

FILED
Court of Appeals
Division II
State of Washington
1/28/2019 3:48 PM

No. 52327-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

RESPONDENT'S GR 14.1 AUTHORITY

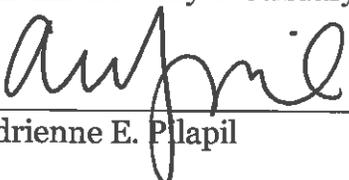
DECLARATION OF SERVICE

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 Respondent's GR 14.1 Authority, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Rhianna M. Fronapfel Bennett Bigelow & Leedom, P.S. 601 Union Street, Suite 1500 Seattle, WA 98101 RFronapfel@bblaw.com CPhillips@bblaw.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
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DATED at Seattle, Washington this 28th day of January, 2019.



Andrienne E. Pilapil

1 Wash.App.2d 1029

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

BOSS CONSTRUCTION, INC., a
Washington corporation, Respondent,
v.
HAWK'S SUPERIOR ROCK, INC., a
Washington corporation, Appellant.

No. 49273-3-II
|
November 21, 2017

Appeal from Grays Harbor County Superior Court, 14-2-00560-8, Honorable David L. Edwards, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Lee, J.

*1 Hawk's Superior Rock, Inc. (Hawk's Superior) appeals the superior court's denial of Hawk's Superior's CR 60(b)(1) motion for relief from an order granting summary judgment in favor of Boss Construction Inc. (Boss) in an underlying breach of contract claim. Hawk's Superior argues that (1) the superior court abused its discretion by denying Hawk's Superior's CR 60(b)(1) motion for relief without addressing the four factor test articulated in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968); (2) the superior court erred in finding that Hawk's Superior's counsel's failure to update his address with the court did not constitute mistake, inadvertence, or

excusable neglect under CR 60(b)(1); and (3) the superior court abused its discretion in denying Hawk's Superior's motion to reconsider again without addressing the *White* test. We affirm.

FACTS

A. BREACH OF CONTRACT CLAIM

On August 11, 2014, Boss filed a complaint for damages against Hawk's Superior. In its complaint, Boss alleged that Hawk's Superior had materially breached express and implied warranties in the contract concerning the quality of its rock and gravel—the subject matter of the contract. On September 29, Hawk's Superior filed an answer denying these allegations and asserting several affirmative defenses, including failure to mitigate damages.

Neither party took further action in the matter for the next year and a half, until Boss filed a motion for summary judgment on February 8, 2016. In support of its motion, Boss filed a declaration by its vice president stating that Hawk's Superior offered to sell Boss the rock and gravel it needed to complete a Washington State Department of Transportation (WSDOT) construction project. In making such offer, Hawk's Superior warranted that its rock and gravel would meet the WSDOT's mandated quality specifications. But the rock and gravel Hawk's Superior provided failed to meet WSDOT's specifications, which forced Boss to purchase the required rock and gravel from a different supplier at a substantially higher cost.

Between the time Boss filed its complaint and its motion for summary judgment, Hawk's Superior's counsel, C. Craig Holley, moved office locations within his building. Holley notified the state bar association, as well as his billing and insurance company of his change in office location. He did not, however, notify Boss's counsel or the court clerk of his new address.

Shortly after Holley moved his office location, he underwent surgery. At the time, Hawk's Superior was Holley's only pending case. However, because no action had been taken on the case for a year and a half, Holley admitted that “it just wasn't in [his] mind” to update his address with the court and opposing counsel. Verbatim Report of Proceedings (VRP) (May 31, 2016) at 3.

Holley never received Boss's motion for summary judgment. As a result, Holley never filed a response to Boss's motion for summary judgment on Hawk's Superior's behalf, and Holley did not appear at the motion hearing scheduled for March 14, 2016.

*2 At the summary judgment motion hearing, the superior court considered the summons and complaint, the affidavit/declaration of service on Hawk's Superior, the motion for default against Hawk's Superior, the notice of appearance of C. Craig Holley, Hawk's Superior's answer to the complaint for damages, the notice of hearing on Boss's motion for summary judgment, the declaration of Chris Hart re motion for summary judgment, and Boss's motion for summary judgment. The superior court entered an order granting plaintiff's motion for summary judgment and awarded judgment against Hawk's Superior in the principle sum of \$241,708.33, judgment for costs in the amount of \$303.00, and a statutory attorney fee of \$250.00.

B. MOTION SEEKING RELIEF FROM JUDGMENT

Holley learned of the superior court's summary judgment order on April 18, after Hawk's Superior's owners started receiving phone calls about a Grays Harbor County Superior Court judgment against them. On April 29, Hawk's Superior filed a motion seeking relief from judgment under CR 60(b)(1). Holley filed a declaration in support of the motion, in which he stated that he had updated his change of address with the Washington State Bar Association and applied for a mail forwarding order with the post office. Holley also stated that he had never received any document by mail from Boss's counsel and that genuine issues of material fact remain in the underlying contract claim.

In its motion for relief, Hawk's Superior argued that the circumstances surrounding Holley's mail and the fact he never received actual notice of Boss's summary judgment motion constituted "procedural irregularity." Clerk's Papers (CP) at 36. Boss filed a response on May 26, asserting that it had mailed the notice of hearing and motion for summary judgment to Holley on February 4. The notice and motion for summary judgment were sent to Holley's address on file with the court on February 4.

At the hearing on the motion for relief, Holley informed the superior court that he did not notify opposing counsel

or the county court clerk of his change in address. As to which provision of CR 60(b) relief was being sought, Holley stated, "Well particularly under mistake or inadvertence, Your Honor." VRP (May 31, 2016) at 4. When asked again, Holley replied, "Under inadvertence or an irregularity." VRP at (May 31, 2016) at 4. Holley conceded that failing to notify opposing counsel or the court was his mistake, but it was due to the irregularity of his medical treatment coupled with the case remaining dormant for approximately 15 months.

The superior court found that Holley had failed to comply with the court rules when he failed to notify opposing counsel of his change in address.¹ The superior court also found such failure was not inadvertent. The superior court further found that Hawk's Superior's motion for relief did "not properly fall within any of the provisions of CR 60(b)." VRP (May 31, 2016) at 7. Therefore, the superior court concluded that it could not grant the motion because Hawk's Superior did not "have a legal basis for it." VRP (May 31, 2016) at 7.

C. MOTION FOR RECONSIDERATION

On June 9, Hawk's Superior filed a motion for reconsideration under CR 59(a)(7) and (a)(9), asserting that the superior court's ruling denying its motion to vacate the summary judgment order was legally erroneous and a denial of substantial justice. In support, Hawk's Superior provided the following documents: supplemental declaration of Holley, supplemental declaration of the tenant who moved into Holley's prior office, declaration of Hawk's Superior's owners, and an attached exhibit e-mail from the WSDOT regarding the gravel tests. This evidence purportedly showed that Hawk's Superior's rock and gravel complied with WSDOT specifications, that Hawk's Superior had never made any warranties to Boss, and that the tenant in Holley's former office could not recall ever receiving any first-class mail from Boss's counsel. In its motion for reconsideration, Hawk's Superior argued that it had shown a "strong, if not conclusive, defense on the merits," and further asserted that Holley's non-appearance at the summary judgment motion hearing "was occasioned by mistake, inadvertence, surprise, or excusable neglect." CP at 66 n.1, 67.

*3 On June 21, the superior court sent a letter directing Boss to respond to Hawk's Superior's assertion that

substantial evidence supported a defense to Boss's breach of contract claim. In this letter, the superior court advised that when Boss filed its motion for summary judgment, it had attached a declaration from its vice president, which referenced an " 'Exhibit A.' " CP at 79. However, this exhibit was not actually attached to the supporting declaration. The superior court directed Boss to attach the exhibit.

Boss filed the attached exhibit on July 8. The exhibit contained the 2010 price quote from Hawk's Superior to Boss, which contained the statement, "All Rock Meets DOT and Corp. of Engineer Specifications for Hardness & Wear." CP at 84. Boss also filed an e-mail from WSDOT from December 15, 2010, which notified Boss that Hawk's Superior failed to meet its special gravel borrow specifications.

On July 19, the superior court denied Hawk's Superior's motion for reconsideration. Hawk's Superior appeals both the order denying its CR 60(b)(1) motion for relief and the order denying its motion for reconsideration.

ANALYSIS

A. MOTION FOR RELIEF FROM JUDGMENT

Hawk's Superior argues that the superior court applied an incorrect legal standard in evaluating its motion for relief from judgment because the superior court did not consider the four factor test articulated by the Washington Supreme Court in *White v. Holm*, 73 Wn.2d 348. Specifically, Hawk's Superior contends that the superior court's failure to address the *White* test on the record in itself constituted abuse of discretion. Additionally, Hawk's Superior argues that the superior court abused its discretion in finding that Hawk's Superior's counsel's failure to update his mailing address with the court was not inadvertence or excusable neglect under CR 60(b)(1). We disagree.

1. Standard of Review

We review a superior court's ruling on a motion to vacate a judgment under CR 60(b) for abuse of discretion. *In re Parenting & Support of C.T.*, 193 Wn. App. 427, 434, 378 P.3d 183 (2016); *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). Review of a CR 60(b) ruling is limited to the propriety of the denial of relief

from judgment, not of the underlying judgment the party sought to vacate. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985).

A court abuses its discretion if its decision to deny a 60(b) motion is manifestly unreasonable or based on untenable grounds. *Showalter*, 124 Wn. App. at 510. Therefore, we will only overturn the superior court's decision if the decision " 'rests on facts unsupported in the record or was reached by applying the wrong legal standard,' " or if the superior court applied the correct legal standard, but "adopt[ed] a view 'that no reasonable person would take.' " *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 822, 225 P.3d 280 (2009) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)), *review denied*, 169 Wn.2d 1012 (2010).

2. Addressing the *White* factors on the record

Hawk's Superior argues that because it sought relief from judgment under CR 60(b)(1),² the superior court was required to make findings of fact on the record on each of the four factors articulated in *White*. Hawk's Superior's argument fails because no case requires the court to make specific findings of fact on the record regarding each factor. *White*, 73 Wn.2d at 352–53.

*4 Hawk's Superior relies on several cases involving denial of motions to vacate default orders as support for the proposition that the superior court's failure to address each *White* factor on the record is itself an abuse of discretion. But Hawk's Superior mischaracterizes the appellate court rulings.

For example, in *Gutz v. Johnson*, 128 Wn. App. 901, 911, 117 P.3d 390 (2005), *aff'd sub nom.*, *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), the court held that the trial court abused its discretion in not reviewing whether the moving party satisfied the *White* test. The court's holding was not based on the fact that the trial court had failed to enter specific findings of fact on each factor, but because the trial court only considered procedural arguments related to notice of default judgments under CR 55 after the parties had extensively briefed the four elements they needed to prove in a CR 60(b) hearing. *Id.* at 909.

Also, the court in *Norton v. Brown*, 99 Wn. App. 118, 992 P.2d 1019, 3 P.3d 207 (1999), did not hold that

consideration of the *White* factors must be “on the record,” as Hawk's Superior contends. Br. Appellant at 11. Rather, *Norton* held that the trial court abused its discretion in refusing to vacate a default judgment where the defendant presented a prima facie defense and showed that his failure to appear was due to mistake, inadvertence or excusable neglect. *Norton*, 99 Wn. App. at 124.

Hawk's Superior fails to provide any legal authority aside from *Norton* discussed above to support its argument that a superior court is required to make specific findings on the record on each *White* factor. We decline to impose such a requirement. Thus, we hold that the superior court did not err by not making specific findings on each *White* factor on the record.

3. Applying the *White* Test³

Under CR 60(b)(1), a superior court may relieve a party from a final judgment, order, or proceeding for “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” The law favors resolution of cases on their merit. *Stanley v. Cole*, 157 Wn. App. 873, 879, 239 P.3d 611 (2010). Because a default order deprives the parties of a trial on the merits, a proceeding to set aside a default judgment is equitable in character and the relief afforded “is to be administered in accordance with equitable principles and terms.” *White*, 73 Wn.2d at 351. With this principle in mind, the Washington Supreme Court held that a four part test shall guide trial courts when evaluating a motion to set aside a default judgment under CR 60(b)(1). *Id.* at 352.

The *White* test requires that the moving party show:

- (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party;
- (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect;
- (3) that the moving party acted with due diligence after notice of entry of the default judgment; and
- (4) that no

substantial hardship will result to the opposing party.

Id. Though no single factor in this test is dispositive, the first two elements are considered to be the primary factors and are given greater weight. *Id.* The test balances the merits of the underlying claim resolved by default judgment with the party's reasons for failing “to timely appear in the action before the default.” *Id.* at 353. If the movant demonstrates a “strong or virtually conclusive defense,” then the court will spend minimal time considering the circumstances that deprived the parties from resolving the case on its merit. *Id.* at 352. But, if the movant only presents a prima facie defense, then the court will more heavily weigh the movant's failure to appear and defend the action. *Id.* at 352–53.

a. Evidence of defense

*5 As the moving party, Hawk's Superior carried the burden of demonstrating to the trial court that it satisfied the *White* test. *Id.* at 352 (holding that the primary and secondary factors of the test “must be shown by the moving party.”). Thus, Hawk's Superior must show that it had a “strong or virtually conclusive defense” or that it can at least establish a prima facie defense. *Id.*

Here, Hawk's Superior failed to provide evidence of a strong or virtually conclusive defense to the breach of contract claim. In its answer to Boss's complaint, Hawk's Superior denied the accusations and asserted several affirmative defenses. And in its motion for relief, the only evidence Hawk's Superior provided addressing the underlying contract claim is found in a few sentences of Holley's supporting affidavit. There, Holley simply stated that Hawk's Superior had made no warranties or representations and that WSDOT had approved a substitute material from Hawk's Superior that Boss could use on the project. At best, this evidence would support a prima facie defense to Boss's breach of contract claim, not a strong or virtually conclusive defense. Because only a prima facie defense can be shown, Hawk's Superior's failure to appear and defend the summary judgment motion is weighed more heavily in balancing the *White* factors. *White*, 73 Wn.2d at 352–53.

b. No excusable neglect

Hawk's Superior argues that Holley's failure to respond to Boss's summary judgment motion was excusable neglect.⁴ But where a party's failure to respond to properly served court documents is due to a breakdown of internal office procedures, such failure does not constitute excusable neglect under CR 60(b)(1). *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 450, 332 P.3d 991 (2014), *review denied*, 182 Wn.2d 1006 (2015); *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 213, 165 P.3d 1271 (2007); *Prest v. Am. Bankers Life Assur. Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995), *review denied*, 129 Wn.2d 1007 (1996). In *TMT*, Petco failed to appear or respond to TMT's breach of contract summons and complaint because the legal assistant responsible for entering the deadline into the calendaring system forgot to do so before leaving on an extended vacation. *TMT*, 140 Wn. App. at 197–98. The court rejected Petco's argument that this constituted excusable neglect under CR 60(b)(1). *Id.* at 213. Similarly, in *Prest*, the court held that the general counsel's failure to respond to a summons and complaint because the documents had been mislaid in the office while the general counsel was out of town was not excusable neglect. *Prest*, 79 Wn. App. at 100.

*6 Hawk's Superior also argues that Holley's foresight in updating his address with the state bar association and postal service demonstrate excusable neglect in failing to notify the superior court of his address change. But Holley's efforts actually support the opposite conclusion. Holley made the effort to ensure certain entities were aware of his change in address. Yet, he failed to exercise the same care in the one case he had pending. Though no action had been taken in the case for a year and a half, Holley knew the case was still pending and his failure to update his address with the court clerk or opposing counsel represents inexcusable neglect. As in *TMT* and *Prest*, such breakdown was due to his own internal case management. The superior court did not abuse its discretion in finding no excusable neglect under CR 60(b)(1).

c. Mistake

Hawk's Superior next argues that the trial court erred in ruling that Holley's failure to receive actual notice

of Boss's summary judgment motion was not a mistake justifying relief under CR 60(b)(1). We find this argument unpersuasive.

Courts have addressed mistake under CR 60(b)(1) in the context of insurance coverage cases. *Norton*, 99 Wn. App. at 120; *Akhavuz v. Moody*, 178 Wn. App. 526, 535, 315 P.3d 572 (2013). In *Norton*, the defendant in an auto accident claim notified his insurance company that he was involved in a motor vehicle accident. *Norton*, 99 Wn. App. at 120. His insurance company began settlement negotiations with plaintiff's counsel regarding plaintiff's claim for personal injuries resulting from the accident. *Id.* The parties were unable to reach an agreement and plaintiff's counsel served the defendant with a summons and complaint. *Id.* The defendant failed to forward the documents to his insurance adjuster because he thought his insurer was already handling the claim. *Id.* The court held that this misunderstanding between the defendant and his insurer constituted a mistake justifying relief under CR 60(b)(1) because it stemmed from a genuine misunderstanding as to who was responsible for answering the summons and complaint. *Id.* at 124.

Comparatively, in *Akhavuz*, the court rejected the defendant's claim that its insurer's failure to answer plaintiff's complaint was a mistake under CR 60(b)(1). *Akhavuz*, 178 Wn. App. at 535–36. There, the defendant received plaintiff's summons and complaint and forwarded it to his insurance adjuster. *Id.* at 530. The insurance adjuster never responded because he assumed the parties were in the process of settlement negotiations. *Id.* at 536. The court held that this failure was not a mistake under CR 60(b)(1) because there was no misunderstanding between the defendant and his insurance company as to who was responsible for defending the plaintiff's claims. *Id.* at 535–36.

Thus, the kind of “mistake” justifying relief under CR 60(b)(1) occurs when there is a genuine misunderstanding as to who is responsible for defending a case. *Id.* at 537; *Norton*, 99 Wn. App. at 124. 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.” WEBSTER'S THIRD NEW INT'L DICTIONARY 1446 (2002).⁵

As in *Akhavuz*, Holley's failure to notify opposing counsel or the court of his change in address did not arise

from a misunderstanding by Holley. Therefore, it did not constitute a mistake under CR 60(b)(1).

d. Inadvertence

Hawk's Superior argues that Holley's actions constituted "inadvertence." Reply Br. of Appellant at 4. Because CR 60(b)(1) does not define "inadvertence," we give the term its "plain and ordinary meaning ascertained from a standard dictionary." *In re Marriage of Worthley*, 198 Wn. App. 419, 426, 393 P.3d 859 (2017) (quoting *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002)).

*7 The ordinary meaning of "inadvertence" is "lack of care or attentiveness." WEBSTER'S, *supra*, at 1139 (2002). Here, Holley's failure to update his address was not inadvertent. Holley updated his address with the bar association and post office. Thus, Holley was aware of the need to update his address. As a result, the superior court did not abuse its discretion in finding that Holley's failure was not inadvertent under CR 60(b)(1).

Hawk's Superior fails to show that substantial evidence supports a strong defense to Boss's claim or that Hawk's Superior's failure to appear in the summary judgment proceedings was due to mistake, inadvertence, or excusable neglect. Thus, Hawk's Superior fails to show that it is entitled to relief under the *White* test.⁶ Accordingly, the superior court did not abuse its discretion in denying Hawk's Superior's CR 60(b)(1) motion for relief from judgment.

B. MOTION TO RECONSIDER

Hawk's Superior contends that the superior court abused its discretion in failing to address the *White* factors on review of its motion for reconsideration. We disagree.

Under CR 59(a)(7), upon motion of an aggrieved party, the superior court may vacate a verdict and grant a new trial where there is "no evidence or reasonable inference from the evidence to justify the verdict or the decisions, or that [the decision] is contrary to law." Further, under CR 59(a)(9), the court may vacate when "substantial justice has not been done."

We review a superior court's denial of a motion for reconsideration for an abuse of discretion. *Christian v.*

Tohneh, 191 Wn. App. 709, 728, 366 P.3d 16 (2015). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 403, 196 P.3d 711 (2008). Though the court's discretion may result in a decision upon which reasonable minds may differ, it must be upheld if it is "within the bounds of reasonableness." *In re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999) (quoting *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009 (1991)).

CR 59 does not prohibit a party from submitting new or additional evidence on reconsideration. *Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013). However, the trial court has discretion whether or not to consider additional evidence presented. *Id.* If the trial court exercises this discretion and considers the additional evidence, then it must view the evidence in the same way it would have in the underlying proceeding. *Id.* at 166.

In *Martini*, Martini brought a negligence claim against his landlord after his wife died in an apartment fire. *Id.* at 158. The superior court granted the landlord's summary judgment motion, finding that Martini failed to prove the element of proximate cause. *Id.* at 159. In his motion for reconsideration, Martini provided the court with additional evidence on causation. *Id.* at 166. Although the superior court considered the additional evidence, it declined to overturn its prior summary judgment ruling. *Id.* at 160. The court reversed, holding that because the superior court considered the additional evidence, it was required to view the evidence in the light most favorable to Martini, as this would be the standard in evaluating the underlying motion for summary judgment. *Id.* at 166.

*8 Here, Hawk's Superior submitted additional evidence to the superior court in its motion for reconsideration. The superior court was not required under CR 59 to consider this evidence. However, the record shows that the superior court did consider Hawk's Superior's additional evidence because upon receiving Hawk's Superior's motion, the court required Boss to provide the court with further evidence to refute Hawk's Superior's defense. Once the superior court decided to weigh the new evidence, it was required to consider the evidence in the same way it would have in the underlying CR 60(b) motion. *Id.* Therefore, because the *White* factors controlled in the underlying CR 60(b)(1) motion hearing, the superior court was required

to consider the new evidence in light of the *White* factors in ruling on Hawk's Superior's motion for consideration.

In its motion for reconsideration, Hawk's Superior presented stronger evidence in defense of Boss's breach of contract claim. Specifically, Hawk's Superior provided correspondence in which WSDOT approved Hawk's Superior's rock and gravel for use by Boss in the construction project. However, Boss provided a subsequent WSDOT e-mail correspondence in which WSDOT stated that Hawk's Superior's rock and gravel failed to meet its specifications upon further testing. At best, Hawk's Superior's additional evidence provided a prima facie defense. *White*, 73 Wn.2d at 352–53.

And although Hawk's Superior provided the court with stronger evidence in support of its motion for reconsideration, Hawk's Superior still did not present further evidence that Holley's failure to update his address was due to mistake, excusable neglect, inadvertence, or irregularity. In its motion for reconsideration, Hawk's Superior presented additional evidence regarding the mail forwarding process and the new tenant's process of providing Holley with any first class mail it received. However, this evidence does not support a finding that

Holley's failure to update the court clerk or opposing counsel of his address was a mistake, inadvertence, excusable neglect or due to irregularity in the court proceedings. Thus, we hold that the superior court did not abuse its discretion in denying Hawk's Superior's motion for reconsideration.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Johanson, P.J.

Melnick, J.

All Citations

Not Reported in P.3d, 1 Wash.App.2d 1029, 2017 WL 5593791

Footnotes

- 1 The superior court did not identify the court rule(s) to which it was referring.
- 2 Hawk's Superior did not raise *White* in its original motion for relief. Rather, Hawk's Superior first raised the *White* test in its motion for reconsideration.
- 3 As to the applicability of the *White* test, both parties assume the *White* test applies. For the purposes of this appeal, we will assume it applies as well.
- 4 Hawk's Superior did not argue "excusable neglect" in its motion for relief or at the motion hearing. Rather, in its motion, Hawk's Superior argued that the order granting summary judgment was obtained through "procedural irregularity." CP at 37. At the motion hearing, counsel specifically stated that its argument fell under the subsections of CR 60 (b)(1) of "mistake or inadvertence." VRP (May 31, 2016) at 4. Hawk's Superior did, however, raise excusable neglect in its motion for reconsideration. Hawk's Superior argues that because it specifically sought relief under CR 60(b)(1) in its motion for relief, *White* compels the superior court to make specific findings of fact on excusable neglect, even if the parties did not argue that ground specifically.
In general, appellate courts will not consider arguments raised for the first time on appeal. RAP 2.5(a); *Unifund, CCR, LLC v. Elyse*, 195 Wn. App. 110, 117–18, 382 P.3d 1090 (2016). However, in bringing a motion for reconsideration under CR 59, a party may preserve the issue for appeal if it is closely related to a previously asserted position and it does not depend on new facts. *River House Dev. Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012). Because Boss addresses Hawk's Superior's excusable neglect arguments in its responsive brief, we address the issue of excusable neglect.
- 5 CR 60(b)(1) does not define "mistake." If a court rule does not define a term, we determine the plain and ordinary meaning of the term from a standard dictionary. *State v. Mankin*, 158 Wn. App. 111, 122, 241 P.3d 421 (2010), *review denied*, 171 Wn.2d 1003 (2011).
- 6 The parties do not dispute that Hawk's Superior met the secondary factors of the *White* test. However, given that Hawk's Superior fails to demonstrate the primary factors of the *White* test, which weigh more heavily, its due diligence in seeking

review and Boss's threat of insubstantial hardship do not tilt in favor of Hawk's Superior. *White*, 73 Wn.2d at 352 (“The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors, vary in dispositive significance as the circumstances of the particular case dictate.”).

183 Wash.App. 1002

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

Inna MEDNIKOVA and Vyacheslav
Avadayev, Respondents,

v.

Mare MORSE and Martin Morse, Appellants.

No. 70863–5–I.

|
Aug. 18, 2014.

Appeal from King County Superior Court; Hon. Theresa
B. Doyle, J.

Attorneys and Law Firms

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UNPUBLISHED

COX, J.

*1 Mare and Martin Morse (collectively “Morse”) appeal the trial court's order denying her motion to set aside an order of default. Morse also appeals the trial court's order of default judgment, findings of fact and conclusions of law, and the order denying her motion for reconsideration.

Morse contends that the trial court abused its discretion when it did not set aside the order of default or vacate the default judgment based on the fact that she believed her insurance company would respond to the summons and complaint. She also asserts that the default judgment is not supported by substantial evidence.

The decision on a motion to set aside an order of default lies within the sound discretion of the trial court.¹ Likewise, whether to vacate a default judgment is also

left to the sound discretion of the court.² A trial court's decision will not be disturbed unless it plainly appears such discretion has been abused.³ “The reasonability of the damage award is a question of fact reviewed for abuse of discretion.”⁴ Here, Mare Morse fails in her burden to show that the trial court abused its discretion in any respect. We affirm.

On May 11, 2010, Morse caused an automobile collision which resulted in injuries to Inna Mednikova. Omni Insurance, Morse's insurer, conducted settlement negotiations with Mednikova's attorney from 2010 to 2013. The negotiations were not successful.

As the three-year statute of limitations approached, Mednikova commenced this action on May 7, 2013 by filing a summons and complaint. The next day, a process server personally served Morse with copies of these documents.

Morse failed to respond to the summons and complaint within the 20-day period following service on May 8, 2013. In her declaration, she testified that she did not “personally take any action after receiving the paperwork.”

Mednikova moved for an order of default, which the court granted on May 31, 2013.

This record reflects that Omni Insurance, Morse's insurer, “first became aware that its insured, Mare Morse, had been served with the Summons and Complaint on or about June 13, 2013.” Other than Morse's admission that she took no action after being served, there is nothing in this record to explain what happened between the May 8 date of service and the June 13 date on which Omni Insurance became aware of service on its insured.

Omni Insurance then retained counsel for Morse, who filed a notice of appearance on June 21. Thereafter, Morse moved to set aside the order of default. At the hearing on this motion, the trial court also considered Mednikova's motion for entry of a default judgment against Morse.

The trial court denied Morse's motion to set aside the order of default. It also entered a default judgment together with findings of fact and conclusions of law.

Morse moved for reconsideration of these orders, which the trial court denied.

Morse appeals.

ORDER OF DEFAULT

Morse argues that the trial court abused its discretion when it denied her motion to set aside the order of default. Because she failed to establish good cause, we disagree.

*2 The decision on a motion to set aside an order of default lies within the sound discretion of the trial court.⁵ “That decision will not be reversed on appeal unless it plainly appears that the trial court abused its discretion.”⁶ A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons.⁷

Under CR 55, “If the defendant fails to appear, the plaintiff first obtains an order finding the defendant to be in default, and then obtains a default judgment.”⁸ “An order (or more accurately, a finding) of default is the official recognition that a party is in default, and is a prerequisite to the entry of judgment on that default.”⁹

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.¹⁰

Here, it is undisputed that Mednikova properly served Morse. It is also undisputed that Morse did nothing with the summons and complaint after service. Her declaration states that she “did not personally take *any* action after receiving the paperwork.” This is the record that was before the trial court to determine whether Morse met the burden of establishing good cause.

Morse argues that the trial court abused its discretion when it rejected her argument that there was good cause to set aside the order of default. She asserts that her failure to appear was based upon excusable neglect and that she was diligent in asking for relief from the order of default. If we determine there was no excusable neglect, we need not consider whether she was diligent in seeking relief.¹¹

In her declaration supporting the motion to set aside the order of default, Morse gave two reasons why she did not take any action after service of the summons and complaint. First, she asserts the process server told her that she “need not worry about [the documents]” because they were “only for a ‘tort.’” “ This makes no sense. The plain language of the summons requires an answer to the complaint within 20 days of service. Why Morse would ignore this plain language based on the alleged representation of a process server is left unexplained. The trial court was reasonably entitled to reject this excuse as not establishing good cause.

We also note that Mednikova submitted a declaration from the process server, which stated that he “never” tells any defendants that they should not worry about the documents he serves. The trial court was also reasonably entitled to believe the process server and disbelieve Morse to support its rejection of this first excuse.

Second, Morse contends that she did not take any action because her insurance company was handling the claim. Thus, she believed that the insurance company would “continue to act on [her] behalf and to protect [her] interests.” This excuse is also not persuasive. Why Morse would fail to do anything with the summons and complaint after service and think her insurer would not need to know about service is also left unexplained. If anything, providing the insurer with this new information would seem the more probable course in view of the fact that it was then acting on her behalf. The trial court was reasonably entitled to reject this excuse as lacking good cause.

*3 In *Johnson v. Cash Store*, Division Three reached a similar conclusion regarding the entry of a default judgment.¹² There, the Cash Store's manager was personally served with a summons and complaint.¹³ “Because she thought the documents were irrelevant to Cash Store business, [the manager] explained, she never informed the company's administration or its legal counsel that she had received them.”¹⁴ The manager also did not respond to the notice of the default hearing, and there was nothing in the record to explain what she did with that notice.¹⁵

The court explained that the manager's "failure to forward the summons and complaint to corporate counsel or to the ... administration—and her unexplained failure to forward the notice of the default hearing—constituted at least inexcusable neglect, if not willful noncompliance."¹⁶ The court concluded that the trial court did not abuse its discretion when it denied Cash Store's motion to vacate the default judgment.¹⁷

Like *Cash Store*, Morse's failure to forward the summons and complaint to her insurance company amounted to inexcusable neglect. The trial court did not abuse its discretion when it rejected this excuse as lacking good cause.

The cases on which Morse relies to argue good cause are distinguishable because the defendants in those cases showed that there was a misunderstanding as opposed to the inexcusable neglect in this case.

In *Norton v. Brown*, Division Three explained that "[a] genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a mistake for purposes of vacating a default judgment."¹⁸ This principle has been stated in a number of other cases.¹⁹

In *Norton*, the court concluded that the defendant's failure to respond to a summons and complaint was excusable neglect.²⁰ The court explained:

[The defendant] was under the impression that his interests were being protected by his insurer through settlement negotiations. **His insurer did not warn [the defendant] that a lawsuit was being commenced or that he should expect service of a summons and complaint and that the paperwork should be immediately forwarded to the insurer.** The court concluded that [the defendant] was confused about what to do with the summons and complaint. This was a mistake on the part of the insurer and excusable neglect on the part of [the defendant].²¹

In *Calhoun v. Merritt*, a case that *Norton* cites, Division Three also concluded that a misunderstanding between an insured and insurer about what to do with a summons and complaint "constituted a bona fide mistake."²² The court explained:

As stated in [the defendant's] affidavit, the fact that his insurer was already involved in the case and dealing with [the plaintiff's] attorney caused him to believe that the insurer knew of the lawsuit and would respond to it. **While [the insurance adjuster] advised [the defendant] to expect service, there is no indication that he told him what to do once service occurred.**²³

*4 Here, unlike *Norton* and *Calhoun*, Morse's declaration does not explain what the insurance company told or did not tell her about the possibility of being served with a summons and complaint.²⁴ There is simply nothing in the record to determine whether there was any genuine misunderstanding between the insured and insurer. More importantly, the trial court was reasonably entitled to conclude that Morse's failure to forward the summons and complaint to her insurance company was inexcusable neglect for the reasons already discussed.²⁵

Additionally, *Norton* and *Calhoun* can be traced back to the supreme court case, *White v. Holm*, which is also distinguishable from this case.²⁶

In *White*, the supreme court held that the trial court abused its discretion when it denied the defendant's motion to vacate the default judgment entered against him.²⁷

There, the defendant failed to appear because there was a misunderstanding about who would represent the defendant until insurance coverage was determined.²⁸ The defendant believed that the insurance company would appear on his behalf, but the insurance company believed that a personal attorney would represent the defendant.²⁹ Notably, the defendant had been in communication with the insurance company and "immediately relayed" the summons and complaint to the insurance adjuster.³⁰ The court concluded that vacation of the default judgment was warranted because there was a "bona fide mistake, inadvertence, and surprise" given the misunderstanding.³¹

Here, unlike *White*, Morse did not take any action after receiving the legal papers.³² There is no showing here of a "bona fide mistake, inadvertence, [or] surprise."³³ Thus, the trial court was well within its discretion when it

concluded that there was no good cause to set aside the order of default.

Morse argues that Mednikova's attorney failed to make the insurance company aware of the lawsuit despite two years of communications and that Mednikova's attorney purposefully evaded communication with the insurance company. As to the first point, there was no duty of counsel that we know of to separately advise the insurer of the lawsuit. Service on the insured was sufficient. As to the second point, even if this assertion is true (and we make no determination of this point), the proper inquiry is whether Morse's failure to appear was excusable neglect. This inquiry is focused on Morse's actions, not the actions of other persons.³⁴ There is simply no showing that counsel's actions had any impact on Morse's decision to ignore service of process.

To support the assertion that other persons' actions are relevant, Morse cites *Morin v. Burris*.³⁵ But that case is distinguishable and does not control.

There, the plaintiff served the defendant with a summons and complaint after they were involved in a motor vehicle collision and could not reach a settlement.³⁶ The defendant promptly informed his insurance company about the papers, and he assumed that the insurance company would take care of the suit.³⁷ When the insurance company contacted the plaintiff's attorney, the attorney's paralegal did not inform the insurance company that the plaintiff had obtained an order of default.³⁸

*5 The supreme court explained, "If the [defendant's] representative acted with diligence, and the failure to appear was induced by [plaintiff's] counsel's efforts to conceal the existence of litigation under the limited circumstances we have described above, then the [defendant's] failure to appear was excusable under equity and CR 60."³⁹ Because the trial court had not considered this issue, the supreme court remanded the case for further consideration.⁴⁰

That case is factually distinguishable from this case because there is no showing that Morse promptly contacted her insurance company after she was served with the summons and complaint. She admits she did nothing with those papers. Additionally, Mednikova's

attorney did not directly communicate with Morse's insurance company and lead it to believe that Mednikova had not already obtained an order of default. Thus, *Morin* has no bearing on this case.

The order of default stands.

DEFAULT JUDGMENT

Morse next argues that the default judgment should not have been entered because the order of default is unenforceable. For the reasons we previously discussed in this opinion, the order of default was properly entered. It stands because the trial court did not abuse its discretion when it concluded that there was no good cause to vacate it.

Morse also asserts that the default judgment should be vacated under CR 60(b)(1) and *White*. We disagree.

Default judgments are generally disfavored because the law favors determination of controversies on their merits.⁴¹ " 'But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.' "⁴² "When balancing these competing policies, the fundamental principle is whether or not justice is being done."⁴³

An appellate court will not reverse the trial court's decision on a motion to vacate a default judgment unless "an abuse of discretion clearly appears."⁴⁴ Under *White*, a trial court must consider four factors when exercising its discretion.⁴⁵

The primary factors are: (1) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; (2) the reason for the party's failure to timely appear, *i.e.*, whether it was the result of mistake, inadvertence, surprise or excusable neglect. The secondary factors are: (3) the party's diligence in asking for relief following notice of the entry of the default; and (4) the effect of vacating the judgment on the opposing party.⁴⁶

"These factors vary in dispositive significance."⁴⁷ If a defendant has a strong defense, the other factors are not as

significant.⁴⁸ “But if the party can show only a minimal prima facie defense, the court will scrutinize the other considerations more carefully.”⁴⁹

For the first factor, Morse argues that she established a prima facie defense with respect to damages. She does not argue that she has a defense to liability. Morse cites *Calhoun* to support her argument regarding her defense to damages.⁵⁰

*6 There, Division Three explained that it is difficult to establish a prima facie defense to damages without the ability to conduct discovery.⁵¹ “Moreover, presenting a defense to damages for pain and suffering is always complicated by the subjective as opposed to objective nature of such damages.”⁵² The court concluded that it was “inequitable and unjust to deny the motion to vacate the damage portion of the judgment on the ground that [the defendant] did not present a prima facie defense.”⁵³ Consequently, the court looked to the other three factors set out in *White*.⁵⁴

Because Morse asserts that she has a defense to damages, like *Calhoun*, we also look to the other three factors. Here, Morse's failure to establish the second factor is dispositive.⁵⁵ For the second factor, Morse fails to establish that her untimely appearance was the result of mistake, inadvertence, surprise, or excusable neglect for the reasons already discussed.

Even if Morse can establish the third and fourth factors—that she was diligent in asking for relief following notice of the entry of default and that Mednikova would not suffer a substantial hardship if the default judgment was vacated—these secondary factors do not outweigh her failure to establish the second factor, which is a primary factor.

Given Morse's failure to establish the second factor, a primary factor, the trial court did not abuse its discretion when it declined to vacate the default judgment.

SUBSTANTIAL EVIDENCE

Morse separately claims that the default judgment is not supported by substantial evidence. We disagree.

As an initial matter and as previously noted, Morse expressly admitted to the trial court that she does not have a defense to liability. In her response to Mednikova's motion to enter a default judgment, Morse stated, “*While Defendant Mare Morse does not have a prima facie defense as to liability for causing the motor vehicle accident*, [Morse does] have a defense to the damages being asserted.”⁵⁶ In Morse's CR 59 motion for reconsideration, the primary focus of her assertions was that she has a defense to damages, not liability.

Given these prior admissions regarding liability, Morse does not have a defense to liability. Having presented no defense, the default judgment regarding liability must stand.⁵⁷

The issue is whether the damages portion of the judgment is supported by substantial evidence.

Under CR 55(b)(2), a default judgment may be entered after an order of default as follows:

“*When Amount Uncertain*. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and conclusions of law are required under this subsection.”⁵⁸

*7 “[F]ollowing default, the trial court must conduct a reasonable inquiry to determine the amount of damages.”⁵⁹ “The reasonability of the damage award is a question of fact reviewed for abuse of discretion.”⁶⁰

In *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, this court explained that a trial court has “discretion to vacate the damages portion of a default judgment even where no meritorious defense [to liability] is established.”⁶¹ That case involved a legal malpractice claim against the defendant's law firm for failing to timely file a motion to vacate a default judgment.⁶²

This court explained that the “standard for when to vacate damages awards from default judgments is the same as

the standard for setting aside awards of damages from trials.”⁶³ “Thus, the default award here could be vacated if there were not substantial evidence to support the award of damages.”⁶⁴ “Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.”⁶⁵

Here, the trial court awarded the following damages:

...

3. Medical Bills: \$15,063.47
4. Lost Wages: \$1,204
5. Pain and Suffering: \$28,000
6. Loss of Consortium and Loss of Services: \$14,000
7. Other Recovery (towing): \$241.00
8. Principal Judgment Amount: \$58,508.47⁶⁶

The medical bills show that they support that award. Mednikova submitted a letter from her employer, which supports the lost wages award. She also submitted a towing bill, which supports “other recovery.” We take that to support the towing charge.

For the pain and suffering and loss of consortium and loss of service awards, Mednikova submitted a declaration that states:

My family life suffered as well. I am a wife, a mother, and a grandmother to a three-year-old granddaughter. For many months after the accident, I was unable to cook for my family, clean the house, grocery shop and perform other household duties. I could not take care of my granddaughter—it was very hard to not be able to play with her. Not only did my husband have to do all of our household chores for months, but he also suffered from my inability to perform my spousal duties for quite a long time. I am an avid dancer. I love to take long

walks. Prior to the accident, I used to take 1 to 2 hour walks almost every day. For a long time after the accident I was not able to continue with these activities, and even now I can't walk for long periods of time. My dancing suffered as well. Being in a car accident has interrupted the normal course of my life and caused me a lot of pain as well as financial and other problems. I believe that I am entitled to a fair compensation by the people who caused my accident.⁶⁷

The determination of an award for pain and suffering and loss of consortium and loss of services is highly subjective.⁶⁸ But, as counsel properly conceded at oral argument of this case, there need not be a specification of the amount of damages sought for recovery for pain and suffering. Given the amount awarded here and Mednikova's declaration, we conclude that the pain and suffering award was reasonable.

*8 Morse cites no authority that the awards in this case are excessive. Rather, Morse contends that there is no evidence to support the pain and suffering and the loss of consortium and loss of services award. But, as previously discussed, Mednikova submitted a declaration to support these awards. Thus, the assertion that there was no evidence to support these awards is incorrect.

Morse also asserts that there is no evidence to support the fact that Mednikova is legally married and thus entitled to a loss of consortium award. But as Mednikova correctly points out, Morse did not make this specific argument to the trial court. Thus, the argument was not preserved for appeal.

Finally, Morse argues that there is not substantial evidence to support the medical bills and lost wages award. She contends that the bills are unauthenticated, and there is no evidence to prove the “reasonableness and necessity” of the bills. Further, she asserts that the letter from Mednikova's employer is not convincing because it does not state the reason for her absence. But these arguments go to the weight of the evidence, not its

admissibility. The evidence is substantial “if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.”⁶⁹ As previously discussed, the evidence meets this standard for those awards.

In sum, there is substantial evidence to support the amount of damages awarded. The trial court did not abuse its discretion in entering judgment for these amounts.

ATTORNEY FEES

Mednikova requests an award of her reasonable attorney fees and costs associated with this appeal pursuant to RAP

18.1. But Mednikova provides no legal basis for awarding attorney fees. Thus, we deny her request.

Costs are awarded to the prevailing party, subject to compliance with the RAPs.

We affirm the judgment and deny the request for an award of attorney fees.

WE CONCUR: VERELLEN, A.C.J, and LEACH, J.

All Citations

Not Reported in P.3d, 183 Wash.App. 1002, 2014 WL 4067921

Footnotes

- 1 *In re Estate of Stevens*, 94 Wn.App. 20, 29, 971 P.2d 58 (1999).
- 2 *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968).
- 3 *Id.*
- 4 *Aecon Bldgs., Inc. v. Vandermolen Constr. Co., Inc.*, 155 Wn.App. 733, 742, 230 P.3d 594 (2009).
- 5 *Stevens*, 94 Wn.App. at 29.
- 6 *Id.*
- 7 *Id.*
- 8 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 9:23 (2d ed.2013).
- 9 4 Karl B. Tegland, *Washington Practice: Rules Practice CR 55* author's cmts. (6th ed.2013).
- 10 *Stevens*, 94 Wn.App. at 30.
- 11 *See id.*
- 12 116 Wn.App. 833, 848–49, 68 P.3d 1099 (2003).
- 13 *Id.* at 839.
- 14 *Id.* at 848.
- 15 *Id.*
- 16 *Id.* at 848–49.
- 17 *Id.* at 849.
- 18 99 Wn.App. 118, 124, 992 P.2d 1019 (1999) (emphasis added).
- 19 *See Akhavuz v. Moody*, 178 Wn.App. 526, 538, 315 P.3d 572 (2013); *Gutz v. Johnson*, 128 Wn.App. 901, 919, 117 P.3d 390 (2005); *Berger v. Dishman Dodge, Inc.*, 50 Wn.App. 309, 312, 748 P.2d 241 (1987); *Calhoun v. Merritt*, 46 Wn.App. 616, 621, 731 P.2d 1094 (1986).
- 20 *Norton*, 99 Wn.App. at 124.
- 21 *Id.* (emphasis added).
- 22 46 Wn.App. 616, 621, 731 P.2d 1094(1986).
- 23 *Id.* (emphasis added).
- 24 *See Norton*, 99 Wn.App. at 124; *Calhoun*, 46 Wn.App. at 621.
- 25 *See Cash Store*, 116 Wn.App. at 848–49.
- 26 *Norton*, 99 Wn.App. at 125 (citing *Calhoun*, 46 Wn.App. at 621); *Calhoun*, 46 Wn.App. at 621 (citing *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968)).
- 27 *White*, 73 Wn.2d at 357.
- 28 *Id.* at 349–50.

- 29 *Id.*
- 30 *Id.* at 350.
- 31 *Id.* at 355.
- 32 See *id.* at 349–50.
- 33 *Id.* at 355.
- 34 See *Norton*, 99 Wn.App. at 125 (“As mentioned above, a review of the transcript of the court’s oral decision on reconsideration makes it clear that the court focused more on the insurance company’s failure to contact [the defendant] than it did on any excusable neglect on [the defendant’s] part. Because the case law does not support the trial court’s conclusion, this was an abuse of discretion.”).
- 35 Brief of Appellant at 12–13 (citing *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007)).
- 36 *Morin*, 160 Wn.2d at 751.
- 37 *Id.*
- 38 *Id.*
- 39 *Id.* at 759.
- 40 *Id.*
- 41 *Akhavuz*, 178 Wn.App. at 532.
- 42 *Id.* (quoting *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007)); see also *Morin*, 160 Wn.2d at 759 (“[W]hen served with a summons and complaint, a party must appear. There must be some potential cost to encourage parties to acknowledge the court’s jurisdiction.”).
- 43 *Akhavuz*, 178 Wn.App. at 532.
- 44 *Calhoun*, 46 Wn.App. at 619.
- 45 *Id.* (citing *White*, 73 Wn.2d at 352).
- 46 *Id.* (citing *White*, 73 Wn.2d at 352).
- 47 *Id.*
- 48 *Id.*
- 49 *Id.*
- 50 Brief of Appellants at 20–21 (citing *Calhoun*, 46 Wn.App. at 620–21).
- 51 *Calhoun*, 46 Wn.App. at 620.
- 52 *Id.*
- 53 *Id.* at 620–21.
- 54 *Id.* at 621.
- 55 See *Akhavuz*, 178 Wn.App. at 540 (explaining that “[i]nexusable neglect is the dispositive factor that should have guided the trial court to deny the motion to vacate”).
- 56 Clerk’s Papers at 92 (emphasis added).
- 57 See *Little*, 160 Wn.2d at 704.
- 58 *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn.App. 231, 240, 974 P.2d 1275 (1999) (quoting CR 55(b)(2)).
- 59 *Smith v. Behr Process Corp.*, 113 Wn.App. 306, 333, 54 P.3d 665 (2002) (citing CR 55(b)(2)).
- 60 *Aecon Bldgs.*, 155 Wn.App. at 742.
- 61 95 Wn.App. 231, 241, 974 P.2d 1275 (1999).
- 62 *Id.* at 237.
- 63 *Fowler v. Johnson*, 167 Wn.App. 596, 606, 273 P.3d 1042 (2012) (citing *Shepard*, 95 Wn.App. at 241–42).
- 64 *Id.* (quoting *Shepard*, 95 Wn.App. at 242).
- 65 *Shepard*, 95 Wn.App. at 242.
- 66 Clerk’s Papers at 235.
- 67 *Id.* at 61.
- 68 See *Calhoun*, 46 Wn.App. at 620.
- 69 *Shepard*, 95 Wn.App. at 242.

SMITH GOODFRIEND, PS

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