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Court of Appeals  
Division II  
State of Washington  
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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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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

This case involves a unique set of facts where an adjuster had communications with Appellant's counsel both before and after suit (and a Motion for Default) was filed. The adjuster, unaware suit had been filed, sent two letters to counsel following up on the status of the claim. The second letter notified counsel the insurance company was closing its file due to the lack of a response. Appellant's counsel not only remained silent after receiving both of these letters, he then strategically waited nearly a year to obtain a Judgment on the Order of Default, knowing it would make it more difficult for Respondent to obtain an order vacating the Judgment.

Given these facts, and Washington's strong policy against default judgements, the Honorable Carol Murphy properly exercised her discretion in setting aside the Order of Default and Default Judgment entered against Respondent. Respondent requests this Court affirm the decision of the Trial Court.

## **II. ISSUES ON APPEAL**

ISSUE 1: Did the Trial Court properly exercise its discretion in setting aside the Order of Default and Default Judgment which had been entered against Respondent?

ANSWER: Yes.

### III. STATEMENT OF THE CASE

**A. This matter stems from a fire which occurred in the home of Appellant's insured.**

On December 20, 2015, a fire severely damaged the home of Appellant's insured, Tyler Powell. (CP 002). Appellant asserts it paid Powell \$226,793.00 under his homeowner's policy. (CP 047).

Powell had contracted with Respondent for the installation of a furnace in his home. (CP 002). Appellant alleges the fire was caused by Respondent negligently modifying the furnace's wiring and, in particular, attempting to bypass a high temperature limit switch in the furnace. (CP 002-3).

**B. Respondent's insurance representative did not receive notice that Appellant had filed suit until after a judgement was taken, despite having been in contact with Appellant's counsel.**

Following the fire, Appellant retained counsel, Craig Evezich, who contacted Respondent. He was referred to Respondent's insurance company, Berkley North Pacific Group ("Berkley").

In March 2016, Berkley claims representative, Walter Pinkerton, received a letter from Appellant's counsel indicating he represented Fire Insurance Exchange. (CP 059). On or around that time, Pinkerton spoke to counsel over the telephone on several occasions and asked for documents supporting the claim that Respondent caused the fire. (*e.g.*, engineering reports). (CP 059-60).

On June 1, 2016, a copy of a Summons and Complaint was served upon Sunset Air, Inc. (CP 001).

On June 15, 2016, Pinkerton sent an e-mail to counsel, reiterating his request for “any subrogation supports, engineer reports, or a C&O finding that speaks to the cause of the fire, let alone any negligence on Sunset.” (CP 066). Several additional e-mails were exchanged between Pinkerton and Appellant’s counsel over the next week, where Pinkerton again stated the need for supporting documentation. (CP 067-73).

The Complaint was filed on June 23, 2016. (CP 001). On July 12, the court signed an order declaring Sunset in default. (CP 036 - 037).

Several weeks later, on July 26, Pinkerton, still unaware the Complaint had been filed, sent a letter to Mr. Evezich “to follow up on our prior communication about this claim....” (CP 074).

After receiving no response, Pinkerton sent another letter to Evezich on December 23, 2016, noting “*[w]e have not seen any response to our prior emails, or our 7/26/16 letter.... As such, we are closing our file at this time.*” (CP 076). Evezich again chose not to respond or to inform Pinkerton that suit had been filed or that he was seeking a Default Judgment.

Eventually, on February 14, 2017, Appellant filed a Motion for Default Judgment. (CP 038). The Default Judgment against Respondent was entered on February 16, 2017. (CP 046).

The claims representative from Berkley was unaware the lawsuit had been filed, and did not receive notice the Appellant intended to move for a default order or judgment. *See* (CP 060). It was not until a year later that Mr. Pinkerton first learned this Complaint had been filed and an Order of Default and Judgement had been entered. *See id.*

**C. Respondent’s fire investigator opines that it would be speculation to suggest or conclude that the Carrier furnace was the ignition source for this fire. Therefore, Respondent has a meritorious defense.**

During the earlier communications described above between Walter Pinkerton and plaintiff’s counsel, Mr. Pinkerton retained the services of a fire expert, Douglas Barovsky, P.E., CFEI. (CP 060). He was asked to review this matter and see if he could determine the origin and cause of the fire. *Id.* Barovsky conducted an investigation and could not reach any conclusion about the cause due to the extensive fire damage at the Powell residence. (CP 080) at ¶ 3 (Barovsky notes “there is no physical evidence to suggest that work performed by Sunset Air was a causal factor in the fire”); *see* (CP 084) at ¶ 18. Mr. Barovsky advised the

insurance representative that it was not possible to determine the cause of the fire. *See* (CP 081) at ¶ 5.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. Standard of Review**

A decision to set aside a default judgment is within the sound discretion of the trial judge. *City of Des Moines v. Personal Property, et al.*, 87 Wn. App. 689, 696 (1997). An Appellate Court will not disturb the Trial Court's disposition unless it clearly appears that discretion has been abused. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). Abuse of discretion is less likely to be found when a default judgment is set aside. *Id.*

##### **B. Under Washington law, default judgments are not favored and will most often be set aside.**

CR 55 states in pertinent part:

###### **(c) Setting Aside Default.**

(1) *Generally*. For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default, and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

Rule 60(b) provides the Court may relieve a party or the party's legal representation from a final judgment, order, or proceeding for eleven separate reasons. Those include, *inter alia*:

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

...

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

CR 60(c) further provides:

- (c) Other remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

A decision to set aside a default judgment is within the sound discretion of the trial judge. *City of Des Moines v. Personal Property, et al.*, 87 Wn. App. 689, 696 (1997). Default judgments are not favored and will most often be set aside. *City of Des Moines, supra*; *C. Rhyne and Associates v. Swanson*, 41 Wn. App. 323 (1985); *see also Little v. King*, 170 Wn.2d 696 (2007) (Even a “tenuous” defense may be sufficient to support a motion to vacate).

**C. The Trial Court properly exercised its discretion in setting aside the Default.**

Respondent contends the Trial Court’s Order Vacating the Default was within its discretion and reasonably based upon the facts of this case. Specifically, the court could have reasonably set aside the Default under CR 60(b)(4) or (11).

- 1. CR 60(b)(4)

Appellant claims Respondent failed to offer any evidence supporting the claim of possible fraud or misrepresentation. However, the Pinkerton Declaration provided an evidentiary basis for the Trial Court to set aside the Default. In particular, after several telephone calls with Appellant's counsel, Pinkerton sent Mr. Evezich letters on July 26 and December 23 of 2016, attempting to follow up on the status of Appellant's claim. (CP 074-76). Pinkerton even noted in the December letter that he was closing his file due to the lack of a response. This is not merely a situation where an honest mistake was made by an insurance adjuster; this is a case where the adjuster was effectively misled to believe a case had not been filed.

It is submitted the conduct of Appellant's counsel is sufficient to qualify as a misrepresentation for purposes of satisfying CR 60(b)(4). Merriam-Webster defines misrepresentation as "an intentionally or sometimes negligently false representation made verbally, *by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally....*"<sup>1</sup> Here, Appellant's counsel failed on several occasions to disclose he had filed his client's Complaint and was seeking a Default, after receiving

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<sup>1</sup> Merriam-Webster Dictionary, available at <https://www.merriam-webster.com/legal/misrepresentation> (emphasis added).

correspondence from Pinkerton demonstrating Pinkerton was not aware the Complaint had been filed.

In *Morin v. Burris*, 160 Wn.2d 745, 758, 161 P.3d 956 (2007), the Washington Supreme Court noted, where plaintiff's counsel actively conceals the fact a Complaint has been filed, that may justify vacating a default pursuant to CR 60(b)(4):

[I]n *Gutz*, the record supports *an inference* that plaintiffs' counsel actively concealed the fact that a summons and complaint had been filed. Under the circumstances, Johnson has made a sufficient enough showing that we remand to the trial court for further consideration of whether Johnson has met the standards of *White* and/or CR 60(b)(1), (4).

*Id.* (emphasis added).

In discussing the fact that an Allstate representative had reached out to the Gutzes' counsel several times, after litigation was commenced (just like the instant case), the Court further noted:

Gutzes' counsel had no duty to inform Allstate of the details of the litigation. **But counsel's failure to disclose the fact that the case had been filed and that a default judgment was pending when the Johnsons' claim 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 the litigation.** If the Johnsons' representative acted with diligence, and the failure to appear was induced by Gutzes' counsel's efforts to conceal the existence of litigation under the limited circumstances we have described above, then the Johnsons' failure to appear was excusable under equity and CR 60. *See Trickel*,

52 Wash. at 15, 100 P. 155; CR 60(b)(4) (default judgment may be set aside for fraud, misrepresentation, or other misconduct).

*Id.* at 759.

Here, Pinkerton had a significant history of communications with Mr. Evezich in which they discussed potential resolution of the claim. Based upon those communications, Pinkerton reasonably expected Evezich to respond to his letters, if Evezich intended to pursue his client's case. However, Evezich never responded to Pinkerton's letters of July 26, 2016, and December 23, 2016—which expressly stated he was closing his file based upon the lack of a response. At the very least, these facts create an inference that Evezich was intentionally failing to disclose the fact suit had been filed with the intent of setting up Sunset for a Default Judgment. This is the exact scenario addressed by the Court in *Morin (Gutz)* and justifies the Trial Court's decision to vacate the Order of Default entered against Respondent.

As for Appellant's claim that CR 60(b)(4) was not raised in Respondent's initial Motion to Set Aside, it was easily within the judge's discretion to consider that argument on reply. *See State ex rel. Washington State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 282, 150 P.3d 568 (2006), as modified on denial of reconsideration (Dec. 20, 2006) ("The trial court has considerable

discretion in determining whether to consider parties' untimely arguments.”) (quoting *Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668 (1992) (“[C]ivil rules contain a preference for deciding cases on their merits rather than on procedural technicalities.”)). The facts and analysis relevant to Respondent’s fraud argument were also thoroughly briefed in Respondent’s moving papers. Thus, there was no prejudice to Appellant.

2. CR 60(b)(11)

It is further submitted that the Trial Court would have been within its discretion to vacate the default under CR 60(b)(11). This rule is identical to the Federal Rule of Civil Procedure 60(b)(6). See *Flannagan v. Flannagan*, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985). The United States Supreme Court has held that this rule “vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Here, given this unique set of facts, the Trial Court was well-within its discretion to determine that vacating the Default was within the interest of justice. The court’s decision should be affirmed.

**V. CONCLUSION**

Under the Washington Supreme Court’s decision in *Morin v. Burris*, and Washington law which strongly disfavors Default Judgments, the Trial Court properly exercised its discretion in setting aside the Default

entered against Respondent. Respondent requests this Court to affirm the lower court's decision.

DATED this 27th day of December, 2018.

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