

FILED

AUG 11 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290778

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

OB-1, L.L.C.,

Appellant,

v.

**JONATHAN PINSON, an individual; and
STAN VINSON, an individual,**

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

In this case, Defendants were given advance notice that Plaintiff intended to pursue a lawsuit against them. Plaintiff requested that Defendants' attorneys in a related matter accept service. When the attorney refused, Plaintiff properly served Defendants and had no contact with them thereafter. Defendants failed to respond in any manner, and Plaintiff properly obtained a default judgment.

Much later, Defendants sought relief under CR 60(b)(4), which authorizes trial courts to vacate default judgments for fraud, misrepresentation, or other misconduct.¹ Vacating a default judgment for one of the grounds enumerated in CR 60(b)(4) requires proof by clear, cogent, and convincing evidence that the alleged fraud, misrepresentation, or misconduct prevented the defendant from "fully and fairly presenting its case or defense." Peoples State Bank v. Hickey, 55 Wn. App. 367, 373, 777 P.2d

¹ Defendants also sought relief under CR 60(b)(6) and CR 60(b)(11), but in its ruling the trial court expressly declined to vacate the default judgment on these grounds, or to even consider them. (CP 152).

1056 (1989), rev. denied 113 Wn.2d 1029. The record shows there was no probative evidence establishing fraud, misrepresentation, or other misconduct on the part of Plaintiff which in any manner prevented Defendants from defending or raising any defense they wished. Defendants have conceded that the sole reason they failed to respond to the summons and complaint was because they erroneously believed it related to the Cascades matter. Even more problematic, the record is devoid of evidence—*especially clear, cogent, and convincing evidence*—showing that Plaintiff made any statements or misrepresentations to Defendants that they did not need to respond, or which prevented them from fully and fairly presenting their case or defense. Indeed, Defendants have never even claimed they relied on any such indications from Plaintiff.

The trial court erred and abused its discretion by vacating the default judgment. Defendants woefully failed to establish the necessary proof required by Hickey. Accordingly, this Court should reverse the trial court's ruling.

II. ASSIGNMENTS OF ERRORS

1. The trial court erred in entering the Order of April 23, 2010, granting Defendants' Motion to Vacate the Default Judgment entered on October 8, 2007.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. May a trial court vacate a default judgment for alleged fraud and/or misconduct pursuant to CR 60(b)(4) when there is no evidence that Plaintiff made any statements or misrepresentations to Defendants which prevented them from fully and fairly presenting their case? (Assignment of Error 1).
2. May a trial court rule that a party seeking a default judgment has a duty to disclose an order in a related matter to the presiding judge when Defendants were never a party in the related action? (Assignment of Error 1).
3. May a trial court base its decision to vacate a default judgment on speculation that the trial court judge who entered the default judgment might have acted differently if he had been presented information regarding a separate order he had entered in a related case? (Assignment of Error 1).

III. STATEMENT OF THE CASE

This is a case involving a 2001 agreement between Defendants and Basin Frozen Food, Inc. (hereinafter "Basin") to supply Defendants' company, Cascades Food Groups, Inc.

(hereinafter “Cascades”), with frozen potato products. Since making the agreement, Defendants have refused to pay for product received. (See CP 4-6). Plaintiff, an Idaho limited liability company and Basin’s successor in interest, filed suit in the Superior Court of Grant County against Defendants, claiming monies due under a piercing the corporate veil theory. (CP 4-8).

This matter is directly related to another action pending before the Superior Court of Grant County for some time, Cascades Food Group, Inc. v. Basin Frozen Foods, Inc., Grant County Cause No. 04-2-00447-7. In that case, Cascades filed suit against Basin and several other defendants, claiming substantial damages from an alleged breach of contract involving a potato processing plant in Warden, Washington. (CP 209-17).

In June 2001, Defendants signed two agreements with Basin: a “Lease Agreement” and a “Handshake Agreement Document.” (CP 235-37). Defendant Pinson signed as President of Cascades; Defendant Vinson signed as Secretary. (CP 5). At that time, Cascades was not an existing legal entity incorporated under

the laws of any state. (CP 402). As such, Defendants signed in their individual capacities.

In April 2004, Cascades filed the above-referenced matter against Basin and several other defendants, including OB-1. (CP 209-17). The Cascades matter was intensely litigated. There were a minimum of six hearings conducted in Grant County where the parties' counsel were present in person, as well as several other telephonic hearings. (CP 162). Judge Sperline was very involved in the matter and presided over a Summary Judgment Motion, a Motion for Reconsideration, a Stipulated Order, and a Motion discussing the entry of an Order Granting Partial Summary Judgment. (CP 440-54, 459-63, 464-67, 468-69). The summary judgment motion presented Judge Sperline with approximately one thousand pages of documents for his review.

In January 2005, Basin considered bringing third-party claims against Defendants. (CP 121, 162, 231-34). The basis of the claims was the same as those OB-1 brought in this case: Basin claimed Defendants were personally liable for the agreement with

it, since they had signed it in their individual capacities and not as agents of a valid existing entity. (CP 231-34).

Basin decided not to pursue the third-party complaint against Defendants to avoid delaying resolution of the Cascades matter. (CP 121). Defendants were not served with the third-party complaint; thus, it was never perfected or at issue. (CP 162).

Although unnecessary since the claim was never perfected, on July 19, 2005, the parties signed a stipulation dismissing Basin's third-party claims against Defendants. (CP 468-69). The stipulation was filed on December 13, 2006. (CP 469). It is important to note that at no time did any party to the Cascades litigation move to dismiss or resolve any claims against Defendants individually. (CP 123, 163).

Prior to dismissing the third-party complaint against Defendants, counsel for Basin (and now the undersigned counsel for OB-1) informed the counsel representing Cascades at that time of his intention to commence a separate action against Defendants. (CP 121, 163). This correspondence was sent to both the counsel

for Cascades and to the South Carolina firm representing Defendants. (CP 163).

On June 22, 2004, Basin moved for partial summary judgment against Cascades. (See CP 244). On December 31, 2005, Judge Sperline granted Basin's Motion in a lengthy memorandum opinion, ruling that Cascades was liable to Basin. (CP 440-54).

On April 4, 2005, Basin moved for clarification of the trial court's order, inquiring whether Basin was entitled to money damages. (CP 455-58). On September 5, 2006, Judge Sperline clarified his initial order, awarding Basin damages of \$268,618.55 against *Cascades*. (CP 464-67). The Order also instructed Basin to not seek to enforce the judgment against *Cascades* until final resolution of the litigation. (CP 465). Tellingly, the Order referred only to *Cascades*. (CP 464-67).

At the time of Judge Sperline's Order, counsel for Cascades never requested that any judge in Grant County enter any type of order preventing a claim against Defendants individually. (CP 108). Further, there was no request that Basin refrain from

attempting to collect any judgment made against Defendants. (CP 108-09). Moreover, that issue has never been addressed by any Grant County judge. (CP 109). Significantly, at the time of the oral arguments regarding the entry of the order, only Defendants' South Carolina attorneys attended and represented Cascades at the hearing. Cascades Seattle attorneys did not participate.

Counsel for OB-1 on several occasions inquired whether the Washington counsel that previously represented Cascades would accept service on behalf of Defendants in this action. (CP 122). Ultimately, counsel for OB-1 was specifically informed that that firm would not be representing Defendants individually in the new action Basin was preparing to file. (Id.). Accordingly, OB-1 had Defendants personally served in South Carolina. (CP 15, 122). After service, no one contacted counsel for OB-1 to discuss the claim against Defendants. (CP 122).

Defendants did not respond to the Summons and Complaint. Accordingly, on October 8, 2007, OB-1 mailed an *ex parte* Motion

for Default, Order of Default, and Default Judgment to Grant County, which Judge Sperline entered. (CP 13-14, 18-19, 20-21).

On June 6, 2009, Defendants moved to vacate the default judgment. (CP 22-35). Defendants acknowledged they had failed to timely respond, but claimed OB-1 had obtained the Default Judgment through misconduct by not informing Judge Sperline of his previous order in the Cascades action. (CP 22, 152).

Judge Knodell granted Defendants' Motion, ruling that OB-1 engaged in misconduct by not informing Judge Sperline "of the pending Cascades litigation, and, in particular, Judge Sperline's order granting summary judgment but prohibiting OB-1 from taking any steps to enforce that judgment." (CP 152).

Judge Knodell entered the Order on April 23, 2010. (CP 194-95). On May 6, 2010, Plaintiff filed its Notice of Appeal to Division III of the Court of Appeals. (CP 199-204).

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IV. ARGUMENT

A. LEGAL STANDARD

A motion to vacate a judgment is addressed to the sound discretion of the trial court. State v. Scott, 92 Wn.2d 209, 212, 595 P.2d 549 (1979). “On appeal, a trial court’s disposition of a motion to vacate will not be disturbed unless it clearly appears that it abused its discretion” Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526, 531 (1990). “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.” Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). The trial court’s discretion “is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles.” Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947).

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B. THERE IS NO EVIDENCE THAT PLAINTIFF MADE ANY STATEMENTS OR MISREPRESENTATIONS WHICH PREVENTED DEFENDANTS FROM FULLY AND FAIRLY PRESENTING THEIR CASE

In the instant case, the trial court vacated the Default Judgment on the grounds that Plaintiff's failure to notify Judge Sperline of his previous Order (September 5, 2006) in the Cascades matter constituted misconduct. (CP 156-160). This ruling was incorrect because the record is devoid of any substantive, probative evidence that the default judgment was entered as a result of fraud, misrepresentation, or misconduct by Plaintiff.

CR 60(b)(4) authorizes trial courts to vacate judgments for fraud, misrepresentation, "or other misconduct of an adverse party." CR 60(b)(4); Lindgren, 58 Wn. App. at 596. CR 60(b)(4) does not, "however, permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment." Id. In other words, the alleged fraudulent conduct, misrepresentation, or misconduct "*must be such that the losing party was prevented from fully and fairly presenting its case or*

defense.” Hickey, 55 Wn. App. at 372 (emphasis added). See also Lindgren, 58 Wn. App. at 596. Moreover, “[t]he party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by *clear and convincing evidence.*” Hickey, 55 Wn. App. at 372 (emphasis added). See also Dalton v. State, 130 Wn. App. 653, 665, 124 P.3d 305, 311 (2005); State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080, 1088 (1996) (“When fraud is the ground to set aside a judgment, the fraud must be shown by clear and convincing evidence.”); Goodman v. Bowdoin College, 380 F.3d 33, 48 (1st Cir. 2004), cert. denied, 543 U.S. 1055, 125 S.Ct. 919 (2005);

The clear, cogent, and convincing standard must be established by evidence that is “highly probable.” Dalton, 130 Wn. App. at 665. See also CJS EVIDENCE § 1624 (the clear, cogent, and convincing standard “reflects a heightened standard of proof that indicates that the thing to be proved is highly *probable or reasonably certain . . .*”) (emphasis added). Suspicion and speculation do not rise to the level of clear and convincing evidence. Hageny v. U. S.,

215 Ct. Cl. 412, 570 F.2d 924 (1978). Even a hint of fraud will not support a finding of fraud. Eastern School v. U. S., 381 F.2d 421, 434, 180 Ct.Cl. 676 (1967).

Hickey is the touchstone case in Washington on the vacation of default judgments for fraud or misconduct, and provides the correct analysis. It is instructive here.

In Hickey, the defendant divorced her husband in 1983 and the court awarded her a lien against her ex-spouse's property. Her ex-spouse then borrowed a large sum of money from the plaintiff, Peoples State Bank, using as security a portion of the property upon which the defendant had a lien. The defendant's ex-spouse eventually defaulted on the loan and the plaintiff filed a complaint for mortgage foreclosure, properly serving the defendant as a person "claiming an interest in the mortgaged property," but erroneously characterizing the defendant's interest as "inferior, subordinate and subject to the lien of the plaintiff" Id. This was notwithstanding the fact that the plaintiff was aware before it filed the complaint that the defendant had filed her lien at an

earlier date. Id. at 369. The defendant was then served with a copy of the complaint, failed to appear, and an order of default was entered. Id.

Two and a half years later, the defendant attempted to set aside the decree of foreclosure pursuant to CR 60(b)(4), claiming that she had not understood the meaning of the word “subordinate” in the complaint. Id. at 370. The trial court denied the motion and the court of appeals upheld the trial court’s decision. Id. The court noted that although the record made “a strong showing that the bank misrepresented the facts regarding Hickey’s lien,” nonetheless “vacation of the default judgment . . . [was] not warranted” Id. at 371.

The court based its opinion on two arguments. First, it stated that the defendant had been too dilatory in seeking to assert her rights. For example, the court emphasized that even though default judgments are generally disfavored, courts must also consider the need to bring finality and closure to judicial proceedings:

Default judgments are not favored in the law
Balanced against that principle is the necessity of
having a responsive and responsible system which
mandates compliance with judicial process and *is*
reasonably firm in bringing finality to judicial
proceedings. To now set aside the decree of
foreclosure in favor of a person who slept on her
rights for 2 1/2 years would *clearly undermine the*
salutary purposes served by finality of judgments.

Id. at 371 (emphasis added).

Thus, because the defendant had waited two and a half years
after receiving the complaint to contest it, the court concluded,
“vacation of the default judgment and the decree of foreclosure is
not warranted in this case” despite the misrepresentation. Id.

Second, and more importantly, the court found there was no
evidence that the defendant had relied on, or was misled by, any
misrepresentation in the complaint. Id. at 372. The court observed
that to vacate a default judgment under CR 60(b)(4), “the conduct
must be such that the losing party was prevented from fully and
fairly presenting its case or defense.” Id. Moreover, the alleged
fraud, misrepresentation, or misconduct must be proved by clear
and convincing evidence. Id.

The court, however, concluded that even though the plaintiff had misrepresented facts in the complaint by asserting the defendant's lien was subordinate, "*there is no connection between the bank's misrepresentation and Hickey's failure to respond to the complaint or employ an attorney,*" and thus "[t]he misrepresentation . . . [had] nothing to do with her failure to respond to the summons and complaint." Id. (emphasis added). Consequently, the court determined that "Hickey cannot meet the requirement that the misrepresentation must have operated to prevent her from fully and fairly presenting her case." Id.

Similarly, in the instant case vacation of the default judgment was inappropriate because Defendants waited nearly two years after receiving the Complaint before bring a claim for relief under CR 60(b)(4), claiming misconduct. (See CP 22-35). But, as in Hickey, they waited too long to vindicate their rights and vacating the default judgment now would undermine the "salutary purposes served by finality of judgments." Hickey, 55 Wn. App. at 371.

Further, as in Hickey, here Defendants cannot demonstrate that the alleged misconduct operated to prevent them from fully and fairly presenting their case. The record in fact is devoid of any evidence—*let alone clear, cogent, and convincing evidence*—that Plaintiff’s alleged misconduct had anything to do with Defendants’ failure to respond to the Summons and Complaint. There is no evidence Plaintiff made any statements or misrepresentations to Defendants which prevented them from answering the Complaint or offering a defense. Defendants’ own Affidavits filed in support of their Motion to Vacate conclusively demonstrate that they chose not to respond or present a defense *merely because of their own erroneous and subjective belief that the Summons and Somplaint did not pertain to them.* (CP 36-38, 39-41). For example, in the Declaration filed in support of the Motion to Vacate, Defendant Jonathan Pinson stated as follows:

On January 18, 2007, my wife was served with the complaint in this matter. *I briefly scanned the complaint, but did not believe it was something I needed to respond to since the Court had previously ordered OB-1 not to take steps to collect the debt . . .*

. In fact, I erroneously believed these papers were related to the CFG [Cascades] case, not a different lawsuit.

(CP 36) (emphasis added).

Defendant Stan Vinson submitted an identical statement in his Declaration. (CP 39). Moreover, Defendants make the same excuse for their failure to respond in their Motion to Vacate. (CP 25). Tellingly, Defendants do not allege—*indeed, have never alleged*—that they did not respond to the Summons and Complaint because of any statement, representation, conversation, or any other indication from Plaintiff that a response was not required.

The importance of Defendants’ statements cannot be overstated. *They clearly demonstrate that Defendants only failed to respond and present their case because they thought service of the Summons and Complaint was related to the Cascades matter.* Yet, as in Hickey, the fact that Defendants misunderstood the nature of the Summons and Complaint does not excuse their negligence in failing to respond. Plaintiff is not responsible for Defendants’ mistaken belief it did not cause. If Defendants truly believed Judge

Sperline's Order precluded this action against them, *they should have responded and raised that as a defense in an answer*. That would have been the proper and prudent method of ensuring their rights were protected.

Moreover, it should be observed that the court in Hickey refused to vacate the default judgment *even though the plaintiff had misrepresented material facts in the complaint*. Thus, there is all the more reason here for the Court to overturn the trial court's ruling *where there were no misrepresentations made, or even alleged, in the Complaint*.

At any rate, it is clear that Defendants' decision not to respond was not due to any misrepresentation "preventing a full and fair presentation of . . . [their] case." Dalton, 130 Wn. App. at

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665.² Even if Plaintiff's failure to notify Judge Sperline of his previous Order was misconduct—which Plaintiff vehemently denies—Defendants have not provided a scintilla of evidence that it prevented a full and fair presentation of their case.

Moreover, there is no evidence Defendants relied on the alleged misconduct, were misled by it, or even knew of it. *Defendants in fact have no specific evidence that they were ever informed of the September 5, 2006 Order, or instructed that the Order purportedly operated to shield them from future lawsuits from Plaintiff.* For example, the record shows that in their submissions in support of their Motion to Vacate Default

² The sort of situation where a party has actually been prevented from presenting his case so as to justify the vacation of a default judgment is illustrated by Suburban Janitorial Services v. Clarke American, 72 Wn. App. 302, 305, 863 P.2d 1377, 1379 (1993), where the court of appeals held that the failure on the part of the plaintiff's counsel to respond to two letters from the defendant's counsel inquiring as to whether the plaintiff intended to drop the case, prevented the defendant from "applying for relief under CR 60(b)(1)" and thus prevented it from "fully and fairly presenting its case." *Id.* at 309. This is manifestly not the case here. Plaintiff has not made any statements or misrepresentation to Defendants which prevented them from fully and fairly presenting their case. Plaintiff, for example, did not indicate to Defendants that it would not seek a default judgment, or that it would not pursue a separate action against them. Plaintiff also has not failed to respond to any of Defendants' inquiries. Defendants in fact never attempted to inquire as to the nature of the Summons and Complaint, as one would expect given their apparent confusion regarding its applicability. Defendants in fact acted remarkably nonchalant concerning their receipt of legal documents, and they should not now be able to lean on the Court's equity to rescue them from their own unprompted, uninfluenced erroneous understanding about the nature of the pleadings.

Judgment, Defendants never presented any evidence that they were even given a copy of the Judge Sperline Order. (See CP 22-35, 163). They did not present any transmittal letter from an attorney sending it to them. Further, they submitted no letter for *in camera* inspection, or otherwise, that it was ever explained to them what impact the Order in Cascades had upon any subsequent action against them. Without that knowledge, the alleged misconduct cannot possibly have impeded with their ability to present their case.

Plaintiff contends that, at a minimum, such evidence is required for the trial court to have even considered vacating the default judgment, especially in light of the higher burden of proof imposed in this instant case. Defendants' generalized statements regarding their subjective, unprompted misconceptions do not come close to the level of clear, cogent, and convincing evidence the law requires.

It should also be emphasized that Defendants were aware OB-1 intended to file suit against them. This undermines their

position. The record shows that Defendants' counsel in South Carolina during the Cascades case was made aware that OB-1 intended to pursue a claim against them individually after it agreed to dismiss its third-party complaint. (CP 121). Counsel for OB-1 asked Defendants' attorneys to accept service on their behalf in this action, yet they refused. (CP 122). It was only after counsel for OB-1 was told that Defendants' attorneys would not accept service that he was forced to have them served in South Carolina. (Id.). Yet, despite this knowledge, there was never any argument or claim that Plaintiff should be precluded from obtaining or enforcing a judgment against Defendants. (CP 123).

In sum, Defendants have not presented any evidence that misconduct even occurred, let alone that it rose to a level warranting relief from judgment. The trial court's finding of misconduct was simply not supported by the record. As noted, the appropriate test for determining fraud under CR 60(b)(4) is found in Hickey. Under that test, a defendant seeking to vacate a default judgment on the basis of fraud must prove by *clear, cogent, and*

convincing evidence that the alleged misconduct prevented him from fairly presenting his case. Defendants have not, and cannot, meet that burden here. There is no evidence Plaintiff made a misrepresentation or statement which prevented Defendants from presenting their case. As noted *supra*, Defendants concede in the affidavits they submitted in support of their Motion to Vacate that the sole reason they failed to respond to the Summons and Complaint was because they believed they related to the Cascades case. *This was their own subjective, unprompted error.* The error was not based on any statement or misrepresentation by Plaintiff.

Thus, Plaintiff never prevented them from presenting their case. Their failure to respond was merely due to their own misunderstanding and misconception about the served Summons and Complaint. Moreover, as noted, there is no specific evidence that Defendants ever received a copy of the September 5, 2006 Order or were ever advised that said Order meant that they were somehow immune from a lawsuit.

It cannot be over-stated that the clear, cogent, and convincing standard is a high burden. It indicates there must be high probability. It cannot be satisfied with speculation or even “hints” of fraud. While a trial court has discretion to vacate a judgment, that discretion “is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles.” Assmann v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947). Given the manifest lack of specific evidence and legal precedent supporting Defendants’ claim of fraud and/or misconduct and the high burden of proof required to vacate judgment pursuant to CR 60(b)(4), Plaintiff submits that the trial court abused its discretion in ruling that the default judgment was obtained through misconduct.

C. THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF HAD A DUTY TO DISCLOSE THE SEPTEMBER 5, 2006 ORDER TO JUDGE SPERLINE WHEN DEFENDANTS WERE *NEVER* PARTIES IN THE CASCADES MATTER

The trial court held that Plaintiff had a duty to inform Judge Sperline of his Order at the time the default judgment was entered.

(CP 159). Plaintiff submits this ruling was clear error and an abuse of Judge Knodell's discretion. More significantly, such a conclusion is irrelevant to the determination of whether a default judgment should be vacated pursuant to the controlling case on the issue, Hickey.

Notwithstanding, the record shows that *Defendants were never actually parties to the Cascades litigation*. Therefore, the September 5, 2006 Order has no impact or bearing on them individually. While Plaintiff did contemplate pursuing a third-party complaint against Defendants under a piercing the corporate veil theory, (CP 231-34), *Defendants were never actually served*. (CP 162). Thus, the Summons and Complaint were never legally perfected.

While both the trial court and Defendants stress that Plaintiff did not file the stipulation dismissing the third-party complaint until seventeen months after it was signed, (CP 25, 156-57), this is irrelevant because the third-party complaint was never perfected. (CP 162). Indeed, given the fact that Defendants were

not served, technically Plaintiff did not even need to file the stipulation. Thus, the stipulation cannot be evidence of misconduct.

This is emphasized by an analysis of Judge Sperline's Order itself, which specifically lists only "CASCADES FOOD GROUP, INC." in its Caption. (CP 459). The Order does not refer anywhere to Jonathan Pinson or Stan Vinson. (Id.). There is no mention of any member of the Cascades corporation. (Id.). Indeed, there is nothing in the Order to suggest that Judge Sperline intended it to apply to anything, or anyone, but the listed plaintiff—Cascades Food Group, Inc. (Id.). In fact, the South Carolina counsel who signed the Order and represented Defendants, although previously having been provided knowledge that Plaintiff planned to pursue Defendants, did not request that the prohibition include Pinson and Vinson personally. (CP 108).

It is significant that no one ever claimed prior to Defendants' Motion that the September 5, 2006 Order applied to an action against Defendants. (CP 108, 123). The first time counsel

for OB-1 became aware of that claim was when he was informed that Defendants were making that claim in the action in South Carolina in an attempt to avoid the enforcement of the judgment against them. (CP 123). *There was thus no reason for Plaintiff to believe it was required to inform Judge Sperline of the pending Cascades litigation and of his September 5, 2006 Order, since the Order applied only to Cascades.*

This is especially true given Judge Sperline's extensive involvement in the Cascades matter. Plaintiff did not sneakily seek its *ex parte* motion for default judgment before a judge utterly unfamiliar with the case. Nothing could be further from the truth. Judge Sperline was very involved in the Cascades action. As noted, he presided over numerous hearings, including at least one Summary Judgment Motion, a Motion for Reconsideration, a Stipulated Order, and a Motion discussing the entry of an Order Granting Partial Summary Judgment. (See supra at 5). Plaintiff contends it is more probable than not, or at least as probable, that Judge Sperline was fully aware of Defendants' connection to the

Cascades matter and his previous Order when he signed the *ex parte* Order. Thus, the trial court erred in ruling that Plaintiff had a duty to disclose the Order to Judge Sperline.

D. THE TRIAL COURT ERRORED BY BASING ITS OPINION ON SPECULATION

An additional reason why this Court should reverse the trial court's vacation of the default judgment is that the trial court erred by basing its opinion on speculation as to what Judge Sperline might have done had he been specifically informed of his September 5, 2006 Order. For the following reasons, such speculation was inappropriate.

As noted, the rule in Washington is that a party seeking to vacate a default judgment pursuant to CR 60(b)(4) "has the burden of proving the assertion *by clear and convincing evidence.*" Hickey, 55 Wn. App. at 372, 777 P.2d at 1058 (citing Plattner v. Strick Corp., 102 F.R.D. 612, 614 (N.D. Ill. 1984) (emphasis added). See also Lindgren, 58 Wn. App. at 596; Dalton, 130 Wn. App. at 665. The clear, cogent, and convincing standard requires a

showing that the alleged fraud, misrepresentation, or misconduct was “highly probable.” Id. at 666 (citing In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997)); In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). Logically, then, it does not admit of speculation, suspicion, or conjecture. Hageny v. U.S., 570 F.2d 924, 937 (1978). Even a hint of fraud will not support a finding of fraud. Eastern School v. U.S., 381 F.2d 421, 434, 180 Ct.Cl. 676 (1967).

In the instant case, there is no evidence whatsoever that the trial court imposed this higher burden of proof on Defendants. The record shows that Judge Knodell’s written opinion was based upon his speculation as to what Judge Sperline *might have done* had he been specifically informed by Plaintiff about the September 5, 2006 Order entered in the Cascades matter.

For example, in his April 23, 2010 order, Judge Knodell stated that Defendants’ “[m]isconduct argument is premised on OB-1’s failure when applying ex parte for default judgment to inform the court of the pending Cascades litigation, and, in

particular, Judge Sperline's order granting summary judgment but prohibiting OB-1 from taking any steps to enforce that judgment." (CP 159). The clear implication of this is that *Judge Knodell assumed Judge Sperline might have refused to sign the default judgment had Plaintiff disclosed to him his previous Order*. Plaintiff submits this is an inappropriate basis for vacating a default judgment. It is of course pure speculation whether Judge Sperline *might have* done anything differently. He might have taken any number of actions, including entering the Order. Tellingly, there is no testimony from Judge Sperline in the record that he would have refused to enter the Order. Without such, to state what he might or might not have done in any given instance is to engage in pure conjecture. As noted, conjecture does not rise to the level of clear and convincing evidence.

Moreover, it cannot be over-emphasized that Judge Sperline was presumably aware of the connection between the instant case and Cascades matter *because he was intimately involved in Cascades and had entered the Order at issue*. (See supra at 5).

Judge Sperline presided over numerous hearings. (Id.). Indeed, the summary judgment hearing in that case was very involved and included numerous issues and approximately a thousand pages of evidence. (Id.).

Finally, it cannot be overemphasized that we are left with nothing but speculation and conjecture because of Defendants' own conduct. As noted, if Defendants truly believed the September 5, 2006 Order applied to them and barred the instant case, they could have—and, more importantly, should have—answered and raised that argument as a defense. Plaintiff did nothing to prevent them from doing so.

In sum, the trial court erred and abused its discretion by relying on speculation in forming its opinion and by not requiring Defendants to present clear, cogent, and convincing evidence that Plaintiff's alleged misconduct prevented Defendants from making a full and fair presentation of their case.

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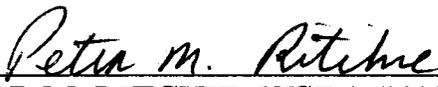
V. CONCLUSION

For the afore-mentioned reason, the Appellant respectfully asks the Court to reverse the trial court's Order of April 23, 2010.

Respectfully submitted this 10th day of August, 2010.



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CERTIFICATE OF SERVICE

I, SHERYL JONES, declare under penalty of perjury of the laws of the state of Washington, that on the 10th day of August, 2010, I deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing the BRIEF OF APPELLANT to the following:

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