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No. 52359-1

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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FIRE INSURANCE EXCHANGE,  
a corporation,

*Appellant,*

v.

SUNSET AIR, INC.  
a corporation,

*Respondent.*

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**APPELLANT FIRE INSURANCE EXCHANGE'S  
REPLY BRIEF**

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TABLE OF CONTENTS

Page

**A. SUMMARY OF REPLY** ..... - 1 -

**B. ARGUMENT** ..... - 4 -

    1. Sunset Abandoned Any Argument that It, Or Its Claims Representative, Ever Appeared In The Action Or Were Entitled To Notice Of The Default. .... - 4 -

    2. Sunset Abandoned Its Main Trial Court Argument That It's Entitled To Relief Pursuant To CR 60(b)(1)(“Mistake, Inadvertence, Surprise, Neglect, or Irregularity”). .... - 5 -

    3. Sunset Has Admitted That CR 60(b)(1) applies to this situation and has failed to produce any evidence of irregularities extraneous to this proceeding which would warrant the use of CR 60(b)(11); Thus, It Cannot Use CR 60(b)(11) as a basis for relief. .... - 6 -

    4. Sunset Failed To Produce Any Facts That A Misrepresentation Or Misconduct Occurred And That Sunset Relied Upon Such, Or That It Was A Proximate Cause Of Its Failure To Defend The Lawsuit, Which Would Entitle It To Relief Pursuant To CR 60(b)(4). .... - 9 -

        A. Sunset failed to produce any evidence of a misrepresentation. .... - 11 -

        B. Sunset failed to produce any evidence of other misconduct. .... - 14 -

        C. Sunset failed to produce any evidence of reliance upon any alleged misrepresentation or misconduct or that it was a proximate cause of its failure to defend the lawsuit. .... - 15 -

**C. CONCLUSION** ..... - 16 -

**D. APPENDIX “B” – SELECTED TEXT OF CITED WASHINGTON STATE & FEDERAL RULES OF CIVIL PROCEDURE** ..... - 17 -

## TABLE OF AUTHORITIES

### Cases

Aecon Buildings, Inc. v. Vandermolen, 155 Wn. App. 733 (Div. I 2009).....	-11-
Allison v. Boondocks, et.al., 36 Wn. App. 280 (Div. I, 1983).....	- 14 -
Friebe v. Supancheck, 98 Wn. App. 260 (Div. I, 1999) .....	- 8 -
Lindgren v. Lindgren, 28 Wn. App. 288 (Div. II, 1990. ....	- 10 -
Klapprott v. United States, 355 U.S. 601 (1949).....	- 7 -, - 8 -
Morin v. Burris, 160 Wn.2d 745 (2007) .....	- 11 -, - 13 -
Trinity Universal Ins. Co. of Kansas v. Ohio Casualty Ins., 176 Wn. App. 185 (Div. I, 2013).....	- 14 -, - 15 -
Union Bank v. Vanderhoek, 191 Wn. App. 836 (Div. II, 2015) ....	- 6 -

### State and Federal Civil Rules

CR 6(b)(2).....	- 1 -, - 6 -
CR 55(a)(3).....	- 4 -, - 13 -
CR 55(f)(2)(A) .....	- 5 -
CR 60 .....	- 6 -
CR 60(b).....	- 6 -
60(b)(1).....	- 1 -, - 2 -, - 5 -, - 6 -, - 8 -, - 9 -
60(b)(3).....	- 9 -
CR 60(b)(4).....	- 2 -, - 9 -, - 14 -
CR 60(b)(11).....	- 1 -, - 2 -, - 6 -, - 8 -, - 9 -
FRCP 60(b)(6).....	- 8 -

## **A. SUMMARY OF REPLY**

At the Trial Court, Sunset argued that it, or its Claims Representative, Pinkerton, appeared and were thus entitled to notice of Fire's motion for Default. In its response brief, Sunset failed to present any argument that it or Pinkerton appeared and was entitled to notice of the Default.

At the Trial Court, Sunset's main argument in support of its motion was that it was entitled to relief, pursuant to CR 60(b)(1) as the default was a result of a mistake, inadvertence, surprise, neglect, or irregularity. CR 6(b)(2) is clear that such relief was time barred as it was brought more than a year after the default and that Sunset had failed to produce any evidence as to what surprise, mistake, or inadvertence had caused it to fail to appear and defend. Subsequently, in its Response Brief, Sunset failed to make any argument that it was entitled to relief pursuant to CR 60(b)(1).

At the Trial Court, as a fallback argument, Sunset argued that CR 60(b)(11) ("Any other reason justifying relief

from the operation of the judgment.”) should provide it relief from the Default. However, that argument was clearly rejected by Division II which held that CR 60(b)(11) can only be used in “extraordinary circumstances,” and cannot be used, when CR 60(b)(1) applies, to circumvent the one-year limitation for relief pursuant to CR60(b)(1). Doing so, is an “abuse of discretion” and violates “...the spirit of [CR 60].”

Despite this case law, Sunset attempts to argue that this case constitutes “extraordinary circumstances” similar to those in a World War II era case in which a naturalized United States Citizen was deported after a series of procedural mistakes resulted in a default being taken on his deportation hearing. This case isn’t anyway similar to that case as discussed below.

Finally, Sunset attempts to seek relief pursuant to CR 60(b)(4) based on alleged misrepresentations and misconduct. Sunset has produced nothing indicative of an active misrepresentation. Instead, the alleged misrepresentation seems to be that Sunset did not know the matter

would be filed with the Court and Evezich had a duty to notify Pinkerton that it was filed, after it was filed. However, the Summons clearly advised Pinkerton that a Default could be taken twenty days after his insured had been served with the Summons and Complaint and, after Pinkerton received the Summons and Complaint, Fire's counsel advised Pinkerton that the Summons and Complaint would be filed. Sunset ignores this fact and does not mention it anywhere in its Response Brief.

Instead, Sunset argues that Fire had an additional duty to advise Pinkerton that the lawsuit had been filed, after it was filed. There is no such duty, and Sunset failed to do anything to inquire into the status of the lawsuit after their insured was served and after being told by Evezich it would be filed.

Between the time the lawsuit was filed, and the Default obtained, there was no communication between Evezich and Pinkerton. Pinkerton's first letter to Evezich after the lawsuit was filed was written two weeks after the Default was entered. Pinkerton's letters are irrelevant as Sunset was already in

Default. Further, the letters do not even inquire as to whether the lawsuit was filed and, thus, there is nothing for Evezich to respond to about the lawsuit.

Sunset argues that misconduct occurred as a result of Fire allowing a year to pass before taking any action on the Default. However, it presents no law in support that such action is inequitable and case law is clear that it is not.

Finally, Sunset failed to produce any evidence that it relied upon any alleged misrepresentation or misconduct or that it was a proximate cause of its failure to defend against the lawsuit.

## **B. ARGUMENT**

### **1. Sunset Abandoned Any Argument that It, Or Its Claims Representative, Ever Appeared In The Action Or Were Entitled To Notice Of The Default.**

Sunset had the burden of proving that it appeared in the action. It offered no argument or evidence that it, or Pinkerton appeared. Thus, neither Sunset or Pinkerton was entitled to notice of the Motion for Default. See, CR 55(a)(3)(Any party who has not appeared before the motion for default and

supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A)).

2. Sunset Abandoned Its Main Trial Court Argument That It's Entitled To Relief Pursuant To CR 60(b)(1) ("Mistake, Inadvertence, Surprise, Neglect, or Irregularity").

Sunset's motion to Vacate Default was premised upon on CR 60(b)(1) which requires proof of a mistake, inadvertence, surprise, neglect, or irregularity which caused the defendant to not defend against the lawsuit. (CP 050). In its Response Brief, Sunset failed to present any evidence of a mistake, surprise, or anything else that caused it to not defend the lawsuit.

Sunset also failed to address anywhere in its Response Brief why the one-year limitation on relief, pursuant to CR 60(b)(1), was not applicable.

The facts of this case are clear: the Order of Default was granted on July 12, 2016 and the Default Judgment was granted on February 16, 2017; thus, when Sunset filed its motion on July 31, 2018, over one-year had elapsed since the Default Judgment and over two-years had elapsed since the

Order of Default. Thus, the one-year limitation of CR 6(b)(2) applies and Sunset is not entitled to relief pursuant to CR 60(b)(1).

3. Sunset Has Admitted That CR 60(b)(1) applies to this situation and has failed to produce any evidence of irregularities extraneous to this proceeding which would warrant the use of CR 60(b)(11); Thus, It Cannot Use CR 60(b)(11) as a basis for relief.

At the Trial Court, Sunset premised its argument on relief pursuant to CR 60(b)(1) and then made a fallback argument, in an attempt to circumvent the one-year bar of CR 60(b)(1), that it was entitled to relief pursuant to CR 60(b)(11) (“Any other reason justifying relief from the operation of the judgment”). However, by relying upon an argument in the Trial Court that CR 60(b)(1) applies, it is barred from now abandoning that position and relying upon CR 60(b)(11). See, *Union Bank v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 844, 845 (Div. II, 2015) (CR 60(b)(11) is “... a catchall provision intended to serve the ends of justice in extreme, unexpected situations and when no other subsection of CR 60(b)

applies.... and only to "... “extraordinary circumstances’ which constitute irregularities extraneous to the proceedings.”).

Additionally, Sunset failed to present any evidence that any irregularities extraneous to the lawsuit occurred. Yet, it argues that that the Court could vacate the Default, pursuant to CR 60(b)(11) to "...accomplish justice" just as was done in *Klapprott v. United States*, 335 U.S. 601 (1949) (Response Brief, pg. 10). *Klapprott* is inapplicable because the facts in this case are nothing like those in *Klapprott*.

In *Klapprott*, Mr. Klapprott was a naturalized U.S. citizen who had his citizenship revoked by default. At the time of the Default Motion, he had been in poor health, imprisoned by federal authorities without any money or legal assistance, an F.B.I. agent breached his promise to deliver to the ACLU a letter Klapprott had written to the ACLU requesting legal assistance. An attorney representing him regarding an allegation that he had violated the Selective Service Act had failed to appear at the denaturalization proceedings as the attorney had promised, and he spent four years in various

federal prisons until the authorities dismissed the Selective Service Act charge and readied him for deportation.

In vacating the Default, Judge Black stated that Klapprott had “an extraordinary situation which cannot fairly or logically be classified as mere ‘neglect’ on his part” and that the case came under the “other reasons” provision of 60(b)(6). *Klapprott*, at 613 ((FR 60(b)(6) was the federal counterpart to Washington State CR 60(b)(11)).

Conversely, in this case, Sunset has not produced *any* facts which would make this an “extraordinary situation.” It has not offered any evidence of why it didn’t appear or defend the lawsuit or why anything that occurred caused it to make a mistake or be surprised.

*Klapprott’s* holding also reiterates why Sunset is not entitled to relief pursuant to CR60(b)(11), even if it had produced evidence of an “extraordinary situation.” Justice Black reiterated the same rule as in Washington State that CR 60(b)(11) cannot be used when CR 60(1) applies and cannot be used to circumvent the one-year limitation on relief when

relief is premised upon CR 60(b)(1). *Id.*, 613 – 614; see, *Friebe v. Supancheck*, 98 Wn. App. 260, 267 (Div. I, 1999)(An attempt to skirt the one-year limitation on motions brought pursuant to CR 60(b)(1) – (3) violates the spirit of the rule). Thus, Sunset cannot rely upon CR 60(b)(11) to serve as a basis for relief from the Default.

4. Sunset Failed To Produce Any Facts That A Misrepresentation Or Misconduct Occurred And That Sunset Relied Upon Such, Or That It Was A Proximate Cause Of Its Failure To Defend The Lawsuit, Which Would Entitle It To Relief Pursuant To CR 60(b)(4).

CR 60(b)(4) provides for relief from a judgment resulting from fraud, misrepresentation, or other misconduct of an adverse party. Sunset has not argued, or produced any evidence of fraud; thus, it is presumed it is arguing that a misrepresentation or misconduct by Fire has occurred. Similarly, Sunset has failed to produce any evidence that Evezich made any statement that is a misrepresentation; thus, it is presumed it is arguing that Evezich failed to tell Sunset something that resulted in a misrepresentation.

A party seeking relief, pursuant to CR 60(b)(4) must prove that the misrepresentation or misconduct occurred by “clear and convincing evidence.” *Lindgren v. Lindgren*, 58 Wash. App. 588, 596 (Div. II, 1990). The fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense. *Id.* Sunset has failed to satisfy that burden.

On June 15, 2016, Evezich emailed Pinkerton and told him the Complaint would be filed. Nowhere in Sunset’s Response Brief is this fact mentioned.

Pinkerton’s Declaration, the only evidence submitted by Sunset in support of its motion, is silent regarding this email. (CP 059 – 060).

Instead, Sunset argues that Pinkerton was “unaware the suit had been filed” and tries to impose on Fire the additional duty of advising Pinkerton not only that the Complaint would be filed, but that it was filed and argues that failure to do this is a misrepresentation or misconduct. It is not.

A. Sunset failed to produce any evidence of a misrepresentation.

Once served with the Summons, Sunset (and Pinkerton) were on notice that a default could be taken after twenty days. Parties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment. *Morin v. Burris*, 160 Wn.2d 745, 758 (2007).

Evezich advised Pinkerton that he was going to file the Summons and Complaint and Pinkerton did nothing. There is no evidence that he looked at the Court's docket or *at any time* ever asked if the Complaint had been filed or a Default taken.

Instead, Sunset argues that it is Fire's burden to advise Pinkerton that the Complaint had been filed, despite Pinkerton never asking for this information. (Response Brief, pgs. 3, 7 – 8). Sunset cites no source of such duty and the court in *Aecon Buildings Inc. v. Vandermolen Construction Co. Inc.*, 155 Wn. App. 733 (Div. 1, 2009) specifically held that no such duty is imposed on plaintiff's counsel. The *Aecon* court held

that a plaintiff's counsel has "... no duty to inform [an insurer] of the details of litigation." *Id.*, at 740.

Sunset also attempts to argue that Fire had a duty to advise Pinkerton that it would be seeking a Default. However, there was no communication between Pinkerton and Evezich in the interim between Evezich's email of June 15<sup>th</sup> and the Default being taken.

Sunset has not produced any evidence that there were any communications between Evezich and Pinkerton during this time. The undisputed evidence is that Evezich's sent his email on June 15, 2016 (notifying Pinkerton that the Summons and Complaint was going to be filed), the Default was granted on July 12, 2016, and Pinkerton's first letter to Evezich was two weeks later, on July 26, 2016. (CP 068, 036 037, 074).

Yet, in an apparent effort to draw a similarity between this case and other cases in which there were communications between plaintiff's counsel and the defendant, while the twenty-day period prior to default was running, Sunset makes the factually unsupported statement, twice, that Pinkerton sent

letters to Evezich at the time Fire was "... seeking a default."  
(Response Brief, pgs. 3, 7 - 8).

Since Pinkerton's first letter wasn't sent until two weeks after the default was obtained, those letters are irrelevant as Sunset was already in Default when they were written.<sup>1</sup> See, CR 55(a)(3)(Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion....).

Additionally, none of Pinkerton's letters written after the default was obtained ask whether the lawsuit was filed or whether a default was being sought. (CP 073 – 076). Despite this, and Evezich's email telling Pinkerton the lawsuit would be filed, Sunset argues that Evezich actively concealed the litigation. (Respondent's Brief, pg. 8). No such thing

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<sup>1</sup> This case is factually different from *Morin v. Burris*, 160 Wn.2d 745, 759 (Wash. 2007) in which the Court held that there was there was a misrepresentation by plaintiff's counsel in the *Gutz* case (three cases were consolidated into *Morin v. Burris*). The Court held that under the "limited circumstances" a misrepresentation occurred when "...counsel's failure to disclose the fact that the case had been filed and that a default was pending when the Johnson's claims representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of litigation." None of those circumstances exist in this case. Evezich advised Pinkerton that he was going to file the lawsuit and there were no communications while the twenty-day period was running.

occurred. Evezich told Pinkerton what he was going to do, did it, and then Pinkerton never inquired into the status of the lawsuit for over a year. This problem is one of Sunset and Pinkerton's making and Fire and Evezich can't be held responsible for not answering a question that wasn't asked.

B. Sunset failed to produce any evidence of other misconduct.

Sunset's only argument of alleged misconduct is that letting a year lapse since the Default was granted is "misconduct." Sunset offers no case law in support of this argument and offers no case law contrary to *Trinity Universal Insurance Company of Kansas v. Ohio State Casualty Insurance Company*, 176 Wn. App. 185, 195, 312 P.3d 976 (Div. I, 2013) which held that waiting more than a year to collect on a default was not inequitable and, thus, could not serve as a basis for relief pursuant to CR 60(b)(4). *Accord, Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wash. App. 280, 285 - 86 (Div.1, 1983)(For the plaintiff to wait over a year to collect on a default judgment, in order to employ

the Civil Rules to the Plaintiff's advantage, has long been held not to be inequitable, unfair, or deceptive.)

C. Sunset failed to produce any evidence of reliance upon any alleged misrepresentation or misconduct or that it was a proximate cause of its failure to defend the lawsuit.

Since Sunset was in default when Pinkerton wrote the letters, there can be no misrepresentation as Sunset cannot reasonably rely on an act or statement made by Fire.<sup>2</sup> See, *Trinity Universal Insurance Company of Kansas v. Ohio Casualty Insurance Company*, 176 Wn. App. 185, 197 (Div. I, 2013)(A Plaintiff has no duty to advise a defendant's insurer of notice of a Default Judgment, then the insurer cannot reasonably rely upon any act or statement made by the Plaintiff). Pinkerton's declaration, the only evidence submitted by Sunset, is silent on this point. (CP 059 – 060).

Likewise, it is silent that any alleged misrepresentation was a proximate cause of its failing to defend. *Id.*

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<sup>2</sup> Sunset argues that "Pinkerton reasonably expected Evezich to respond to his letters, if Evezich intended to pursue his client's case." (Respondent's Brief, pg. 9). There is no evidence of any such belief as Pinkerton's declaration is silent on the matter. (CP 059 – 060).

Thus, Sunset has failed to prove that any alleged misrepresentation or misconduct caused it to fail to defend the lawsuit.

**C. CONCLUSION**

The Court should reverse the Trial Court's Order Vacating the Order of Default and Default Judgment and remand for reinstatement of the Order of Default and Default Judgment.

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

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**D. APPENDIX “B” – SELECTED TEXT OF CITED WASHINGTON STATE & FEDERAL RULES OF CIVIL PROCEDURE.**

Washington State Rules of Civil Procedure

CR 55: DEFAULT AND JUDGMENT

(a) Entry of Default ...

(3) Notice. Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A)...

(f) How Made After Elapse of Year...

(2) Service. Service of notice of the time and place on the application for the order of default or default judgment shall be made as follows:

(A) by service upon the attorney of record....

CR 60: RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; ...

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ...

(11) Any other reason justifying relief from the operation of the judgment...

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken....

Federal Rules of Civil Procedure

CR 60: RELIEF FROM JUDGMENT OR ORDER

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(6) any other reason that justifies relief.

## CERTIFICATE OF FILING AND SERVICE

I, Heather Derenski, hereby state and certify that I filed the Appellant Fire Insurance Exchange's Reply Brief with the above-entitled Court and served the same upon the following counsel, on the date, at the addresses, and via the method of service indicated:

Thomas J. Collins Merrick, Hoffstedt & Lindsey, P.S. 3101 Western Ave Ste 200 Seattle, WA 98121 Attorney for Respondent Sunset Air, Inc.		Via First Class U.S. Mail
		Via ABC Legal Messenger
	✓	Via e-Service through the Court's portal
	✓	Via Email to: tcollins@mhlseattle.com

Signed under penalty of perjury under the laws of the State of Washington this 28<sup>th</sup> of January 2019, in Issaquah, Washington.

  
Heather Derenski, Legal Assistant  
Evezich Law Offices, P.L.L.C.

**EVEZICH LAW OFFICES P.L.L.C.**

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