

No. 49273-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BOSS CONSTRUCTION, INC.,

Respondent

v.

HAWK'S SUPERIOR ROCK, INC.,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR GRAYS HARBOR COUNTY
THE HONORABLE DAVID EDWARDS

BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court deprived appellant Hawk's Superior Rock, Inc. of substantial justice when it refused to vacate a crippling \$240,000 default judgment that will ruin the small business and was entered without actual notice solely because of trial counsel's excusable failure to notify opposing counsel that he had moved his office one floor in the same building. Respondent Boss Construction sued Hawk's Superior for breach of contract in August 2014, and Hawk's Superior timely filed its answer the following month. Boss Construction took no further action until it moved for summary judgment in February 2016. During the 16 months of inactivity in the case, Hawk's Superior's counsel moved his office to the next floor in the same building, notified the WSBA and the postal service of his change of address, but forgot to file a notice of change of address with the trial court. As a result, Hawk's Superior did not receive, and could not respond to, the motion for summary judgment, and the trial court granted the \$240,000 default judgment in March 2016.

Hawk's Superior promptly moved under CR 60(b)(1) to vacate the default judgment within 11 days of learning of its existence, and within six weeks of the trial court entering its order. Without properly applying the legal test compelled by *White v. Holm*, 73

Wn.2d 348, 438 P.2d 581 (1968), the court denied both Hawk's Superior's motion to vacate and its motion for reconsideration. The trial court abused its discretion in refusing to vacate this devastating default judgment to allow the case to be heard on the merits and in denying reconsideration.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order Denying Defendant's Motion for Relief from Judgment. (CP 62-63) (App. A)
2. The trial court erred in entering its Order Denying Defendant's Motion for Reconsideration. (CP 92) (App. B)

III. STATEMENT OF ISSUES

1. Did the trial court abuse its discretion by denying a CR 60(b)(1) motion to vacate a \$240,000 default judgment entered by trial counsel's excusable neglect (1) without considering the *White v. Holm* factors, and (2) where the defendant promptly moved to set aside the judgment, established excusable neglect, demonstrated a valid defense, and the plaintiff would not suffer substantial hardship?

IV. STATEMENT OF FACTS

The procedural facts leading to entry of the \$240,000 judgment are based upon the pleadings before the trial court in refusing to vacate the summary judgment. The facts establishing Hawk Superior's defense to this action are also based upon the record on reconsideration:

A. Boss Construction received a credit for rock purchased from Hawk's Superior.

Appellant Hawk's Superior Rock, Inc. supplies rock and gravel to the construction industry. (CP 76) Respondent Boss Construction, Inc. is a construction company, which successfully bid on a Washington State Department of Transportation ("WSDOT") project in 2010. (CP 20, 75-76)

Hawk's Superior quoted prices for various types of rock – gravel borrow, crushed surfacing base course, and quarry spalls – to the contractors bidding on the WSDOT project. (CP 76, 85) Hawk's Superior sent a list of prices to contractors with "copies of the most recent testing done by WSDOT, Pacific County," and a private testing firm, "as well as pit approval . . . from the Corps of Engineers, whose standards exceed those of the WSDOT." (CP 75-76) Hawk's Superior's price quote stated that the quoted materials "meets DOT and Corp. of Engineer Specifications for Hardness & Wear." (CP 75-76, 84)

When subsequent testing showed that the gravel borrow “was considered a little out” on a “sieve analysis” (CP 76), Boss Construction “requested approval [from WSDOT] to use [the] rock for portions of the work on this job.” (CP 78) WSDOT sampled and tested the rock, which “show[ed] one minor out of spec result.” (CP 78, 76) However, WSDOT “evaluated this condition and determined in this specific case it will not adversely compromise the performance of the material.” (CP 78) WSDOT specifically stated: “Therefore, we can allow Boss Construction, Inc. to use the material with a minor 3% price reduction.” (CP 78, 39)

Hawk’s Superior “agreed to a .30 credit on the material” (CP 76), and WSDOT began “writing a change order to accept this material with the price reduction.” (CP 78) Yet Boss Construction chose not to use the gravel borrow or the approved quarry spalls, which Hawk’s Superior left in a stockpile for a year. (CP 39, 76)

B. The trial court entered a \$240,000 default judgment against Hawk’s Superior after its attorney, who had moved his office, did not receive a motion for summary judgment.

Almost four years later, on August 11, 2014, Boss Construction sued Hawk’s Superior in Grays Harbor County, alleging breach of contract and breach of express and implied warranties to provide rock that would meet WSDOT requirements. (CP 3-5) Hawk’s

Superior answered on September 29, 2014, denying the allegations and alleging several affirmative defenses, including Boss Construction's failure to mitigate its damages. (CP 7-9)

The parties did not engage in discovery and took no action at all in the case for 16 months, until Boss Construction filed a motion for summary judgment, on February 8, 2016. (CP 11-18, 38) Boss Construction claimed \$51,820 for rock and gravel it was "forced" to purchase from another source to complete the project, as well as \$189,887 in damages from seven months of alleged "delay" on the project. (CP 18)

In the 16 months that had passed since Hawk's Superior filed its answer, its counsel, C. Craig Holley, moved his law practice to another office in the same building, directly one floor above his previous office. (CP 38, 46) Mr. Holley changed his address with the Washington State Bar Association and obtained a mail forwarding order with the United States Postal Service ("USPS"), but forgot to file a notice of change of address with the Grays Harbor County Superior Court. (CP 38, 46; RP 4) This case was Mr. Holley's only pending case at the time, as he had reduced his practice because he was undergoing chemotherapy. (RP 4-5)

Boss Construction claimed that it mailed the motion for summary judgment to Mr. Holley's former address (CP 57), but it is undisputed that Mr. Holley never received the motion. (CP 38-39, 46-47; RP 6-7) The new tenant in Mr. Holley's former office routinely returned all of Mr. Holley's first-class mail to the postal service, and "plainly and unequivocally" told Mr. Holley that he did not receive any mail addressed from Boss Construction's lawyers. (CP 74)

Because its counsel never received the motion for summary judgment, Hawk's Superior did not respond. Even though the motion did not include any invoice or other documentation containing a warranty, the Honorable David Edwards ("the trial court") granted Boss Construction's motion for summary judgment and entered a \$241,708 judgment against Hawk's Superior by default on March 14, 2016. (CP 25-28, *see* CP 79) Of that amount, only \$51,820.41 was for additional "gravel costs," with the balance of almost \$190,000 attributable to "delay costs." (CP 21-22)

C. The trial court refused to vacate the default judgment.

Hawk's Superior first became aware of the default judgment six weeks after its entry, on April 18, 2016, when its owners, Michael and Ann Runyon, received a phone call from a collection agency. (CP

38, 46, 77) On April 29, 2016, Hawk's Superior promptly moved to vacate the \$240,000 default judgment under CR 60(b), supported by its counsel's declaration establishing his inadvertent failure to give Boss Construction notice of his change of address. (CP 34-39, 42-47; RP 3-5) The trial court denied Hawk's Superior's motion to vacate, holding that counsel's failure to provide specific notice to Boss Construction and the trial court of his new address "does not properly fall within any of the provisions of CR 60(b)." (RP 7; CP 62)

Hawk's Superior moved for reconsideration, arguing that the trial court's order was contrary to law and substantial justice had not been done because WSDOT's regional administrator had specifically approved "the material with a minor 3% price reduction." (CP 65-69, 78) The trial court called for a response, noting for the first time that Boss Construction's summary judgment motion did not contain any documentation reflecting the parties' agreement or the alleged warranty. (CP 79)

Boss Construction submitted Hawk Superior's price list for this project, dated July 29, 2010, quoting per ton prices for the five different types of rock (CP 84), along with additional correspondence from a WSDOT project engineer alleging that the "Gravel Borrow for Retaining Wall" did not meet the modified specifications. (CP 86-87)

However, he noted that the “Quarry Spall” material purchased by Boss Construction had not been tested or rejected. (CP 86) The trial court denied the motion for reconsideration. (CP 92) Hawk’s Superior appeals. (CP 93-97)

V. ARGUMENT

A. **The trial court abused its discretion in denying Hawk Superior’s motion to vacate a default judgment that was clearly and indisputably the result of its counsel’s excusable neglect.**

This Court reviews a motion to vacate and a motion for reconsideration for abuse of discretion, “evaluat[ing] the trial court’s decision by considering the unique facts and circumstances of the case” before it. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, ¶ 9, 101 P.3d 867 (2004); *Norton v. Brown*, 99 Wn. App. 118, 125, 992 P.2d 1019, 3 P.3d 207 (1999) (trial court abused its discretion in refusing to vacate judgment on reconsideration), *rev. denied*, 142 Wn.2d 1004 (2000). This Court’s “primary concern is that a trial court’s decision on a motion to vacate a default judgment is just and equitable.” *Showalter*, 124 Wn. App. at 510, ¶ 9. This Court is more likely to find an abuse of discretion where the trial court does not set aside the default judgment. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *Showalter*, 124 Wn. App. at 511, ¶ 9; *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968)

("[W]here the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues.").

Washington courts highly disfavor default judgments, which are in derogation of the "overriding policy which prefers that parties resolve disputes on the merits." *Showalter*, 124 Wn. App. at 510, ¶ 8; *Griggs*, 92 Wn.2d at 581. Because a default judgment is "one of the most drastic actions a court may take to punish disobedience to its commands," *Griggs*, 92 Wn.2d at 581, a party may seek relief under CR 60(b)(1) from a default judgment obtained through mistake, inadvertence, surprise, excusable neglect, or irregularity.

A motion to vacate a default judgment under CR 60(b)(1) "is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms." *White*, 73 Wn.2d at 351. Accordingly, where a CR 60(b) motion "is not manifestly insufficient or groundless," this Court "should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." *White*, 73 Wn.2d at 351; *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897) (in ruling on a motion to vacate,

“the court should be liberal in the exercise of its discretion in furtherance of justice”) (quoted source omitted). The “fundamental guiding principle” is “whether or not justice is being done.” *Griggs*, 92 Wn.2d at 582 (quoted source omitted).

Justice was not done here. This \$240,000 default judgment resulted from the excusable neglect of Hawk’s Superior’s counsel, Hawk’s Superior promptly moved for relief under CR 60(b)(1), alleging a defense that, at a minimum, presented disputed issues of fact, and Boss Construction would not suffer any hardship, save for having to prove its case on the merits.

B. The trial court committed legal error by not considering the factors that justified relief under CR 60(b).

The trial court erroneously concluded that it did not “have a legal basis” (RP 7) for setting aside the judgment after failing to correctly apply the very legal test that would have compelled relief under CR 60(b)(1).

The trial court abuses its discretion if it does not consider each basis raised by the moving party under CR 60(b)(1). *See Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 653-54, 774 P.2d 1267 (1989) (trial court “erred when it limited its consideration to the vacation of the judgment on the basis of excusable neglect”;

remanding for consideration of appellant's claim of irregularity under CR 60(b)(1)); *see also Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (trial court necessarily abuses its discretion if it applies the wrong legal standard).

The trial court must consider whether the party seeking relief under CR 60(b)(1) has established: (1) substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear and answer the opponent's claim was occasioned by mistake, inadvertence, surprise, or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that the opposing party will not suffer substantial hardship. *White*, 73 Wn.2d at 352. The trial court must demonstrate its consideration of these factors on the record. *Norton*, 99 Wn. App. at 123-24.

In *Norton*, the trial court found that the moving party under CR 60(b)(1) presented a prima facie defense, but that his failure to appear was not caused by mistake, inadvertence, or excusable neglect. The trial court did not make any findings regarding the movant's diligence in seeking relief, or whether the opposing party

would be prejudiced if the judgment was vacated. Division Three reversed and remanded for trial because the trial court's failure to make findings on these two factors was an abuse of discretion. *Norton*, 99 Wn. App. at 124.

Similarly, here, the trial court erred by failing to properly apply *White* and consider all CR 60(b)(1) bases raised by Hawk's Superior. Hawk's Superior sought to vacate the default judgment under CR 60(b)(1) for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity." (CP 42-47; RP 3-5) The trial court focused exclusively on counsel's failure to file with the court clerk a notice of change of address, challenging his contention that it was "inadvertent." (RP 4) The trial court again failed to properly apply *White* to determine whether excusable neglect warranted relief on reconsideration.

The trial court's legal error constitutes an abuse of discretion. *See Plouffe v. Rook*, 135 Wn. App. 628, 633, ¶ 11, 147 P.3d 596, (2006) (reversing order denying motion to reinstate based on incorrect legal standard). Because Hawk's Superior established grounds for relief under those factors and CR 60(b)(1), this Court should reverse and remand for trial.

- 1. The trial court committed an error of law in holding that the default judgment did not result from mistake, inadvertence, and excusable neglect of Hawk's Superior's trial counsel, as contemplated by CR 60(b)(1).**

The trial court's belief that Hawk's Superior's counsel's mistake "does not properly fall within any of the provisions of CR 60(b)" is a manifest error of law. (RP 7) Mr. Holley's mistake and inadvertence falls squarely within CR 60(b)(1).

CR 60(b)(1) allows relief from judgment where a party's failure to timely answer "was a mistake, the result of a misunderstanding, and excusable neglect, not a willful intent to ignore the lawsuit." *Showalter*, 124 Wn. App. at 514, ¶ 22. "What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." *Griggs*, 92 Wn.2d at 582 (quoted source omitted); *Gustafson v. Gustafson*, 54 Wn. App. 66, 70-71, 772 P.2d 1031 (1989) (grounds for relief under CR 60(b) are not mutually exclusive and may overlap).

"Excusable neglect is determined on a case by case basis." *Gutz v. Johnson*, 128 Wn. App. 901, 918, ¶ 55, 117 P.3d 390 (2005), *aff'd sub nom. Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007) "The concept of excusable neglect 'is at bottom an equitable one,

taking account of all relevant circumstances surrounding the party's omission.” *Little v. King*, 160 Wn.2d 696, 717, ¶ 55, 161 P.3d 345 (2007) (Madsen, J., concurring/dissenting) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498, 123 L.Ed.2d 74 (1993)); *see, e.g., O’Toole v. Phoenix Ins. Co.*, 39 Wash. 688, 692-93, 82 P. 175 (1905) (trial court abused its discretion in denying motion to vacate where an “honest mistake was doubtless made,” and if “appellant’s attorney was guilty of any negligence, . . . such negligence was not inexcusable, but was simply the result of mistake or inadvertence”); *Leavitt v. De Young*, 43 Wn.2d 701, 705-06, 263 P.2d 592 (1953) (“default judgment was caused by excusable neglect or inadvertence” where defendant’s attorneys were unaware of plaintiff’s motion, despite plaintiff’s counsel having left voicemail of his intent to seek default, and “the file relating to this case had been mislaid” when defense attorneys moved to another office “and was not recovered until after the default judgment had been taken”); *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 453, ¶ 41, 332 P.3d 991 (2014) (default judgments may be set aside for excusable neglect and unilateral mistake), *rev. denied*, 182 Wn.2d 1006 (2015).

Federal courts have defined “excusable neglect” under Rule 60¹ to “encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Pioneer*, 507 U.S. at 394, 113 S. Ct. at 1497; *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223 (9th Cir. 2000) (noting that excusable neglect “covers negligence on the part of counsel”). “Where default results from an honest mistake . . . there is especial need to apply Rule 60(b) liberally.” *United Coin Meter Co., Inc. v. Seaboard Coastline RR.*, 705 F.2d 839, 845 (6th Cir. 1983) (quoted source omitted). “[O]ne of the very purposes of Rule 60(b) is to prevent litigants from being deprived of their day in court because of inadvertent, technical mistakes of their attorneys.” *Mann v. Lynaugh*, 690 F. Supp. 562, 564 (N.D. Tex. 1988).

¹ “Where a state rule parallels a federal rule, analysis of the federal rule may be looked to for guidance.” *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998). Because CR 60(b)(1) parallels Federal Rule of Civil Procedure 60(b)(1), Washington courts have routinely looked to federal decisions when interpreting CR 60(b). *See, e.g., Barr v. MacGugan*, 119 Wn. App. 43, 47, 78 P.3d 660 (2003) (turning to federal courts for guidance in finding that an attorney’s mental illness or disability constituted grounds for relief under CR 60(b)); *Tatham v. Rogers*, 170 Wn. App. 76, 100, ¶ 42, 283 P.3d 583 (2012) (“turn[ing] to federal courts for guidance in determining the scope of the catchall provision” of CR 60(b)); *Luckett v. Boeing Co.*, 98 Wn. App. 307, 311, 989 P.2d 1144 (1999) (“Because the time limitations of CR 60(b) parallel those in the federal rule, analysis of the federal rule may be looked to for guidance and followed if the reasoning is persuasive.”), *rev. denied*, 140 Wn.2d 1026 (2000).

The policy for liberal reinstatement of lawsuits that have been dismissed because a notice has been sent to counsel's former, rather than current, address is also reflected in CR 41(b)(2)(B), which entitles a party who does not receive actual notice of a clerk's dismissal for want of prosecution to seek reinstatement of the lawsuit "within a reasonable time after learning of the dismissal." This provision specifically recognizes that mistakes occur because of the "failure of the post office to forward mail." *Plouffe*, 135 Wn. App. at 634-35, ¶ 16 (quoting Purpose Statement to Proposed Amendment to CR 41, Official Advance Sheets, 130 Wn.2d No. 8 at Proposed - 104 (Jan. 14, 1997)).

The trial court clearly erred here in holding that Mr. Holley's failure to receive actual notice of the summary judgment was not mistake and inadvertence and thus does not "properly fall within any of the provisions of CR 60(b)." (RP 7) When Mr. Holley moved offices, he set up a forwarding service with USPS and changed his address on the Washington State Bar Association website, but failed to file a notice of change of address with the trial court. This was Mr. Holley's only pending case, as counsel suffered from personal health problems and was undergoing chemotherapy, and plaintiffs had not

made any motions or proceeded with their case in 16 months. (RP 4-5; CP 46-47)

Further, it is undisputed that Hawk's Superior acted diligently when it became aware of the default judgment. (Arg. §V.B.2, *infra*) These are all "relevant circumstances surrounding" Hawk's Superior's omission that demonstrate excusable neglect. *Little*, 160 Wn.2d at 717, ¶ 55 (Madsen, J., concurring/dissenting).

A federal case with remarkably similar facts, *Blois v. Friday*, 612 F.2d 938 (5th Cir. 1980), is particularly compelling. In *Blois*, the plaintiff's attorney failed to file a notice of his change of address with the district court. As a result, plaintiff's attorney did not receive a copy of the defendant's motion for summary judgment and was unaware of the motion or the district court's order granting the motion. The district court denied plaintiff's motion to vacate under Rule 60(b). The Fifth Circuit reversed, holding that "[t]he events leading up to this failure by plaintiff's attorney to file a timely answer also do not show any willful misconduct or other extreme or unusual circumstances," and that that the district court abused its discretion in the absence of any prejudice to the defendant by vacating the order. *Blois*, 612 F.2d at 940.

The Fifth Circuit reasoned that “[p]laintiff’s attorney merely neglected to file a notice of his change of address with the district court. This neglect, and the untimely forwarding of the copy of the defendants’ motion for summary judgment from the old address of plaintiff’s attorney combined to deprive plaintiff of a judicial decision on the merits.” *Blois*, 612 F.2d at 940. Although the Fifth Circuit “d[id] not condone the neglect of plaintiff’s counsel,” it concluded that the plaintiff “should not have to pay with the loss of his cause of action for his attorney’s minor mistake without clear proof of serious misconduct and prejudice. Neither exists in this case.” *Blois*, 612 F.2d at 940.

Just as in *Blois*, there is absolutely no evidence of willful misconduct, prejudice, “or other extreme or unusual circumstances” here. Hawk’s Superior had a devastating \$240,000 default judgment entered against it as a result of its trial counsel’s excusable neglect. The Runyons should not have to pay for their attorney’s mistake with the loss of their business without having the opportunity to defend themselves on the merits. (CP 77) The trial court abused its discretion by refusing to vacate the order.

2. Hawk's Superior acted with due diligence to promptly vacate the default judgment.

The trial court failed to make any finding that Hawk's Superior failed to act with reasonable diligence, nor could it on this record. "A motion to vacate under CR 60(b)(1) must be filed within a reasonable time and within one year from the judgment." *Ha*, 182 Wn. App. at 454, ¶ 45. In determining what constitutes a "reasonable time," the "critical period is between when the moving party became aware of the judgment and when it filed the motion to vacate." *Ha*, 182 Wn. App. at 454, ¶ 45. This Court has held that "a party that moves to vacate within one month of notice satisfies the diligence requirement." *Ha*, 182 Wn. App. at 454, ¶ 45.

Hawk's Superior acted with due diligence by promptly moving to vacate the default judgment within 11 days of learning about the judgment. Boss Construction moved for summary judgment on February 8, 2016. (CP 11-18) The trial court granted the motion and entered judgment against Hawk's Superior on March 14. (CP 24-28) Hawk's Superior first became aware of the order on April 18, and promptly moved to vacate the judgment under CR 60(b)(1) on April 29. (CP 29-39) Hawk's Superior satisfied the diligence requirement under CR 60(b)(1).

3. Boss Construction will not suffer substantial hardship if the judgment is set aside.

There was similarly no hardship to Boss Construction in having to defend this case on the merits. “[T]he prospect of trial cannot constitute, without more, ‘substantial hardship’ within the meaning of White’s fourth factor.” *Pfaff v. State Farm Mut. Auto Ins. Co.*, 103 Wn. App. 829, 836, 14 P.3d 837 (2000), *rev. denied*, 143 Wn.2d 1021 (2001). “If the law were otherwise, a judgment would never be set aside, for that *always* generates the prospect of trial.” *Pfaff*, 103 Wn. App. at 836 (emphasis in original) (finding “lack of substantial hardship” where the record shows no hardship other than the prospect of trial); *Norton*, 99 Wn. App. at 126 (no prejudice where plaintiff “has known of [defendant’s] intent to defend the lawsuit from the beginning”).

The record is devoid of any evidence that Boss Construction would suffer hardship aside from trial. Boss Construction clearly knew of Hawk’s Superior’s intent to defend itself from the start of this suit when Hawk’s Superior filed an answer denying the allegations against it and alleging several affirmative defenses. (CP 7-9) Further, Boss Construction conceded that no substantial hardship existed by simply requesting “terms and conditions” if the trial court set aside the judgment. (CP 54-55, 88-91) Boss Construction did not, and cannot,

claim that it would suffer a substantial hardship by vacating the default judgment. (CP 50-55, 88-91)

4. Hawk's Superior raised a genuine issue of material fact to survive summary judgment.

Whether and the extent to which Boss Construction established a quarter of a million dollars in damages for Hawk's Superior's alleged breach of a warranty that its materials complied with WSDOT specifications presented a disputed issue of fact. The trial court erred in refusing to vacate the default judgment because the evidence on the motion to vacate and on reconsideration established disputed factual issues.

Under *White*, one of the "primary" factors a moving party must establish is evidence "to support, at least prima facie, a defense to the claim asserted by the opposing party." 73 Wn.2d at 352. "In making this determination, the trial court must examine the evidence and reasonable inferences in the light most favorable to the moving party." *Ha*, 182 Wn. App. at 449, ¶ 31; *Pfaff*, 103 Wn. App. at 835. "The trial court need only determine whether the defendant is able to demonstrate *any* set of circumstances that would, if believed, entitle the defendant to relief." *Ha*, 182 Wn. App. at 449, ¶ 31 (emphasis added); *see also United Coin*, 705 F.2d at 845 ("In determining whether a defaulted defendant has a meritorious

defense, [l]ikelihood of success is not the measure”; “if any defense relied upon states a defense good at law, then a meritorious defense has been advanced.”) (alteration in original, quoted source omitted).

Summary judgment is proper only “if the pleadings, affidavits, depositions, and admissions on file,” viewed in the light most favorable to the nonmoving party, “demonstrate the absence of *any* genuine issues of material fact,” and “reasonable minds could reach but one conclusion on the evidence.” *Versuslaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wn. App. 309, 319, ¶ 22, 111 P.3d 866 (2005) (citing CR 56) (emphasis added), *rev. denied*, 156 Wn.2d 1008 (2006). Here, reasonable minds could differ on whether or not Hawk’s Superior breached a contract with Boss Superior warranting that it would provide materials that met WSDOT standards, and, if so, whether the gravel borrow Hawk’s Superior provided was “suitable for the Project.” (CP 17)

Hawk’s Superior “never made any guarantees on products”; it simply “provided copies of the most recent testing done by WSDOT” to all potential bidders, the results of which showed that the “rock met WSDOT standards for hardness and wear.” (CP 75-76; *see* CP 84) In addition, although there was “one minor out of spec result” with the gravel borrow, WSDOT “evaluated this condition and determined in

this specific case it will not adversely compromise the performance of the material.” (CP 78) WSDOT confirmed that it could “allow Boss Construction, Inc. to use the material with a minor 3% price reduction,” and that WSDOT was “currently writing a change order to accept this material with the price reduction.” (CP 78) Boss Construction claimed that Hawk Superior’s gravel borrow did not meet specifications, but it did not address the other four types of rock, and the correspondence it submitted stated that that WSDOT had not rejected the quarry spall material. (CP 86) It was undisputed that Boss Construction failed to pick up that material. (CP 76)

This evidence creates a factual issue as to whether or not Hawk’s Superior breached any alleged warranties and whether Boss Construction mitigated its damages: A reasonable jury could find that the material Hawk’s Superior “selected and furnished” was “suitable for the Project and would satisfy all WSDOT specifications” (CP 17) after WSDOT wrote a change order with a price reduction, that Boss Construction failed to establish the remaining materials were defective, and that Hawk’s Superior was not liable for almost \$190,000 in delay damages awarded to Boss Construction. (CP 78)

Hawk’s Superior demonstrated genuine issues of material fact for trial, thus satisfying one of the “major elements” warranting

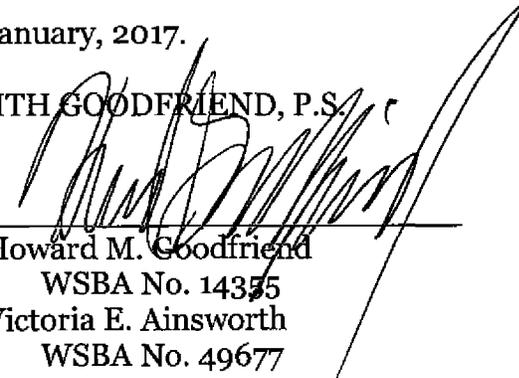
vacation under CR 60(b)(1). *White*, 73 Wn.2d at 352. The trial court abused its discretion in denying the motion to vacate and in denying Hawk's Superior's motion for reconsideration.

VI. CONCLUSION

This Court should reverse the trial court's order and vacate the default judgment.

Dated this 11th day of January, 2017.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend

WSBA No. 14375

Victoria E. Ainsworth

WSBA No. 49677

Attorneys for Appellant

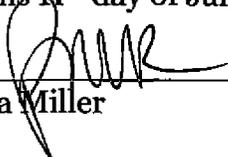
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 11, 2017 I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of January 2017.



Patricia Miller

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN GRAYS HARBOR COUNTY

BOSS CONSTRUCTION, INC., a
Washington corporation

Plaintiff,

vs.

HAWK'S SUPERIOR ROCK, INC., a
Washington corporation,

Defendant.

NO. 14-2-00560-8

ORDER DENYING MOTION FOR
RELIEF FROM JUDGMENT

BASED UPON the Motion for Relief from Judgment and supporting declaration contained therein, the Response to the Motion for Relief From Judgment, the Declaration of Counsel filed in Response to the Motion for Relief from Judgment, the Declaration of Stuart Giles, and the records and files herein,

IT IS ORDERED that the Motion for Relief from Judgment is denied.

DATED: May 31 2016.


Judge

///
///

ORDER DENYING MOTION FOR
RELIEF FROM JUDGMENT-1

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App. A

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Presented by:

PARKER, WINKELMAN & PARKER, P.S.
Attorneys for Plaintiff

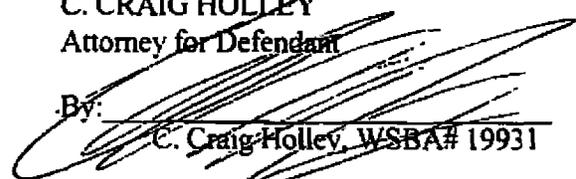
By:


James T. Parker, WSBA#36599

Approved for entry:

C. CRAIG HOLLEY
Attorney for Defendant

By:


C. Craig Holley, WSBA# 19931

ORDER DENYING MOTION FOR
RELIEF FROM JUDGMENT-2

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THE SUPERIOR COURT OF WASHINGTON
GRAYS HARBOR COUNTY

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Re: *Boss Construction, Inc. v. Hawk's Superior, Inc.*
Grays Harbor County Cause No. 14-2-00560-82

Dear Counsel:

The court has received and reviewed the defendant's motion for reconsideration of the court's prior decision to deny defendant's motion to vacate summary judgment.

The motion for reconsideration is denied.

Very truly yours,



David L. Edwards
Superior Court Judge

DE/bmm
cc: file

App. B

SMITH GOODFRIEND PS

January 11, 2017 - 4:12 PM

Transmittal Letter

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Court of Appeals Case Number: 49273-3

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