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No. 52327-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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

Appellant,

v.

LONGVIEW ORTHOPEDIC ASSOCIATES, PLLC,

Respondent.

---

APPEAL FROM THE SUPERIOR COURT  
FOR COWLITZ COUNTY  
THE HONORABLE STEPHEN M. WARNING

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

This case involves the trial court's discretion to vacate an order of default within four days of its entry and prior to entry of a default judgment. Exercising its broad discretion, the trial court found "good cause" under CR 55(c)(1) to set aside an order of default that was supported by findings that respondent Longview Orthopedics Associates was blameless, that it acted with diligence in promptly moving to set the default aside, and that the plaintiff would suffer no prejudice if his claims were decided on the merits rather than based on a default entered days earlier.

Contrary to the hyperbole of appellant Nathan Toney, this case presents no issue of "first impression" and has nothing to do with the "professionalism of attorneys" (App. Br. 1-2) or the sanctity of final judgments. Nor would affirming the trial court's discretionary determination that "good cause" exists to vacate the order of default equate to a holding that trial courts are in all instances required to excuse counsel's mistakes as a matter of law. This Court should affirm because, consistent with established law, the trial court considered and expressly addressed the equities in exercising its broad discretion to vacate an order of default under CR 55(c)(1)'s "good cause" standard.

## II. RESTATEMENT OF ISSUE

The trial court certified for interlocutory review under RAP 2.3(b)(4) the issue of “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 194) Because *VanderStoep* addresses vacation of final judgment under CR 60, not an interlocutory order of default under CR 55, the issue is properly framed as:

Whether the trial court properly exercised its discretion in finding good cause to vacate an order of default under CR 55 because “[t]he failures to answer or appear were in no way related to conduct of Longview Orthopedic, LLC, and/or its insurer, who were both blameless in this regard,” once defense counsel “discovered the default order . . . [counsel] diligently moved to have it set aside,” “Plaintiff will not be prejudiced by setting aside the default order” and pursuing his claim on the merits, and the court awarded “terms in the amount of \$14,263.10 to compensate Plaintiff for the attorney fees and costs incurred by Plaintiff in obtaining the default order and resisting Defendant’s efforts to have that order set aside.” (CP 193-94)

### III. RESTATEMENT OF THE CASE

Toney served a complaint for medical negligence on Longview Orthopedics on December 21, 2017. (CP 18, 193) On December 27, Longview sent the complaint to its liability insurer, which promptly assigned the case to defense counsel at Bennett Bigelow & Leedom (“BB&L”). (CP 18-19) Toney concedes that the failure to appear and answer that led to the order of default at issue here was in no way the fault of Longview or its liability insurer. (App. Br. 4)

BB&L’s usual practice is that, once appointed as defense counsel by a liability insurer, the responsible attorney will immediately file a notice of appearance and calendar the due date for filing the answer. (CP 19) However, the BB&L lawyer assigned to the case, Amy Forbis, was preparing for a complex, multi-week, medical malpractice trial, scheduled to begin in less than three weeks, and failed to timely appear or answer the complaint. (CP 19)

On Tuesday, January 16, 2018, 26 days after service, and the first day of Ms. Forbis’ scheduled trial, Toney obtained an *ex parte* order of default. (CP 8-9) On Sunday, January 21, 2018, Ms. Forbis realized her mistake and took immediate action. (CP 19, 193) The following day, January 22, 2018 — four court days after entry of the order of default, and before Toney presented evidence of damages or

obtained a judgment — Ms. Forbis filed a notice of appearance on behalf of Longview, answered the complaint, and moved to set aside the order of default. (CP 10, 13, 18)

Toney’s attempt to recast what is an indisputable mistake as an ‘intentional’ violation of professional ethics based on purported “admissions” (App. Br. 4-5 & n.5, 25) is utterly without merit. Longview’s counsel did not “admit” that it failed to consult with Longview or its insurance adjuster before it answered and asserted defenses on January 22 — “facts” that in any event are wholly irrelevant to Longview’s failure to appear and answer within 20 days of service. Instead, Longview argued in opposing discretionary review that, as the trial court found, Longview did everything required of it when it immediately forwarded the summons and complaint to its liability insurer, and that there is no evidence that Longview authorized, contributed to, or in any way ratified the neglect of its counsel’s failure to timely appear and answer before January 22, 2018. (MDR Opp. at 9-10, 12-16)

Following a contested hearing, the trial court found “good cause” under CR 55(c)(1) and exercised its discretion to vacate the order of default. While finding counsel’s neglect “inexcusable,” the trial court expressly found that “[t]he failures to answer or appear

were in no way related to conduct of Longview Orthopedic, LLC, and/or its insurer, who were both blameless in this regard.” (CP 193) It also found that once defense counsel “discovered the default order . . . [counsel] diligently moved to have it set aside.” (CP 193; *see also* RP 16: “There’s no argument about the due diligence. That occurred.”) The trial court further ensured that “Plaintiff will not be prejudiced by setting aside the default order” and pursuing his claim on the merits, awarding “terms in the amount of \$14,263.10 to compensate Plaintiff for the attorney fees and costs incurred by Plaintiff in obtaining the default order and resisting Defendant’s efforts to have that order set aside.” (CP 193-94)

At Toney’s request (CP 174-75), the trial court certified its order for immediate interlocutory review under RAP 2.3(b)(4). (CP 194) It signed Toney’s proposed order identifying the issue as whether the “rule” of *VanderStoep v. Guthrie*, 200 Wn. App. 507, 533-34, ¶ 79, 402 P.3d 883 (2017), *rev denied*, 189 Wn.2d 1041 (2018), that the inexcusable neglect of a liability insurer in failing to arrange for counsel to appear and answer should not be imputed to the innocent defendants, should be “exten[ded] . . . to cases where an innocent party suffers a default order due to the inexcusable neglect of that party’s counsel.” (CP 194)

This Court granted Toney’s motion for discretionary review.

#### IV. ARGUMENT

**A. This Court reviews the trial court’s decision to set aside an order of default for abuse of discretion.**

This Court reviews a trial court’s order setting aside a default for abuse of discretion. A trial court has broad discretion to vacate an order of default under the liberal “good cause” standard of CR 55(c). *Canam Hambro Sys., Inc. v. Horbach*, 33 Wn. App. 452, 453, 655 P.2d 1182 (1982) (“decision to set aside an order of default is generally within the discretion of the trial court, subject to the good cause requirement of CR 55(c)”). The trial court’s discretionary decision on a motion to vacate an order of default “is a decision upon which reasonable minds can sometimes differ.” *Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999) (quoted source omitted). Therefore, whether this Court would make the same decision in the first instance is irrelevant. Under the abuse of discretion standard, “[t]he trial court’s decision will be affirmed unless no reasonable judge would have reached the same conclusion.” *Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985); *Matter of Parental Rights to E.D.*, 195 Wn. App. 673, 685, ¶ 21, 381 P.3d 1230 (2016), *rev. denied*, 187 Wn.2d 1018 (2017).

The plain language of CR 55(c)(1) – that “[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default . . .” – requires no interpretation. And the trial court’s factual determinations – that Longview Orthopedics was blameless, that counsel acted with reasonable diligence, and that Toney suffered no prejudice as a result of the vacation of the order of default (CP 193-94) – are unchallenged and verities on appeal.

Appellant Toney pays lip service to the proper standard, but then wrongly argues that the trial court’s vacation of the order of default under CR 55 presents a legal issue. Toney further confuses the analysis by relying upon the standards for vacation of a default judgment to argue that the trial court erred as a matter of law in vacating the order of default in this case. This Court should review the trial court’s exercise of discretion in finding “good cause” to vacate the default under the deferential standard applicable to CR 55(c)(1), rather than CR 60(b), and affirm.

**B. A default judgment is a final judgment, subject to vacation only under CR 60, but an order of default is an interlocutory order that may be vacated under the more relaxed good cause standard of CR 55.**

**1. Orders of default lack the finality of a default judgment.**

An order of default does not carry with it the finality that attaches to entry of a default judgment. A judgment terminates the litigation. “A judgment is the final determination of the rights of the parties in the action . . .” CR 54(a). Not only may a party appeal a judgment, RAP 2.2(a)(1), it becomes *res judicata*, foreclosing any claims that were, or could have been, asserted in the action. *See, e.g., Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 280, 996 P.2d 603 (2000). The law accords a default judgment all the attributes of a final judgment entered following a trial. *Graham v. Yakima Stock Brokers, Inc.*, 192 Wash. 121, 125, 72 P.2d 1041 (1937).

By contrast, an order of default is an interlocutory order. *See Graham v. Yakima Stock Brokers, Inc.*, 190 Wash. 269, 270-71, 67 P.2d 899 (1937) (distinguishing between final judgments and interlocutory orders of default). Entry of default for failure to appear and defend may establish the allegations in the plaintiff’s complaint, but does not, by itself, terminate the case. CR 55(b). For instance, where, as here, the complaint seeks damages “in an amount to be

proven at trial” (CP 2), even after entry of an order of default the plaintiff must provide proof of damages before he or she is entitled to entry of a judgment. CR 55(b)(2) (“the court may conduct such hearings as are deemed necessary or . . . have such matters resolved by a jury.”) In this case, for instance, had the default not been vacated, the trial court would have been required to conduct an evidentiary hearing on damages before any final judgment could be entered.

**2. CR 55(c) provides a more lenient standard for vacating a default order than that imposed by CR 60(b) for vacating a default judgment.**

Because only a default judgment is accorded finality, the Civil Rules provide different standards to set aside orders of default and default judgments. A party seeking to set aside a default judgment must meet one of the specific criteria of CR 60(b), such as “[m]istakes, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment . . .,” CR 60(b)(1), and must establish a bona fide defense to the complaint. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). By contrast, CR55(c)(1) expressly grants the trial court broader discretion to vacate an order of default that has not resulted in a default judgment, providing that “[f]or good cause

shown and upon such terms as the court deems just, the court may set aside an entry of default . . .”

Because the courts favor resolution of disputes on the merits, the “good cause” required to vacate an order of default under CR 55(c)(1) is a less onerous standard than that required to vacate a judgment under the criteria of CR 60(b). *Canam Hambro Sys.*, 33 Wn. App. at 453; *Lenzi*, 140 Wn.2d at 278 n.8 (“CR 55(c)(1) sets forth a rather lenient rule for setting aside defaults”); *Estate of Stevens*, 94 Wn. App. at 30. “The goal of finality is not relevant to a motion for relief from a default entry, which is another reason for the greater discretion and leniency shown with respect to setting them aside.” Wright & Miller, 10A *Fed. Prac. & Proc. Civ.* § 2693 (4th ed. 2018).

**3. Cases interpreting CR 60(b)’s criteria for vacating a default judgment do not directly apply to CR 55(c), but support the trial court’s discretionary decision here.**

Case law addressing the “good cause” standard of CR 55(c)(1) is relatively scarce, undoubtedly because entry of an order of default is not itself an appealable order, and because CR 55(b) authorizes entry of a default judgment at the same time that the court enters an order of default if the amount of damages claimed can be discerned from the unanswered complaint. Thus, most appellate cases consider entry of a default judgment as well as a default order, and

do not clearly distinguish between the “good cause” standard of CR 55(c)(1) and the more stringent and particular grounds for vacating a default judgment under CR 60(b).

The trial court’s certification order in this case reflects this lack of clarity, framing the issue as whether *VanderStoep v. Guthrie*, 200 Wn. App. 507, 533-34, ¶ 79, 402 P.3d 883 (2017), *rev denied*, 189 Wn.2d 1041 (2018) – holding that the inexcusable neglect of a liability insurer in failing to arrange for counsel to appear and answer should not be imputed to an innocent defendant – should be “exten[ded] . . . to cases where an innocent party suffers a default order due to the inexcusable neglect of that party’s counsel.” (CP 194) But the trial court’s vacation of a *default order* for good cause in this case would in no way “extend” *VanderStoep*, where this Court *reversed* a trial court’s refusal to vacate a *default judgment* under CR 60. To the contrary, *VanderStoep* demonstrates why the trial court in this case did not abuse its discretion in vacating an order of default under CR 55’s more lenient “good cause” standard.

This Court in *VanderStoep* held that an innocent defendant should not be charged with its liability insurer’s “inexcusable neglect” in failing to timely assign counsel to defend its insured against a negligence claim and that the defendant was entitled as a

matter of law to vacate the default judgment under CR 60(b)(1)'s standard of "mistake, inadvertence, surprise, or excusable neglect," 200 Wn. App. at 533-34, ¶ 79. This Court held that the proper focus is "on the [defendant's] conduct rather than on [the insurer's] conduct." 200 Wn. App. at 532, ¶ 73. Because the insured promptly notified its insurance carrier, "[t]hey did what they were supposed to do when served with the complaint." 200 Wn. App. at 532-33, ¶ 76. The *VanderStoep* court makes no mention of the "good cause" standard of CR 55(c)(1).

Toney perpetuates the confusion between the "good cause" standard of CR 55(c)(1) and the more onerous standard of CR 60(b) by relying extensively on cases that, like *VanderStoep*, address the trial court's exercise of discretion in ruling on a motion to vacate a judgment under CR 60, rather than a motion to set aside an order of default. *See, e.g., Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 446, ¶¶ 20-21, 332 P.3d 991 (2014), *rev. denied*, 182 Wn.2d 1006 (2015) (App Br. 20-24); *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 195, ¶ 15, 312 P.3d 976 (2013) (App. Br. 12), *rev. denied*, 179 Wn.2d 1010 (2014); *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 200, ¶¶ 19-20, 165 P.3d 1271 (2007) (App. Br. 11, 16-17, 19-21, 25); *Norton v.*

*Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999), *rev. denied*, 142 Wn.2d 1004 (2000) (App. Br. 11, 25); *Prest v. Am. Bankers Life Assur. Co.*, 79 Wn. App. 93, 97, 900 P.2d 595 (1995), *rev. denied*, 129 Wn.2d 1007 (1996) (App. Br. 10-12, 19-21); *Boss Constr., Inc. v. Hawk's Superior Rock, Inc.*, 1 Wn. App. 2d 1029, 2017 WL 5593791 (2017) (unpublished) (App. Br. 19-20, 21-22). These cases, which like *VanderStoep* assess the trial court's discretion to vacate a default judgment under the more stringent standards of CR 60(b), do not control whether the trial court abused its discretion in finding "good cause" to vacate an order of default here.

While *VanderStoep* did not address or even mention the standard of good cause under CR 55(c)(1), its holding – that innocent defendants should not be punished with a final judgment when they "did what they were supposed to do" – may be applied by analogy to vacation of an order of default before entry of final judgment under the more liberal standard of CR 55(c)(1) without "extending" the law. That is because "any showing sufficient to justify relief under Rule 60(b) should qualify as 'good cause' for purposes of reopening a default entry. Conversely, some demonstrations of 'good cause' may be inadequate to justify disturbing a final judgment, even if it is a default judgment." Wright & Miller, 10A *Fed. Prac. & Proc. Civ.* §

2694 (4th ed. 2018). Thus, while they do not address “good cause” under CR 55, the CR 60 cases fully support the trial court’s exercise of discretion to vacate the order of default in this case. Arg. § C.2, *infra*.

**C. The trial court properly exercised its discretion after finding that Longview was innocent of any neglect, that its counsel diligently moved to vacate the default, and that Toney suffered no prejudice after being fully compensated for fees and costs.**

The only issue in this appeal is whether the trial court abused its discretion in finding “good cause” under CR 55(c)(1) to vacate its order of default. The trial court properly applied the correct legal standard because good cause is a flexible and equitable concept that takes into account the unique facts and circumstances of the particular case. The trial court did not abuse its discretion here because its unchallenged findings that Longview was innocent of any neglect, that its counsel diligently moved to vacate the default, and that Toney suffered no prejudice after being fully compensated for fees and costs, fully support its decision.

**1. Good cause is a flexible standard, and the trial court has broad discretion to apply that standard to the facts of a particular case.**

As Toney concedes, “good cause” under CR 55(c)(1) is a flexible standard that authorizes the trial court to exercise its

discretion taking into consideration the equities and circumstances of the particular case. (App. Br. 11). Toney's contention that a trial court has no discretion to find "good cause" when the default is due to defense counsel's "inexcusable neglect" in failing to timely appear and answer lacks any support in the cases interpreting CR 55, which consistently affirm the trial court's liberal exercise of discretion to vacate a default entered against an innocent defendant.

Toney cites not a single case reversing an order of default entered through no fault of the defendant. Reflecting the fact that a discretionary decision on a motion to vacate a default is, by definition, one "upon which reasonable minds can sometimes differ," *Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999) (quoted source omitted), each of the few CR 55 cases relied upon by Toney *affirms* the trial court's exercise of discretion in ruling on the motion. In *Estate of Stevens*, (App. Br. 9-10), this Court *affirmed* the trial court's refusal to vacate a default because the moving party waited three months before moving to vacate the order despite receiving notice of its entry. 94 Wn. App. at 34-35. In *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 271, 818 P.2d 618 (1991) (App. Br. 9), this Court again *affirmed* a court's

exercise of discretion on the ground that the defendant “made one phone call, then did nothing else for 14 months.”

Similarly, in *Brooks v. University City, Inc.*, 154 Wn. App. 474, 479-80, ¶¶ 14-15, 225 P.3d 489, *rev. denied*, 169 Wn.2d 1004 (2010) (App. Br. 9), the Court *affirmed* the trial court’s refusal to vacate a default because the defendant’s own agent failed to forward the summons to counsel for two years. In *Mednikova v. Morse*, 183 Wn. App. 1002, 2014 WL 4067921, at \*1 (2014) (unpublished), Division One similarly *affirmed* the trial court’s refusal to vacate an order of default because “there is nothing in this record to explain” why the defendant failed to notify her insurer for five weeks after being served with a summons and complaint.<sup>1</sup>

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<sup>1</sup> Every decision cited in the Order Granting Discretionary Review also *affirms* the trial court’s ruling on a motion to vacate a default order under CR 55(c)(1). *Welfare of S.I.*, 184 Wn. App. 531, 544, ¶ 29, 337 P.3d 1114 (2014), *rev. denied*, 183 Wn.2d 1002 (2015); *Meade v. Nelson*, 174 Wn. App. 740, 751-52, ¶ 25, 300 P.3d 828, *rev. denied*, 178 Wn.2d 1025 (2013); *Aecon Bldgs. Inc. v. Vandermolten Constr. Co., Inc.*, 155 Wn. App. 733, 741, ¶ 18, 230 P.3d 594 (2009); *Graves v. Employment Sec. Dep’t*, 144 Wn. App. 302, 311, ¶ 16, 182 P.3d 1004 (2008); *Matter of Parental Rights to E. R. D.*, 197 Wn. App. 1042, 2017 WL 239629, *rev. denied*, 396 P.3d 350 (2017) (unpublished).

No CR 55 case limits the trial court's discretion where, as here, the client is innocent of any neglect. Toney relies on the statement in *Estate of Stevens* that "[t]o establish good cause under CR 55, a party *may* demonstrate excusable neglect and due diligence." 94 Wn. App. at 30 (emphasis added). (App. Br. 9) *Stevens*, in turn, cites Judge Morgan's statement in *Seek Systems*, 63 Wn. App. at 271, that "two factors to be considered in each instance [under both CR 55(c)(1) and CR 60(b)(1)] are excusable neglect and due diligence overall." But neither of these decisions, nor any other precedent, holds that an innocent client is barred as a matter of law from obtaining relief under CR 55(c)(1) by its counsel's "inexcusable neglect," as Toney asks this Court to hold here.

Courts instead recognize that a party's excusable neglect, like its due diligence, is an "appropriate factor" to consider in evaluating "good cause" under CR 55(c)(1). *Seek Systems*, 63 Wn. App. at 271 & n.4. That CR 55(c)(1) uses the term "good cause," without any further definition, reflects the trial court's broad discretion to take into account a variety of facts and circumstances, among which is certainly the excusable (or inexcusable) neglect of a party, as this Court's decisions in *Stevens* and *Seek Systems* reflect. But that is not

the only factor relevant under Rule 55(c). Other relevant factors may include:

- the nature and extent of the prejudice which may be suffered by the nondefaulting party if the default is set aside
- the presence of material issues of fact
- the prompt filing of the petition to open
- the presence of a meritorious defense to the claim
- the significance of the interests at stake
- whether the failure to answer was intentional or willful or the result of conscious indifference
- the degree of intransigence on the part of the defaulting party, including a history of dilatory conduct
- the amount of money involved
- whether a party or counsel bears responsibility for the default
- the availability of less drastic sanctions

47 Am. Jur. 2d Judgments § 652.

That CR 55(c)(1) does not provide a specific definition of “good cause” reflects the flexible nature of the standard. *See Matter of Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992) (term “good cause” in Rule 55(c) “is not susceptible to a precise definition”). This is equally true in other contexts. In *Application of Sage*, 21 Wn. App. 803, 810-11, 586 P.2d 1201 (1978), for instance, the court held “[t]here is no precise definition of ‘good cause’ either by statute or case law,” for disclosure of adoption records; “rather, the judge must make this determination on a case-by-case basis,” *rev. denied*, 92 Wn.2d 1002

(1979). See also *G & G Elec. & Plumbing Dist. v. Employment Sec. Dep't*, 58 Wn. App. 410, 413, 793 P.2d 987 (“the factors . . . pertinent to [the] good cause” standard for eligibility for unemployment benefits “was a determination well within the broad discretion given the Commissioner”), *rev. denied*, 115 Wn.2d 1023 (1990).

Applying the identically-worded standard of “good cause” in Fed. R. Civ. P. 55(c), the federal courts routinely vacate orders of default entered due to the neglect of an attorney if other equitable factors support a finding of “good cause.” See, e.g., *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 420 (4th Cir. 2010) (district court “relied too heavily” on fault of defendant’s registered agent; reversing refusal to vacate default “in light of overwhelming evidence supporting ‘good cause’” under FRCP 55(c)); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 953 (4th Cir. 1987) (reversing refusal to vacate default where “the defendants are blameless. There has been no prejudice to the plaintiff. Any dilatory action was on the part of the attorney, not the defendants.”); *Leshore v. County of Worcester*, 945 F.2d 471, 473 (1st Cir. 1991) (district court order vacating default where attorney failed to respond “is not the kind of judgment call an appellate court should normally second-

guess”). Toney provides no reasoned argument why the trial court abused its discretion in vacating the order of default in this case.

2. **Even under the CR 60 standard relied upon by Toney, an innocent client is not barred as a matter of law from relief from a default judgment entered because of defense counsel’s “inexcusable neglect.”**

The rule advocated by Toney – that a trial court is barred as a matter of law from vacating a default on behalf of an innocent client if its defense lawyer lacks a reasonable excuse for neglecting to appear and answer – would make it harder to vacate an order of default under CR 55(c)(1) than a default judgment under CR 60(b)(1). Had the trial court here vacated a final judgment under CR 60(b)(1) rather than order of default, its decision would fall within its broad discretion under settled law, without improperly “extending” *VanderStoep*.

In contrast to the flexible “good cause” standard of CR 55(c)(1), CR 60(b)(1) authorizes a court to set aside a final default judgment only upon a showing of “[m]istakes, inadvertence, surprise, excusable neglect, or irregularity.” Yet even under CR 60’s stricter standard, the trial court has broad discretion to determine whether the circumstances constitute mistake, inadvertence or excusable neglect, guided primarily by the policy that default

judgments are disfavored. As a result, the appellate court is “more likely to reverse a trial court decision refusing to set aside a default judgment” than one vacating a default judgment. *Gutz v. Johnson*, 128 Wn. App. 901, 916, ¶ 45, 117 P.3d 390 (2005), *aff’d sub nom. Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).

“A default judgment . . . [is] one of the most drastic actions a court may take to punish disobedience to its commands . . . [and] the policy of the law [is] that controversies be determined on the merits rather than by default.” *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (internal quotation marks and quoted source omitted). There is no “hard and fast rule applicable to all situations” in the trial court’s exercise of discretion under CR 60. *Griggs*, 92 Wn.2d at 582 (quoted source omitted).

Toney criticizes *VanderStoep* as an anomalous “fact-specific ruling” (App. Br. 18) ignoring that under CR 60(b), “[w]hat 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.” *TMT Bear Creek*, 140 Wn. App. at 200, ¶ 19 (alteration in original) (quoting *Little v. King*, 160 Wn.2d 696, 703, ¶ 16, 161 P.3d 345 (2007) and *Griggs*, 92 Wn.2d at 582). And the “rule” in *VanderStoep* – that the “inexcusable neglect” of defendants’

representative “should not be imputed to [the blameless defendants]” under CR 60(b)(1), 200 Wn. App. at 533-34, ¶ 79, – is itself settled law.

In *VanderStoep*, defendants notified their insurer of a lawsuit on the same day that the summons and complaint were served, but the insurer failed “to arrange for an attorney to defend [its insured]” due to “a breakdown of its internal office procedures.” 200 Wn. App. at 531, ¶ 72. This Court *reversed* as an abuse of discretion the trial court’s refusal to vacate the default judgment under CR 60(b)(1), holding that the defendants, who were themselves blameless, had a “legitimate excuse for not appearing” that was not negated by their representative’s “inexcusable neglect.” *VanderStoep*, 200 Wn. App. at 532, ¶ 73.

This Court reasoned that “[a]llowing the default judgment to stand here is not fair to the [defendants],” who “did what they were supposed to do when served with the complaint.” *VanderStoep*, 200 Wn. App. at 532, ¶ 76. Toney’s attempt to distinguish *VanderStoep* on the ground that the judgment there resulted “from a defendant’s ‘mistaken’ belief that he or she is being defended” (App. Br. 22) ignores that the trial court here also found that Longview reasonably

believed it would be defended when it promptly forwarded the summons and complaint to its liability insurer. (CP 193)

Toney relies extensively on cases holding that a party's own inexcusable neglect in failing to forward process to its insurer or its legal counsel can justify the refusal to vacate a default judgment under CR 60. *See TMT Bear Creek*, 140 Wn. App. at 212-13, ¶¶ 55-57 (affirming trial court's denial of CR 60(b)(1) motion where tenant had no excuse for its failure to forward the complaint to counsel); *Prest*, 79 Wn. App. at 100 (defendant insurance company, whose business was "to respond to legal process that is served upon it," inexcusably misplaced complaint), *rev. denied*, 129 Wn.2d 1007 (1996); *see also Trinity Universal*, 176 Wn. App. at 197-98, ¶ 22 (affirming refusal to vacate judgment under CR 60(b)(1) for excusable neglect more than one year after judgment was entered), *rev. denied*, 179 Wn.2d 1010 (2014) (App Br 11-12). Toney's reliance on these cases to argue that the trial court abused its discretion here because Longview's insurer-appointed defense counsel inexcusably failed to appear and answer is without merit.

In arguing that the *VanderStoep* court erred in "pivot[ing] the CR 60(b) analysis away from the conduct of the defendant's insurance company and to the conduct of the actual defendant" (App

Br. 17), Toney asks this Court not only to overrule *VanderStoep*, but to abandon the established requirement that the trial court's focus under CR 60 must be on the conduct of the party, not that of its representatives, starting with the Supreme Court's seminal CR 60 case, *White v. Holm*, 73 Wn.2d 348, 354, 438 P.2d 581 (1968) (reversing refusal to vacate default where trial court imputed liability insurer's "inexcusable" neglect to defendants; as the defendants were "blameless," the "circumstances do not warrant an imputation of any such fault to defendants").<sup>2</sup> Vacating a default judgment entered against a blameless party due to an attorney's neglect in failing to appear or answer represents no "extension" of this established legal principle. *See Ha*, 182 Wn. App. at 452, ¶ 40, 454, ¶ 43 (affirming vacation of default judgment; even if the attorney's "conduct [had been] negligent," imposing default "would unjustly deny [the blameless defendant] a trial on the merits").

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<sup>2</sup> *Accord Gutz*, 128 Wn. App. at 919, ¶¶ 56-57 (reversing trial court's refusal to vacate default judgment where defendant had "promptly left a message" with the insurer and his failure to confirm receipt of the message "is not an equitable and just reason to deny him the opportunity for a trial on the merits"); *Norton*, 99 Wn. App. at 125 (reversing trial court's refusal to vacate default judgment; the trial court "focused more on the insurance company's failure to contact [the defendant] than it did on any excusable neglect on [defendant]'s part").

Toney's reliance on an unpublished case that *affirms* a trial court's refusal to vacate a final judgment entered *after* an attorney has appeared, defended and litigated a case on the merits is even further afield from the default order at issue in this case. (See App. Br. 19, discussing *Boss Construction, Inc. v. Hawk's Superior Rock, Inc.*, 1 Wn. App. 2d 1029, 2017 WL 5593791 (2017) (unpublished)) In *Boss Construction*, the defendant appeared, defended, engaged in discovery, but failed to defend a summary judgment motion, resulting in entry of a final judgment. The defendant sought "relief from judgment under CR 60(b)(1)," 2017 WL 5593791, at \*2, relying on its counsel's declaration that he did not receive notice of the motion because he had failed to provide notice of his new address. This Court affirmed the denial of the motion to vacate as within the trial court's discretion because the defendant had not shown "a strong or virtually conclusive defense," and its counsel's neglect was not excusable, was "not a mistake justifying relief under CR 60(b)(1)," and was not "inadvertence," because the attorney "was aware of the need to update his address." 2017 WL 5593791, at \*5-7.

There may be compelling reasons to give finality to a judgment entered "once a party has designated an attorney to represent him in regard to a particular matter," and the case has

advanced to a contested proceeding. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). But that policy supporting finality is wholly lacking here, because the trial court did not enter a final judgment, but only an order of default before counsel had appeared in the case.

**3. The trial court's order, based on unchallenged findings, was not a manifest abuse of discretion; affirmance will not encourage "inexcusable or intentional" misconduct of counsel.**

Affirming the trial court's ruling does not require this Court to hold that "only default orders that result from a party's own inexcusable neglect may withstand a motion to set aside" (App. Br. 18-19), will not result in a "rule that allows neglectful attorneys to routinely avoid default orders" (App. Br. 24) or encourage "inexcusable or intentional" misconduct of counsel. (App. Br. 26) Toney's "moral hazard" argument to that effect is legally erroneous and borders on the ridiculous. Affirmance of the trial court's discretionary ruling in this case imposes no hard and fast rule of law. It simply means that while reasonable minds may have reached a different result in the first instance, the trial court's decision was not manifestly unreasonable. That is the very nature of a discretionary

decision and the definition of a manifest abuse of discretion. *Estate of Stevens*, 94 Wn. App. at 30.

Toney's insistence that this court's review of a discretionary ruling establishes a "rule of law" underlies his moral hazard argument – that CR 12(a) "will be transformed . . . to a mere suggestion" – if the trial court is affirmed here. (App. Br. 26) "[T]he fact that an appellate court has affirmed a decision . . . does not, of course, necessarily mean that the trial court erred . . . [in making a different decision] in this case. The broad standard of abuse of discretion means that courts can reasonably reach different conclusions . . ." *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 353, 333 P.3d 388 (2014) (quoting *Stedman v. Cooper*, 172 Wn. App. 9, 18, 292 P.3d 764 (2012)).

Toney irrationally argues that lawyers will deliberately place their clients in legal jeopardy, subjecting their clients to default judgments and exposing themselves to claims of legal malpractice, on the hope and prayer that a trial court judge may later exercise its discretion to vacate the default on a subsequent motion. Toney's suggestion that Longview's counsel deliberately engaged in this gambit here not only lacks any evidentiary support in this record, but any basis in the reality of litigation practice.

The trial court in this case based its determination of “good cause” on unchallenged findings of fact. The trial court specifically found that “[t]he failures to answer or appear were in no way related to conduct of Longview Orthopedics, LLC, and/or its insurer, who were both blameless in this regard.” (CP 193) It found that once defense counsel “discovered the default order . . . [counsel] diligently moved to have it set aside” (CP 193) and that “Plaintiff will not be prejudiced by setting aside the default order” and pursuing his claim on the merits, awarding “terms in the amount of \$14,263.10 to compensate Plaintiff for the attorney fees and costs incurred by Plaintiff in obtaining the default order and resisting Defendant’s efforts to have that order set aside.” (CP 193-94)

These findings are verities on appeal because Toney failed to assign error to them and fails to make any argument challenging them on appeal. *Shelcon Constr. Group, LLC v. Haymond*, 187 Wn. App. 878, 889-90, ¶ 25, 351 P.3d 895 (2015); RAP 10.3(g). They fully and amply support the trial court’s discretionary determination that “good cause” exists to set aside the order of default.

**V. CONCLUSION**

The trial court's order to vacate the order of default for "good cause" under CR 55(c)(1) was not a manifest abuse of discretion and should be affirmed.

Dated this 28<sup>th</sup> day of January, 2019.

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**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 28, 2019, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 28<sup>th</sup> day of January, 2019.

  
\_\_\_\_\_  
Andrienne E. Filipil

**SMITH GOODFRIEND, PS**

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