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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MILWAUKIE LUMBER CO., a Washington corporation,

Respondent,

v.

VERISTONE FUND I, LLC, et. al.;

Appellant.

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OPENING BRIEF BY APPELLANT VERISTONE FUND I, LLC

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## I. INTRODUCTION

This is a consolidated appeal of the trial court's refusal to vacate three interlocutory default judgments that gave Milwaukie Lumber, Co.'s (Milwaukie") inferior materialmen's liens priority over Veristone Fund I, LLC's ("Veristone") deeds of trust on Lot 2, Lot 3, and Lot 4 of the Sterling View Short Plat in Clark County, Washington.

In determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are preserved and justice is done. If a default judgment on a meritless claim is allowed to stand, justice has not been done. As outlined and detailed below, justice has not been done in the cases related to this consolidated appeal and the orders of the trial court should be reversed.

## II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying Veristone's motion to vacate where Veristone timely moved to vacate the default judgment under CR 60(b)(1) and Veristone established each factor under *White v. Holm*.

2. The trial court abused its discretion in denying Veristone's motion to vacate under CR 60(b)(1) based on irregularities in obtaining the default judgments.

3. The trial court abused its discretion in refusing to set an evidentiary hearing where affidavits presented an issue of fact as to whether Veristone was served with the Summons and Complaints.

4. The interest rate in Milwaukie's final judgments are not supported by the facts.

5. The trial court erred in granting Milwaukie's petitions for attorneys' fees.

6. The trial court erred in entering sanction awards against Veristone.

### **III. STATEMENT OF THE CASE**

Veristone is a lender that financed the construction of residential homes on Lots 2-5 in the Sterling View Short Plat (the "Short Plat") located in Clark County.<sup>1</sup> In October of 2016, the owners of Lots 2-5 executed promissory notes and granted Veristone four Deeds of Trust that encumbered each of the respective Lots and secured repayment of each of the four underlying obligations.<sup>2</sup>

In July of 2017, at the request of the owners of Lots 2-5, Veristone refinanced the original loans with new secured loans.<sup>3</sup> As part of the refinance, each new obligation was secured by a primary Deed of Trust on

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<sup>1</sup> CP 214, 980, 1657.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

the related Lot, and three separate Deeds of Trust on the other three Lots as additional security for the obligations. Therefore, each obligation is secured by four separate Deeds of Trust on Lots 2-5.<sup>4</sup>

Milwaukie began to perform labor on Lot 3 and Lot 4 on September 21, 2017, after Veristone's Deeds of Trust were recorded on July 26, 2017.<sup>5</sup> Milwaukie began to perform labor on Lot 2 on December 21, 2016, before the refinanced Deeds of Trust were recorded, but after the original Deed of Trust on Lot 2 was recorded on October 20, 2016.<sup>6</sup>

Milwaukie recorded a materialmen's lien on Lot 2 on September 29, 2017<sup>7</sup>, and recorded liens on Lot 3 and Lot 4 on February 22, 2018.<sup>8</sup> Before Milwaukie filed these foreclosure complaints, it obtained Litigation Guarantees on Lot 2, Lot 3, and Lot 4.<sup>9</sup> Before the filing of these cases, the Litigation Guarantees disclosed to Milwaukie and its attorneys Veristone's Deeds of Trust that were recorded on July 26, 2017 and also disclosed the existence of Veristone's prior Deed of Trust on Lot 2 that was recorded on October 20, 2016 and reconveyed on September 7, 2017.<sup>10</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> CP 12 (Lot 3) and CP 1471 (Lot 4).

<sup>6</sup> CP 753, 781.

<sup>7</sup> CP 753.

<sup>8</sup> CP 12 (Lot 3) and CP 1458 (Lot 4).

<sup>9</sup> CP 115 (Lot 3); CP 880 (Lot 2); and CP 1552 (Lot 4).

<sup>10</sup> CP 939 (Reconveyance of original Deed of Trust on Lot 2 with reference to its recording date, auditor's File No, date of the Deed of Trust, and the date of reconveyance.)

On May 11, 2018, Milwaukie filed three Complaints to judicially foreclose the materialmen's liens it had recorded on Lot 2, Lot 3, and Lot 4.<sup>11</sup> On June 12, 2018, Milwaukie filed Amended Complaints, and notwithstanding the information disclosed in the Litigation Guarantees establishing the priority of Veristone's Deeds of Trust, instead alleged the sole following language with regard to Veristone:

Defendant Veristone Fund I, LLC ("Veristone") is a Washington limited liability company that may claim an interest in the Property defined below by way of deed of trust recorded against the Property. The deeds of trust are inferior in priority to [Milwaukie's] claim of construction lien.<sup>12</sup>

(emphasis added).

On July 2, 2018, Milwaukie obtained *ex parte* default judgments against only Veristone in all three cases (the "Veristone Default Judgments").<sup>13</sup> Milwaukie's motions were supported only by declarations from its counsel Paige Spratt and a Declarations of Service from Tim Hedgpeth.<sup>14</sup> Veristone's Deeds of Trust (and the dates on which they were recorded) were not part of the record before the Court when the Veristone Default Judgments were entered.

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<sup>11</sup> CP 3 (Lot 3 was assigned Case No. 18-2-01115-2); CP 744 (Lot 2 was assigned Case No. 18-2-01116-1); and, CP 1449 (Lot 4 was assigned Case No. 18-2-01117-9).

<sup>12</sup> CP 16 (Lot 3); CP 757 (Lot 2); and, CP 1462 (Lot 4).

<sup>13</sup> CP 29-35 (Lot 3); CP 770-776 (Lot 2); and, CP 1475-1481 (Lot 4).

<sup>14</sup> *Id.*

On August 7, 2018, Veristone discovered the Veristone Default Judgments and, on August 23, 2018, promptly moved to vacate the judgments under CR 60(b)(1) and (b)(11). Veristone also disputed that it was served with the Summons and Complaint. In support of its Motion, Veristone submitted affidavits from Meghann Good, Veristone’s registered agent, disputing that she was personally served with the Summons and Complaints.<sup>15</sup> Veristone presented conclusive defenses that its Deeds of Trust on Lot 3 and Lot 4 were recorded before Milwaukie began work. With regard to Lot 2, Veristone pointed out, as part of the refinance of Lot 2, that it paid off the obligation secured by the original Deed of Trust and was therefore equitably subrogated to the priority of said original Deed of Trust. With respect to Lot 3 and Lot 4, Veristone further pointed out that the Litigation Guarantees obtained by Milwaukie revealed these facts yet these facts had not been disclosed to the Court by counsel for Milwaukie when the Veristone Judgments were presented.<sup>16</sup>

On September 12, 2018, the trial court denied Veristone’s Motions to Vacate; the trial court held that Veristone was properly served despite the competing Declaration from Meghann Good,<sup>17</sup> the trial court held that there were questions of fact with regard to Veristone’s defense because “the

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<sup>15</sup> CP 66 (Lot 3); CP 813 (Lot 2); and, CP 1512 (Lot 4).

<sup>16</sup> CP 194 (Lot 3); and CP 1638 (Lot 4)

<sup>17</sup> RP 30-31.

cross-collateralization issue disturbs me,”<sup>18</sup> and found that Veristone’s failure to respond was willful, relying on Milwaukie’s citation to an outdated statute and caselaw<sup>19</sup>:

THE COURT: I’ve made my ruling, and I am not – I think the issues that were on the defense, you know, certainly would have been proper for trial. I think there’s a strategic reason why they waited to bring this motion to set aside, so that they could not cure --<sup>20</sup>

On September 24, 2018, Veristone moved for reconsideration of the order denying its motion to vacate.<sup>21</sup> On December 20, 2018, 87 days after the motion was filed, the trial court denied Veristone’s motion for reconsideration, again finding only that: (1) Veristone was properly served with Plaintiff’s summons and complaint and the amended summons and complaint filed in this action; and (2) Veristone failed to appear, answer or otherwise defend in this action.<sup>22</sup>

Because there were remaining defendants and claims in all three cases, Milwaukie’s Default Judgments against Veristone were interlocutory and Veristone filed Notices of Discretionary Review on January 17, 2019.<sup>23</sup> While the Motions for Discretionary Review were pending, Milwaukie

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<sup>18</sup> RP 33

<sup>19</sup> Milwaukie’s citation and the trial court’s reliance on a repealed statute is explained further in section (B)(4) below.

<sup>20</sup> RP 34

<sup>21</sup> CP 199 (Lot 3); CP 968 (Lot 2); CP 1643 (Lot 4).

<sup>22</sup> CP 337 (Lot 3); CP 1103 (Lot 2); CP 1779 (Lot 4).

<sup>23</sup> CP 338 (Lot 3); CP 1104 (Lot 2); CP 1780 (Lot 4).

obtained final judgments in the Lot 3 and Lot 4 cases and Veristone filed Notices of Appeal in those cases.<sup>24</sup>

On April 2, 2019, Commissioner Schmidt denied Veristone's Motions for Discretionary Review as to Lot 3 and Lot 4 as moot because of the Notices of Appeal, consolidated those cases into one appeal under this case number, and stayed the appeal pending the outcome of the Motion for Discretionary Review in the Lot 2 appeal. On the same day, Commissioner Schmidt stayed the ruling on Veristone's Motion for Discretionary Review on Lot 2 for 60 days pending the entry of order resolving the claims of the other parties.

On April 11, 2019, Veristone moved for entry of a final judgment pursuant to CR 54(b) in the Lot 2 case, which was opposed by Milwaukie.<sup>25</sup> After Veristone filed the motion for entry of judgment, the sole remaining defendant and third-party plaintiff Canby Drywall, Inc. ("Canby") agreed to release its lien on Lot 2 and dismiss its third-party complaint, thereby resolving all claims as to all parties in the Lot 2 case.<sup>26</sup>

Veristone also filed motions in the Lot 3 and Lot 4 cases on April 4, 2019 requesting the trial court deem the subject properties as sufficient

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<sup>24</sup> CP 355, 361 (Lot 3); CP 1799, 1803 (Lot 4).

<sup>25</sup> CP 1120.

<sup>26</sup> CP 1158, 1169, and 1173.

supersedeas security to stay the trial court's orders.<sup>27</sup> The trial court denied Veristone's requests, but ordered that Veristone could renew its motions with new evidence of the value of the properties and set the supersedeas bonds at 250% of Milwaukie's judgment amounts, \$142,927.25 for Lot 3 and \$101,900.23 for Lot 4.<sup>28</sup>

On May 24, 2019, Milwaukie filed a motion for entry of judgment in the Lot 2 case and motions to correct its judgments in the Lot 3 and Lot 4 cases.<sup>29</sup> Veristone opposed Milwaukie's motions because they (1) sought attorneys' fees that Milwaukie had forfeited; (2) none of the attorneys' fees requested by Milwaukie were supported with evidence; (3) Milwaukie's request to increase the interest rate in the original judgments from 12% to 24% was not supported by the underlying contracts; and, (4) Milwaukie's request to characterize post-judgment interest as pre-judgment interest was improper.<sup>30</sup>

On June 10, 2019, Veristone filed renewed motions requesting the trial court deem the subject properties as sufficient supersedeas security and provided the trial court with property valuations for each Lot showing

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<sup>27</sup> CP 392 (Lot 3); CP 1834 (Lot 4).

<sup>28</sup> CP 429 (Lot 3); CP 1871 (Lot 4); RAP 36-45.

<sup>29</sup> CP 1166 (Lot 2 Motion for Entry of Judgment); CP 431 (Lot 3 Motion to Correct Judgment); and, CP 1873 (Lot 4 Motion to Correct).

<sup>30</sup> CP 521 (Lot 3); 1255 (Lot 2); CP 1964 (Lot 4).

sufficient value in each Lot to cover far more than the supersedeas bond amounts set by the trial court.<sup>31</sup>

Milwaukie's motions to correct judgments, motion for entry of judgment in the Lot 2 case, and Veristone's supersedeas motions were first heard by the trial court on June 14, 2019.<sup>32</sup> The trial court ordered Milwaukie to submit an affidavit supporting its attorneys' fees and set all other motions over to June 28, 2019.<sup>33</sup> In response to Milwaukie's argument that Veristone's objections shouldn't be considered because it was in default, the trial court specifically granted Veristone permission to file an opposition to Milwaukie's fee request.<sup>34</sup>

On June 21, 2019, Milwaukie filed its petition for attorneys' fees and Veristone filed objections on June 26, 2019.<sup>35</sup> At the hearing on June 28, 2019, the trial court first denied Veristone's supersedeas motions despite Veristone submitting new evidence as it had previously ordered.<sup>36</sup> The trial court then ruled that Veristone could appear in this matter,<sup>37</sup> heard oral argument, and took the remaining issues under review.<sup>38</sup>

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<sup>31</sup> CP 441 (Lot 3); CP 1181 (Lot 2); CP 1884 (Lot 4).

<sup>32</sup> RP 45-60.

<sup>33</sup> RP 58-59.

<sup>34</sup> RP 59.

<sup>35</sup> CP 582, 665 (Lot 3); CP 1315, 1392 (Lot 2); CP 2025, 2108 (Lot 4).

<sup>36</sup> RP 60-74. The order denying Veristone's supersedeas motion for Lot 2 also set the supersedeas bond amount at \$221,987.52. CP 1408.

<sup>37</sup> RP 73 ("And I am granting leave of the Court to the defendant to appear in this matter by oral motion that was made at the last hearing").

<sup>38</sup> RP 85.

On August 15, 2019, the trial court entered Milwaukie's Judgment in the Lot 2 case and Amended Judgments in the Lot 3 and Lot 4 cases.<sup>39</sup> The trial court also entered orders sanctioning Veristone \$66,275.14 in the Lot 3 case, \$29,577.00 in the Lot 2 case, and \$49,926.03 in the Lot 4 case, and requiring Veristone to "make payment directly to Milwaukie by cashier's check payable to Schwabe, Williamson & Wyatt Client Trust account on or before November 15, 2019, and if payment is not made as directed, Milwaukie may return before this Court for further sanctions."<sup>40</sup>

On August 23, 2019, Veristone filed Amended Notices of Appeal in the Lot 3 and Lot 4 cases and a Notice of Appeal in the Lot 2 case.<sup>41</sup> Also on August 23, 2019, Veristone also filed motions requesting clarification and/or reconsideration of the sanction awards.<sup>42</sup> Milwaukie did not file a response to the motions for clarification and/or reconsideration and, as of the date of this filing, the trial court has not ruled on Veristone's motions for reconsideration of the sanction awards.

On September 4, 2019, this Court lifted the stay on this appeal and all three cases were consolidated under this cause number. On November 15, 2019, Veristone posted supersedeas bonds in all three cases in the trial

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<sup>39</sup> CP 685 (Lot 3); CP 1414 (Lot 2); CP 2128 (Lot 4).

<sup>40</sup> CP 689 (Lot 3); CP 1412 (Lot 2); CP 2132 (Lot 4).

<sup>41</sup> CP 691 (Lot 3); CP 1427 (Lot 2); CP 2134 (Lot 4).

<sup>42</sup> CP 728 (Lot 3); CP 1418 (Lot 2); CP 2171 (Lot 4).

court staying enforcement of the judgments and sanction awards pending this appeal.

#### IV. ARGUMENT

Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). For “more than a century, it has been the policy of [the Washington Supreme Court] to set aside default judgments liberally.” *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007); *see also Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867 (2004) (“we are less likely to reverse a trial court decision that sets aside a default judgment than a decision which does not”); *see also, White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (Where the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial ensues.).

In determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are preserved and justice is done . . . “If a default judgment on a meritless claim is allowed to stand, justice has not been done.” *TMT Bear Creek Shopping Center, Inc., v. Petco*, 140 Wn. App. 191, 205, 165 P.3d 1271 (2007)(emphasis added).

Judicial discretion means sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the trial judge to a just result. *State v. Grant*, 10 Wn. App. 468, 471, 519 P.2d 261 (1974).

A trial court abuses its discretion when its decision is: (1) manifestly unreasonable; or (2) based on untenable grounds; or (3) based on untenable reasons.<sup>43</sup> The establishment of any one of the above establishes an abuse of discretion. In this case, all three are present.

A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices given the facts and applicable legal standard.<sup>44</sup> As noted in further detail below, that is the case here. A trial court's decision is based on untenable grounds if the factual findings are unsupported by the record.<sup>45</sup> As noted further below, that is also the case here. A trial court's decision is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.<sup>46</sup> For example, a trial court abuses its discretion by admitting or

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<sup>43</sup> See., *Matter of L.H.*, 198 Wn. App. 190, 194, 391 P.3d 490 (2016) citing *Katara v. Katara*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012); *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)

<sup>44</sup> *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)

<sup>45</sup> *Id.* at 47.

<sup>46</sup> *Id.* at 47.

excluding evidence if its decision is contrary to law.<sup>47</sup> As explained below, that can also be established here.

A. The trial court abused its discretion in refusing to vacate the default judgments under CR 60(b)(1).

The default judgments should be vacated under CR 60(b)(1) and the *White v. Holm* factors. The discretion which the trial court is called upon to exercise in passing upon an appropriate application to set aside a default judgment concerns itself with and revolves about two primary and two secondary factors which must be shown by the moving party. *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). These factors are: (1) that there is substantial evidence 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.*

The four above elements "vary in dispositive significance as the circumstances of the particular case dictate." *White*, 73 Wn.2d at 352, 438 P.2d 581. When the defendant can demonstrate a strong or virtually conclusive defense, a default judgment generally should be set aside

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<sup>47</sup> *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001)

regardless of why the defendant failed to timely appear unless that failure was willful or the secondary *White* factors are not satisfied. *VanderStoep v. Guthrie*, 200 Wn.App. 507, 402 P.3d 883 (Division 2, 2017).

1. *Veristone established a conclusive defense with regard to Lot 3 and Lot 4 because its Deeds of Trust were prior to Milwaukie's liens as a matter of law.*

The priority of materialmen's liens is governed by RCW 60.04.061. *Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn.App. 899, 904 (1999). RCW 60.04.061 provides:

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

Veristone's Deeds of Trust on Lot 3 and Lot 4 were recorded on July 26, 2017. Milwaukie began supplying materials to the Property on September 21, 2017. Veristone's Deeds of Trust were recorded before Milwaukie delivered any materials or performed any services on the Property and, therefore, Veristone's Deeds of Trust are superior to Milwaukie's liens as a matter of law. *Mannington Carpets, Inc., supra*, at 910.

At the request of Milwaukie, the trial court found that there were questions of fact with regard to Veristone's defense because of the number

of deeds of trust Veristone had on each Lot, and the amount of the obligation that the Deeds of Trust secured.<sup>48</sup> In Washington, a single obligation can be secured by multiple deeds of trust on multiple properties. “The [DTA] does not prohibit the use of separate deeds of trust to secure a single obligation.” *Donovick v. Seattle-First Nat Bank*, 111, Wn.2d 413, 416, 757 P.2d 1378 (1988). *See, also Gardner v. First Heritage Bank*, 175 Wn. App. 650, 654, 303 P.3d 1065, 1067 (2013) (A single obligation was secured by multiple deeds of trust on separate lots). A single obligation can also be secured by a single deed of trust that covers multiple properties. *See, e.g. Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wn.2d 503, 506, 760 P.2d 350, 352 (1988) (A single obligation was secured by a single Deed of Trust that encumbered two separate parcels in separate counties).

The Deed of Trust Act (the “DTA”), RCW 61.24 *et seq.*, specifically contemplates that a single obligation can be secured by multiple parcels of real property in RCW 61.24.100(3)(b) (“This chapter does not preclude any one or more of the following after a trustee’s sale under a deed of trust securing a commercial loan executed after June 11, 1998 . . . Any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security

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<sup>48</sup> RP 33, lines 14-24 (The Court: Well, I think there were questions of fact with regard to your defense, quite frankly, because the cross-collateralization issue disturbs me...That there’s a representation, essentially – if you look at the documents, that seven and a half million dollars were lended on each lot, the way it’s – the way those deeds of trust are written, there’s nothing to show – and that it doesn’t make any sense.”).

agreements, or other security interests or liens covering any real or personal property granted to secure the obligation that was secured by the deed of trust foreclose) and RCW 61.24.040(9) (The place of sale shall be at any designated public place within the county where the property is located and if the property is in more than one county, the sale may be in any of the counties where the property is located...”).)

Here, it is undisputed that Veristone’s Deeds of Trust against Lot 3 and Lot 4 were recorded prior to the date Milwaukie commenced work on those properties. As a matter of law, Milwaukie’s liens on Lot 3 and Lot 4 do not have priority over Veristone’s Deeds of Trust. Milwaukie’s own title report submitted by Milwaukie’s counsel in response to the motions to vacate disclosed each of the prior recorded Veristone Deeds of Trust. Notwithstanding, Milwaukie not only improperly pled, but then obtained relief in the Lot 3 and Lot 4 cases. Relief that its counsel knew it was not entitled to, by improperly withholding from the trial court material facts that, if disclosed, would have prevented the entry of the Veristone Default Judgments relating to Lots 3 and Lot 4 .<sup>49</sup>

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<sup>49</sup> RPC 3.3(f) requires an attorney in an ex parte proceeding to inform the tribunal of all relevant facts known to the attorney that should be disclosed to permit the tribunal to make an informed decision, **whether or not the facts are adverse**. The recording dates of Veristone’s Deeds of Trust (and the Deeds of Trust themselves) were, without question, material to a determination of its lien priority with Milwaukie’s lien, and not part of the record when Milwaukie obtained its default judgments against Veristone.

Again, as already noted above, “In determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are preserved and justice is done...If a default judgment on a meritless claim is allowed to stand, justice has not been done.” *TMT Bear Creek Shopping Center, Inc., v. Petco* (“Petco”), 140 Wn. App. 191, 205, 165 P.3d 1271 (2007) (emphasis added).

2. *Veristone has a conclusive defense of Equitable Subrogation as to Lot 2*

With respect to Lot 2, Veristone raised the doctrine of equitable subrogation in its motion to vacate as a conclusive defense to Milwaukie’s claim of lien priority. The response by Milwaukie and the Court was that the first Deed of Trust “was reconveyed”- but as Veristone pointed out, a reconveyance of the original mortgage is consistent with the application of equitable subrogation. If equitable subrogation didn’t apply in cases where the original mortgage was reconveyed, it would serve no purpose.

“Equitable subrogation provides an exception to the first in time rule by permitting a person who pays off an encumbrance to assume the same lien priority position as the holder of the previous encumbrance.” *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 493-94, 254 P.3d 835, 846 (2011) citing *Bank of America, NA v. Wells Fargo Bank, NA*,

126 Wn. App. 710, 714, 109 P.3d 863 (2005), *rev'd on other grounds*, *Bank of Am., N.A. v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007).

For example, suppose A, a homeowner, has two mortgages: one recorded first by bank B and one recorded second by bank C. Our recording act says B has a higher priority because it recorded first, putting the world on notice as to its interest in A's land. RCW 65.08.070. “If D fully discharges B's debt, then equitable subrogation substitutes D for B, so D has a higher priority than C, even though D recorded after.

*Prestance*, 160 Wn.2d at 564–65, 160 P.3d 17. “As an equitable remedy, subrogation is designed to avoid one person receiving an unearned windfall, *i.e.*, the intervening lienholder through an advancement in priority, at the expense of another, *i.e.*, the new mortgagee who paid the prior debt.” *Bank of America*, 126 Wn.App. at 714, 109 P.3d 863. In *Prestance*, our Supreme Court adopted the definition of “equitable subrogation” from Restatement (Third) of Property: Mortgages § 7.6 (1997). That section provides,

(a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.

Division Two recently applied equitable subrogation to preserve the lien position of a refinancing lender in *America's Credit Union v. Countrywide Home Loans Inc.* (“ACU”), 188 Wn.App. 1063, 2015 WL

4456181 (2015)(Unpublished).<sup>50</sup> In *ACU*, the Sheltons took out a \$98,000.00 mortgage on their property from Bank of America's ("BOA") predecessor in 1994. *Id.* at \*1. In 1998, the Sheltons took out a second mortgage on the same property from ACU that secured a line of credit of \$40,000.00. *Id.* In 2002, the Sheltons refinanced with Countrywide; the money from the refinancing loan paid the balance of BOA's mortgage and the balance on the ACU line of credit. *Id.* **Notably, BOA reconveyed the original deed of trust granted by the Sheltons in 1994.** *Id.* Shelton's line of credit with ACU remained open, however, and the Sheltons continued to draw on it. *Id.* at \*2.

In 2012, the Sheltons defaulted on the loan from ACU, ACU filed a foreclosure complaint and named Countrywide as a party with an interest in the Shelton's property junior to ACU's. *Id.* Countrywide answered and contended that under the doctrine of equitable subrogation, it stepped into BOA's shoes and could enforce the senior deed of trust that had secured the original loan. The trial court refused to apply equitable subrogation, Countrywide appealed, and Division Two reversed, holding that:

No genuine issues of material fact exist on the elements of equitable subrogation as defined in *Restatement (Third) of Property* section 7.6 and adopted by Washington's Supreme Court.

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<sup>50</sup> GR 14.1 provides that unpublished opinions of the Court of Appeals filed on or after March 1, 2013 may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

Countrywide performed the Sheltons' obligation to pay BOA, an obligation secured by the deed of trust on the DuPont property. Subrogation is appropriate to prevent unjust enrichment. Countrywide performed for the Sheltons at their request, Countrywide was promised repayment by the Sheltons, and Countrywide reasonably expected to receive a security interest in the real estate with the priority of the BOA mortgage. Subrogating Countrywide to BOA's status as the senior secured creditor on the obligation owed at the time of the refinancing will not prejudice ACU; it remains the junior secured creditor in the exact position it would have been in but for Countrywide's payment of the loan from BOA. The facts here are exactly the type where equitable subrogation "should" apply. *Prestance*, 160 Wn.2d at 581. Viewing the evidence in the light most favorable to the nonmoving party, summary judgment for Countrywide was appropriate, and the trial court erred by refusing to grant it.

*Id.* at \*4. Here, the facts are also exactly the type where equitable subrogation should apply and Milwaukie never even attempted to address equitable subrogation in their Response to Veristone's Motion to Vacate.

It is undisputed that the proceeds from Veristone's second loan paid off the balance of the first loan at the request of the borrower Sterling Inspiration, LLC.<sup>51</sup> Veristone was promised repayment by Sterling

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<sup>51</sup> Milwaukie submitted no evidence disputing Ms. Good's declaration regarding the elements of equitable subrogation. Instead, counsel for Milwaukie argued there is no "corroborating evidence other than Ms. Good's word". Ms. Good's declaration is based on her personal knowledge and is admissible, and undisputed, evidence. The recorded deeds of trust alone corroborate Ms. Good's declaration regarding the refinance transaction and, in any event, a copy of the Final Settlement Statement is attached to Ms. Good's declaration in support of this motion for reconsideration. CR 1072.

Inspiration, LLC, and Veristone reasonably expected to receive a security interest in the real estate with the priority of the First Deed of Trust. Furthermore, subrogating Veristone to its status as the senior secured creditor on the obligation owed at the time of the refinancing will not prejudice Milwaukie; it remains in the exact position it would have been in but for Veristone's payment of the first loan. Equitable subrogation is a complete defense and therefore, the default judgment should be vacated.

*3. Veristone did not willfully disregard the summons*

In no event can Veristone's actions be deemed a willful failure to respond. Washington cases that find a willful failure to respond involve defendants that admit to being served a clear mandate to come to court (*e.g.*, a summons, order to show cause, or writ of garnishment), and there is evidence on the record that the defendant intentionally disregarded that mandate without further explanation. For example, in *Bishop v. Illman*, 14 Wn.2d 13, 126 P.2d 582 (1942), the garnishee defendant was served a Writ of Garnishment ordering it to Answer the Garnishment. Instead of filing an answer, the garnishee defendant told the plaintiff: "We never make a practice of answering garnishments, besides we refused this garnishment." *Id.* at 16. The court found the garnishee defendants' actions to be a willful disregard of the command of a summons. *Id.* at 17.

Similarly, in *Commercial Courier Service, Inc., v. Miller*, 13 Wn.App. 98, 533 P.2d 852 (1975), the plaintiff was admittedly served with the summons and complaint and a temporary restraining order and order to show cause, both of which commanded the defendant to appear within 20 days. *Id.* at 857. The defendant stated that he thought the action was “merely a bluff” and offered no other explanation as to why he did not appear and defend despite receiving both the summons and order to show cause commanding him to appear. *Id.*

On the other hand, Washington cases have found no evidence of a willful failure to respond where the reason for failing to appear is based on confusion, mistakes of law, and other reasons that would otherwise be found to be inexcusable neglect but for the existence of a conclusive defense. In *Borg-Warner Acceptance Corp v. McKinsey*,<sup>52</sup> the Supreme Court affirmed vacation of a default judgment where the garnishee defendant explained that it failed to respond to the Writ of Garnishment because it confused the subject writ with another that they had received against the same debtors. *Id.* at 652. The Supreme Court noted that “a conclusive defense requires little excuse on a prompt motion to vacate an order of default” and affirmed

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<sup>52</sup> 71 Wn.2d 650, 430 P.2d 584 (1967).

the writ finding no evidence of a willful disobedience of the writ. *Id.* at 652-53.

Similarly, in *Gage v. Boeing*,<sup>53</sup> Boeing failed to file an answer after receiving a notice of appeal pursuant to RCW 51.52.110 (which required Boeing to file a notice of appearance twenty days after receipt of a notice of appeal of an industrial injury claim before the Board of Industrial Insurance Appeals). *Id.* at 158. Counsel for Boeing acknowledged she was unaware of the notice of appearance requirement. *Id.* at n. 1. The Court affirmed vacation of the default judgment specifically finding that “nothing in the record suggests that counsel’s failure to file a notice of appearance was willful.” *Id.* at 164.

Here, unlike *Miller* and *Illman*, Veristone submitted affidavits that it did not receive the summons and complaint, much less intentionally disregarded a court mandate to appear. Veristone’s registered agent, Meghann Good, testified that that she did not receive the pleadings, the description of her in Hedgpeth’s declaration is inaccurate and several other people in the office better fit the description given, and there were no business records of her receipt of the Summons and Complaint.<sup>54</sup> There is

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<sup>53</sup> 55 Wn.App. 157, 776 P.2d 991 (1989).

<sup>54</sup> *Id.*

no evidence on the record support a finding that Veristone willfully disregarded a command to appear in court under Washington law.

4. *Milwaukie's "strategic" claim is based on a repealed statute*

Milwaukie's counsel bolstered its claim of "willfulness" to the trial court by claiming that its lien would be invalid if Veristone wasn't served within 90 days of filing their complaint, thereby claiming it was a strategic move by Veristone.<sup>55</sup> The trial court relied on Milwaukie's argument: "I think there's a strategic reason why they waited to bring this motion to set aside so that they could not cure." RP 34.

The statute at issue in *Queen Anne Painting v. Olney & Assoc.* cited by Milwaukie was RCW 60.04.100. That statute **was repealed in 1992**, and now, under the current statute RCW 60.04.141, all that is required is service on the "**owner of the subject property**." Veristone is not the owner here. *See also, Schumacher Painting Co. v. First Union Management, Inc.* 69 Wn.App. 693, n. 7 (1993) ("When the Legislature repealed former RCW 60.04.100 and replaced it with RCW 60.04.141, the reference to the need to serve "necessary parties" was removed and language requiring that the 'owner of the subject property' be served was inserted.)

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<sup>55</sup> CP 317-318.

Under current law (not cited to the trial court by Milwaukie) it is only the owner of the property (which in this case is not Veristone) who has to be served within 90 days in order to perfect the lien foreclosure action<sup>56</sup>. Milwaukie's false arguments attributing a "strategic" reason to Veristone in this case fall flat and constitute yet another misrepresentation by counsel for Milwaukie to the trial court. Further, even assuming Milwaukie's counsel didn't misrepresent the law, the trial court had no basis or evidence to find that Veristone willfully didn't respond.

*5. Veristone acted diligently and Milwaukie is not prejudiced.*

The last two secondary factors also weigh in favor of vacating the default judgment. It has never been disputed that Veristone acted diligently in moving to vacate the default judgment; it learned of the default on August 7, 2018 and filed to motion to vacate less than a month later. *Johnson v. Cash Store*, 116 Wn. App. 833, 842 (2003) (Filing motion to vacate less than a month after receiving notice established due diligence factor).

There is also no conceivable hardship or prejudice to Milwaukie by vacating the Veristone Default Judgments at that early stage of the litigation; as at the time of the filing of Veristone's motion to vacate, no discovery had been conducted, none of the other parties had filed answers,

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<sup>56</sup> See RCW 60.04.141

and Milwaukie's complaints failed to state valid lien priority claims against Veristone. Milwaukie has argued that it would be prejudiced if the default judgments were vacated because it concedes it would lose on the merits of the case. CP 82, 831, and 1521. ("Accordingly, if Milwaukie loses its priority to Veristone, it will be highly prejudicial"). But a decision based on the merits of the case cannot be considered prejudice to Milwaukie for purposes of this factor under *White v. Holm*. See, *Johnson v. Cash Store*, 116 Wn. App. 833, 842 (2003) ("[V]acation of a default judgment inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits.").

Regardless of the trial court's improper finding that Veristone had been served and failed to respond, the default judgment should have been vacated under CR 60(b)(1) and the *White v. Holm* factors. The trial court committed obvious and/or probable error and abused its discretion by refusing to vacate the default judgment.

B. The Default Judgments should have been vacated based on "irregularities" pursuant to CR 60(b)(1).

Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted

or done at an unreasonable time or in an improper manner. *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267, 1270 (1989). A claim of irregularity is not controlled by the test set out in *White*, which applies to cases involving excusable neglect or inadvertence. *Id.* at 652.

Here, the Default Judgments entered in the Lot 3 and Lot 4 cases were obtained by the misrepresentations of Milwaukie’s counsel. Milwaukie does not meaningfully dispute that its liens are subordinate to Veristone’s Deeds of Trust and explained the following basis for naming Veristone as a defendant:

MS. SPRATT: I’m a construction lawyer. **We always allege that we have priority over all other deeds of trust – or all other lien claimants or encumbrances in a deed of trust.**<sup>57</sup>

There is no authority approving Milwaukie’s conduct. Indeed, there is only one approved basis for a junior lienholder to name a senior lienholder in a foreclosure action, and that “is for the limited purpose of determining the amount of those liens and making an intelligent decision how much to bid. *Worden v. Smith*, 178 Wn. App. 309, 321-322, 314 P.3d 1125 (2013) *citing* Restatement (Third) of Property § 7.1; 5 Herbert Thorndike Tiffany, the Law of Real Property § 1536 (Basil Jones 3d ed.1939)(the holder of a

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<sup>57</sup> RP 16, lines 11-14 (emphasis added).

senior lien “may be made a party merely to obtain an adjudication as to the amount of his lien, in order that the purchaser may be advised of what he is purchasing.”).

Milwaukie’s counsel knowingly presented erroneous pleadings which stated that Veristone’s Deeds of Trust were inferior and those misrepresentations provided the legal basis for entry of the default judgments. In order to obtain a default judgment, the moving party must present evidence to the court or commissioner which establishes its entitlement to the precise relief it seeks. CR 55(b). Had the trial court known that Veristone’s Deeds of Trust were superior to Milwaukie’s lien, it would have refused to enter judgment against Veristone without conducting a hearing to determine whether the lien had been satisfied. CR 55(b)(2).

*Mosbrucker* applies to this case. In *Mosbrucker*, Larry Clark signed a 10-year lease agreement (the “Agreement”) as a guarantor and, at some point, his signature was crossed off the Agreement. *Id.* at 648. When the lessee defaulted on the Agreement, the lessor filed an action naming Clark and obtained a default judgment against him. *Id.* Although the Complaint referenced the Agreement, a copy **was not** part of the record or before the judge that entered the default judgment. *Id.* at 651-52. The court noted the significance of the lease not being on the record:

However, the court’s opinion does not reflect whether it considered Mr. Clark’s claim that the lease may not have been before, or called to the attention of, the judge who granted the default order and judgment. The record does not reflect any explanation for the fact that the lease could not be located in the file when Mr. Clark’s attorney requested a copy of the lease from the superior court. **The inference that the lease may never have been in the file presents a stronger basis for a claim of irregularity in the default judgment.**

*Id.* at 651 (emphasis added).

... failure to annex the lease to the complaint, or to provide it when the default judgment was obtained, could significantly impact the proceedings, because the alteration on the lease raises the question whether Mr. Clark had any liability as a guarantor for the judgment sought. . .

*Id.* at 652. The Court of Appeals further noted that “**the challenge here. . . goes to the integrity of the proceedings**” and that “**the judge granting the default order and judgment may well have refused to do so had he seen that the signature upon which the judgment was sought had been crossed off—a fact which the Mosbruckers knew when they brought suit.**” *Id.* at 652-53 (emphasis added).

Here, the issue is lien priority between a construction lien and four deeds of trust which turns on whether Veristone’s Deeds of Trust were recorded at the time of commencement of labor or professional services or

first delivery of materials or equipment by the lien claimant.<sup>58</sup> It is undisputed that, with respect to Lot 3 and Lot 4, Veristone’s Deeds of Trust were recorded on July 26, 2017. It is also undisputed that Milwaukie “began to perform labor, provide professional services, supply material or equipment” on Lot 3 and 4 on September 21, 2017.<sup>59</sup> The recording dates of Veristone’s Deeds of Trust are necessary to determine priority under RCW 60.04.061.

Like the lease in *Mosbrucker*, the failure to disclose to the Court the recording dates or copies of Veristone’s recorded Deeds of Trust themselves “could significantly impact the proceedings” because the recording dates of the Deeds of Trust bar the relief Milwaukie sought.<sup>60</sup> There is no question that had the Court been notified of the recording dates of Veristone’s Deeds of Trust, the Veristone Default Judgments relating to Lot 3 and Lot 4 would not have been entered. This conduct, just like in *Mosbrucker*, goes directly to the integrity of the proceedings.

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<sup>58</sup> RCW 60.04.061: “The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.”

<sup>59</sup> A construction lien is required to state “the first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due.” RCW 60.04.091(1)(b).

<sup>60</sup> RPC 3.3(f) imposes a duty of candor to the tribunal in an ex parte proceeding which is designed to protect the integrity of the legal system and the ability of courts to function as courts.

*Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993) also supports vacating the default judgment and was raised in Veristone's Motion to Vacate. In *Caouette*, the court held that where a default judgment is "based upon incomplete, incorrect or conclusory factual information," vacation of the judgment is proper. Milwaukie's failure to disclose to the trial court the Veristone Deeds of Trust or, at minimum, the recording date of those deeds of trust constitutes an irregularity in the proceeding and supports the vacation of the Veristone Default Judgments related to Lot 3 and Lot 4.

C. The trial court abused its discretion by refusing to hold an evidentiary hearing

When a motion to set aside a default judgment is supported by affidavits asserting lack of personal service, and the plaintiff files controverting affidavits, a triable issue of fact is presented. *Woodruff v. Spence*, 76 Wn.App. 207, 210 (1994). The court, in its discretion, may direct that an issue raised by motion be heard on oral testimony if that is necessary for a just determination. *Id. citing Swan v. Landgren*, 6 Wn.App. 713, 495 P.2d 1044 (1972). A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility. *Id., citing Autera v. Robinson*, 419 F.2d 1197, 1202 (D.C.Cir.1969).

Here, Veristone testified that it has a well-developed system for processing and handling lawsuits served on Veristone. After receiving original process, Veristone's registered agent Meghann Good processes the summons and complaint by creating electronic copies of the documents by scanning and saving them to its computer system, entering the time and date of service in a computer log, and stamping the date and time on the physical documents that she receives. She creates both a physical file and an electronic file for new civil matters. Veristone has no records of having received service of the summons and complaint in this lawsuit, and Meghann Good has no specific recollection of receiving this summons and complaint.

Furthermore, Hedgpeth's description of Good in his declaration submitted in Response to Veristone's Motion to Vacate does not describe Good. Hedgpeth's description of the person he served identifies someone that weighed 20 pounds more and was 5 inches taller than Good.<sup>61</sup> Good also testified that there are several other people that meet Hedgpeth's description of the person he served that works in the same office.<sup>62</sup> Veristone expressly requested that an evidentiary hearing be set to

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<sup>61</sup> CP 823 (Hedgpeth Declaration); CP 984 (Good Declaration).

<sup>62</sup> CP 984.

determine the credibility of the parties and the trial court's denial was an abuse of discretion.

D. The interest rate in Milwaukie's judgments are not supported by the underlying contracts

Milwaukie requested to amend its judgment to reflect a 2%/month interest rate instead of the 12% per annum interest rate in its original Judgment. Milwaukie did not cite any excusable neglect under CR 60(b) to amend the original interest rate that it requested of 12%. Second, Milwaukie's Contract with Emerald Valley Development does not provide for "payment of interest until paid at a specific rate" under RCW 4.56.110(1) and, therefore, 12% is the proper interest rate under RCW 4.56.110(4) and RCW 19.52.020.<sup>63</sup>

The relevant statutes governing interest on judgments RCW 4.56.110(1) and (5). RCW 4.56.110(1) provides that Judgments founded on written contract, providing for the payment of interest until paid at a specific rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the Judgment.

RCW 4.56.110(4) provides that excepts as provided under subsections (1) . . . judgments shall bear interest from the date of entry at

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<sup>63</sup> CP 520 (Lot 3); CP 764 (Lot 2); CP 1963 (Lot 4).

the maximum rate permitted under RCW 19.52.020<sup>64</sup> on the date of entry thereof.

The Contracts here provide only that a “late payment charge of 2% per month will be assessed after the 26<sup>th</sup> (S2 minimum)”<sup>65</sup>. The debts are reduced to a judgment, there are no late payments, and a late charge does not equate to the “payment of interest until paid at a specified rate.” Because the Contract does not provide for payment of interest until paid at a specified rate, the statutory interest rate is 12%. *TJ Landco, LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 260, 346 P.3d 777 (2015). The trial court erred in granting Milwaukie’s request regarding the interest rate.

E. The trial erred in granting Milwaukie’s petition for attorneys’ fees.

Veristone opposed Milwaukie’s attorney fee petitions because they included fees that were forfeited, the fee applications failed to segregate attorney time between each case, numerous entries were block billed, vague and failed to show that the time was reasonable or recoverable, and the hourly rates were excessive. The trial court did not make any findings of fact or conclusions with regard to Milwaukie’s attorneys’ fees, and entered the Judgments apparently reducing the attorneys’ fees by

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<sup>64</sup> RCW 19.52.020 provides the highest legal rate of 12% per annum.

<sup>65</sup> No explanation is given for the meaning of (S2 minimum).

\$2,320.25 in the Lot 3 case, \$5,218.70 in the Lot 2 case, and \$1,194.50 in the Lot 4 case.

An award of attorneys' fees must be supported by findings of fact and conclusions of law. *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000).

Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.

*Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013) (emphasis added) quoting *Mahler v. Szucs*, 135 Wn. 2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998). The burden of demonstrating that a fee is reasonable always remains on the fee applicant. *224 Wetlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 741, 281 P.3d 693 (2012) citing *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). Here, the trial court made no findings of fact or conclusions of law, the basis for the attorney fees and reductions made by the trial court are entirely unknown.

F. The trial court abused its discretion in entering sanction awards against Verisone.

CR 11 procedures must comport with due process requirements. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992). Due process requires notice and an opportunity to be heard before a

governmental deprivation of a property interest. *Id.* A court will not entertain a CR 11 motion unless a party has been given notice regarding the potential violation – absent such notice, “CR 11 sanctions are unwarranted.” *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994).

Here, it is entirely unknown what basis, pleading, argument, or action by Veristone serves as the basis for the sanction order. The trial court expressly authorized Veristone to appear in the case after the default. Milwaukie never brought a motion under CR 11 and the Court never brought a potential CR 11 violation to Veristone’s attention. The record does not support a CR 11 sanction award against Veristone.

The sanction orders do not specify the sanctionable conduct. When a trial court imposes CR 11 sanctions, it must specify the sanctionable conduct in its order. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 418, 157 P.3d 431 (2007). “The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose.” *Id.* This was not done here.

The Order fails to identify what the CR 11 sanction is for, the specific conduct, pleading, or what grounds its finding is based on. And, again, the sanction award contradicts the Court’s ruling granting its motion

to allow Veristone to appear and file its objections to the fees and costs claimed by Milwaukie that the Court then later reduced.

The sanction orders are not reasonable. CR 11 is not a fee shifting mechanism but, rather, is a deterrent to frivolous pleadings. *Id.* If a trial court grants fees under CR 11, “it must limit those fees to the amounts reasonably expended in responding to the sanctionable filings.” *Id.* (emphasis added). Remand for recalculation is appropriate where a trial court does not limit an attorney fee award to amounts reasonably expended in responding to specified sanctionable conduct. *Id.* Here, the sanction award is improper because it is for the entire amount of the Judgments and it was not limited to the amounts reasonably expended in responding to any specific sanctionable conduct (of which there is none).

Finally, even if the orders were not intended to be sanction awards, the orders are improper because there is no basis to impose personal liability in any amount against Veristone. Veristone does not have a contractual relationship with Milwaukie and Milwaukie does not dispute this. The dispute between Veristone and Milwaukie relates to the priority of their liens, not whether Veristone is personally obligated on the debt to Milwaukie. Indeed, Milwaukie’s Judgments makes it clear that the judgment is solely against Emerald Valley Development LLC.

Moreover, Milwaukie's Amended Complaints solely request a monetary judgment against Emerald and Popick. A default judgment cannot exceed the demand of the complaint. *Stablein v. Stablein*, 59 Wn.2d 465, 466, 368 P.2d 174 (1962).<sup>66</sup> If it does so, the excess is void. *Id.* Here, the Court's Order directing Veristone to pay Milwaukie improperly imposes a monetary obligation on Veristone to pay Milwaukie the entire Amended Judgment amount, it exceeds the relief requested in the Amended Complaint, it is void, and should be deleted. The sanction award orders should be reversed and vacated.

G. Veristone requests its attorneys' fees and costs incurred on this Appeal.

Under its Deeds of Trust and RCW 60.04.181(3), Veristone is entitled to its attorneys' fees and costs. Accordingly, pursuant to RAP 18.1, Veristone requests an award of their attorney's fees and costs in prosecuting this appeal.

## V. CONCLUSION

Milwaukie's misrepresentations of the facts and law, and the trial court's acceptance has led to inequitable results in these three consolidated

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<sup>66</sup> Citing *Sheldon v. Sheldon*, 47 Wn.2d 699, 289 P.2d 335; *State ex rel. Adama v. Superior Court*, 36 Wn.2d 868, 220 P.2d 1081; *Ermey v. Ermey*, 18 Wn. 2d 544, 139 P.2d 1016; *Bates v. Glaser*, 130 Wn. 328, 277 P. 15; *State ex rel. First Nat. Bank v. Hastings*, 120 Wash. 283, 207 P. 23; *In re Sixth Avenue West*, 59 Wash. 41, 109 P. 1052; *In re Groen*, 22 Wash. 53, 60 P. 123.

cases. As Division I has stated, in determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are preserved and justice is done. If a default judgment on a meritless claim is allowed to stand, justice has not been done. *TMT Bear Creek Shopping Center, Inc., v. Petco* (“*Petco*”), 140 Wn.App. 191, 165 P.3d 1271 (2007). That has occurred here.

In these cases, Veristone established to the trial court conclusive defenses under facts known by Milwaukie but not presented to the trial court when it obtained its default judgments. The trial court’s decisions denying Veristone’s motions to vacate said judgments should be reversed and this matter should be remanded to the trial court for further proceedings. In addition, the trial court’s decisions amending the judgments and awarding attorneys’ fees should be reversed and remanded for further proceedings. Finally, for all the reasons articulated above, the sanction awards should be reversed and vacated.

Dated: January 13, 2020.

Respectfully submitted,

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