 60 day period set forth in the Summons for appearing or answering. CISDF believed it had done everything required of it to appear and avoid a default, in serving its answer and counterclaim on Makarenko’s attorney.

CISDF next received from Makarenko's counsel his October 24, 2011 letter, which enclosed a proposed unsigned motion for default. But, these papers did not make sense to CISDF, in light of what it believed to be full compliance with the Summons it had received, by service of an answer and counterclaim weeks earlier. And, the letter of Makarenko's counsel, and the accompanying unsigned motion papers, were factually and legally incorrect for the reasons set forth above.

Even New York counsel, who voluntarily contacted Makarenko's counsel in early November 2011, was puzzled by her counsel's actions, and the impropriety of seeking a default judgment in the circumstances.

When Makarenko's counsel persisted in moving forward with its un-noted motion for default, CISF moved as quickly as possible to find and retain suitable local counsel in the State of Washington to protect its interests. Local counsel was found within two weeks of entry of the default judgment on November 7, 2011. Ongoing efforts to negotiate the vacation of the judgment thereafter continued over the next month. When these efforts failed, counsel for CISDF filed a motion for an order to show cause why the default judgment should not be vacated.

These facts hardly present a scenario of "inexcusable neglect", in particular when Makarenko and her counsel were playing it fast and

loose with the statutory affidavit in support of out-of-state service, in disregarding the October 3, 2011 pro se answer and counterclaim, and in making at best marginal disclosures to the trial court in support of the original motion for default.

Nor are the time frames and asserted “delays” on the part of CISDF egregious. Only nine (9) days passed between the time of Makarenko’s counsel’s mailing of its October 24, 2011 letter (and unsigned pleadings) from this State to CISDF in New Jersey, and Makarenko’s mailing to the trial court of its un-noted motion for default on November 2, 2011. From this, the Court incorrectly finds “inexcusable” delay, overriding well-established precedent in favor of a trial on the merit and against a default?

CISDF’s mistake, if any, was in believing that service of its October 3, 2011 pro se answer and counterclaim on Makarenko’s counsel was enough, without further filing of its answer, averted the possibility of a default being taken against it. CISDF had no knowledge that its pro se status was objectionable, and in fact Makarenko was urging it to file an appearance or answer, not to retain independent legal counsel. The trial court further noted in its March 22, 2012 decision that: “[w]hen the defendant finally hired an attorney to represent the

corporation, he acted with due diligence and in a prompt manner.” (CP 379)

The trial court also erred in surprisingly concluding that there only “may be” prima facie evidence of a defense to Makarenko’s complaint, versus substantial evidence of a defense, thus raising the bar for CISDF in obtaining relief from the Default Judgment. (CP 379) CISDF begs to differ. The proof in support of its defenses is set forth in detail in four pleadings: (i) its October 3, 2011 answer and counterclaim (CP 65 – 72), (ii) the original declaration of Alexander Bondarev, President of CISDF, in support of its motion to vacate (CP 47-72), (iii) the original declaration of its Logistics Manager, Maria Bondareva (CP 74-77), and (iv) the supplemental declaration of Alexander Bondarev (CP 310).

In these pleadings, CISDF asserts full performance of its contractual obligations to Makarenko, provides documentation including bills of lading and receipts from the Ukrainian charity in issue to demonstrate timely shipment and delivery of over \$1,300,000 in donated clothing, denies the allegations that it agreed to do anything more, and claims lack of any knowledge about or participating in any other alleged re-distribution agreement for the shipped clothing between Makarenko’s brother (Sasha) and the Ukrainian charity. (Supra)

The proposed amended answer, submitted by CISDF's counsel as a part of its Civil Rule 15(a) and 60(b) motions for relief, further restates the same underlying defenses to Makarenko's claim and formally pleads related affirmative defenses that: (i) CISDF had fully performed any and all contractual or legal obligations; (ii) Makarenko had failed to state a claim against CISDF upon which relief may be granted; (iii) Makarenko's damages, if any, were caused by the actions or omissions of herself, or third parties, as to which CISDF has no liability or responsibility; (iv) Makarenko has unclean hands and should be denied any of the relief requested; (v) Makarenko's claims should be denied under the doctrine of laches; (vi) Makarenko's claims are frivolous and not well grounded in fact or law, entitling CISDF to Civil Rule 11 sanctions for having to defend this action; and, (vii) any alleged dealings Makarenko claimed to have had with her brother Sasha and/or representatives of the Ukrainian charity, for re-distribution of the humanitarian aid shipped by CISDF in May 2010 for specific use by the charity, were contrary to CISDF's contractual undertakings and smacked of misconduct and a nefarious intent, which are deserving of a trial on the merits. (CP 101 at Pars. 1-7)

Lastly, the balance of the equities greatly favors vacating the Default Judgment, where the prejudice to CISDF, and its good name, will be severe, if it is not allowed a trial on the merits for Makarenko's claims. (CP 48-390, at Pars. 4, 5, 6) Makarenko has no recognizable prejudice, and has only suffered her own legal fees in presenting an ill-advised motion for default in the first place.

In sum, CISDF satisfied the established criteria for relief under Civil Rule 60(b)(1), and the trial court erred in not vacating the judgment on this alternative ground.

8. The trial court erred in declining to vacate the default and default judgment under Civil Rule 60(b)(11).

The record on appeal further supports vacation of the Default Judgment pursuant to Civil Rule 60(b)(11) on grounds of fundamental fairness and principles of equity.

CISDF should be given the opportunity to defend its reputation, as a charitable organization, against Makarenko's serious allegations of fraud and misconduct. Her allegations relating to the donation and shipment of clothing go to the very core of CISDF's longstanding charitable work and operations.

This, coupled, with the highly irregular circumstances relating to Makarenko's claim justify a trial on the merits. Makarenko asserts an

alleged arrangement with CISDF for the donation of \$46,500 in cash for the purchase of specific clothing, which clothing CISDF would ship to the Ukrainian charity in issue for re-distribution of the clothing back to Makarenko and/or her brother Sasha. As explained in the Declaration of Alexander Bondarev, its President, this is contrary to how CISDF has done business at any time since its inception. (CP 49-50 at Pars. 7, 8, 9) It receives either donations of clothing, or funds for the shipment of clothing received from other sources and stored in its warehouse in New Jersey. (Id.) CISDF does not receive monetary donations tied to a specific shipment or container or item of aid. (CP 50 at Par. 10) The clothing in its warehouse is then shipped to previously approved charities around the world with which it has established a relationship. (See CP 68 at Pars. 13, 17)

Makarenko's allegations hint of suspicious dealings with third-parties, such as her brother, with whom CISDF has had no dealings. These allegations cry out for further examination and a trial on the merits, and the trial court's ultimate award of sanctions to CISDF under Civil Rule 11 if it finds that her claim has not been brought in good faith and without the proper factual or legal support.

CISDF has documented the shipment of donated clothing valued at \$1,300,000 to the Ukrainian charity in May 2010. This was made possible in part because of the cash donation received from Makarenko to cover, among other things, the considerable costs of packaging and then shipping three containers of clothing overseas. The clothing shipped and delivered by CISDF was valued at more than twenty-five (25) times the value of the clothing Makarenko alleges was to be purchased. It would be inherently inequitable and prejudicial to CISDF if Makarenko is allowed to recover all of her money back, after CISDF relied upon its agreement with her and already incurred the costs of shipping.

9. The trial court erred in declining to grant CISDF leave under Civil Rule 15(a) to amend its answer concurrently with the requested vacation of the Default Judgment.

At the trial court level, CISDF further requested leave under Civil Rule 15(a) to submit an amended answer and affirmative defenses, a copy of which was attached to the moving declaration of its counsel, Terry E. Thomson. (CP 86-102) The format of the proposed, amended answer better conforms to the Civil Rules. It clarifies and restates the allegations previously set forth in CISDF's October 3, 2011 answer and counterclaim. It asserts the above-enumerated affirmative defenses to Makarenko's complaint. And, CISDF's counterclaim for moral

damages, set forth at the end of its October 3, 2011 answer, is re-stated as a Civil Rule 11 request for sanctions.

Each of the allegations in the proposed amended answer, as well as CISDF's new affirmative defenses, is substantiated by the supporting declarations of CISDF's principals, Alexander and Maria Bondarev. (CP 46, 73)

Civil Rule 15(a), and longstanding precedent, provide that leave to amend shall be freely given when justice so requires. Quackenbush v. State, 72 Wn.2d 670, 672, 434 P.2d 736 (1967) In the instant case, Makarenko's lawsuit had only recently commenced. No trial had been set. And, the amended pleading not only would have restated and clarified CISDF's pleadings for the benefit of all parties, but also it would have been filed and served by counsel (thus resolving any issues over CISDF's pro se status).

The trial court should have concurrently vacated the Default Judgment and granted CISDF's Civil Rule 15(a) motion for leave to leave its answer. It erred in not doing so.

10. The trial court erred in failing to strike inadmissible hearsay

replete throughout the answering declarations of Makarenko and her two attorneys.

Large portions of Makarenko's answering declarations, in opposition to CISDF's motion to vacate, are replete with inadmissible hearsay in violation of Evidence Rule 801. These should have been stricken from the record on CISDF's cross-motion to strike, concurrently with the vacation of the Default Judgment. The trial court erred in not doing so, at the time of its consideration of CISDF's motion to vacate. The trial court's decision is silent on this issue. (CP 377)

Paragraphs 4, 5, 6, 7, 12, and 15 of Nataliya Makarenko's declaration should have been stricken in their entirety, as constituting hearsay and hearsay within hearsay. Paragraph 4 of Makarenko's answering declaration refers to what a non-party, i.e. Valery Russky in the Ukraine, allegedly "told me", and "I was told"; Paragraph 5 improperly refers to what non-party Valery Russky "told me", and then fails to distinguish between what he and CISDF allegedly told her; Paragraph 6 improperly refers to "representations of non-party Valery Russky" without distinguishing between what this non-party represented, and what CISDF allegedly represented; Paragraph 7 improperly refers to what Makarenko's brother, Sasha, and non-party Valery Russky said or represented; Paragraph 12 improperly refers to

what non-parties Sasha and Valery Russky “told me” or “presented”; and, Paragraph 15 improperly refers to what non-party “Valery Russky” “denied”.

Nor does Makarenko offer any exception to the hearsay rule - to justify her pervasive hearsay testimony proof. See ER 803. Nor can Makarenko attempt to establish, through what third-party Valery Russky allegedly told her, that Russky was some sort of agent or representative of CISDF (which he was not). Agency has to be proved by the acts and statements of the alleged principal, i.e., here CISDF, and cannot be proved by those of an alleged agent, let alone the hearsay statements of a biased party about what that purported agent said. State of Washington v. Chambers, 134 Wn.App. 853, 142 P.2d 668, 670 (Div. Two 2006).

Similarly, attorney Caitlin Wong’s answering declaration contains numerous hearsay statements about a conversation on November 3, 2011 with the New York attorney approached by the daughter of the principals of CISDF, i.e. Alex Ross. But, Mr. Ross was not an agent or representative of CISDF. He was simply an attorney in a law firm where the daughter of the President of CISDF worked. Mr. Ross graciously, and on his own initiative, was attempting to follow up on the status of the case. Mr. Ross has submitted his own declaration in

this matter, and has unequivocally stated that he was not counsel for CISDF, and denied the representations made by Makarenko's counsel. Accordingly, Paragraphs 3 (second sentence only), 5, 6, and 10 of Caitlin Wong's declaration should be stricken from the record as constituting inadmissible out-of-court statements by a third-party.

Paragraph 11 of attorney Ronald T. Adam's answering declaration similarly violates the hearsay rule, by attaching copies of a news article, and docket, relating to an entirely unrelated 1990's era proceeding in a California court. These references are irrelevant and a waste of time to consider, and an attempt to prejudice the trial court, by injecting unrelated matters that happened more than ten years earlier. They too should have been stricken from the record under Evidence Rules 401, 403, and 801.

11. The trial court erred in not awarding CISDF its reasonable attorneys' fees and costs under RCW 4.28.185(5), concurrently with the requested vacation of the default judgment.

Under the extraordinary circumstances of this case, where a defective statutory affidavit, and invalid service, rendered the Default Judgment void as a matter of law, and where Makarenko's disingenuous half-truths and omissions in its motion for default materially contributed to the entry of an improper and invalid judgment, attorneys' fees and

costs specifically related to CISDF's motion to vacate should have been awarded.

RCW 4.28.185(5) of the long arm jurisdiction statute provides:

In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

Here, CISDF should be deemed the "prevailing party" with respect to the Default Judgment - once vacated. All proceedings relating to the default will have been adjudicated, and a final order may be entered under Civil Rule 54(b) with respect thereto.

An award of fees and costs incurred with respect to the motion to vacate should have been awarded under the cited provisions of the State's long arm jurisdiction statute, concurrently with the requested vacation of the Default Judgment. The trial court erred in failing to do so.

F. RAP 18.1(a) REQUEST FOR AWARD OF FEES AND COSTS ON APPEAL.

For the same reasons set forth in Section E.11 above, CISDF requests an award of its attorney's fees and costs on appeal, pursuant to RCW 4.28.185(5), if the trial court's decision is reversed and the Default

Judgment is vacated as requested. Upon its vacation, CISDF should be deemed the prevailing party on appeal pursuant to the fee provisions of RCW 4.28.185(5).

G. CONCLUSION AND RELIEF REQUESTED.

CISDF respectfully requests that:

1. The trial court's March 22, 2012 Order, declining to vacate the November 7, 2011 default and default judgment, be reversed.
2. The November 7, 2011 default and default judgment be vacated, and CISDF awarded its reasonable legal fees and costs under RCW 4.28.185(5) as prevailing party with respect to default judgment. Alternatively, this Court should remand this matter to the trial court for further proceedings pursuant to RCW 4.28.185(5) consistent with this Court's opinion, and for a determination of CISDF's reasonable attorneys' fees and costs in prosecuting the motion to vacate at the trial court level.
3. This Court award CISDF its reasonable fees and costs under RCW 4.28.185(5) in prosecuting the instant appeal.

4. CISDF's Civil Rule 15(a) motion for leave to amend its October 3, 2011 answer and counterclaim be granted, or that the Court remand its Civil Rule 15(a) motion to the trial court for further proceedings consistent with the Court's opinion.

RESPECTFULLY SUBMITTED on this 10th day of June 2012.

STERNBERG THOMSON OKRENT
& SCHER, PLLC

By



Terry E. Thomson, WSN 5378
Attorneys for Appellant CIS Development
Foundation, Inc.

CERTIFICATE OF SERVICE

The undersigned counsel of record for appellant certifies that he caused the original of this Opening Brief of Appellant to be filed with the Clerk of the Court, and a true and correct copy to be delivered by U.S. Mail, postage prepaid, to counsel for respondent Nataliya Makarenko, i.e., Ronald T. Adams, Esq., Black Helterline LLP, 805 S.W. Broadway, Suite 1900, Portland, Oregon 97205, on June 11, 2012.



Terry E. Thomson, WSBA # 5378

FILED
COURT OF APPEALS
DIVISION II
2012 JUN 11 PM 1:12
STATE OF WASHINGTON
BY _____
DEPUTY