

FILED
Court of Appeals
Division II
State of Washington
3/12/2020 12:27 PM
NO. 53175-5-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

MILWAUKIE LUMBER CO., a Washington corporation,

Respondent,

vs.

DANA POPICK; EMERALD VALLEY DEVELOPMENT LLC;
STERLING RIVER VIEW, LLC; VERISTONE FUND I, LLC; CITY OF
CAMAS; STERLING VIEW HOMEOWNERS ASSOCIATION;
LEXON INSURANCE CO, together with Bond No. 981745; and GREAT
AMERICAN INSURANCE CO., together with Bond No. 4844353,

Appellant.

RESPONDENT MILWAUKIE LUMBER'S ANSWERING BRIEF

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. RE-STATEMENT OF THE ISSUES	2
IV. STATEMENT OF THE CASE.....	3
A. Milwaukie Supplied Lumber to a Residential Development in Camas, Washington.....	3
B. Veristone Recorded Twelve Deeds of Trust Totaling Nearly \$7.5 Million in Security Against Three Undeveloped Residential Lots	4
C. Veristone Was Served With Six Complaints and Failed to Respond to a Single One.....	6
D. The Trial Court Found That Veristone’s Failure to Answer Was Strategic and Unexcused	9
E. Post Judgment Proceedings.....	11
V. STANDARDS OF REVIEW	13
VI. ARGUMENT	15
A. The Trial Court’s Refusal to Vacate the Default Judgments Under CR 60(b)(1) is Supported By the Record	15
1. Veristone’s Failure to Appear Was Willful	15
2. Veristone’s Failure to Appear Was Also Unexcused Under CR 60(b)(1)	21
a. Veristone’s Failure to Appear Was Not Excusable Neglect.....	22
b. Veristone’s Defenses Were Not Conclusive.....	29

TABLE OF CONTENTS

	Page
c. Veristone’s Strategic Delay Harms Milwaukie	35
3. There Was No Irregularity Under CR 60(b)(1)	36
B. Veristone’s Challenges to the Substance of the Underlying Judgments are Without Merit	40
1. The Judgments Apply the Appropriate Interest Rate	40
2. The Court Acted Well Within its Discretion by Including Attorney Fees in the Judgment	43
B. The Trial Court’s Award of Sanctions Was Proper	44
C. Veristone Has No Valid Basis to Request Fees	45
D. Milwaukie is Entitled to Recover Fees on Appeal.	46
VII. CONCLUSION.....	46

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. Starr</i> , 104 Wn. 246, 247 (1918)	26
<i>Beckett v. Cosby</i> , 73 Wn.2d 825, 440 P.2d 831 (1968)	23, 24
<i>Berryman v. Metcalf</i> , 177 Wn. App. 644, 312 P.3d 745 (2013)	44
<i>Bishop v. Illman</i> , 14 Wn.2d 13, 126 P.2d 582 (1942)	16
<i>Bjurstrom v. Campbell</i> , 27 Wn. App. 449, 618 P.2d 533 (1980)	40
<i>Bob Pearson Constr. v. First Cmty. Bank</i> , 111 Wn. App. 174, 43 P.3d 1261 (2002)	1, 18, 19, 20
<i>Boeing Co. v. Sierracin Corp.</i> , 108 Wn.2d 38, 738 P.2d 665 (1987)	14
<i>Borg-Warner Acceptance Corp. v. McKinsey</i> , 71 Wn.2d 650, 430 P.2d 584 (1967)	13
<i>Boss Constr., Inc. v. Hawk’s Superior Rock, Inc.</i> , 2017 Wash. App. LEXIS 2629 (Div. II Nov. 17, 2017)	23
<i>Buich v. Tadich Grill Dev. Co., LLC</i> , 2020 Wash. App. LEXIS 14 (Div. I Jan. 6, 2020)	14
<i>Burrell v. State</i> , 137 Wn.2d 918, 976 P.2d 113 (1999)	26
<i>Brewster v. Wakefield</i> , 63 U.S. (22 How.) 118, 16 L. Ed. 301 (1860)	42
<i>Christian v. Tohmeh</i> , 191 Wn. App. 709, 366 P.3d 16 (2015)	14

TABLE OF AUTHORITIES

	Page(s)
<i>Columbia Cmty. Bank v. Newman Park, LLC</i> , 166 Wn. App. 634, 279 P.3d 869 (2012)	32
<i>Commercial Courier Serv. v. Miller</i> , 13 Wn. App. 98, 533 P.2d 852 (1975)	16, 23, 25
<i>Eagle Point Condo. Owners Ass’n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000)	44
<i>Griggs v. Averbek Realty</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979)	21
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978)	37
<i>Housing Auth. of Grant County v. Newbigging</i> , 105 Wn. App. 178, 19 P.3d 1081 (2001)	45, 46
<i>Hollowell v. Southern Bldg. & Loan Ass’n</i> , 120 N.C. 286, 287, 26 S.E. 781 (1897)	41
<i>Johnson v. Cash Store</i> , 116 Wn. App. 833, 68 P.3d 1099 (2003)	23
<i>Kain v. Sylvester</i> , 62 Wn.151, 152, 113 P. 573 (1911)	22
<i>L.D.M. Worldwide Corp. v. Dalman</i> , 2014 Wn. App. LEXIS 291 (Div. I Feb. 3, 2014)	27, 28
<i>Leen v. Demopolis</i> , 62 Wn. App. 473, 815 P.2d 269 (1991)	26, 27, 28, 39
<i>Little v. King</i> , 160 Wn.2d 696, 161 P.3d 345 (2007)	15, 44, 45
<i>Martin v. Pickering</i> , 85 Wn.2d 241, 533 P.2d 380 (1975)	13
<i>Mosbrucker v. Greenfield Implement, Inc</i> , 54 Wn. App. 647, 774 P.2d 1267 (1989)	37

TABLE OF AUTHORITIES

	Page(s)
<i>National Bank of Washington v. Equity Investors</i> , 81 Wn.2d 886, 506 P.2d 20 (1973).....	33
<i>Northwick v. Long</i> , 192 Wn. App. 256, 364 P.3d 1067 (2015)	28
<i>Pacific Coast Paper Mills v. Pacific Mercantile Agency</i> , 165 Wn. 62, 4 P.2d 886 (1931).....	23
<i>Prest v. American Bankers Life</i> , 79 Wn. App. 93, 900 P.2d 595 (1995)	<i>passim</i>
<i>Queen Anne Painting v. Olney & Assoc.</i> , 57 Wn. App. 389, 788 P.2d 580 (1990)	18, 19, 20
<i>Roth v. Nash</i> , 19 Wn.2d 731, 144 P.2d 271 (1943).....	21
<i>Rufer v. Abbott Labs.</i> , 154 Wn.2d 530, 114 P.3d 1182 (2005).....	14
<i>Showalter v. Wild Oats</i> , 124 Wn. App. 506, 101 P.3d 867 (2004)	13, 22
<i>Smiley v. Citibank (s.D.), N.A.</i> , 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996).....	40, 41
<i>State v. Santos</i> , 104 Wn.2d 142, 702 P.2d 1179 (1985).....	13, 40
<i>Streeter-Dybdahl v. Nguyet Huynh</i> , 157 Wn. App. 408, 236 P.3d 986 (2010)	26, 27
<i>Thomas v. Green</i> , 32 Wn. App. 29, 645 P.2d 732 (1982)	16, 17
<i>TJ Landco, LLC v. Harley C. Douglass, Inc.</i> , 186 Wn. App. 249, 346 P.3d 777 (2015)	14, 42
<i>TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.</i> , 140 Wn. App. 191, 165 P.3d 1271 (2007)	16, 23

TABLE OF AUTHORITIES

	Page(s)
<i>VanderStoep v. Guthrie</i> , 200 Wn. App. 507, 402 P.3d 883 (2017)	16
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968).....	<i>passim</i>
<i>Woodruff v. Spence</i> , 76 Wn. App. 207, 883 P.2d 936 (1994)	27, 28, 39
<i>Woodstream Constr. Co. v. Van Wolvelaere</i> , 143 Wn. App. 400, 177 P.3d 750 (2008)	36
<i>Worden v. Smith</i> , 178 Wn. App. 309, 314 P.3d 1125 (2013)	38
<i>Xebek, Inc. v. Nickum & Spaulding Assocs.</i> , 43 Wn. App. 740, 718 P.2d 851 (1986)	41, 42
<i>Yeck v. Dep’t of Labor & Indus.</i> , 27 Wn.2d 92, 176 P.2d 359 (1947)	13
 Statutes	
RCW 4.56.110	14
RCW 60.04.061	30
RCW 60.04.141	18, 19, 36
RCW 60.04.181	45
RCW 60.04.181(3).....	43, 46
 Other Authorities	
CR 8	38
CR 11	44
CR 55(a)(2)	12
CR 55(b)(1).....	43

TABLE OF AUTHORITIES

	Page(s)
CR 60(b).....	15, 45, 46
CR 60(b)(1).....	<i>passim</i>
RAP 18.1.....	46

I. INTRODUCTION

This case raises the question of what constitutes a willful default and what authority a trial court has to make that determination based on the evidence before it. Veristone Fund I, LLC (“Veristone”) is a Bellevue based hard money lender who purports to have secured nearly \$7.5 million against three undeveloped residential lots that are part of a development in Clark County. Milwaukie Lumber Co. (“Milwaukie”) is a local lumber company who supplied building materials to the development.

When the property owners failed to pay Milwaukie for the supplies it provided, Milwaukie commenced lien foreclosure actions to recover payment for its supplies. Veristone was named as a defendant and personally served in each of the three actions and, in each of the three actions, failed to appear and defend. Instead, Veristone waited until after Milwaukie’s 90-day window to serve Veristone had passed, then moved to set aside the default orders, arguing that it had never been properly served. If successful, Veristone’s untimely service defense would strip Milwaukie of any hope of recovering the costs of its materials, because Milwaukie’s lien is void against any lienholder not served within 90 days of filing. *Bob Pearson Constr. v. First Cmty. Bank*, 111 Wn. App. 174, 43 P.3d 1261 (2002). Veristone—with its alleged \$7.5 million in security—would swallow up any potential equity from a sale of the properties and leave

nothing for Milwaukie and other suppliers.

After reviewing detailed evidence confirming that Milwaukie served Veristone with both the original and amended complaints in each of the three actions, the trial court found that Veristone's failure to appear and defend was "strategic" and refused to set aside the defaults. The record supports the trial court's conclusion that Veristone chose not to appear and defend against Milwaukie's allegation of priority. The record also supports the trial court's finding that Veristone's defenses were inconclusive, and that its failure to appear was not due to excusable neglect.

Veristone has engaged in a campaign of litigation tactics that have left Milwaukie with the Hobson's choice of either walking away from its lien rights altogether or incurring ever-mounting attorney's fees defending them. The trial court did not err when it refused to vacate the default judgments under these circumstances.

II. ASSIGNMENTS OF ERROR

Milwaukie does not assign error to the trial court's decisions below.

III. RE-STATEMENT OF THE ISSUES

(1) Whether the record reasonably supports the trial court's finding that Veristone intentionally defaulted to gain a strategic advantage?

(2) Whether the record reasonably supports the trial court's refusal to set aside the default judgments against Veristone under CR 60(b)(1)

where Veristone's defenses were *prima facie* and its failure to appear was inexcusable?

(3) Whether the trial court properly exercised its discretion in awarding Milwaukie its reasonable attorney fees and interest as part of the judgments?

IV. STATEMENT OF THE CASE

A. Milwaukie Supplied Lumber to a Residential Development in Camas, Washington

Milwaukie was hired by Emerald Valley Development, LLC ("Emerald") to supply materials for residential construction projects on three lots (referred to as "Lot 2," "Lot 3," and "Lot 4," respectively) in the Sterling View Short Plat in Camas, Washington. CP 852 (Lot 2); 101 (Lot 3); 1541 (Lot 4). Lot 2 is located at 1617 NW Juneau Court in Camas, Washington, and is owned by Sterling Inspiration, LLC. CP 852. Lot 3 is located at 1625 NW Juneau Court and is owned by Sterling River View, LLC. CP 101. Lot 4 is located at 1641 NW Juneau Court and is owned by Sterling Greenspire, LLC. CP 1541. Milwaukie supplied materials to Lot 2 from December 2016 to July 2017, and to Lots 3 and 4 from September 2017 to December 2017. CP 853 (Lot 2); 102 (Lot 3); 1542 (Lot 4).

Emerald failed to pay Milwaukie for its materials. Accordingly, on September 29, 2017, Milwaukie recorded a lien in the principal amount of

\$38,027.95 against Lot 2. CP 853. On February 22, 2018, Milwaukie recorded a lien in the principal amount of \$29,584.54 against Lot 3, and a lien in the principal amount of \$15,143.63 against Lot 4. CP 102 (Lot 3); 1542 (Lot 4).

**B. Veristone Recorded Twelve Deeds of Trust
Totaling Nearly \$7.5 Million in Security Against
Three Undeveloped Residential Lots**

On July 26, 2017, more than seven months after Milwaukie began supplying materials to Lot 2, Veristone recorded twelve separate deeds of trust, reflecting nearly \$7.5 million in security against the three, as yet developed residential lots. CP 891-938. Veristone recorded deeds of trust in the amount of \$640,159.98, \$618,472.31, \$657,921.97 and \$537,223.22 against Lot 2. CP 891-906. It recorded nearly identical deeds of trust against both Lots 3 and 4. CP 907-938. Not one of Veristone's twelve deeds indicates that it is "cross collateralizing" loans related to different properties, or makes any reference whatsoever to the other deeds. To the contrary, each of the deeds recites an agreement by the grantor that it is to be in a "first lien position," without any reference to the other three deeds recorded against each lot on the same day. CP 124-170.

Veristone argued to the trial court that its deeds secured \$2.5 million for construction on four lots within the development, but no evidence was ever presented as to how much, if any, of the money was actually funded

and when. CP 214-215 at ¶¶ 2-3. Construction was never completed on any of lots at issue. The partially-completed structures remain exposed to weather and the elements. CP 1230. Below are photographs of Lots 2, 3 and 4, respectfully, which were taken on January 15, 2019:





CP 402-403.

C. Veristone Was Served With Six Complaints and Failed to Respond to a Single One

Milwaukie filed lawsuits to foreclose its relatively small material liens against Lots 2, 3 and 4 on May 11, 2018. CP 742-750 (Lot 2); 1-9 (Lot 3); 1447-1455 (Lot 4). Veristone was named as a party in each of the three actions, its name appears in the caption in each of the three complaints, and in each action Milwaukie alleged that Veristone's deeds of trust "are inferior in priority to [Milwaukie's] claim of construction lien" and sought an order establishing Milwaukie's lien "as valid and superior to the interests of all other interested parties." *Id.*

Milwaukie hired Nationwide Process Servers ("Nationwide") to personally serve Veristone. CP 177-179. On May 30, 2018 at 3:13pm, professional process server Tim Hedgpeth went to Veristone's office and

asked for Meghann Good, the registered agent for Veristone. CP 823-826 (Lot 2); 75-77 (Lot 3); 1630-1633 (Lot 4). A woman situated near the front entrance that appeared to be performing the duties of a receptionist told Mr. Hedgpeth to have a seat and she would tell Ms. Good that he was there. *Id.* Mr. Hedgpeth sat for a few minutes waiting when a woman walked toward him and identified herself as Meghann Good. *Id.* Mr. Hedgpeth estimated that she was about 40 years old, roughly 5’5” tall, weighed approximately 140 pounds, and had brown hair. *Id.* Mr. Hedgpeth advised Ms. Good that he had three sets of legal documents for her as registered agent for Veristone Fund I, LLC. *Id.* Each set of documents included the Summons and Complaint, together with Exhibits A-C; a Case Information Cover Sheet; and Notice of Assignment to Judicial Department and Setting Scheduling Conference Date (“Process Papers”). *Id.* Mr. Hedgpeth handed Ms. Good the Process Papers. She looked at the documents and acknowledged receipt. *Id.* The summons was the lead document on each of the three sets of Process Papers—they were not in a folder or envelope or concealed in any way. *Id.*

Mr. Hedgpeth has been a professional process server for 10 years and has served upwards of 10,000 documents. *Id.* at ¶ 3. He made hand written notations on his work order immediately following service of Ms. Good, noting his estimate of her age, height, weight, and hair color. *Id.* at ¶ 4, Ex. A. Service was uneventful and Ms. Good was cooperative. *Id.*

Nevertheless, Veristone did not appear or answer.

Following Milwaukie's personal service of the three original summons and complaints on Veristone, on June 12, 2018, Milwaukie filed amended complaints in each of the three actions. CP 756 (Lot 2); 15 (Lot 3); 1461 (Lot 4). The amended complaints similarly named Veristone as a party, contained its name in the caption, and alleged that Veristone's deeds of trust "are inferior in priority to [Milwaukie's] claim of construction lien." Like the original complaints, the amended complaints sought orders establishing Milwaukie's liens "as valid and superior to the interests of all other interested parties." *Id.*

Milwaukie sent Veristone copies of each of the three amended complaints by first class mail, addressed to Ms. Good as its registered agent. CP 947. Veristone concedes that it received copies of the three amended complaints. CP 218 at ¶ 26. Even after receiving the amended complaints, however, Veristone did not appear or answer in any of the three actions.

On July 2, 2018, Milwaukie moved for orders of default and default judgment against Veristone. CP 773 (Lot 2); 32 (Lot 3); 1478 (Lot 4). The trial court granted the motions. CP 775 (Lot 2); 34 (Lot 3); 1480 (Lot 4).

Over a month later, on August 7, 2018, Ms. Good emailed Milwaukie requesting copies of its Motions for Default and Default Judgment, Affidavits of Service for Veristone Fund I, LLC, and the Orders

of Default Judgment. CP 186-187. There is no explanation in the record as to how Veristone learned of the judgments if it was not otherwise tracking the litigation. During the exchange, Ms. Good never claimed that Veristone had not been properly served. CP 99-100. The following week, counsel for Veristone contacted Milwaukie to discuss the case. *Id.* He explained that Veristone would be moving to vacate the default, but never stated or indicated that Veristone had not been properly served. *Id.* Milwaukie's 90-day window to serve Veristone passed without any indication from Veristone that it intended to contest service.

D. The Trial Court Found That Veristone's Failure to Answer Was Strategic and Unexcused

Rather than simply paying off Milwaukie's lien and foreclosing on its own deeds,¹ 104 days after Milwaukie filed the actions, Veristone filed motions to vacate the three default judgments. CP 813 (Lot 2); 66 (Lot 3); 1512 (Lot 4). Veristone's motions to vacate were based upon a declaration

¹ Notably, each of Veristone's twelve deeds of trust give Veristone the right to pay off other senior lienholders and add those amounts to its own claim, which could then be foreclosed via a nonjudicial foreclosure sale. *See, e.g.*, CP 126 at ¶ 7 ("Should Grantor fail to pay when due any . . . encumbrances or other charges against the property . . . Beneficiary may pay the same, and the amount so paid, with interest at the rate set forth in the note secured hereby, shall be added to and become a part of the debt security in this Deed of Trust"). Nothing prevented Veristone from pursuing this option, which would have eliminated the need for either party to incur further attorney fees disputing what were relatively small liens.

from Megann Good stating that she “[did] not recall ever being personally served with the Summons and Complaint” and had “no records that [she] or anyone else at Veristone, received the Summons and Complaint on May 30, 2018.” CP 58. Ms. Good’s initial declaration was silent as to Veristone’s receipt of the three amended complaints and contained no corroborating evidence disputing proper service. Milwaukie opposed the motions and pointed out that Veristone’s new-found service defense would deprive Milwaukie of any ability to recover on its modest liens because Veristone’s purported \$7.5 million in security left no room for second place finishers. CP 831. Milwaukie was forced to oppose Veristone’s motions at the risk of losing all of its liens.

After reviewing briefing and affidavits from both sides, and hearing argument of counsel, the trial court found that Veristone had been personally served with the three original summonses and complaints and had also received copies of the three amended complaints via mail, which the court found should have served as a “wake-up call.” VR at 30:15-31:6; 32:11-14. The trial court further found that Veristone had failed to respond to these six complaints for “strategic reasons.” VR 34:6-10 (“I think there’s a strategic reason why [Veristone] waited to bring this motion to set aside so that [Milwaukie] could not cure”). Finally, the trial court found that Veristone’s defenses were inconclusive. VR 40:7-9 (“I think there were

questions of fact with regard to your defense”). Accordingly, the trial court denied Veristone’s motions to vacate. CP 966 (Lot 2); 197 (Lot 3); 1641 (Lot 4).

Veristone filed motions for reconsideration which were similarly denied. CP 1103 (Lot 2); 337 (Lot 3); 1779 (Lot 3).

E. Post Judgment Proceedings

After tying up the remaining loose ends against other defendants, Milwaukie moved for entry of final judgment as to Lots 3 and 4 on February 15, 2019.² CP 348 (Lot 3); 1794 (Lot 4). The trial court entered judgments on March 8, 2019. CP 355 (Lot 3); 1799 (Lot 4). Veristone promptly appealed, which was stayed pending entry of final judgment as to Lot 2. CP 361 (Lot 3); 1803 (Lot 4).

Milwaukie moved for entry of final judgment on Lot 2 on May 24, 2019, and at the same time, moved to amend the judgments as to Lots 3 and 4 to include required foreclosure language and to reflect increased attorney fees and a corrected interest rate. CP 1166 (Lot 2); 431 (Lot 3); 1873 (Lot

² Following denial of its motions for reconsideration, on January 17, 2019, Veristone sought discretionary review of the three default judgments in this Court. CP 338 (Lot 3). Milwaukie opposed the relief sought on the grounds that final judgment in each of the three actions was imminent. After briefing and oral argument, this Court denied Veristone’s motions as to Lot 3 and 4 as moot, consolidated the three actions, and stayed the appeal pending the anticipated final judgment as to Lot 2. CP 379.

4). Although Veristone was not a party to the action, and without first seeking leave of court under CR 55(a)(2), Veristone opposed Milwaukie's motions to correct the judgments as to Lots 3 and 4. CP 521 (Lot 3); 1964 (Lot 4). The trial court heard argument on Milwaukie's motions and requested that Milwaukie submit a more detailed petition in support of the requested attorney fees, which Milwaukie submitted. VR 59:1-3; CP 1315-1359.

On August 15, 2019, the trial court entered final judgment in the Lot 2 case in favor of Milwaukie in the amount of \$87,128.40. CP 1414. It also entered amended final judgments as to Lots 3 and 4, which included a discount on the attorney fees that Milwaukie had requested. The amended judgment for Lot 3 gives Milwaukie a priority lien in an amount of \$66,275.14, nearly half of which is attorneys' fees. CP 685. The amended judgment for Lot 4 gives Milwaukie a priority lien in an amount of \$49,926.03, more than half of which is attributable to attorneys' fees incurred as a result of Veristone's litigation tactics. CP 2129.

Finally, in conjunction with the judgments, the Court signed orders granting Milwaukie's motions to correct the judgments, which included awards of sanctions against Veristone. CP 1412 (Lot 2); 689 (Lot 3); 2132 (Lot 4). Veristone filed motions for reconsideration of the sanctions orders (CP 1412 (Lot 2); 728 (Lot 3); 2132 (Lot 4)), but as of the filing of this

brief, the trial court has not ruled on those motions and Milwaukie is not aware of any efforts by Veristone to check on the status of the rulings.

V. STANDARDS OF REVIEW

A trial court's ruling on a motion to vacate is reviewed for abuse of discretion. *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968) (citing *Yeck v. Dep't of Labor & Indus.*, 27 Wn.2d 92, 176 P.2d 359 (1947)); *Borg-Warner Acceptance Corp. v. McKinsey*, 71 Wn.2d 650, 430 P.2d 584 (1967). An order denying a motion to vacate "should not be overturned on appeal unless it plainly appears that this discretion has been abused." *Martin v. Pickering*, 85 Wn.2d 241, 245, 533 P.2d 380 (1975). Abuse of discretion "means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable." *Prest v. American Bankers Life*, 79 Wn. App. 93, 97, 900 P.2d 595 (1995).

Review 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. *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985). So long as the trial court's ruling is based upon tenable grounds and is "within the bounds of reasonableness," it must be upheld. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). Put another way, the judgment should be sustained even if this

Court disagrees with the trial court's decision. Only if the decision is "manifestly unreasonable" should it be set aside. *Id.*

The trial court's order denying Veristone's motion for reconsideration is also reviewed for an abuse of discretion. *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015).

An award of attorney fees is similarly reviewed for an abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987); *TJ Landco, LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 260, 346 P.3d 777 (2015); *Buich v. Tadich Grill Dev. Co., LLC*, 2020 Wash. App. LEXIS 14 at n. 2 (Div. I, Jan. 6, 2020) ("the proper test is whether the trial court took an active role in assessing the reasonableness of the fee award"; court's edits to proposed order evidenced that it found certain hours unreasonable).

Postjudgment interest is mandatory under RCW 4.56.110. *TJ Landco*, 186 Wn. App. at 256; *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 551-53, 114 P.3d 1182 (2005). "Consequently, awards of postjudgment interest are matters of law that are reviewed *de novo*." *TJ Landco*, 186 Wn. App. at 256.

VI. ARGUMENT

A. The Trial Court's Refusal to Vacate the Default Judgments Under CR 60(b)(1) is Supported By the Record

CR 60(b)(1) permits a trial court to relieve a party from a default judgment due to “mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” A motion to vacate a default judgment pursuant to CR 60(b) is addressed to the sound discretion of the trial court. *Prest*, 79 Wn. App. at 97.

A party seeking to vacate a default judgment must show: (1) substantial evidence to support a *prima facie* defense; (2) that its failure to appear and answer was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) it acted with due diligence after notice of the default judgment; and (4) no substantial hardship will result to the opposing party. *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007) (citing *White*, 73 Wn.2d at 352). The first two factors are “primary” and the second two are “secondary.” *Id.* However, the test is not mechanical and ultimately “whether or not a default judgment should be set aside is a matter of equity.” *Id.*

1. Veristone's Failure to Appear Was Willful

Courts do not countenance a willful disregard of process by granting a motion to vacate where the record supports such a finding. There is no

“balancing” of the factors where a party has defaulted for strategic reasons. Even a conclusive defense cannot carry the day where the failure to appear was intentional. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 206, 165 P.3d 1271 (2007) (even where a conclusive defense is presented, “equity will not allow for vacation of the judgment if the actions leading to default were willful.”); *White*, 73 Wn.2d at 352-353 (explaining that the test applies “provided . . . the failure to properly appear . . . was not willful”); *Bishop v. Illman*, 14 Wn.2d 13, 17, 126 P.2d 582 (1942) (“The courts will seldom relieve one who has willfully disregarded the command of a summons duly served”); reversing and remanding with instructions to reinstate default); *Thomas v. Green*, 32 Wn. App. 29, 31, 645 P.2d 732 (1982) (upholding default judgment where the record indicated the failure to appear was deliberate); *Commercial Courier Serv. v. Miller*, 13 Wn. App. 98, 106, 533 P.2d 852 (1975) (upholding default judgment; “[t]his court will not relieve a defendant from a judgment taken against him due to his willful disregard of process”).

In considering the defendant’s excuse for failing to appear, “the trial court may make credibility determinations and weigh the evidence in order to determine whether the defendant can show mistake, inadvertence, or excusable neglect.” *VanderStoep v. Guthrie*, 200 Wn. App. 507, 527, 402 P.3d 883 (2017). If the record reasonably supports a finding of willfulness,

the standard of review requires that this Court affirm the trial court's decision, even if this Court would reach a different conclusion on the same facts. *Thomas*, 32 Wn. App. at 31.

The trial court's finding that Veristone's failure to appear in the three actions below was willful was amply supported by the record. Based on a detailed declaration by process server Tim Hedgpeth, the court found that Veristone was properly served with the three original complaints on May 30, 2018. The court also found—and Veristone *admitted*—that it received the three amended complaints on July 12, 2018. Yet still, Veristone failed to appear and answer. The trial court found this “interesting,” and noted that at the very least, receipt of the amended complaints should have “triggered something.” VR at 30:14-31:6.

It was not until August 7, 2018 (more than 2 months after service of the original complaints) that Veristone emailed Milwaukie requesting copies of the three default judgments. Not once during this exchange did Veristone claim that it was never properly served. CP 954. On August 13, 2018, counsel for Veristone contacted Milwaukie to discuss the case and at no point during that conversation did counsel state that Veristone was not properly served. CP 851. Veristone's motion to vacate, filed on August 23, 2018, was the first time that Milwaukie learned that Veristone disputed service. *Id.* By that point, 104 days had expired since Milwaukie filed its

three actions.

In Washington, a lien foreclosure action is void against a fellow lienholder unless the foreclosing party completes service within 90 days of filing. *Bob Pearson Constr. v. First Cmty. Bank*, 111 Wn. App. 174, 43 P.3d 1261 (2002); see also *Queen Anne Painting v. Olney & Assoc.*, 57 Wn. App. 389, 393, 788 P.2d 580 (1990) (mechanic's lien action void where plaintiff failed to serve all parties with recorded lien interests within 90 days); RCW 60.04.141 ("No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time . . . and service is made upon the owner of the subject property within ninety days of the date of filing the action").

Veristone's motive for quietly waiting 90 days was strategic: if Veristone could successfully argue that it was not properly served within 90 days, Milwaukie's liens would be invalid against Veristone's purported \$7.5 million in security. *Bob Pearson*, 111 Wn. App. at 174. Before the 90 days, Milwaukie could cure any alleged service issue; but once 90 days passed that chance was gone. If Veristone's strategic default was successful, Milwaukie would lose not only the judgment, but any opportunity thereafter to show that it has priority over Veristone. Veristone's multiple deeds on the three small residential properties in

Southwest Washington would more than wipe out the value of the properties and Milwaukie would be left with nothing to compensate it for the lumber it provided.

Veristone now argues that its multiple defaults could not have been strategic because, following a 1992 amendment, RCW 60.04.141 only requires the lien claimant to serve the *owner* of the property within 90 days to preserve its lien and not other “necessary parties” such as Veristone. Appellant’s Brief at 23-24. That argument is a red herring. Regardless of the 1992 amendments, the law continues to be that if Milwaukie failed to serve Veristone within 90 days of filing, Milwaukie’s claim would fail as to Veristone. *Bob Pearson*, 111 Wn. App. at 179.³ *Bob Pearson* addressed the impact of a lien claimant’s failure to serve other lienholders within 90-days of the lien foreclosure deadline. *Id.* at 177. This Court held that where a lien claimant failed to serve two lenders who had recorded deeds of trust against the property within 90 days after filing, that lien claimant lost its lien rights against those two lenders. *Id.* at 179.

The same result would occur here if Milwaukie failed to properly

³ Milwaukie’s response to Veristone’s motion to vacate in the trial court cited to *Queen Anne Painting v. Olney & Assoc.*, 57 Wn. App. 389, 393, 788 P.2d 580 (1990). Veristone never disputed that *Queen Anne* was good law until this appeal. *Queen Anne* has never been overruled. Even if *Queen Anne* does not apply to Milwaukie’s claims against Veristone, the *Pearson* case certainly does and the effect is the same.

serve Veristone within the 90-day window which ended just days before Veristone revealed its service defense. Whether Milwaukie's lien would be completely void, as was the case in *Queen Anne Painting*, or whether it would just be void as against Veristone, as was the case in *Bob Pearson*, makes no material difference. Veristone's motive to establish an unfair advantage is unchanged. In either case, because of the size of Veristone's purported deeds, Milwaukie would be left with nothing to show for the materials it indisputably provided to the properties.

It merits emphasis that Veristone could have raised its service defense after receiving the three amended complaints, but it did not. Veristone also could have raised the service issues when it contacted counsel and requested copies of the three default judgments on August 7, 2018, but it did not. If Veristone had timely raised the service issue, Milwaukie could have cured any alleged deficiencies.

The trial court's conclusion that Veristone's default was willful is supported by the evidence: (1) Veristone was properly served with copies of the original summonses and complaints; (2) Veristone admitted receiving the amended complaints; (3) despite learning about the amended complaints and even the default judgments prior to the running of the 90 day window, Veristone waited until after that window passed before raising its service defense. If successful, Veristone would have gained an additional defense

against Milwaukie's liens.

When “an informed judge, aware of the [facts], exercised [her] discretion with the facts and theory of the defense known to [her], there was no error.” *Griggs v. Averbek Realty*, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979) (upholding denial of motion to vacate default judgment because it could not be said that no reasonable person would take the position adopted by the trial court); *Roth v. Nash*, 19 Wn.2d 731, 740, 144 P.2d 271 (1943) (upholding default judgment where the trial judge credited one side's testimony over the other; “[t]he evidence was certainly sufficient to support the court's conclusion, and we are in no position to say, from the record before us, that the court erred in that respect”). The Court should affirm the judgments on this basis alone.

2. Veristone's Failure to Appear Was Also Unexcused Under CR 60(b)(1)

Even if no reasonable jurist could have found that Veristone's default was willful, this Court should still affirm the trial court's decision denying the motions to vacate because (1) Veristone's failure to appear was, in the very least, unexcused, (2) Veristone's defenses to the three actions are merely *prima facie*, and (3) as a result of Veristone's delay, Milwaukie will suffer significant hardship if vacatur is granted. *White*, 73 Wn.2d at 352.

a. Veristone's Failure to Appear Was Not Excusable Neglect

Excusable neglect is defined as a failure to take a proper step “not because of the party’s own carelessness, inattention, or willful disregard of the court’s process, but because of some unexpected or unavoidable hindrance or accident or because of reliance on the care and vigilance of the party’s counsel or on a promise made by the adverse party.” BLACK’S LAW DICTIONARY (11th ed. 2019). Courts have found excusable neglect where a defendant mistakenly believed he had hired an attorney, or where there was a misunderstanding between a risk manager and paralegal. *Kain v. Sylvester*, 62 Wn.151, 152, 113 P. 573 (1911); *Showalter*, 124 Wn. App. at 514. In the seminal case of *White v. Holm*, for example, the court found that the defendant’s failure to appear was excused where he presented evidence that he had immediately provided the complaint to his insurance company and was assured that they had or would shortly appoint counsel to represent him. *White*, 73 Wn.2d at 350. In all of these cases, the defendants presented evidence that their failure to appear and defend was due to some outside happening that was beyond their control.

On the other hand, the general rule is that “if a company’s failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable.”

TMT, 140 Wn. App. at 212. To this end, courts routinely uphold default judgments where a party simply misplaces the papers or fails to take necessary steps to retain counsel. *Id.* (upholding default where legal assistant forgot to enter dates in system); *Johnson v. Cash Store*, 116 Wn. App. 833, 848, 68 P.3d 1099 (2003) (“If a company fails to respond to a complaint because someone other than general counsel accepted service of process and then neglected to forward the complaint, the company’s failure to respond is deemed due to inexcusable neglect”); *Prest*, 79 Wn. App. at 100 (general counsel’s failure to respond due to misplacing papers in office not excusable neglect; reversing order vacating default); *Boss Constr., Inc. v. Hawk’s Superior Rock, Inc.*, 2017 Wash. App. LEXIS 2629 (Div. II Nov. 17, 2017) (failure to respond due to breakdown of internal office procedure is not excusable neglect) (collecting cases); *Pacific Coast Paper Mills v. Pacific Mercantile Agency*, 165 Wn. 62, 4 P.2d 886 (1931) (reversing order vacating default, despite meritorious defense; evidence that office could not recall being served insufficient); *Beckett v. Cosby*, 73 Wn.2d 825, 440 P.2d 831 (1968) (no abuse of discretion in denying a motion to vacate where defendant was lulled into inattentiveness by telephone conversations with the plaintiff’s attorney). Federal courts similarly refuse to set aside default judgments where the failure to appear resulted from mere carelessness by the defendant. *Commercial Courier Serv.*, 13 Wn. App. at 107 (citing 7 J.

Moore, FEDERAL PRACTICE 254 (1974)).

Trial courts considering motions to vacate are permitted wide berth in resolving factual disputes over whether a failure to appear was due to excusable or inexcusable neglect. In *Beckett*, 73 Wn.2d 825, the Washington Supreme Court was presented with the question of whether “[the reviewing] court can say that the trial court manifestly abused its discretion in denying a motion to vacate” where the defaulting defendants presented evidence that the plaintiff had lulled them into believing that no further proceedings would be taken until a meeting could be arranged. *Id.* at 831, 828. The court cited a number of cases in which appellate courts have deferred to a trial court’s resolution of factual disputes over the reason for the default. *Id.* at 829-830. The court found no manifest abuse in the trial court’s resolution of the factual disputes presented.

Veristone’s original “excuse” for failing to appear was contained in an affidavit by its registered agent stating little more than she did “not recall” being served with the original three complaints and could not find any record of service. CP at 57-58. The affidavit did not contain any explanation for who Mr. Hedgpeth may have actually served, since he testified that he served a woman at Veristone’s offices who affirmatively identified herself as Veristone’s agent for service of process. Veristone presented no other corroborating evidence, such as declarations from the

receptionist Mr. Hedgpeth spoke to. Veristone's affidavit was similarly silent as to Veristone's receipt of the three amended complaints, which Veristone later admitted it had received (but only on reconsideration, after the trial court refused to vacate the judgments). *Id.*

Neither the original affidavit nor the affidavit Veristone submitted in support of its motion for reconsideration provided any plausible explanation for what might have occurred that led to Veristone ignoring the original three summonses and complaints that were served on it in May 2018. *Id.* With respect to the amended complaints, which Veristone later admitted receiving, it argued that it believed they were provided "merely as a courtesy copy." CP at 984. At best, the trial court was left to speculate that there must have been a breakdown in Veristone's office procedures for handling service of process. That is not excusable neglect.

In *Commercial Courier Serv.*, 13 Wn. App. 98, the defendant submitted evidence that he thought the plaintiff was just "bluffing" when he served the complaint, and that defendant mistakenly believed he had 60 days to respond. *Id.* at 101. The trial court refused to vacate the judgment, and the court of appeals agreed, noting that "it is difficult to conclude other than that defendant's noncompliance with that process was likely willful, and if not, was at least due to inexcusable neglect." *Id.* at 106.

Prest, 79 Wn. App. 93, 900 P.2d 595 (1995) is also instructive.

There, a copy of the summons and complaint was received by the designated agent. *Id.* at 100. Nevertheless, the defendant failed to answer the complaint. *Id.* at 96. Its excuse was that the individual was out of town and the file just sat unattended. *Id.* The court found that “[w]hile certainly [defendant’s] failure to answer was neglect, it was not excusable.” *Id.* “The most that can be said is that [defendant] acted with due diligence after it learned that the default judgment had been entered. That does not, however, provide it with a defense or excuse its neglect.” *Id.*

Nor can Veristone prevail in showing excusable neglect based on its service defense. A defendant attempting to challenge an affidavit of service “bears the burden of showing by clear and convincing evidence that the service was improper.” *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010); *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991); *Allen v. Starr*, 104 Wn. 246, 247 (1918). Clear and convincing evidence “exists when the evidence shows the ultimate fact at issue to be highly probable.” *Burrell v. State*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999). If the defendant presents unequivocal evidence challenging the affidavit of service that cannot be resolved without evaluating witness credibility, the trial court retains the discretion to hold an evidentiary hearing. Compare *Leen*, 62 Wn. App. at 479-480 (equivocal affidavits did not adequately rebut affidavit of service and did not require a hearing), with

L.D.M. Worldwide Corp. v. Dalman, 2014 Wn. App. LEXIS 291 at *14-18 (Feb. 3, 2014) (unequivocal and conflicting factual representations merit evidentiary hearing).

An affidavit of service is “presumptively correct” and provides *prima facie* evidence that service of process was properly executed. *Streeter-Dybdahl*, 157 Wn. App. at 412. In *Leen v. Demopolis*, the defendant appealed the trial court’s refusal to set aside default judgment based on an alleged lack of proper service. 62 Wn. App. at 475. The plaintiff provided valid proof of service with an affidavit of a third-party stating that he had personally served the defendant,⁴ records of payment for serving the papers, and a billing statement from an attorney for travel to retrieve the affidavit of service. *Id.* at 479. The defendant attempted to rebut this evidence with a declaration stating that he found the complaint in his mailbox without a summons and evidence that he was at a restaurant at the time when he was allegedly served at his business. *Id.* at 475, 479. On appeal, the court held that the defendant had failed to present clear and convincing evidence that service was improper. *Id.* at 478; *see also Woodruff*, 76 Wn. App. 207, 210 n.1, 883 P.2d 936 (1994) (characterizing

⁴ The third party was not a professional process server but instead a former client of the plaintiff who personally knew the defendant and agreed to deliver the summons and complaint to the defendant.

the evidence presented by the defendant in *Leen* as “equivocal”). Accordingly, the trial court did not abuse its discretion when it credited the affidavit of service and corroborating evidence and refused to vacate the default. *Id.* at 479; *Northwick v. Long*, 192 Wn. App. 256, 364 P.3d 1067 (2015) (upholding default judgment where trial court credited certificate of service and corroborating evidence over defendant’s evidence that no service occurred).

Veristone’s argument that it was not properly served relies wholly on a self-serving affidavit that its registered agent does “not recall” receiving service. There is no corroborating evidence, such as declarations from others in the office, to suggest that service did not in fact occur. Nor does the declaration attach any business records confirming that Milwaukie’s summonses and complaints do not actually appear in Veristone’s records. The lack of corroborating affidavits and evidence distinguishes this from cases such as *Woodruff* and *L.D.M.* in which the defendants each presented multiple non-party affidavits to buttress their own statements that they were not served at the time and place alleged by the plaintiffs. *Woodruff*, 76 Wn. App. at 209; *L.D.M.*, 2014 Wn. App. LEXIS 291. Veristone’s equivocal statement that it does “not recall” being served with the original three summonses and complaints falls far short of the clear and convincing evidence required to rebut a valid affidavit of

service.

In contrast, Milwaukie presented substantial evidence corroborating the affidavit of service. First, though Veristone challenges Mr. Hedgpeth's physical description of Ms. Good,⁵ Mr. Hedgpeth's declaration fairly describes Ms. Good as "about 40 years old, roughly 5'5" and about 140 lbs with brown hair." CP 823. It includes contemporaneous notes Mr. Hedgpeth made at the time of service describing Ms. Good's appearance and provides a detailed description of his interaction with Veristone's receptionist and Ms. Good. *Id.* Finally, Milwaukie provided the court with copies of the invoices for service of process on Veristone from Nationwide, Mr. Hedgpeth's employer. CP 1615. The invoices reference the specific date and time when service was executed and identify Ms. Good as the individual who received the three summonses and complaints. The trial court did not err in crediting this evidence of service over Veristone's inability to recall being served.

b. Veristone's Defenses Were Not Conclusive

Veristone appears to take the position that its defenses (at least as to Lots 3 and 4) are so strong as to render unnecessary any inquiry into the

⁵ It is notable that the declaration of service filed in support of a different default judgment against Veristone describes Ms. Good in a similar fashion as Mr. Hedgpeth described her. CP 1757.

reason for its failure to appear. Neither the law nor the facts support this conclusion. Trial courts are directed to consider *two* primary factors: (1) whether the defendant has presented substantial evidence of a *prima facie* defense; and (2) whether the defendant's failure to appear was due to excusable neglect. While a stronger defense may cause a trial court to give less attention to the excuse for failing to appear, both factors are "primary" and must be established by the moving party before the trial court can exercise its discretion to vacate the order. A strong defense will not excuse inexcusable neglect. In *Prest*, this Court reversed a trial court's order vacating a default judgment, explaining that "the trial court apparently concluded that Bankers's burden to explain why it failed to answer was of less importance than the requirement it establish a defense. We are satisfied that the *White* requirements are of equal importance and that the trial court was incorrect in concluding otherwise." *Prest*, 79 Wn. App. at 99.

In any event, the evidence that Veristone presented of its defenses was far from conclusive. With respect to Lot 2, Veristone concedes that Milwaukie began supplying the property before Veristone recorded its four deeds. Thus, under RCW 60.04.061, Milwaukie's lien would appear to have priority. Nevertheless, Veristone argues that one of its four deeds of trust should be equitably subrogated to a 2016 deed of trust.

The evidence that Milwaukie submitted to the trial court in support

of its Lot 2 defense consisted of two paragraphs in a business records declaration signed by its registered agent. CP 777-778. It states that Veristone recorded a deed of trust against Lot 2 in 2016, purporting to secure a \$537,042.39 loan. *Id.* at ¶ 2. It goes on to state that on July 19, 2017, the borrower obtained a second loan of \$640,159.98, part of the proceeds of which allegedly went to pay off the 2016 loan, and that “Veristone reasonably expected to receive a security interest in the real estate with the priority of the First Deed of Trust.” *Id.* at ¶ 3.

Veristone’s defense is ripe with issues of fact. To start, Veristone fully reconveyed its 2016 deed of trust. CP 939. It recorded no subordination agreement that would have allowed it to assume the priority of the reconveyed deed or given notice to other lien holders that that was its intention. Veristone’s 2017 deeds make no mention of any “first” deed. It submitted no corroborating evidence, aside from self-serving hearsay, that the secured loan was actually used to pay off the “first” deed. It attached no business records to substantiate its claims, nor did it establish that the affiant had personal knowledge of the payoff. CP 939. (Veristone submitted an unauthenticated “Final Refinancement Statement” from a title company in support of its motion for reconsideration, after the trial court denied its motion to vacate, but even then it failed to submit any evidence of actual funding or payoff). CP 1072.

Not only are the facts inconclusive, but the law does not support Veristone's defense to the Lot 2 action. Milwaukie was unable to find a single Washington case in which equitable subrogation was applied to a bank like Veristone that allegedly refinanced its own loan, for more money, and was thereby equitably subrogated to itself. That would appear to be an improper use of equitable subrogation. *Columbia Cmty. Bank v. Newman Park, LLC*, 166 Wn. App. 634, 644, 279 P.3d 869 (2012) ("equitable subrogation may arise when one pays or performs in full an obligation **owed by another** and secured by a mortgage") (emphasis added); RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 7.6, notes ("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.**") (emphasis added). Veristone may have argued its novel equitable subrogation theory as a defense to Lot 2 had it chosen to appear and answer, but the evidence it presented to the trial court in support of its motion to vacate was far from conclusive.

Veristone's defenses to the Lot 3 and 4 claims do not fare much better. Its initial evidence of a defense consisted of a single paragraph in a declaration signed by its registered agent stating that the owners of those two lots had executed a deed of trust for each lot to secure repayment of related promissory notes, and that each of the two deeds were recorded on

July 26, 2017. CP 57 (Lot 3); 1503 (Lot 4). The only documents that Veristone attached were copies of the two recorded deeds. *Id.* Veristone did not attach copies of the promissory notes. It did not submit any evidence whatsoever that the loans were ever funded. And its declaration was silent as to the other three deeds of trust that it had recorded against the two lots. *Id.*

After its motions to vacate were denied, Veristone attempted to supplement the record on reconsideration by submitting a second declaration of its registered agent, this time avowing that the various loans had been made to finance construction of four separate lots (Lots 2, 3, 4 and 5) and that all four had been “internally refinanced” with new loans in July of 2017. CP 980-985 (Lot 2); 214-219 (Lot 3); 1657-1662 (Lot 4). There is no evidence that the affiant had personal knowledge of the alleged refinances. Nor is there any evidence that any of the loans was ever funded and, if so, to what extent.

Veristone argues that the mere fact that it recorded its deeds of trust against Lots 3 and 4 before Milwaukie began supplying to those specific lots (but long after Milwaukie commenced supplying the development in general) is conclusive of Veristone’s priority. The law is not so simple. In *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973), the Washington Supreme Court was faced with the question of

whether a materialman's lien claim could be superior to a previously recorded deed securing a construction loan (like Veristone). In that case, the material supplier's lien was declared inferior to the bank's deed of trust because the deeds had been in effect before the delivery of the lumber. *Id.* at 895. The supplier argued that any construction advances made on the loan were optional, not obligatory, and therefore were entitled to priority only on the date they were actually made, rather than the date of recording. *Id.* at 896. "If they were optional, then under the principles adopted by [the Court], [the material supplier's] lien for lumber delivered and utilized in the apartment house project should be superior to that of the bank's deed of trust insofar as advances made subsequent to the materialman's perfected lien are concerned." *Id.* The Court found that the bank's agreement with the borrower rendered the advances optional, and therefore held that the bank's deeds were not entitled to priority despite their prior recording date. *Id.* at 899-900 (noting that "[t]he rule here contended for by lender would lead to an inevitable unjust enrichment, enabling the lender to withhold or apply the loan money as he saw fit, all the while knowing that putative lien claimants were furnishing valuable materials and doing valuable work to the enhancement of his security").

There were also questions surrounding Veristone's conduct in recording four separate deeds for each of the three lots, all on the same day.

The various deeds appear to be for the same amounts, but are separate deeds, that make no reference to one another. The total amount that Veristone purports to secure on each lot is \$2,453,777. Thus, on the face of the deeds, Veristone claims that it loaned more than \$7.5 million for three as-yet developed residential lots. The trial court expressed suspicion regarding these deeds, which no-where mention Veristone's "cross collateralization" theory. VR 33:14-34:10 ("[T]he cross-collateralization issue disturbs me").

Thus, contrary to Veristone's contention, the recording date of its deeds on Lots 3 and 4 is not conclusive of their priority. In the absence of any evidence of actual funding of the loan, or any evidence of the terms of the construction agreement, the trial court acted well within its discretion in finding that there were "questions" about Veristone's defenses. VR 33:14-34:10.

c. Veristone's Strategic Delay Harms Milwaukie

Veristone's contention that it has "never been disputed" that it acted diligently is not well taken. Appellant's Brief at 25. To be sure, Veristone filed its motion to vacate well within one year. However, diligence must be considered in context and in conjunction with the nature of the harm done. Here, Veristone's strategic delay of 104 days in asserting its defenses resulted in significantly increased harm to Milwaukie. Had Veristone

simply appeared and defended upon receipt of the amended complaints, Milwaukie could have cured any alleged deficiencies with service. By waiting more than 90 days and then asserting a service defense, however, 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.

This is not, as Veristone contends, an argument that vacating the defaults would result in Milwaukie losing on the ordinary merits. To the contrary, the harm here arises solely from Veristone's strategic delay and the risk that Milwaukie will be prevented from presenting its case on the merits. *See, e.g., Woodstream Constr. Co. v. Van Wolvelaere*, 143 Wn. App. 400, 409, 177 P.3d 750 (2008) (declining to apply equitable tolling to supplier's lien claim where it was not served within 90 days; "RCW 60.04.141 is a statute of limitations on the duration of a mechanics' lien. Consequently, the lien and the right to enforce it expire with the statutory period."). The additional defense Veristone sought to obtain by its delay would effectively prevent Milwaukie from recovering anything, regardless of the validity of its claims.

3. There Was No Irregularity Under CR 60(b)(1)

An "irregularity" within the meaning of CR 60(b)(1) "has been defined as the want of adherence to some prescribed rule or mode of

proceeding; and it consists either in the omitting to do something that is necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable time or improper manner.” *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978).

Veristone relies on *Mosbrucker v. Greenfield Implement, Inc*, 54 Wn. App. 647, 652, 774 P.2d 1267, 1270 (1989), to argue that Milwaukie’s failure to specifically plead the recording date of Veristone’s deeds was an irregularity because “[h]ad 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.” Appellant’s Brief at 28. Veristone’s argument is circular. The whole point of Milwaukie’s lawsuits was to determine priority. *Mosbrucker* stands for the unremarkable proposition that before entering judgment on a breach of contract claim, the trial court must at least have the subject contract in the record. Here, the court was not entering judgment on the merits of Veristone’s deeds, it was just determining priority.

In any event, the trial judge was well aware of Veristone’s twelve deeds of trust. It carefully considered them and found the cross collateralization argument and the \$7.5 million in security on the three residential lots “disturbing,” despite knowing that the deeds on Lots 3 and

4 were recorded prior to Milwaukie's lien. VR 33:14-34:10. The court considered this evidence and, contrary to Veristone's argument, found that there were factual issues concerning Veristone's defenses. *Id.* In other words, the trial court considered Veristone's deeds and *still* upheld the default judgment. These findings undermine Veristone's assertion that the default judgments would not have been entered if the trial court were aware of the recording dates of its deeds.

Veristone's citation to *Worden v. Smith*, 178 Wn. App. 309, 314 P.3d 1125 (2013), does not support its contention that it was an irregularity for the trial court to grant default judgment on Milwaukie's claims of priority without first considering the recording date of Veristone's deeds. *Worden* stands for the general premise that senior lienholders are unaffected by the foreclosure of a junior lien. It does not provide authority for Veristone's contention that Milwaukie was required to plead the recording dates of Veristone's deeds, or was otherwise prohibited from naming Veristone as a party for the purposes of challenging the priority of its liens.

As set forth above, the recording dates are not dispositive of priority. Moreover, there is no requirement under Washington law for a plaintiff to present and rebut an opponent's potential defenses at the outset. Washington is a notice pleading state. CR 8 ("Washington follows notice pleading rules and simply requires a 'concise statement of the claim and the

relief sought”).

Milwaukie’s complaint put Veristone on notice that Milwaukie was claiming priority over its deeds of trust. As set forth more fully above, Milwaukie had a good faith basis for asserting priority in all three cases. That was all that the law required.

The trial court similarly acted within its discretion when it declined Veristone’s invitation to set an evidentiary hearing on the issue of service. Milwaukie submitted detailed, contemporaneous evidence confirming that Veristone was personally served with copies of all three summonses and complaints on May 30, 2018. Veristone’s response consisted of a self-serving affidavit stating that Ms. Good did “not recall” being served. Having no recollection of being served is a very different thing than not being served. There was no reason to call an evidentiary hearing because Veristone failed to submit clear and convincing evidence that service was improper. *Leen*, 62 Wn. App. at 479-480 (equivocal affidavits did not adequately rebut affidavit of service and did not require a hearing).

Woodruff v. Spence, 76 Wn. App. at 210, does not require a different result. It merely held that a trial 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” and to assess witness credibility (*i.e.* in a he said/she said scenario). *Woodruff* does not apply here because there was no he

said/she said. No credibility determination was required.

B. Veristone's Challenges to the Substance of the Underlying Judgments are Without Merit

Veristone attacks the substance of the underlying default judgments in two regards. First, it challenges the trial court's application of a 2% monthly interest rate, as called for by Milwaukie's contract with the owners of the properties. Second, it attacks the attorney fees that the trial court awarded as part of Milwaukie's judgments. An appellate court does not question the underlying merits of a judgment on review of a denial of a motion to vacate. *Santos*, 104 Wn.2d at 145; *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-451, 618 P.2d 533 (1980). The Court should decline Veristone's invitation to address the merits of the underlying default judgments. Veristone waived its right to challenge those merits when it chose not to appear and defend.

Nevertheless, to the extent the Court is inclined to address the merits of these issues, Milwaukie provides the following by way of response.

1. The Judgments Apply the Appropriate Interest Rate

Veristone argues that a "late payment charge of 2% per month" does not mean "2% interest on unpaid amounts." Appellant's Brief at 34. Courts have not been so limiting when defining "interest." *See Smiley v. Citibank (s.D.), N.A.*, 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). "Interest is the compensation allowed by law, or fixed by the parties, for the use or

forbearance of money or as damages for its detention.” *Id.* at 745; *see also* BLACK’S LAW DICTIONARY at 936 (10th ed. 2019) (“[t]he percentage that a borrower of money must pay to the lender in return for the use of money”). Whether referred to as a “charge,” “fee,” or “fine,” courts have determined that such rates are indeed “interest.” *Smiley*, 517 U.S. at 745 (citing *Hollowell v. Southern Bldg. & Loan Ass’n*, 120 N.C. 286, 287, 26 S.E. 781 (1897) (“any charges made against him in excess of the lawful rate of interest, whether called fines, charges, dues or interest are, in fact, interest and usurious”)).

Milwaukie’s agreement with the borrowers provided as follows:

. . . Invoices are considered past due on the 12th of the month. **A late payment charge of 2% per month will be assessed after the 26th (\$2 minimum).** Applicant agrees to pay reasonable attorney fees, cost of collection and court costs that may arise in the enforcement of these terms. . . .

CP 764.

Veristone states that “there are no late payments” (Appellant’s Brief at 34), but the entire basis of this case is a claim of lien because Milwaukie was not paid at all, let alone by the 12th of the month that the payment came due. The contractual “late payment charge of 2% per month” applies and accrues as interest. Other Washington courts have agreed. *Xebek, Inc. v. Nickum & Spaulding Assocs.*, 43 Wn. App. 740, 718 P.2d 851 (1986). In

Xebek, the contract at issue provided that “Contractor will submit invoices twice monthly for services rendered under this Agreement. The terms of payment are net thirty (30) days, **or a 1-1/2 percent per month late charge will become effective.**” *Id.* at 743 (emphasis added). Even though the contract referred to the 1-1/2 percent per month as a “late charge,” the *Xebek* court applied it as “interest,” compounded at the rate of 18% per year, which the court then applied as the post-judgment rate. The language in Milwaukie’s agreement with the borrowers is similar.

In the *TJ Landco* case cited by Veristone, 186 Wn. App. at 257, the court stated that “parties can contractually account for interest in case of the possibility of breach. Chief Justice Taney long ago observed: ‘The contract being entirely silent as to interest, if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract.’” *Id.* at 257 (quoting *Brewster v. Wakefield*, 63 U.S. (22 How.) 118, 127, 16 L. Ed. 301 (1860)). Milwaukie’s agreement is not “entirely silent” as to the interest rate. The 2% monthly “late payment charge” was intended as interest on unpaid amounts. There is no requirement that the contract use the term “interest.” After reviewing the agreement and the evidence, the trial court properly applied a 2% per month post-judgment interest rate. There was no error.

2. The Court Acted Well Within its Discretion by Including Attorney Fees in the Judgment

The court's award of attorney fees were expressly authorized by RCW 60.04.181(3). The court was not required to enter separate findings of fact and conclusions of law when it included those fees as part of the judgments. Veristone's argument overlooks the express language of CR 55(b)(1), which provides in relevant part:

When Amount Certain. When the claim against a party, whose default has been entered under section (a), is for a sum certain or for a sum which can by computation be made certain, the court upon motion and affidavit of the amount due shall enter judgment for that amount and costs against the party in default, if the party is not an infant or incompetent person. . . . *Findings of fact and conclusions of law are not necessary under this subsection even though reasonable attorney fees are requested and allowed.*

(Emphasis added).

Milwaukie sought, and was granted, judgment for an amount certain on its mechanic's lien pursuant to CR 55(b)(1), which unambiguously provides that "findings of fact and conclusions of law are not necessary under this subsection even though reasonable attorney fees are requested and allowed." Veristone's argument would render this language meaningless. None of the cases cited by Veristone in support of its assertion

that the trial court was required to enter findings of fact supporting the attorney fees portion of the judgment involved a default judgment. *See Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000) (judgment following bench trial); *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013) (judgment following jury trial). The trial court did not abuse its discretion.⁶

B. The Trial Court's Award of Sanctions Was Proper

Veristone had notice of Milwaukie's request for CR 11 sanctions because Milwaukie requested sanctions for having to respond to Veristone's frivolous objections to Milwaukie's motions for entry of judgment. CP 1261. The parties argued whether sanctions were appropriate to the trial court. VR 58:2-24; 78:2-11; 83:9-17. Ultimately, the trial court granted the request for sanctions. CP 689; 1412; 2132. While Veristone filed a motion for reconsideration, it has not followed up in any way for a ruling on that motion.

⁶ Even if the trial court was required to enter findings of fact and conclusions of law supporting an award of attorney fees in a default, the proper remedy would be to remand for entry of findings, and not vacation of the default. *Little*, 160 Wn. App. at 707 ("We note that if more formal findings of fact and conclusions of law were necessary for appellate review, remand for their entry would be appropriate, not vacation of the default judgment.").

Veristone argues that the orders were in error because the court did not enter findings. Appellant's Brief at 36. To the extent there is an insufficient record for review, the appropriate remedy would be to remand the issue, with instructions for the trial court to enter appropriate findings on the record supporting the award. *See Little*, 160 Wn. App. at 707.

C. Veristone Has No Valid Basis to Request Fees

Veristone's request for attorney fees pursuant to RCW 60.04.181 is not well taken. RCW 60.04.181 permits the prevailing party in a mechanic's lien foreclosure action to recover its reasonable fees. Even if Veristone were to succeed in getting the default judgments vacated, it would not be the prevailing party on the merits. Furthermore, it would be entirely inequitable for force Milwaukie, as a small material supplier, to fund Veristone's endless litigation that was caused exclusively by its own failure to appear and defend. For this reason, even in the event that one or more of the defaults are vacated, Washington law supports an award of fees to Milwaukie to compensate it for the costs it was forced to incur as a result of the defaulting party's conduct. CR 60(b)(allowing vacatur "upon such terms as are just"); *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 192, 19 P.3d 1081 (2001); *White*, 73 Wn.2d at 587. Under no circumstances should Veristone be entitled to fees.

D. Milwaukie is Entitled to Recover Fees on Appeal

Milwaukie respectfully requests an award of its attorney fees incurred on appeal under RCW 60.04.181(3) and RAP 18.1. Milwaukie has been forced to incur significant attorney fees defending against Veristone's multiple motions in the trial court, numerous post-judgment pleadings, three ill-conceived motions for discretionary review (filed just weeks before the entry of final judgment), and now a consolidated appeal—all because Veristone chose not to respond to the summonses and complaints.

Should the Court find that one or more of the trial court's orders was an abuse of discretion and direct that a default be vacated, Milwaukie requests an award of its fees in equity, to compensate it for amounts it occurred in dealing with Veristone's default. CR 60(b) (allowing vacatur "upon such terms as are just"); *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 192, 19 P.3d 1081 (2001); *White*, 73 Wn.2d at 587.

VII. CONCLUSION

For all the foregoing reasons, the Court should affirm the trial court's orders in all respects, and award Milwaukie its reasonable attorney fees incurred on appeal.

Dated: March 12, 2020

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 12th day of March, 2020, I served the foregoing **RESPONDENT MILWAUKIE LUMBER'S ANSWERING BRIEF** on the following parties and/or counsel of record via *Electronic Court E-Service* as follows:

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March 12, 2020 - 12:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53175-5
Appellate Court Case Title: Milwaukie Lumber, Respondent v. Popick and Veristone, et al., Petitioner
Superior Court Case Number: 18-2-01115-2

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