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No. 53175-5

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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REPLY OF APPELLANT VERISTONE FUND I, LLC

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Veristone submits the following reply to Milwaukie’s Response:

1. The underlying interlocutory Default Judgments are within the scope of this appeal

An appeal from the Final Judgments<sup>1</sup> on all claims and parties brings up for review all prior partial judgments, including the defective Default Judgments<sup>2</sup>. RAP 2.2(d), 2.4. Milwaukie’s Response incorrectly states that “[r]eview is limited to the propriety of the denial of the motion for relief from judgment—the appellate court does not review the underlying judgment the party sought to vacate.” Response at pp. 13 and 40. The underlying Default Judgments, however, are properly before this Court because Veristone filed a timely Notice of Appeal of the Final Judgments entered in all three cases, and designated the *interlocutory* Default Judgments in those notices.<sup>3</sup> The interlocutory Default Judgments do not contain either a finding that there was no just reason for delay or an express direction for entry of judgment and they did not resolve all claims asserted by all parties.<sup>4</sup> Pursuant to CR 54(b) and RAP 2.2(d), the Default Judgments were first appealable on August 15, 2019 when the Final

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<sup>1</sup> “Final Judgments” refers herein to the final judgments entered in all three cases on August 14, 2019, which is the Amended Judgment in Lot 3 (CP 685); the Judgment entered in Lot 2 (CP 1414) and the Amended Judgment in Lot 4 (2128).

<sup>2</sup> “Default Judgments” refers herein to the ex parte Orders of Default and Default Judgments obtained by Milwaukie against Veristone only that were entered on July 2, 2018, which are located in the record as follows: CP 29-35 (Lot 3); CP 770-776 (Lot 2); and, CP 1475-1481 (Lot 4).

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

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

Judgments were entered. *Rush v. Blackburn*, 190 Wn. App. 945, 958, 361 P.3d 217 (2015)

The exclusive procedure to attack a defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60 motion. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980). Because Veristone timely appealed the Final Judgments, review of the interlocutory Default Judgments are properly before this Court and any attempt to limit review solely to the CR 60(b) motions should be rejected.

2. The irregularities in obtaining the Default Judgments Regarding Lot 3 and Lot 4 are not disputed and require vacation

Milwaukie does not address or dispute that the Default Judgments and Final Judgments regarding Lot 3 and Lot 4 were never proven, and it is also undisputed that they were obtained by Milwaukie's counsel's misrepresentations. Milwaukie's counsel admitted to the trial court that she always alleges lien priority regardless of whether she had a reasonable basis:

Going to the allegation that I made misrepresentations, under CR 11, I – I've pled a number of lien foreclosure cases. 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.**

RP at 16, lines 9-14 (emphasis added). This admission has never been disputed or even addressed by Milwaukie. Rather in its response brief, Milwaukie incorrectly asserts there was an “absence of any evidence of

actual funding of the loan, or any evidence of the terms of the construction agreement”<sup>5</sup>. This assertion greatly misses its mark for a number of reasons. First, there was evidence of the existence of the Veristone loans on all three lots secured by the Deeds of Trust. This was provided in the Declarations of Meghan Good and was not rebutted by Milwaukie<sup>6</sup>. Second, the record confirms that Milwaukie submitted its own title reports into the record, confirming it had actual knowledge of Veristone’s Deeds of Trust and their recording dates prior to filing of the complaints and the obtaining of the Default Judgments.<sup>7</sup> As such, as further discussed again below, Milwaukie and its counsel were put on inquiry notice and “are deemed to have constructive notice of all that the inquiry would have disclosed.” *Miebach v. Colasurdo*, 102 Wn. 2d 170, 175-176, 685 P.2d 1074 (1984).

Milwaukie’s Amended Complaints and Motions for Default Judgments intentionally omit the recording dates of Veristone’s Deeds of Trust (notably, Milwaukie did include the recording dates of the liens subsequent to their liens).<sup>8</sup> Milwaukie’s Motions for Default Judgments fail

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<sup>5</sup> Answering Brief at Page 35.

<sup>6</sup> CP 57, 777, and 1503.

<sup>7</sup> CP 115 (Lot 3); CP 880 (Lot 2); and, CP 1552 (Lot 4).

<sup>8</sup> CP 16; 29-35 (Lot 3); CP 757; 770-776 (Lot 2); and CP 1462; 1475-1481 (Lot 4). Note that in paragraph 1.6 of the Amended Complaints, the recording date of the City of Camas’s lien, January 31, 2018, is alleged.

to include any proof, declaration, or any evidence whatsoever to support a court order declaring the lien priority between Milwaukie's liens and Veristone's Deeds of Trust.<sup>9</sup> Proof is an absolute requirement and the Default Judgments are void based on this alone.

Milwaukie failed to prove its declaratory Default Judgments regarding Lot 3 and Lot 4 against Veristone under CR 55(b).<sup>10</sup> In order to obtain a *judgment* of default, the moving party must present evidence to the court or commissioner which establishes its entitlement to the precise relief it seeks.<sup>11</sup> Here, Milwaukie sought declaratory relief against Veristone- a determination of priority between its liens and Veristone's Deeds of Trust.<sup>12</sup> Proof is required to support a default declaratory judgment. *Taylor v. State*, 29 Wn. 2d 638, 642, 188 P.2d 671 (1948):

Respondents have asked the court to put *its* stamp of approval on their purported compliance with a special statute. **Even had there been no appearance by the**

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<sup>9</sup> *Id.*

<sup>10</sup> Plaintiff's sole claims against Veristone is for a judgment "declaring Plaintiff's lien superior to all other claimed interests in the Property." CP 746 at ¶ 4.8.

<sup>11</sup> Under CR 55(b)(2), a default judgment may be entered after an order of default as follows:

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

<sup>12</sup> *See* Milwaukie's Response at p. 37: "The whole point of Milwaukie's lawsuits was to determine priority . . . Here, the court was not entering judgment on the merits of Veristone's deeds which Milwaukie did not challenge, it was just determining priority."

**appellants in the court below, a default declaratory judgment could not have been secured without offering sufficient evidence to support it.**

*Taylor v. State, supra.* at 642 (emphasis added). A default judgment not supported by substantial evidence will be vacated. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 241-42, 974 P.2d 1275 (1999). Evidence is substantial if it is sufficient to persuade a fair minded, rational person of the truth of the declared premise. *Id.* at 242.

Here, there was no evidence to support the interlocutory Default Judgments regarding Lot 3 and Lot 4 in the first place; the declarations from Milwaukie's counsel are the only evidence supporting the Default Judgments and they say nothing about lien priority. Veristone subsequently submitted substantial evidence, at a minimum, that the Default Judgments regarding Lot 3 and Lot 4 were obtained by misrepresentations and gave Milwaukie relief it was not entitled to, yet the trial court proceeded to allow entry of Final Judgments regarding Lot 3 and Lot 4 based on the defective Default Judgments.

The Amended Complaints also failed to allege any facts to support the bare legal conclusion that Milwaukie's liens had priority over the Deeds

of Trust of Veristone. A complaint that fails to state facts legally entitling the plaintiff to any recovery is void.<sup>13</sup>

As Veristone pointed out in its Opening Brief, an irregularity under CR 60(b) is not controlled by the same factors for excusable neglect under *White*, because irregularities go to the “integrity of the proceedings.” *Mosbrucker v. Greenfield Implement Co.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989). An irregularity occurs when “there is a failure to adhere to some proscribed rule or mode of proceeding, such as when a procedural matter that is necessary for orderly conduct of trial is omitted or done at an unreasonable time or in an improper manner.” *Id.*

The irregularities that occurred here with respect to Lot 3 and Lot 4 go well beyond CR 55(b). Milwaukie’s attorney’s conduct was also a clear violation of CR 11. When an attorney signs a court filing, the attorney certifies that “to the best of the ... attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) [the pleading, motion, or memorandum] is well grounded in fact; [and] (2) it is

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<sup>13</sup> *Ware v. Phillips*, 77 Wn. 2d 879, 884-5, 468 P.2d 444 (1970) (“[I]f a Complaint wholly fails to state facts legally entitling the plaintiff to any recovery, or states facts affirmatively showing that the plaintiff has no right of recovery, as those complaints did, a default judgment rendered thereon is void just as such default judgment would be void in so far as it awarded relief beyond that which the allegations of the complaint showed the plaintiff legally entitled to.”); *see also Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993) (vacation of a default judgment based upon incomplete, incorrect or conclusory factual information is proper).

warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law...”. CR 11(a).

In *Peoples State Bank v. Hickey* (“*Hickey*”), 55 Wn. App. 367, 777 P.2d 1056 (1989), the majority determined identical conduct amounted to a misrepresentation. The dissent in *Hickey* also pointed out that it is a clear CR 11 violation and that this type of misrepresentation does not merely affect the “fairness” of the parties’ relative positions at trial; rather it affects the validity of the judgment itself. *Id.* at 373-74.

Ultimately, the majority in *Hickey* allowed the defective default judgment to stand because Hickey failed to bring her motion to vacate until 27 months after the final judgment was entered, CR 60(b)(1) was not available to her, and the subject property had also been sold to a third party at the sheriff’s sale.

Here, while the facts are similar as to the Plaintiff’s conduct, Veristone is in a much different position than Hickey. CR 60(b)(1) is available to Veristone, the defective Default Judgments were brought to the trial court’s attention months before the Final Judgments were entered and could have been corrected at any time, and both the Default Judgments and the Final Judgments are before this Court. Therefore, the outcome of *Hickey* does not control here, and Justice Pekelis’s dissent is instructive:

In contrast, the misrepresentation in this case does not merely affect the “fairness” of the parties' relative positions at trial; rather, it affects the validity of the judgment itself. Peoples' counsel knowingly presented erroneous findings of fact which stated that Carol Hickey's lien was inferior or subordinate. These findings provided the legal basis for entry of the default judgment. Had the trial court known that Carol Hickey's lien was superior to Peoples' lien, it would have, no doubt, refused to enter judgment against Carol Hickey without conducting a hearing to determine whether the lien had been satisfied. CR 55(b)(2). Thus, the misrepresentation by Peoples' counsel subverted the integrity of the court itself . . .

The conduct of Peoples' counsel, unlike that of the plaintiff in *Plattner*, also violated CR 11.

*Hickey, supra.*, at 374<sup>14</sup>

Under RPC 3.3(f), in an ex parte proceeding, an attorney is required 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 Washington Supreme Court addressed RPC 3.3(f) as follows:

While we consider all alleged violations of the RPC with great seriousness, we view misrepresentations to the court in ex parte proceedings with particular disfavor. The duty of candor in an ex parte proceeding directly influences the administration of justice. We cannot, and will not,

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<sup>14</sup> The dissent in *Hickey* also noted that Plaintiff's conduct arguably violated RPC 3.3 which prohibits a lawyer from “knowingly making a false statement of material fact or law to a tribunal”, and RPC 8.4 which prohibits attorneys from engaging “in conduct involving dishonesty, fraud, deceit or misrepresentation” and “in conduct that is prejudicial to the administration of justice” *Id.* at n. 2, citing RPC 8.4(c) and (d).

tolerate any deviation from the strictest adherence to this duty.

*In re Disciplinary Proceeding Against Carmick*, 146 Wash.2d 582, 595, 48 P.3d 311, 317 (2002) (emphasis added). The Supreme Court further explained that:

These rules are designed to protect the integrity of the legal system and the ability of courts to function as courts. An attorney's duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. Such a high level of candor is necessary to prevent judges from making decisions that differ from those they would reach in an adversarial proceeding.

*Id.*, citing Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: Handbook on the Model Rules of Professional Conduct* § 29.2, at 29-3, 29-4 (3d ed.2001).

Furthermore, the role of judges and commissioners on a motion for default judgment is explained by the Washington Supreme Court as follows: “[j]udges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court when the amount of a default judgment is uncertain.” *Lenzi v. Redlands, Inc. Co.*, 140 Wn. 2d 267 281, 996 P.2d 603 (2000). Here, the trial court was initially not presented with all of the evidence to make an informed decision at the time of the entry of the Default Judgments on Lot 3 and Lot 4. The irregularities in obtaining the Default

Judgments identified above are not merely sufficient to support a vacation of the Default Judgments regarding Lot 3 and Lot 4, they are sufficient to establish that they are void and should have never been entered in the first place. Thereafter, the trial court abused its discretion in failing to address the issues presented by later disregarding the material facts and refusing to vacate the Default Judgments regarding Lot 3 and Lot 4; and then by entering Final Judgments based on the void Default Judgments.

3. There is no evidence that Veristone's failure to respond was willful.

Milwaukie's argument and the trial court's belief that Veristone had a motive to delay responding to give it an "additional defense" defies logic because Veristone had nothing to gain from delaying. Its Deeds of Trust already had priority on Lot 3 and Lot 4 and it had conclusive defense as to Lot 2. The "strategic reason" was conjecture solely created by Milwaukie's counsel (with absolutely no evidence).

First, the case Milwaukie relies on, *Bob Pearson Const. v. First Community Bank*, 111 Wn. App. 174, P.3d 1261 (2002), was never cited to the trial court and is, in any event, factually distinguishable because the Plaintiff in that case failed to commence a lawsuit against the mortgage holders WaMu and FCB within the statutory time frame of eight months from the date it recorded its lien. The issue of whether a lien claimant that

timely sues, subsequently amends its complaint, but fails to serve within 90 days of the original filing was not before the *Bob Pearson* court.

Second, there is no evidence that Veristone or Meghann Good knew of the existence of the *Bob Pearson* case, its holding, or that Milwaukie's liens could possibly be void if Veristone wasn't served within 90 days of filing the complaint. The mere existence of a potential legal outcome, without anything more, is conjecture because it required the trial court to guess that, at the very minimum, Veristone or Meghann Good somehow knew of the holding of *Bob Pearson*.

To make a finding of willfulness, a court must find that Veristone acted knowingly.<sup>15</sup> The rule is well established that the existence of a fact or facts cannot rest in guess, speculation, or conjecture.<sup>16</sup> In applying circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.<sup>17</sup> The trial court's unreasonable inferences led to its finding that Veristone's failure to respond was connected to a "strategic reason why they waited to bring this motion to set aside, so that they could

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<sup>15</sup> See, *Crosswhite v. Washington State Department of Social and Health Services*, 197 Wn. App. 539, 551-552, 389 P.3d 731 (2017); RCW 9A.08.010(4) (A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense).

<sup>16</sup> *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947).

<sup>17</sup> *Id.* at 809.

not cure”, but without any evidence that Veristone knew about the existence of the actual strategy itself.<sup>18</sup> The timing of the motions to vacate is entirely consistent with Good’s testimony. Good testified that she didn’t receive the original summons and complaint.<sup>19</sup> It was unrebutted that the Amended Complaints mailed to Good did not have a summons directing Veristone to answer or appear within a specific timeframe.<sup>20</sup> It was also unrebutted that Veristone discovered the Default Judgments for the first time on August 11, 2018, promptly retained counsel, and filed its motions to vacate shortly thereafter.<sup>21</sup> Furthermore, Veristone never asserted *Bob Pearson* as a defense in those motions to vacate.

The evidence cannot support an inference that Veristone engaged in a deliberate scheme to get defaulted just to gain an unnecessary defense. Milwaukie’s theory would also set a precedent that any defendant in a materialmen’s lien case that disputes service of process after the 90-day period would be precluded from relief under CR 60(b)(1). Because Milwaukie’s “strategic reason” theory wasn’t supported with any evidence, its consideration by the trial court was an abuse of discretion.

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<sup>18</sup> See, *Johnson v. Aluminum Precision Products, Inc.*, 135 Wn. App. 204, 143 P.3d 876 (2006) (Addressing why two theories of liability based on speculation were insufficient).

<sup>19</sup> CP 58.

<sup>20</sup> CP 218 at ¶ 26.

<sup>21</sup> CP 58.

Milwaukie otherwise cites only one case not already discussed by Veristone where there was a finding of willful failure to respond: *Thomas v. Green*, 32 Wn. App. 29, 31, 645 P.2d 732 (1982). In *Thomas v. Green*, the defendant Green did not dispute that he was served, he filed a notice of appearance before the default judgment was entered and still failed to respond. *Id.* at 732-33. The court stated:

Green deliberately refused to appear timely to defend against Thomas’s complaint, waited almost a year to file his motion to vacate the default judgment, refused to attend various supplemental proceedings and demonstrated no compelling defense.

*Id.* at 733. *Green* is similar to the other cases finding willful failure to respond- there was no dispute of service, a refusal to respond to the served summons and a refusal to comply with several other orders compelling Green to appear post-judgment (supplemental proceedings).

The facts of this case are not even close. The only evidence from Milwaukie was a declaration from its process server Tim Hedpeth stating that he served someone he thought was Meghann Good. Hedpeth and Good never testified at an evidentiary hearing, and the trial court refused Veristone’s request for an evidentiary hearing despite there being disputed material facts. The trial court’s finding of “willfulness” is not supported by substantial evidence and was an abuse of discretion.

4. The “inexcusable neglect” standard does not apply to Veristone.

Milwaukie spends eight pages arguing that Veristone failed to demonstrate excusable neglect, but none of the cases Milwaukie cites to involve a strong or conclusive defense. This is significant because the standard changes if a strong or conclusive defense has been shown. The purpose of making the determination between a “prima facie defense” and a “strong or virtually conclusive defense” is explained in *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 203, 165 P.3d 1271 (2007).

First, the purpose of requiring the defendant to demonstrate the existence of a “prima facie defense” is simply to avoid a useless subsequent trial. *Petco, supra.* at 204 *citing Griggs*, 92 Wash.2d at 583, 599 P.2d 12889. “In contrast, the purpose of determining whether there exists a strong or virtually conclusive defense is not to avoid a useless subsequent trial but, rather, to serve principles of equity.” *Id. citing Cash Store*, 116 Wash.App. at 841, 68 P.3d 1099 (“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.” *Id.* (Emphasis added).

The standard under CR 60(b)(1) changes from excusable neglect to a “not willful” failure to respond when a “strong or conclusive” defense has

been presented. The analysis under CR 60(b)(1), therefore, begins with whether Veristone has a strong or conclusive defense, which it has done. And if so, “the default judgment should be vacated provided the moving party timely moved to vacate and the failure to appear was not willful.” *Showalter v. Wild Oats*, 124 Wn. App. 506, 512, 101 P.3d 867, 870 (2004) *citing Cash Store*, 115 Wash.App. at 841, 68 P.3d 1099 (*quoting White*, 73 Wash.2d at 352, 438 P.2d 581).

5. Veristone established a conclusive defense as to Lot 2.

Milwaukie argues for the first time on appeal that equitable subrogation is not available to a lender that refinances its own loan. But Milwaukie cites to only a portion of comment e to section 7.6, and leaves out the most relevant portion. The comment in full, with the relevant part in bold, reads:

Obviously subrogation cannot be involved unless the second loan is made by a different lender than the holder of the first mortgage; one cannot be subrogated to one's own previous mortgage. **Where a mortgage loan is refinanced by the same lender, a mortgage securing the new loan may be given the priority of the original mortgage under the principles of replacement and modification of mortgages; see § 7.3. The result is analogous to subrogation, and under this Restatement the requirements are essentially similar to those for subrogation.**

Restatement (Third) of Property: Mortgages § 7.6 Subrogation, comment e (emphasis added). Washington adopted Restatement (Third) of Property:

Mortgages § 7.3 in *Kim v. Lee*, 145 Wn.2d 79, 89, 43 P.3d 1222 (2001). In *Kim*, the Supreme Court referred to the “principles of replacement and modification of mortgages” from § 7.3 as the “principle of subrogation in the mortgage loan context.” Notably, the elements for equitable subrogation and equitable replacement are the same. *See, Kim v. Lee* at 89. Veristone’s defense is no less conclusive.<sup>22</sup>

Meghann Good’s Declaration was based on her personal knowledge and as a business record custodian for Veristone.<sup>23</sup> Good testified that Veristone paid the first loan at the borrower’s request, Veristone was promised repayment, and Veristone reasonably expected to receive a security interest in the real estate with the priority of its original deed of trust.<sup>24</sup> This evidence was unrebutted by Milwaukie. Milwaukie failed to raise a genuine issue of material fact as to the application of equitable subrogation as to Lot 2. Milwaukie also failed to show that Veristone was not entitled to judgment as a matter of law as to equitable subrogation as to Lot 2. The trial court abused its discretion in determining that Veristone failed to present a conclusive defense.

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<sup>22</sup> Arizona and Nevada, like Washington, have adopted the Restatement (Third) of Property” Mortgages § 7.3 and 7.6 and applied equitable replacement in analogous cases. *See, e.g., US Bank, N.A. v. JPMorgan Chase Bank, N.A.*, 242 Ariz. 502, 505, 398 P.3d 118, 121 (Ariz. Ct. App. 2017); *Freedom Mortgage Corp. v. Trovare Homeowners Ass’n*, 2:11-CV-01403-MMD, 2012 WL 5986441, at \*4 (D. Nev. Nov. 28, 2012)

<sup>23</sup> CP 777.

<sup>24</sup> CP 778 at ¶ 3.

6. Veristone established a conclusive defense as to Lot 3 and Lot 4.

Milwaukie, unsurprisingly, attempts to raise another new argument on appeal based on an outdated case citing an outdated statute that has no relevance to this case. In *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973), a lender's construction mortgage secured future advances that were found to be "optional" and thus lower in priority than intervening liens. *Id.* Responding to *Equity Investors*, the Legislature adopted RCW 60.04.220 in 1973, which was reenacted in 1991 as RCW 60.04.226. *Pacific Continental Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 380, 273 P.3d 1009 (2012).

RCW 60.04.226 abrogates the obligatory/optional distinction and provides that a recorded mortgage or deed of trust takes priority over subsequently recorded liens "to the extent of all sums secured by the mortgage or deed of trust regardless of when the same are disbursed or whether the disbursements are obligatory." *Id.*, citing RCW 60.04.226.

The statutory trade-off to RCW 60.04.226 is the so called "stop notice" created by RCW 60.04.221. *Id.* "Subject to some exceptions, an unpaid potential lien claimant is empowered to give a lender who provides 'construction financing' a notice of his claim, whereupon the lender is required to hold back from progress payments enough to cover the claim." *Id.*, RCW 60.04.221. There is no evidence Milwaukie sent Veristone a

“stop-notice” under RCW 60.04.221. Without a stop-notice, any hypothetical issue raised by Milwaukie related to future advances or whether the loans were “funded” is irrelevant because the statute would give Veristone priority as to the entire debt secured by its Deeds of Trust. Milwaukie also failed to raise this “issue” to the trial court and should not be considered since it was not preserved for appeal.

With regard to the trial court’s findings of “issues” with the amounts and cross-collateralization of the Deed of Trust, the amount of the obligation a deed of trust secures is not relevant to priority. Milwaukie did not respond to the cases cited by Veristone. When an obligation is secured by more than one security interest, that does not affect that security interest’s priority. The trial court did not understand Veristone’s Deeds of Trust and based its ruling only on its subjective belief about cross-collateralization.<sup>25</sup> Further, it is undisputed that (with respect to all three lots) at the times Milwaukie commenced to provide materials to the lots, Milwaukie had, at minimum, constructive notice of the prior recorded liens of Veristone against each of them. As such, Milwaukie was on constructive notice that any materialman’s lien it may subsequently file against the lots would be subordinate to the liens of Veristone.<sup>26</sup> Notwithstanding,

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<sup>25</sup> RP at 33, lines 14-24.

<sup>26</sup> *Shephard v. Holmes*, 185 Wn. App. 730, 743-44, 345 P.3d 786 (2014); *Miebach v. Colasurdo*, 102 Wn. 2d 170, 175-176, 685 P.2d 1074 (1984)

Milwaukie elected at its own risk to supply the materials anyway. The trial court also, perhaps, believed that equity favored Milwaukie because it provided a benefit to the properties and would not be paid if the Default Judgments were vacated.<sup>27</sup> But whether Milwaukie enhanced the properties or whether Milwaukie gets paid is not relevant to priority. The court in *Mannington Carpets, Inc. v. Hazelrigg* addressed the same argument as follows:

It is undisputed that Mannington provided a benefit to the building for which it has not been paid. But whether the carpet enhanced the property does not answer the priority question before us. We are not asked to determine whether the lien is valid or whether the material provided value to the building. Rather, the issue before us is the relative priority of the lien in relation to the two deeds of trust. We therefore reject this argument.

*Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn.App. 899, 909, 973 P.2d 1103 (1999). The trial court was misled by Milwaukie's counsel into believing this played a role in determining priority, but it is entirely irrelevant. The record is sufficient to determine that Veristone's Deeds of Trust are prior to Milwaukie's liens and that determination was critical to the trial court's analysis under CR 60(b)(1) (because a conclusive defense changes the applicable standard as discussed above).

7. Veristone acted diligently and there is no prejudice to Milwaukie

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<sup>27</sup> RP 23, lines 6-24.

Milwaukie claims it was prejudiced by the delay because “Veristone put Milwaukie in the impossible position of having to defend the defaults at the risk of losing any and all defenses it had to priority over Veristone’s \$7.5 million in deeds.”<sup>28</sup> First, Milwaukie has no defenses to priority as discussed above. Second, even if Milwaukie did have a defense to priority, it does not follow that vacating the Default Judgments precludes Milwaukie from asserting those defenses. Milwaukie is conflating an order vacating the Default Judgments with an order similar to the one entered in the *Bob Pearson* case deeming the lien void for failing to file within 8 months and serve within 90 days. But an order vacating the Default Judgments does not itself preclude Milwaukie from asserting a defense to priority, so that perceived prejudice does not exist. And while Veristone does dispute that service was proper here, it has never asserted the defense Milwaukie contends it tried to “create”. Third, Milwaukie hasn’t pointed to any actual prejudice that would have been caused by an order vacating the default judgments (other than a determination of the case on the merits, which is not the type of prejudice contemplated by *White v. Holm*). No other party had answered the Amended Complaints and it is undisputed that Veristone

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<sup>28</sup> Answering Brief at 36.

first discovered the Default Judgments on August 11, 2018 and promptly filed its motions to vacate them thereafter.<sup>29</sup>

8. The trial court’s summary determination of proper service on Veristone and that Veristone’s failure to respond was willful was an abuse of discretion.

If there is an issue of material fact, it needs to be resolved by a fact-finding hearing.<sup>30</sup> Veristone’s declarations, as detailed more fully above, established a genuine issue of material fact that required a fact-finding hearing as to the determination of proper service and also as to willfulness.

It is also worth pointing out that the trial court’s determination of credibility and willfulness relied, at least in part, on a document submitted by Milwaukie’s counsel for the first time at the hearings on the Motions to Vacate. Specifically, Milwaukie’s counsel brought a copy of a default judgment that was entered in a different case against Veristone (the “Unrelated Default Judgment”), the purpose of which was to discredit

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<sup>29</sup> It should further be noted that because the Default Judgments were interlocutory, the one-year period for a motion to vacate under CR 60(b)(1) did not actually begin to run until the Final Judgments were entered. *Rush v. Blackburn*, 190 Wn. App. 945, 959, 361 P.3d 217 (2015) (The one-year period to move to vacate a default judgment under CR 60(b)(1) does not start until that default judgment is final.) Veristone could have waited for entry of the Final Judgments, but it did not. It acted immediately. It cannot be disputed that Veristone was diligent and Milwaukie will not be prejudiced in the way contemplated by *White v. Holm*.

<sup>30</sup> *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000); *Carson v. Northstar Dev. Co.*, 62 Wn. App. 310, 316-17, 814 P.2d 217 (1991); *In re Marriage of Maddix*, 41 Wn. App. 248, 703 P.2d 1062 (1985); see also *Okanogan County v. Various Parcels of Real Property, et al*, 2020 WL 1648118 at \*4 (2020).

Good's testimony that it was Veristone's policy to always respond in a timely manner. RP at 15 lines 3-25. Veristone objected.<sup>31</sup> However, the trial court not only admitted this evidence about the Unrelated Default Judgment over Veristone's objection, but also subsequently relied on it in determining that Veristone's failure to respond was willful:

Mr. McIntosh: You can't say that's a willful  
– so is it a finding of willfulness?

The Court: Well, I've also got the subsequent case where they didn't respond and were defaulted in the same action. So—

RP at 32, lines 15-19.

In support of Veristone's motions for reconsideration, Good addressed the facts of the Unrelated Default Judgment, explaining that Veristone did not file an answer in that action simply because Veristone did not oppose the relief sought in that complaint and, if requested, Veristone would have stipulated to the relief sought.<sup>32</sup> Good testified that Veristone was also in open communications with the Plaintiff in that case, who was aware Veristone would not be filing an objection.<sup>33</sup> Based on the evidence

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<sup>31</sup> The basis of the Veristone's objection was that it was speculation as to why Veristone did not respond in the other case and that it was for an entirely different reason that had no bearing on this case. *Id.* at lines 22-25.

<sup>32</sup> CP 1661-1662.

<sup>33</sup> *Id.*

before the trial court, Milwaukie was not entitled to a summary determination of proper service and willfulness.

9. Amending the Final Judgment to change the interest rate to a higher amount was improper

Milwaukie does not dispute that it failed to establish excusable neglect or any basis under its CR 60(b) motion to amend the original interest rate from 12% to 24%. Milwaukie also cites to *Xebek, Inc. v. Nickum & Spaulding Associates, Inc.*, 43 Wn. App. 740, 718 P.2d 851 (1986), but that case addresses only whether post-judgment interest can be compounded, not whether a late fee calculation can be used as interest. The trial court erred in amending the final judgments to increase the interest rates to 24%, an amount that was solely described as a late fee in the contracts.

10. The trial court abused its discretion in granting Milwaukie's attorneys' fees.

Milwaukie conceded in this matter that findings of fact and conclusions of law as to its attorneys' fees were required by the trial court. *See*, Respondent Milwaukie Lumber Co.'s Motion for Extension of Time to File Response Brief filed in this action on January 23, 2020. In that request, Milwaukie acknowledges the requirement in *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000) and failure of the trial court to make findings of fact and conclusions of law.

11. The sanction awards should be reversed.

Milwaukie fails to address the arguments set forth in Veristone’s Opening Brief regarding defective due process and notice, amount, and lack of findings of fact and conclusions of law, and Veristone incorporates those arguments by reference here.

Milwaukie argues it moved for CR 11 sanctions at CP 1261, which is “Plaintiff’s Response in Opposition to Objection to Motion of Entry of Final Judgment” that states only: “Veristone should be sanctioned in the amount of Milwaukie’s fees for having to respond to this improper objection pursuant to CR 11”. CP 1261 (emphasis added).

But the trial court subsequently ruled that “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.” RP 73. It appears to Veristone that the trial court may have been confused as to the purpose of Milwaukie’s proposed orders, which Veristone attempted to clarify in its motions for reconsideration. Those motions, however, still have not been ruled on by the trial court.

#### 12. Veristone is entitled to its fees on appeal

RAP 18.1 authorizes the award of attorney fees on appeal if permitted by applicable law. Here, RCW 60.04.181(3) permits the prevailing party in a lien priority action to recover attorney fees. *Mannington Carpets, Inc., v. Hazelrigg*, 94 Wn. App. 899, 973 P.2d 1103

(1999). This action involves a lien priority dispute and Veristone has established, conclusively, its Deeds of Trust are prior to Milwaukie's liens.

Milwaukie argues it would be inequitable for Veristone to be awarded its fees because Milwaukie is a small material supplier, but that is not a basis to deny an attorney fee award. Furthermore, Veristone has only done what was required to secure justice in light of the improper litigation tactics of Milwaukie and its counsel. Veristone has a statutory bases and Veristone has, in fact, established priority.

13. Milwaukie's request for attorneys' fees should be denied

Milwaukie should not prevail in this appeal nor should it be awarded its fees. Milwaukie has consistently propounded meritless arguments with no explanation as to how or why they are legally significant. Milwaukie attempts to justify their improperly obtained "gotcha" default judgments by citing outdated statutes and cases and speculating and misconstruing the facts. This conduct is ongoing. CR 60(b) is also an improper basis to award fees on appeal and is inapplicable because the Complaints were frivolous to begin with. Milwaukie had constructive notice of Veristone's Deeds of Trust and Milwaukie's counsel had actual knowledge.

Veristone respectfully requests that this Court vacate the Default Judgments and the subsequent Final Judgments.

Dated: April 13, 2020.

Respectfully submitted,

/s/ Thomas S. Linde

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/s/ John A. McIntosh

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