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No. 52327-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES SELLERS, Guardian ad Litem of NATHAN TONEY,
A Minor,

Appellant,

vs.

LONGVIEW ORTHOPEDIC ASSOCIATES, PLLC,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

No Washington appellate court has ever ruled that a client should escape a default order or default judgment simply because it resulted from his or her attorney's inexcusable neglect. The general rule in Washington, as in all jurisdictions known to counsel for Toney, is that clients are bound by the conduct of their attorneys. Under *Vanderstoep v. Gurthrie*, a different rule applies to insurance adjusters who have no authority to bind anyone other than the insurance company. Affirming the trial court in the case at bar requires the extension of *Vanderstoep* into the attorney-client context. Longview Orthopedic attempts to deny this but offers no other avenue to affirm. Under *Estate of Stevens*, this default order can be set aside only if the inexcusable neglect of counsel is ignored.

If the rationale behind *Vanderstoep v. Guthrie* is extended to attorneys and clients, no attorney caused default order or judgment will be able to withstand a motion to set aside. A client cannot cause his or her attorney to be neglectful. Inexcusable attorney neglect is caused by the conduct of attorneys, not clients. There truly is no middle ground. Affirming the trial court will result in a *de facto*, if not explicit, rule that all attorney-caused default orders or judgments must be set aside under CR 55(c).

II. ARGUMENT

A. Longview Orthopedic's Restatement of the Issue.

Unhappy with the lay of the land, Longview Orthopedic attempts to reshape it with a "Restatement of Issue." The trial court certified for immediate review a question of law, "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." [CP 193-194] Whilst ruling, the Honorable Stephen A. Warning said, "I think what the controlling law is very much at issue." [RP, April 25, 2018, page 13]

Nonetheless, Longview Orthopedic insists that the issue presented is factual. In doing so, appellate counsel not only assumes superior knowledge of Judge Warning's own thought processes, but also creates the unseemly implication that counsel for Toney tricked the judge into signing an order that did not represent his own thoughts. Counsel points out that the trial court certified this appeal "[a]t Toney's request" and that the court "signed Toney's proposed order identifying the issue."¹ This veiled slight ignores the fact that Longview's attorney signed the April 25, 2018, order, right under the words "Approved as to Form[.]" [CP 193] If counsel for Longview Orthopedic believed that the order did not properly

¹ *Brief of Respondent*, page 5.

memorialize the court's ruling, she should have brought her concerns to the court's attention or refused to sign the order.

From the start, Longview Orthopedic's appellate counsel has doggedly attempted to convert the legal question before the court into a factual one. Commissioner Bearse disagreed, identifying two legal issues for review by this court:

This court agrees that the trial court properly certified its order setting aside the order of default for appellate review. Primarily, whether *Vanderstoep's* reasoning should apply to these facts, and if applied, whether Longview Orthopedic has a right to set aside the default order regardless of its attorney's inexcusable neglect is a controlling question of law on which there is substantial ground for a difference of opinion and immediate review of the order may materially advance the ultimate termination of the litigation by potentially resolving the issue of liability, a major issue here. Secondly, the related issues whether *Ha* is distinguishable and whether, instead, the reasoning in the unpublished *Boss* opinion should apply to the conduct of independent counsel would also benefit from appellate review. Accordingly, this court grants review under RAP 2.3(b)(4).

Undeterred, Longview Orthopedic filed a motion to modify the Commissioner's ruling, wherein they argued that Commissioner Bearse, like the trial court judge before her, was confused.² The motion was denied.

² *Motion to Modify Commissioner's September 10, 2018, Ruling Granting Review*, page 12.

B. Longview Orthopedic's Restatement of the Case.

Longview Orthopedic attempts to change the facts in the record as well. At page 3, counsel states that the default was taken on "the first day of Ms. Forbis' scheduled trial." This statement finds no support in the record. It is either entirely made up, or it is based on information outside the record. Either way, it cannot be considered by this court. What is more, the statement falls short of stating that Ms. Forbis was actually in trial on that day. There is nothing in the record that indicates that this "scheduled" three-week trial ever happened.

Longview Orthopedic provides the court with another half-truth on page 3, when he states, "On Sunday, January 21, 2018, Ms. Forbis realized her mistake and took immediate action." It was not Ms. Forbis who discovered the default order, but rather, her associate Rhianna Fronapfel. This, of course, begs the question as to what Ms. Forbis's alleged trial had to do with any of this given the availability of Ms. Fronapfel to assist her on this case.

The last time Longview Orthopedic played fast and loose with the trial court record, it inadvertently admitted that Bennett Bigelow & Leedom had failed to even contact its client in the thirty-one days following service of process. At page 4, counsel attempts to walk this
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back, but the court can judge for itself the breadth of this admission at page 15 of Respondent's *Answer to Motion for Discretionary Review*.

While the appellate counsel's admission provides additional depth to the level of Bennett Bigelow & Leedom's neglect, the inexcusability of this neglect is a verity on appeal. No one has ever contested this issue. Ms. Forbis chose to duck or otherwise ignore it at the trial court level, and Longview Orthopedic's appellate counsel failed to assign error to the trial court's finding of inexcusable neglect.

C. Abuse of Discretion vs. *De Novo* Review.

The trial court has discretion to make factual decisions under CR 55(c). The trial court has no discretion regarding the legal implication of these factual decisions. No court has discretion to ignore the law, misapply the law, or apply the wrong law. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 669, 230 P.3d 583 (2010); *Dix v. ICT Group, Inc.*, 161 Wn.2d 826, 833, 161 P.3d 1016 (2013).

The trial court has discretion to find excusable neglect or not. Once inexcusable neglect is found, the trial court's discretion ends and the motion to set aside must be denied. In the absence of excusable neglect, there can be no set aside under CR 55(c). *Estate of Stevens*, 94 Wn.App. 20, 30, 971 P.2d 58 (1999)("[the trial court] found no excusable neglect,

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without which neither an order of default nor a default judgment can be vacated.”).

Longview Orthopedic has been given numerous opportunities to point out how *Stevens* has been overruled, superseded, or is otherwise no longer the law. Toney has placed *Stevens* front and center before the trial court, before Commissioner Bearse, and now before this court. Longview Orthopedic’s response has been to either deny that this law exists or ignore it entirely.³

Inexcusable neglect precludes set aside under CR 55(c). This is the law. The default resulted from the inexcusable neglect of Longview Orthopedic’s trial counsel. This is a verity on appeal. The only question that remains is whether the trial court committed legal err in ignoring counsel’s inexcusable neglect in favor of an allegedly innocent defending

³ In resisting discretionary review, counsel wrote “[N]o court addressing only vacation of a default order has held that finding excusable neglect is a necessary predicate for determining whether ‘good cause’ exists under CR 55[.]” *Longview Orthopedic Answer to Motion for Discretionary Review*, page 9. Toney pointed out the error of this statement in its reply brief. Despite being made aware of this error, Longview Orthopedic continued to deny the existence of the *Stevens* ruling at page 8 of its motion to modify Commissioner Bearse’s ruling: “But the requirement of ‘excusable neglect’ is not found in the text of CR 55(c)(1); it is instead only one of the criteria in CR 60(b)(1). The Commissioner’s ruling is premised on a ‘legal standard’ that is not contained in CR 55 itself, nor in the case law interpreting it.” (emphasis added) At page 9, Longview Orthopedic again incorrectly states: “But neither of these decisions, nor any other precedent, requires a trial court to find ‘excusable neglect[.]’” Longview Orthopedic has done nothing to address these erroneous statements of the law, only the first of which could have been unintentional.

party.⁴ The question of whose conduct must be analyzed and whose conduct must be ignored is a legal question subject to *de novo* review.

D. Attorneys file answers, clients don't.

Extending *Vanderstoep v. Guthrie* from the insurance context to the attorney-client context creates a *de facto* rule that requires all attorney-caused default orders to be set aside. Once an attorney is retained, it is the attorney, not the client, that is charged with filing an answer or notice of appearance with the court. It is difficult to imagine a situation where an attorney's failure to file an answer or notice of appearance would ever be the fault of the client. As such, it is hard to imagine a default order based on an attorney's inexcusable neglect that would ever survive CR 55(c) if the trial court is affirmed.

Longview Orthopedic denies that the application of *Vanderstoep* to the case at bar would create a "rule" or otherwise bind trial courts to grant CR 55(c) motions where the default resulted from attorney neglect. Counsel goes so far as to chide Toney for making a "moral hazard" argument that "borders on ridiculous."⁵ A careful reading of *Vanderstoep*,

⁴ The issue before this court is whether *Vanderstoep v. Guthrie* should apply to the case at bar. While the diligence of Longview Orthopedic in forwarding the summons and complaint to its insurance company was not contested at the trial court level and was not assigned error by Toney, Longview Orthopedic's admissions on appeal create factual differences between the conduct of the Guthries in *Vanderstoep* and Longview Orthopedic that break any analogy between these two cases.

⁵ *Brief of Respondent*, page 26.

however, shows that these concerns are very real. In *Vanderstoep*, the trial court denied the defendant's motion to set aside a default judgment that resulted from an insurance company's inexcusable neglect. The Court of Appeals agreed that the insurance company's neglect was inexcusable, but *reversed* the trial court's denial of the motion to set aside. The appellate court ruled that the trial court erred in looking to the conduct of the insurance company and not the conduct of the actual defendants who, in that case, were blameless.

The reversal in *Vanderstoep* leaves little room for any other outcome. Where a defendant diligently forwards the summons and complaint to his or her insurance company, any default that results from the inexcusable neglect of the insurance company must be set aside. *Vanderstoep v. Guthrie* provides clear direction to trial courts—you must decide the motion based on the conduct of the defendant, not the conduct of the defendant's insurance company. While *Vanderstoep* may not strip the trial court of its discretion to decide what constitutes excusable neglect, it unequivocally directs the trial court where to look in exercising that discretion.

The trial court in the case at bar expanded *Vanderstoep's* directive, and, in doing so, committed legal error. No Washington appellate decision holds that a default order or default judgment may, let alone

must, be set aside if it results solely from the inexcusable neglect of counsel. Longview Orthopedic inexplicably denies that this is a case of first impression, but later admits that there are no cases directly on point. The outcome of this case will decide whether a second *de facto* rule will come out of *Vanderstoep*. This new rule would mandate that all default orders and default judgments resulting solely from attorney neglect must be vacated. An affidavit of counsel claiming sole responsibility for the failure to appear or answer will be all that is required to obtain set aside.

Professionalism issues aside, such a ruling inadvertently creates a result so hypocritical that it would be an embarrassment to the legal community. The well-established rule that a breakdown in internal office procedure cannot constitute excusable neglect would continue to apply to Washington's private citizens, corporations, and in-house counsel. The same rule, however, could never apply to professional litigators like Bennett Bigelow & Leedom. Under what circumstance could a client ever cause his or her law firm to suffer a breakdown of internal office procedure? It is axiomatic that a default order caused by attorney's inexcusable neglect are caused by the conduct of that attorney, not his or her client. If the reasoning of *Vanderstoep* is extended, the set aside of attorney-caused default orders and default judgments will be mandatory.

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E. Civil Rule 55 vs. Civil Rule 60.

Longview Orthopedic bemoans Toney’s discussion of CR 60 cases, having evidently forgotten that its arguments at the trial court level and in resisting discretionary review rely entirely on CR 60 cases. *Vanderstoep v. Guthrie* is a CR 60 case, after all. Nonetheless, at page 7, Longview Orthopedic asks the Court of Appeals to decide this case under the “standard applicable to CR 55(c)(1), rather than CR 60(b)[.]” Toney could not agree more.

CR 55 appellate decisions from all three divisions condition set aside of a default order on a finding of excusable neglect, *see Estate of Stevens*, 94 Wn.App. 20, 30, 971 P.2d 58 (1999); *Seek Systems v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn.App. 266, 271, 818 P.2d 618 (1991); *Brooks v. University City*, 154 Wn.App. 474, 491-92, 225 P.3d 489 (2014); and *Mednikova v. Morse*, 2014 WL 4067921 (unreported and nonbinding).

Should the court find that CR 60 cases are completely inapplicable, then it is left with *Stevens* and a single conclusion—the default order must stand and the trial court must be reversed.

After admonishing Toney to focus on CR 55 cases, Longview Orthopedic offers five pages of argument (pages 9 through 13) and another six pages of argument (pages 20 through 25) based entirely on

hand-picked CR 60 cases. It seems that the only CR 60 cases Longview Orthopedic finds irrelevant are those that create the hypocrisy identified in Toney's opening brief, i.e., the inexcusable neglect of *pro se* defendants and inhouse counsel results in default, whereas the same inexcusable neglect of professional litigators results in set aside.

Longview Orthopedic cannot hide from the reality that the only way to prevail on this appeal is to ignore Washington's CR 55 common law and cherry-pick out of Washington's CR 60 common law. The *dicta* from *Ha v. Signal Electric, Inc.*, 182 Wn.App. 436, 446, 332 P.2d 991 (2014) and holding from *Vanderstoep v. Guthrie*, both of which are CR 60 cases, are the centerpieces of Longview Orthopedic's argument. Faced with the inevitable hypocrisy that the other CR 60 cases create, Longview Orthopedic creates a limited universe of CR 60 cases and dives headlong into analyzing them.

The CR 60 case that Longview Orthopedic will not discuss is *Prest v. American Bankers Life Assurance Company*, 79 Wn.App. 93, 900 P.2d 595 (1995). Like the *Stevens* decision, *Prest* is a Division II opinion that devastates Longview Orthopedic's position in this case. In *Prest*, the defendant's answer was only three days late when the plaintiff took a

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default judgment.⁶ Six days later, defendant discovered the default judgment and immediately brought a motion to have the judgment set aside. The trial court granted that motion. Despite the fact that defendant's appearance was only nine days late, and despite the lack of prejudice to plaintiff, the Division II Court of Appeals *reversed* the trial court. While it is true that the reversal was due in part to the defendant's failure to demonstrate a prima facie defense, the *Prest* court specifically found that the lack of excusable neglect, standing alone, demanded reversal:

Even if we were to assume that the application was admissible and provided a defense to *Prest*, we are satisfied, for other reasons, that the motion to vacate should not have been granted. That is so because we agree with *Prest* that the trial court erred in concluding that Banker's neglect in failing to answer the complaint was excusable.

Id. at 99, 900 P.2d 595.

In *Prest*, the plaintiff's summons and complaint were received by defendant and sent to the wrong person inside the company because corporate general counsel was out of town. As a result, defendant's legal coordinator did not learn of the lawsuit until after default. This

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⁶ Out of state service of process on the defendant occurred on March 20, 1992, making defendant's answer due in sixty days. Sixty-three days later, on May 22, 1992, defendant obtained an *ex parte* default order and judgment. *Prest*, 79 Wn.App. at 95, 900 P.2d 595.

breakdown of internal office procedure is similar, if not more excusable, than what occurred at Bennett Bigelow & Leedom.⁷

What makes *Prest* so devastating for Longview Orthopedic is the prominence that excusable neglect played in the Division II court's reasoning. Even assuming a prima facie defense and a complete lack of prejudice to plaintiff, the Division II Court of Appeals ruled that the trial court abused its discretion in setting aside the default judgment because the defendant's neglect was inexcusable. The fact that the defendant discovered the default within nine days of when its answer was due and acted quickly to set it aside was similarly found irrelevant by the Division II court: "The most that can be said is that the 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." *Id.* at 100, 900 P.2d 595.

Longview Orthopedic's lengthy discussion regarding the difference between default orders and default judgments, particularly with

⁷ Trial counsel for Longview Orthopedic provided the court with no explanation as to why her firm failed to appear or answer on time. Counsel simply claimed that she was very busy and someone at her office forgot to file a notice of appearance or calendar the date Longview Orthopedic's answer was due. The record is also silent as to why her firm waited until her client's answer was eleven days late to even begin thinking about drafting an answer. And finally, there is no explanation as to why Ms. Forbis's staff of legal assistants, paralegals, and associate attorneys were unable to secure an appearance or draft answer, let alone speak with, write a letter to, or even email her client while Ms. Forbis allegedly prepared for a trial that was "scheduled" but apparently never occurred.

regard to the policy of “finality” fails in light of *Prest*. The default order and judgment in *Prest* were obtained at the very outset of the litigation, just like the default order in the case at bar. Longview Orthopedic offers no rational explanation for why a nine-day-old default judgment should be upheld, as in *Prest*, but the six-day old default order in this case should be set aside. The common thread running through all of these cases, be they default order or default judgment cases, is that set aside cannot occur absent excusable neglect.

While it is true that setting aside a default order requires less of a showing than the set aside of a default judgment, both require excusable neglect. Longview Orthopedic has repeatedly complained that, under Toney’s argument, setting aside a default order would be more difficult than setting aside a default judgment. This argument, however, confuses the burden of persuasion under CR 55 and CR 60. As the moving party, the party seeking set aside under both CR 55 and CR 60 must show certain things. Under CR 55, to set aside a default order, the moving party need only prove excusable neglect and diligence. Questions regarding meritorious defense or prejudice to the plaintiff are irrelevant. Under CR 60, to set aside a default judgment, the moving party must prove four things: excusable neglect, diligence, meritorious defense, and lack of prejudice to the plaintiff. Setting aside a default judgment is more

difficult because the moving party must make a showing of two additional factors (meritorious defense and lack of prejudice) that it need not prove to succeed under CR 55.

While there are numerous cases that say less proof is required to set aside a default order than to set aside a default judgment, there are no Washington cases that hold that either a default order or a default judgment may be set aside in the absence of excusable neglect. Counsel for Longview Orthopedic harps on the lower threshold of proof under CR 55(c), the lack of finality of default orders, the policy in favor of trial on the merits, and myriad other equitable platitudes, but none of that can take away from the universal requirement of excusable neglect. Longview Orthopedic's nebulous, anything-goes definition of "good cause" under CR 55(c) finds no support in Washington law.

**F. Reversing the trial court does not require overruling
Vanderstoup v. Guthrie.**

Toney seeks a ruling that confines *Vanderstoup v. Guthrie* to the insurer-insured context or, at the very least, prohibits its application to the attorney-client context. While there may be some support in Washington's common law for the idea that an insured will be relieved of responsibility for its insurer's failure to assign counsel, there is no support
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for extending this concept to an attorney who has been successfully retained to defend. If the trial court is affirmed, this case will be the first.

G. Longview Orthopedic's citation to a disjointed cocktail of federal cases fails in light of the U.S. Supreme Court's decision in *Pioneer Investment Serv. Co. v. Brunswick*.

At page 19, Longview Orthopedic shifts to federal cases, making the grandiose statement that the “federal courts routinely vacate orders of default entered due to the neglect of an attorney.” Despite the claim that these orders are routinely vacated, Longview Orthopedic only manages to cobble three cases in its string cite, none of which involved attorney neglect. In *Colleton Preparatory Academy, Inc., v. Hoover Universal, Inc.*, 1611 F.3d 413, 420 (4th Cir. 2010), the federal court employed a five-part test that has no equivalent in Washington law and the neglect in question was not that of any attorney. In *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987), a default was entered against the defendant as a discovery sanction, which is an extraordinary remedy subject to an entirely different body of jurisprudence. And in *Leshore v. County of Worcester*, 945 F.2d 471, 473 (1st Cir. 1991), the appellate court approved of the district court's order setting aside a default that resulted from defense counsel's illness while making no reference to attorney neglect, excusable or otherwise.

Longview Orthopedic's dive into the federal common law is noticeably shallow, and for good reason. At the federal level, any idea that the inexcusable neglect of the attorney must be ignored in favor of the otherwise diligent client is utterly destroyed by a string of U.S. Supreme Court cases, beginning with *Link v. Wabash*, 370 U.S. 626, 82 S.Ct. 1286, 8 L.Ed.2d (1962). In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993), the U.S. Supreme Court summarized its past rulings, including a lengthy quote from *Link v. Wabash*, as follows:

There is one aspect of the Court of Appeals' analysis, however, with which we disagree. The Court of Appeals suggested that it would be inappropriate to penalize the respondents for the omissions of their attorney, reasoning that "ultimate responsibility of filing the ... proofs of claim rested with respondents' counsel." The court also appeared to focus its analysis on whether respondents did all they reasonably could in policing the conduct of their attorney, rather than on whether their attorney, as respondents' agent, did all he reasonably could to comply with the court-ordered bar date. In this, the court erred.

In other contexts, we have held that clients must be held accountable for the acts and omissions of their attorneys. In *Link v. Wabash*, 370 U.S. 626, 82 S.Ct. 1286, 8 L.Ed.2d (1962), we held that a client may be made to suffer the consequences of dismissal of its lawsuit because of its attorney's failure to attend a scheduled pretrial conference. In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's inexcusable conduct imposes an unjust

penalty on the client.” *Id.* at 633, 82 S.Ct. at 1390. To the contrary, we wrote:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney.’ *Id.* at 633-34, 82 S.Ct. at 1390 (quoting *Smith v. Ayer*, 101 U.S. 320,326, 25 L.Ed 955 (1880)).

This principle also underlies our decision in *United States v. Boyle*, 469 U.S. 241, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985), that a client could be penalized for counsel’s tardy filing of a tax return. This principle applies with equal force here and requires that respondents be held accountable for the acts and omissions of their chosen counsel. Consequently, in determining whether respondents’ failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents and their counsel was excusable.

While the Supreme Court went on to find counsel’s neglect to be excusable in *Pioneer Investment Services*, it nonetheless found that “the Court of Appeals in this case erred in not attributing to respondents the fault of their counsel[.]” In the case before this court, counsel’s inexcusable neglect is a verity and, under *Pioneer Investment Services*, Longview Orthopedic is bound by it.

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H. Extending *Vanderstoep v. Guthrie* creates a needless exception to Washington law governing the attorney-client relationship and threatens professionalism in this state.

The U.S. Supreme Court's ruling in *Pioneer Investment Services* is consistent with Washington law with regard to the attorney-client relationship. The concept that clients are bound by the actions of their attorneys, particularly with regard to court appearances, is nothing novel. It is the most basic, and perhaps most important, assumption of our system of representative litigation. It should come as no surprise that Washington follows this general rule. *See, e.g., Lane v. Brown & Haley*, 81 Wn.App. 102, 107, 912 P.2d 1040 (Div.2 1996) (“Generally, the incompetence or neglect of a party’s own attorney is not sufficient grounds for relief from a judgment in a civil action.”); *In Re Estate of Harford*, 86 Wn.App. 259, 266, 936 P.2d 48 (2005); *M.A. Mortenson Company, Inc., v. Timberline Software Corp.*, 93 Wn.App. 819, 838, 970 P.2d 803 (Div.1 1999); *In re Marriage of Burkey*, 36 Wn.App. 487, 490, 675 P.2d 619 (1984); *Shoemaker v. Shoemaker*, 2018 WL 5984139 (Div.1 2018)(not reported and nonbinding) (“An attorney’s mistake or negligence does not provide an equitable basis for relief from judgment.”); *Ogden v. Washington State Criminal Justice Training Commission*, 2014 WL 954431)(not reported

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and nonbinding)(“Courts generally attribute an attorney’s negligence to his or her client.).

This is a key distinction between the case at bar and *Vanderstoep*. Attorneys have broad authority and are generally able to act on behalf of their clients and bind their clients with their words and actions. Insurance adjusters enjoy no such station. An insurance adjuster is the agent of the insurance company, not the insured individual who bought insurance from that company. Lawyers represent and act on behalf of their clients.

In advocating for the extension of *Vanderstoep*, Longview Orthopedic seeks an exception to this most basic and important rule. This exception would universally allow the client to escape responsibility for its attorney’s failure to appear and defend under CR 12. Attorneys can appear or not appear, answer or not answer, and nothing will come of it so long as the client did not explicitly authorize such conduct. Under such a rule, what justification would exist for limiting it to an attorney’s failure to appear or answer? Would not the same reasoning apply to discovery abuses, disregard of court orders, general laziness, and other forms of attorney misconduct and neglect?⁸

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⁸ And what of plaintiff attorneys who, without their client’s consent, fail to file claims within the applicable statute of limitations? The irony of this whole discussion is that all of this hand-wringing about the importance of judgment on the merits evaporates when the shoe is on the other foot.

This is not to say that the application of *Vanderstoep* to attorneys will result in the apocalyptic meltdown of the civil justice system as we know it. Most lawyers, in fact, the vast majority of lawyers, will continue to endeavor to follow the rules, work hard for their clients, and respect the courts. But some lawyers will not, and when they are called to account for their actions, an affidavit from their client disapproving of their conduct and a citation to the appellate decision rendered in this case are all it will take to escape responsibility.

The interplay between Civil Rule 12 and Civil Rule 55 are a perfect example of how the bar is often lowered when there is no consequence for the disobedience of the civil rules. CR 12 requires an answer to be filed by an in-state defendant within 20 days of service of process. However, a plaintiff cannot present a motion for default against a defendant that has “appeared” without first giving notice of the motion. The result is painfully predictable—answers are not filed within 20 days of service of process. Answers are filed when the plaintiff threatens default or files a motion for default. There simply is no mechanism to force a defendant to answer with the time required by CR 12, so they seldom do.

The record establishes that counsel for Longview Orthopedic has a practice of ignoring CR 12 in favor of filing a notice of appearance,

effectively delaying her client's answer until she feels ready or the plaintiff serves a motion for default. Appellate counsel for Longview Orthopedic scoffs at Toney's complaint about this practice, pointing out that this is a widely-used tactic of the civil defense bar. Widely used or not, it is still a violation of Civil Rule 12. Longview Orthopedic's argument that "everyone does it, so what is Toney complaining about?" proves exactly why *Vanderstoep* should not be extended to attorneys. Civil defense attorneys ignore Rule 12 *because they can*. With one breath Longview Orthopedic points out the current widespread disregard for Rule 12, but with the next breath decries any suggestion that extending *Vanderstoep* will have a similar effect on the conduct of attorneys.

III. CONCLUSION

The Court of Appeals should reverse the trial court's April 25, 2018, order setting aside the order of default against Longview Orthopedic and remand this cause to the trial court for trial on the sole issue of damages.

DATED: February 26, 2019.

Respectfully submitted,



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

CERTIFICATE

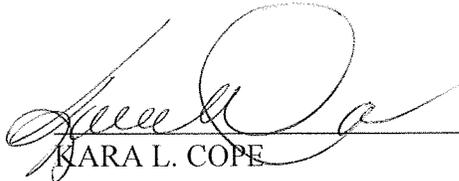
I certify that on this day I caused a copy of the foregoing REPLY MEMORANDUM to be e-mailed and mailed, postage prepaid, to Respondent's attorney, addressed as follows:

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DATED this 15th day of February 2019, at Longview,
Washington.


KARA L. COPE

WALSTEAD MERTSCHING PS

February 26, 2019 - 4:25 PM

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