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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
Cowlitz County Cause No. 17-2-01335-08

JAMES L. SELLERS, Guardian ad Litem of NATHAN TONEY, a minor

Appellant,

vs.

LONGVIEW ORTHOPEDIC ASSOCIATES, PLLC

Respondent.

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Appellant is James Sellers, the Guardian ad Litem for Nathan Toney, a minor child. Nathan Toney was injured due to the medical negligence of Respondent Longview Orthopedic Associates, LLC.

Toney sought discretionary review of the Cowlitz County Superior Court's April 25, 2018, order setting aside a default order against Longview Orthopedic. The trial court, in the April 25, 2018, order, certified the following question for appellate review under RAP 2.3(b)(4):

The court hereby certifies under RAP 2.3(b)(4) that this order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of this litigation, namely the extension of *Vanderstoep v. Guthrie*, 200 Wn.App. 507, 533-34, 402 P.3d 883 (2017) to cases where an innocent party suffers a default order due to the inexcusable neglect of that party's counsel.¹

On September 10, 2018, Commissioner Aurora R. Bearse granted Toney's *Motion for Discretionary Review*.

The legal issue presented by this appeal is a long overdue case of first impression that impacts the orderly dispensation of civil justice and the professionalism of attorneys across the State of Washington. Toney advocates

¹ CP 193-194.

for a ruling that holds attorneys responsible for their inexcusable conduct. Longview Orthopedic and its insurance company ask for a ruling that allows attorneys to ignore not only the civil rules, but their clients, without consequence. So long as the attorney can swear in an affidavit, “This is all my fault—my client had nothing to do with this,” inexcusable conduct becomes excusable. This result is absurd.

B. ASSIGNMENT OF ERROR

The trial court erred by vacating its January 16, 2018, order of default against Longview Orthopedic. The trial court’s action raises three issues on appeal.

First, where a trial court misapplies the law or applies the wrong law whilst making a discretionary decision under CR 55(c)(1), is the proper standard of review *de novo*?

Second, does a trial court’s finding that a default order resulted from the inexcusable neglect of defense counsel preclude a finding of “good cause” under CR 55(c)(1)?

Third, should public policy concerns regarding the orderly dispensation of civil justice and the professionalism of attorneys require trial courts to focus on the conduct of counsel when determining “good cause” under CR 55(c)(1) in cases where the default was the result of attorney conduct after that attorney has been retained by the defending party?

C. STATEMENT OF THE CASE

Toney filed suit against Longview Orthopedic on December 14, 2017, and served the summons and complaint on December 21, 2017.² Longview Orthopedic forwarded the summons and complaint to its insurance company, Physician's Insurance, on December 27, 2017. That same day, Amy Forbis, with the firm Bennett Bigelow & Leedom, P.S., was retained by Physician's Insurance to defend Longview Orthopedic.³

Ms. Forbis failed to file an answer on behalf of Longview Orthopedic within 20 days as required by CR 12(a)(1). She also failed to file a notice of appearance, which would not have cured her failure under CR 12(a)(1). It would, however, have given her the right to notice of Toney's motion for default and an opportunity to file a late answer prior to entry of the default order.

On January 16, 2018, counsel for Toney properly obtained an order of default without notice to Longview Orthopedic.⁴

Rhianna Fronapfel, an associate attorney working for Ms. Forbis at Bennett Bigelow & Leedom, P.S., began reviewing Toney's medical records on January 21, 2018, in anticipation of preparing an answer to Toney's complaint. Longview Orthopedic's answer was already eleven days past due

² CP 1 and 5.

³ CP 26-27.

⁴ CP 8-9.

at that time. When Ms. Fronapfel found no notice of appearance in her file, she went online to check the electronic court file. She discovered the default order against Longview Orthopedic. The next day, on January 22, 2018, Ms. Forbis filed Longview Orthopedic's motion to set aside the default order.⁵

In her January 22, 2018, declaration, Ms. Forbis blamed Longview Orthopedic's failure to timely appear or answer on a "clerical error" at her law office, but offered no explanation as to how that error occurred.⁶ Rather, she blamed her busy schedule, despite the formidable support staff and resources at her disposal, stating:

At that time, my legal assistant and I were very busy preparing for a multi-week trial on a complex medical malpractice matter, which was scheduled to begin less than a month later, on January 16, 2018.⁷

Ms. Forbis also offered no explanation for why her firm waited until Longview Orthopedic's answer was eleven days late to even begin preparing her client's answer.

On appeal, counsel for Longview Orthopedic voluntarily admitted that Bennett Bigelow & Leedom, P.S., attorneys and staff had failed to even contact Longview Orthopedic in the thirty-one days that followed service of

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⁵ See CP 27 for all factual statements in this paragraph.

⁶ CP 27.

⁷ CP 27.

process. At page 15 of Longview Orthopedic's *Answer to Motion for Discretionary Review*, counsel writes:

[L]ongview Orthopedic never authorized defense counsel to do anything. It never met with or communicated with BB&L, was unaware that the firm had been retained, and did nothing to ratify its action.⁸

As such, it appears that Ms. Forbis drafted, signed, and filed her client's answer with the court, which included numerous denials and affirmative defenses, before Longview Orthopedic, her client, was even aware that she represented them.⁹

CR 55(c)(1) provides that the court "may" set aside a default order for "good cause shown." The Division 2 Court of Appeals has defined "good cause" under CR 55(c)(1) as "excusable neglect" before default and "due diligence" in seeking set aside after default. *Estate of Stevens*, 94 Wn.App. 20, 30, 971 P.2d 58 (1999).

At the trial court level, Longview Orthopedic never denied that its attorney's neglect in failing to appear or answer was inexcusable. Instead,

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⁸ *Answer to Motion for Discretionary Review*, page 15. This admission was made without citation to the trial court record and for good reason. Longview Orthopedic neither made this argument nor provided a factual basis for this statement at the trial court level. Appellate Counsel for Longview Orthopedic apparently made these admissions in an attempt to draw this case factually closer to *Vanderstoep v. Guthrie*.

⁹ See CR 11(a).

counsel denied the importance of excusable neglect and attempted to recast her conduct as a “mistake” under CR 60(b).¹⁰

The court rejected this argument and applied *Estate of Stevens*, finding that excusable neglect and diligence were the standard. The court went on to find that Ms. Forbis’s neglect was inexcusable.¹¹

However, Ms. Forbis had also argued that since she was an “outside attorney,” her client could not suffer a default order due to her conduct. It was her client’s conduct, not her own, that the court needed to analyze. This argument was an extension of *Vanderstoep v. Guthrie*, wherein the Division 2 Court of Appeals set aside a default judgment that resulted from an insurance company’s failure to retain legal counsel for its insured. Since her client did nothing to cause the default, so the argument goes, the default order must be set aside. The trial court accepted this argument and extended the *Vanderstoep v. Guthrie* holding from the insurer-insured context to the attorney-client context and set aside the default order.¹²

In making this ruling, the court noted with dismay the lack of guidance from the Washington courts of appeal on the question of whether an order of

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¹⁰ CP 18-23 and CP 53-65.

¹¹ RP, February 28, 2018, page 16, and CP 193-94.

¹² CP 193-94.

default, when resulting solely from the inexcusable neglect of an attorney, must be set aside.¹³

D. ARGUMENT

I. The issue certified for appeal by the trial court, and approved for review by Commissioner Bearse, is legal in nature and, therefore, the appropriate standard of review is de novo.

While a trial court's factual determinations under CR 55(c)(1) are reviewed under the abuse of discretion standard, a trial court never has discretion to misapply the law or apply the wrong law. A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law or involves the application of an incorrect legal analysis. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 669, 230 P.3d 583 (2010). The abuse of discretion standard gives deference to a trial court's fact-specific determinations, while permitting reversal where an incorrect legal standard is applied. *Dix v. ICT Group, Inc.*, 161 Wn.2d 826, 833, 161 P.3d 1016 (2013). If a pure question of law is presented, a de novo standard of review should be applied. *Id.* at 833-34, 161 P.3d 1016.

While counsel for Longview Orthopedic has gone to great lengths to show that this is a factual controversy subject to the abuse of discretion standard, there is no question that the trial court, in making the decision in

¹³ RP, February 28, 2018, pages 11 and 16.

question, viewed the status of the law under *Vanderstoep v. Guthrie* as not only unsettled, but critical to its analysis. In certifying this legal question for review, the trial court stated:

[I] am going to grant certification. The reason is as follows. There is a controlling issue of law here we don't have any real guidance on the - - factually the situation we have is there's no fault on the part of the defendant. There's no excusable neglect on the part of outside counsel. I don't think the *Ha* case really applies here, because there the Court went to great length to talk about this being a mistaken understanding of who was representing who, and did their very best to avoid the whole notion of excusable neglect.

* * *

So I think what the controlling law is very much at issue.¹⁴

The trial court erred at law by ruling that it was bound by *Vanderstoep* to ignore counsel's inexcusable neglect and set aside the default order.

II. Washington common law defines "Good cause" under CR 55(c)(1) as excusable neglect before the entry of the default order and diligence in seeking set aside thereafter.

Under CR 55(c)(1), a trial court "may" set aside a default judgment for "good cause shown." Washington courts have developed a robust common law regarding the definition of "good cause" under CR 55(c)(1). To show good cause, a defendant must show that its neglect was excusable before

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¹⁴ RP, April 25, 2018, page 13.

the entry of default and that it was diligent in seeking set aside after. *Estate of Stevens*, 94 Wn.App. 20, 30, 971 P.2d 58 (1999).

Estate of Stevens, which is a Division II case, is consistent with a prior Division II ruling, *Seek Systems v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn.App. 266, 271, 818 P.2d 618 (1991), wherein the court stated:

Although the requirements for setting aside a default order are not entirely the same as those for setting aside a default judgment, two factors to be considered in each instance are excusable neglect and due diligence over all.

Division III agrees, stating “A default order may be set aside upon a showing of good cause, i.e., a showing of excusable neglect and due diligence.” *Brooks v. University City*, 154 Wn.App. 474, 491-92, 225 P.3d 489 (2014)(emphasis added).

Division I is in accord, stating in an unreported case, “Under CR 55(c)(1), a court may set aside an order of default upon a showing of good cause. To show good cause under this rule, a party may demonstrate excusable neglect and due diligence.” *Mednikova v. Morse*, 2014 WL 4067921 (unreported and nonbinding)(emphasis added).

However, no amount of diligence after a default order is entered can erase the inexcusable neglect that caused the default in the first place. Although the court in *Estate of Stevens* court referred to excusable neglect and diligence as “factors,” both factors must be proven before the court can find

“good cause” under CR 55(c)(1). In *Estate of Stevens*, the trial court’s refusal to set aside a default order was *affirmed*, the Appellate Court noting that the trial court “found no excusable neglect, without which neither an order of default nor a default judgment can be vacated.” 94 Wn.App. 20, 30, 971 P.2d 58 (1999). The *Estate of Stevens* court went on to refuse to even analyze the question of diligence in the absence of excusable neglect:

The second factor considered under the “good cause” standard requires a showing of due diligence in making an appearance after the court enters the order of default. Here, the trial court made no finding as to whether Curtis acted with due diligence because it already had determined that there was no excusable neglect. **As there was no excusable neglect, we need not determine whether Curtis acted with due diligence.**

94 Wn.App. at 35, 971 P.2d 58. (Emphasis added and internal citations omitted.)

The same result occurred in *Prest v. American Bankers*, where the Division II Court of Appeals dismissed the defendant’s diligence arguments out of hand: “The most that can be said is that Bankers acted with due diligence after it learned that the default judgment had been entered. That does not, however, provide it with a defense or excuse its neglect.” 79 Wn.App. at 100, 900 P.2d 595 (1995).

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III. The trial court correctly found that Defense Counsel's neglect in allowing a default order to be taken against Longview Orthopedic was inexcusable.

Excusable neglect for the purposes of setting aside a default is determined on a case-by-case basis. *Norton v. Brown*, 99 Wn.App. 118, 123, 992 P.2d 1019 (1999). Excusable neglect is not established when a party disregards process, whether willfully or due to inattention or carelessness. *Commercial Courier Serv. Inc. v. Miller*, 13 Wn.App. 98, 106, 533 P.2d 852 (1975).

Counsel for Longview Orthopedic seemed to admit that her firm's neglect was inexcusable by refusing to even address the issue in her written materials to the trial court. The declarations of Amy Forbis describe a breakdown of office procedure, and it has long been established that such breakdowns cannot be excusable neglect. In *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn.App. 191, 212-13, 165 P.3d 1271 (2007), the Court of Appeals summarized the law as follows:

Judicial decisions have repeatedly held that, if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable.

Citing *Johnson v. Cash Store*, 116 Wn.App. 833, 848, 68 P.3d 1099 (2003); *Beckman v. Dep't of Social & Health Servs.*, 102 Wn.App. 687, 11 P.3d 313 (2000)(neglect in failing to institute office management procedure to "catch" administrative errors was inexcusable); *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn.App. 93, 900 P.2d 595

(1995)(neglect inexcusable when summons and complaint were “mislaidd” while general counsel was out of town).

In *TMT*, the defendant suffered a default because the legal assistant for its general counsel failed to enter the answer deadline into the calendaring system. The Court of Appeals found this neglect to be inexcusable. *Id.* at 213, 165 P.3d 1271.

This rule was reaffirmed in *Trinity Universal Insurance Company of Kansas v. Ohio Casualty Insurance Company*, 176 Wn.App. 185, 196 fn.6, 312 P.3d 976 (2013), where the Division I Court of Appeals summarily dispatched defendant’s argument that a registered agent’s failure to forward the complaint was “excusable neglect” without even mentioning the argument in the body of the opinion. At Footnote 6, the court wrote:

Even if we were to consider Ohio’s claim of inadvertence or excusable neglect, we find it unavailing. * * * We have repeatedly held that when a company’s failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, it is not excusable under CR 60(b).

(Internal citations omitted.)

The same result occurred in *Prest v. Am. Bankers Life Assurance, Co.*, where the defendant suffered a default because general counsel was out of town and the legal assistant who was supposed to receive and calendar pleadings “mislaidd” the summons and complaint. The Division II Court of Appeals found this neglect to be inexcusable. *Id.* at 100, 900 P.2d 595.

On appeal, counsel for Longview Orthopedic has not challenged the trial court's finding of inexcusable neglect. To the contrary, appellate counsel exacerbates this finding by admitting, without reference to the record, that Ms. Forbis's firm had failed to even contact Longview Orthopedic in the thirty-one days following service of process. By destroying any factual analogy between *Vanderstoep v. Guthrie* and the case at bar, this admission provides a second basis for reversing the trial court.

In *Vanderstoep v. Guthrie*, the Guthries immediately notified their insurance company that they had been sued by speaking with a representative of that company. They followed up this discussion with two telephone calls to the insurance company seeking confirmation that they were being defended. Both calls resulted in voicemail messages being left for the insurance company's representatives which again notified the company of the lawsuit and the Guthries' expectation that the company would defend them. Despite these efforts, the insurance company failed to appear and default order was entered against the Guthries. *Vanderstoep*, 200 Wn.App. at 530-31, 402 P.3d 883.

In the case at bar, Ms. Forbis claimed that the default order was the result of a "clerical error" that caused her firm to not generate and file a notice of appearance. At the trial court level, Ms. Forbis did not disclose that Bennett Bigelow & Leedom, P.S., had failed to contact her client until at least the

thirty-first day after service of process.¹⁵ Her declaration describes how the summons and complaint were served on the registered agent on December 21, 2017, and forwarded to the insurance company on December 27, 2017, and that her firm was “retained” that same day.¹⁶ The ordinary process of being “retained” includes speaking with, or at least notifying, your client that you represent them. Ms. Forbis’s firm failed to do this, and by omitting this information from her declaration, Ms. Forbis created the implication that Longview Orthopedic was aware of her representation and, therefore, was blameless in not appearing to defend itself.

This key fact severs any analogy to *Vanderstoep v. Guthrie*. In *Vanderstoep*, the court found that the Guthries acted reasonably by repeatedly contacting their insurance company to confirm their defense. In the case at bar, the record establishes that Longview Orthopedic did nothing more than forward the summons and complaint on to its insurance company. The summons orders Longview Orthopedic to appear in court within twenty days or suffer a default judgment. By claiming to have been “retained,” Ms. Forbis’s declaration creates the false impression that Longview

¹⁵ The revelation that Ms. Forbis’s firm had failed to contact Longview Orthopedic upon being retained by the insurance company indicates that her firm’s neglect went well beyond the “clerical error” described in her declaration. It is unclear what, if anything, her firm did to further the representation of Longview Orthopedic in these thirty-one days.

¹⁶ CP 26-27. See Line 1 of CP 27 (“In the present case, these steps were not undertaken at the time of my **retention**, due to a clerical error.” (emphasis added).)

Orthopedic believed that it was being defended by her firm, when the reality is, per appellate counsel's admission, that Longview Orthopedic did not know whether it was being defended or not. Despite having never heard from Ms. Forbis's firm, the record contains no evidence that Longview Orthopedic took any steps to confirm that it was being defended. Had Ms. Forbis made a full disclosure to the court, this information would have been available to the trial judge and the court's application of *Vanderstoep*, let alone its finding that Longview Orthopedic was blameless, never would have happened.

Ms. Forbis's declaration creates the false implication that Longview Orthopedic knew that it was represented by Bennett Bigelow & Leedom, P.S., and believed that the firm would be defending. The truth, however, is that Longview Orthopedic simply forwarded the complaint to its insurance and never looked back. But for defense counsel's half-true declaration, *Vanderstoep v. Guthrie* is factually distinguishable from the case at bar. As such, there is no legal basis for the trial court's decision to disregard defense counsel's inexcusable neglect.

Moreover, the record establishes that the attorneys at Bennett Bigelow & Leedom, P.S., had no intent to follow Civil Rule 12(a)(1) by filing an answer within 20 days. Ms. Forbis openly admitted that her firm had not even begun the process of drafting an answer until eleven days after it was due. The record also established that Ms. Forbis's normal practice is to ignore the

20-day deadline in CR 12 in favor of filing a notice of appearance.¹⁷ While Ms. Forbis's failure to file a notice of appearance within twenty days may not have been willful, her failure to file an answer within twenty days certainly was willful. The court will not overturn a default that was the result of willful conduct by the defendant. In *TMT*, 140 Wn. App. at 205-206, 165 P.3d 1271, the Division I Court of Appeals stated:

[W]here the defaulting party's actions are deemed willful, equity will not afford that party relief, even if the party has a strong or virtually conclusive defense to its opponents' claims. * * * Willful defiance of the court's authority can never be rewarded in an equitable proceeding.

(Internal citations omitted.)

In the case at bar, the trial court correctly found that Ms. Forbis's neglect was inexcusable. This, under *Estate of Stevens*, should have been the end of the court's inquiry and the motion to set aside should have been denied.

IV. The trial court erred at law by pivoting its analysis away from attorney neglect and to Longview Orthopedic's actions prior to retaining counsel.

The trial court committed legal error when it disregarded Ms. Forbis's inexcusable neglect, applying by analogy *Vanderstoep v. Guthrie*. In *Vanderstoep*, the defendant's insurance company failed to retain counsel for the defendant after the defendant forwarded the summons and complaint to

¹⁷ CP 117-173.

the adjuster. The plaintiff obtained a default judgment, and the defendant brought a motion to vacate under CR 60(b). The insurance company offered no explanation for why defense counsel was never retained. The *Vanderstoep* court saw this as dispositive of the issue of excusable neglect, stating:

In the absence of any explanation, it appears that American Family's failure to arrange for an attorney to defend the Guthries resulted from a breakdown of its internal office procedures. The general rule is that "if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable." *TMT Bear Creek Shopping Ctr., Inc. v PETCO Animal Supplies, Inc.*, 140 Wn.App. 191, 212, 165 P.2d 1271 (2007). **Therefore, American Family's failure to arrange for a timely appearance on behalf of the Guthries did not result from mistake, inadvertence, surprise, or excusable neglect.**

Vanderstoep, 200 Wn.App. at 531-32, 402 P.3d 883 (emphasis added).

The *Vanderstoep* court, however, pivoted the CR 60(b) analysis away from the conduct of the defendant's insurance company and to the conduct of the actual defendant. "The question here is which party's behavior controls: the Guthries' legitimate excuse for not appearing or American Family's inexcusable neglect." *Id.* at 532, 402 P.3d 883. In the end, the *Vanderstoep* court determined that the defendant's conduct, not that of its insurance company, controlled. The *Vanderstoep* court set aside the default order and judgment.

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In finding that the trial court had abused its discretion, the *Vanderstoep* court handed down a *de facto* mandate—in the insurer/insured context, the trial court must consider the conduct of the insured, not the insurer, when analyzing excusable neglect.

In the case at bar, Ms. Forbis argued that her conduct, as an “outside attorney,” could not harm Longview Orthopedic because Longview Orthopedic had done nothing to cause the default. The trial court agreed, and, based on the application of *Vanderstoep v. Guthrie*, disregarded Ms. Forbis’s inexcusable neglect. This was legal error.

First, the Division II Court of Appeals in *Vanderstoep* made a fact-specific ruling that the Guthries’ conduct, and not that of American Family Insurance, would control the question of excusable neglect in that case. No blanket rule was handed down in *Vanderstoep* which makes default orders resulting from non-party conduct automatically subject to set aside. The only rule, if any, to be taken from *Vanderstoep* is that a defendant who diligently seeks representation from its insurer will not be held responsible for that insurer’s failure to retain counsel. This is a far cry from the position taken by Longview Orthopedic which argued to the trial court that *only* default orders that result from a party’s own inexcusable neglect may withstand a motion to set aside.

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Had the Division II Court of Appeals wished to articulate such a broad rule, it could have done so in *Vanderstoep*. More importantly, however, had the court wished to extend *Vanderstoep* to the attorney-client context, it could have done so in *Boss Construction, Inc. v. Hawk's Superior Rock, Inc.*, 2017 WL 5593791 (Div.2 2017), an unreported case. The *Boss Construction* decision was issued two months after *Vanderstoep*, and it is signed by Judges Lee and Johanson, two of three judges that signed *Vanderstoep*. In *Boss Construction*, a default judgment resulted from the inexcusable neglect of the defendant's attorney when he moved his offices but failed to notify opposing counsel or court administration. When the plaintiff mailed summary judgment papers to defense counsel, they went to the prior office and defendant failed to oppose the motion for summary judgment. Judgment was entered against the defendant, and the defendant sought set aside under CR 60(b). The trial court denied the motion, and the Division II Court of Appeals *affirmed*, finding the attorney's neglect to be inexcusable.

There is no question that the defendant in *Boss Construction* was blameless with regard to its attorney's failure to defend the summary judgment motion. In fact, Division II specifically found that the failure to defend was the result of a break down in defense counsel's internal case management and, therefore, was inexcusable under *TMT* and *Prest*. When faced with this same argument at the trial court level, counsel for Longview Orthopedic made the

cynical argument that only in-house attorneys are subject to *TMT* and *Prest*, but professional litigators that are “outside counsel” are not. However, the ruling from *Boss Construction* holds the opposite.

Second, there is no case in Washington where a court of appeal has found an attorney to be inexcusably neglectful but set aside a default order nonetheless. Longview Orthopedic’s “inside attorney” versus “outside attorney” theory is not only bad public policy, it finds little support in Washington State jurisprudence. Longview Orthopedic attempted to distinguish *TMT* and *Prest* because the attorney in both of those cases was in-house counsel and Ms. Forbis was an “outside attorney.” This argument runs directly against Division II’s decision in *Boss Construction*, wherein *TMT* and *Prest* were applied to an “outside attorney.”

While there is no Washington holding that is consistent with Longview Orthopedic’s argument, there is *dicta* from a Division I Court of Appeals opinion that lends some support to this argument. In *Ha v. Signal Electric, Inc.*, 182 Wn. App. 436, 446, 332 P.3d 991 (2014), the defendant had hired an attorney named “Tracy” to represent defendant in a Chapter 11 bankruptcy. The bankruptcy trustee had also hired a financial advisor named “Tieman.” When Tracy was presented with a summons, complaint, and acceptance of service, he was unsure of whether he had the authority to sign the acceptance of service. Tracy discussed the matter with Tieman. They

decided that Tracy would accept service and that Tieman would forward the summons and complaint to the defendant's insurance company. Tracy accepted service and Tieman sent the complaint to the wrong insurance company. Due to this mistake, no attorney was engaged to defend the defendant and a default resulted. The defendant moved to have the default set aside and the trial court granted the motion. The Division I Court of Appeals *affirmed*, finding that the failure to defend was the result of a "mistake." *Id.* at 450, 332 P.3d 991.

On appeal, the plaintiff argued that Tracy's failure to appear and defend was inexcusable neglect, citing the court to *TMT* and *Prest*. The Division I Court of Appeals distinguished *TMT* and *Prest* because the attorneys in those cases were employees of the defending party, whereas Tracy was not an employee of the defendant, stating:

Ha's case is readily distinguishable. As we determined above, Tracy is not Signal Electric's general counsel. Nor is he an office employee. Rather, he is an independent attorney retained for the Chapter 11 bankruptcy proceeding. The same is true of Tieman, who was retained solely as a financial advisor in the bankruptcy action. Their mistakes were not a breakdown of internal procedure, and so the rule of *TMT* does not apply.

Id. at 451, 332 P.3d 991.

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These statements by Division I directly contradict Division II's ruling in *Boss Construction* where the Division II Court of Appeals explicitly applied "the rule of *TMT*" to "outside counsel."

Furthermore, the above quote from *Ha* is mere *dicta* because the *Ha* court, in the end, found that Tracy and Tieman's conduct was not neglectful in the first place, making the excusable versus inexcusable question moot,

These facts demonstrate that Signal Electric's failure to respond was not deliberate or even neglectful. Rather, it resulted from Tracy's genuine misunderstanding as to whether he should accept service and Tieman's mistake in forwarding the summons and complaint to the wrong insurance company.

Id. at 450, 332 P.3d 991.

The *Ha* case was decided based on "mistake," not excusable neglect, and for good reason. There is a long line of Washington cases, including *Vanderstoep v. Guthrie*, wherein Washington courts repeatedly set aside default orders and judgments that result from a defendant's "mistaken" belief that he or she is being defended. "Mistake" and "excusable neglect" are two

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distinct concepts, as pointed out by the Division II Court of Appeals in *Boss*

Construction,

[T]he kind of “mistake” justifying relief under CR 60(b)(1) occurs when there is a genuine misunderstanding as to who is responsible for defending the case. This aligns with the ordinary meaning of “mistake,” which is “to take in a wrong sense,” or “to be wrong in the estimation or understanding of.”

2017 WL 5593791 at page 6.

At the trial court level, Longview Orthopedic attempted to cast its attorney’s failure to defend as a “mistake,” even though Ms. Forbis had been successfully retained to defend this action. Longview Orthopedic’s briefing ignores the question of excusable neglect entirely, and describes Ms. Forbis’s “clerical error” as a “mistake,” bold-facing the word “mistake” twelve times as if trying to win the trial judge over with subliminal messaging.¹⁸ The trial court rightly rejected this argument and found that excusable neglect was the standard.¹⁹

And this is the key factual distinction between the case at bar and *Vanderstoep v. Guthrie*. In *Vanderstoep*, the defendant’s insurance company failed to obtain counsel for the defendant and the defendant “mistakenly” believed, due to no fault of its own, that an attorney had been retained. In the case at bar, no such “mistake” occurred. Bennett Bigelow & Leedom, P.S.,

¹⁸ CP 53-65.

¹⁹ RP, February 28, 2018, page 16.

was successfully retained to defend. This is what makes the analytical pivot away from Ms. Forbis's conduct so inappropriate. If default orders that result from attorney neglect can only be sustained when caused by the conduct of the client, then default orders based on attorney neglect can never be sustained. It is axiomatic that a lawyer's inexcusable neglect will always be the result of that lawyer's own conduct as opposed to the conduct of the client.

V. Once an attorney has been retained to defend an action, the "good cause" analysis of CR 55(c)(1) must focus solely on the conduct of counsel.

This brings the analysis to the third, and most powerful, argument against allowing *Vanderstoep v. Guthrie*'s application to the attorney-client context. The Respondent's proposed combination of *Ha* and *Vanderstoep* would be the end of Civil Rule 12(a). Any "outside" attorney, no matter how neglectful, can have a default order set aside by simply stating the obvious—"This was all my fault, my client had nothing to do with it." Worse still, this protection would be reserved for professional litigators, like Ms. Forbis, leaving inhouse counsel and *pro se* litigants no way to escape the consequences of their inexcusable neglect. A rule that allows neglectful attorneys to routinely avoid default orders, but offers similarly situated *pro se* litigants no slack whatever not only smacks of cronyism, it threatens the standards of professionalism in the State of Washington.

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A bright-line rule that focusses the good cause analysis of CR 55(c)(1) on attorney conduct not only avoids this hypocritical outcome, it is consistent with Washington's policy in favor of the orderly dispensation of justice. Defense counsel's briefing has always been heavy on the equitable nature of CR 55(c)(1) proceedings and the policy in favor of judgment on the merits but ignores the other side of this policy coin. In *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999), the Court of Appeals stated:

As a policy matter, our Supreme Court has stated that default judgments are not favored because “[i]t is the policy of the law that controversies be determined on the merits[.]” **On the other hand, an orderly system of justice mandates that parties comply with a judicial summons.**

(Internal citations omitted and emphasis added.)

In *TMT*, the Court of Appeals pointed out how Washington's policy in favor of the orderly dispensation of justice must also be considered:

[W]e also value an organized, responsive and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with the rules. As our Supreme Court recently noted, “litigation is inherently formal. All parties are burdened by formal time limits and procedures.”

140 Wn. App. at 199-200, 165 P.3d 1271. (Internal citations omitted.)

Civil Rule 12(a)(1) requires a defendant to answer the plaintiff's complaint within twenty days of service. Counsel for Longview Orthopedic intentionally chose not to do so, as provided by her own declaration and the

evidence in the record describing her past practice in other cases. A notice of appearance would have given Ms. Forbis the cover to do this without fear of an *ex parte* default motion, but she inexcusably failed to file the notice. Continuing to focus on the conduct of the defendant, even after the attorney has taken over the defense of the case, renders Civil Rule 12(a) a dead letter. It is hard to imagine any circumstance where an attorney's decision to not file an answer on time, coupled with that attorney's failure to file a notice of appearance, will ever be the fault of the client.

Toney acknowledges the equitable principles that are at play, but a bright line rule is necessary to protect the integrity of the civil rules and the professionalism of attorneys. If the sole consideration on every motion to set aside a default order is the policy in favor of judgment on the merits and avoidance of the hardship suffered by the defendant, no attorney-caused default order will be sustained no matter how inexcusable or intentional the conduct of the attorney. Civil Rule 12(a) will be transformed from a rule of law to a mere suggestion. The court should use this case to make it clear that trial courts must consider the conduct of the attorney, not the client, for the purposes of "excusable neglect" once the attorney has been successfully retained to defend the case.

In the absence of such a rule, *pro se* litigants and in-house counsel are held to a higher standard than "outside attorneys," including professional

litigators like Ms. Forbis and Bennett Bigelow & Leedom, P.S. The attorneys who make their living in the courtroom should be held to the highest standard with regard to compliance with the Civil Rules. The well-settled rule that a breakdown of internal office procedure can never be excusable neglect would apply to every kind of office in the state of Washington except law offices. A hypocritical outcome such as this cannot be endorsed by the court.

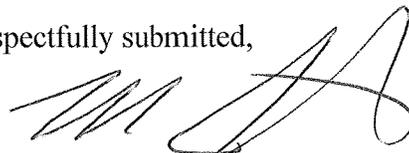
Furthermore, the default in question was not the result of a mere clerical error. The default was caused by Ms. Forbis and her firm ignoring Longview Orthopedic for the first three and a half weeks following their retention. This is exactly the kind of conduct that extending *Vanderstoep* will enable. Attorneys will be free to ignore a summons and complaint, ignore the deadlines of Rule 12(a), and ignore their clients for nearly a month without fear of default.

E. CONCLUSION

The court should reverse the trial court's April 25, 2018, order setting aside the January 16, 2018, default order.

DATED: November 19, 2018.

Respectfully submitted,



MATTHEW J. ANDERSEN, WSBA #30052
Of Attorneys for Appellant

CERTIFICATE

I certify that on this day I caused a copy of the foregoing APPELLANT'S OPENING BRIEF to be mailed, postage prepaid, and e-mailed to Respondent's attorney, addressed as follows:

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DATED this 28th day of November 2018, at Longview,
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KARA L. COPE

WALSTEAD MERTSCHING PS

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