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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 290778

DIVISION THREE, COURT OF APPEALS
OF THE STATE OF WASHINGTON

OB-1, L.L.C.,

Plaintiff/Appellant

v.

JONATHAN PINSON and STAN VINSON,

Defendants/Respondents

ON APPEAL FROM GRANT COUNTY SUPERIOR COURT
(Honorable Honorable John D. Knodell, III)

BRIEF OF RESPONDENTS

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I. INTRODUCTION

OB-1's appeal asks this Court to ignore a number of well-settled principles of Washington law: (1) trial courts must vacate default judgments liberally; (2) consistent with that rule, a decision to vacate a default judgment can only be disturbed on appeal if the trial court has clearly abused its discretion; and (3) if the party seeking to vacate a default judgment has shown a defense on the underlying merits, courts should spend "scant time" inquiring into the facts surrounding the entry of the default. This Court should not disregard these rules of law.

There are at least three reasons why the Grant County Superior Court did not clearly abuse its discretion when it granted Respondents/Defendants Jonathan Pinson and Stan Vinson's motion to vacate the default judgment entered against them.

First, Appellant/Plaintiff OB-1 LLC *has not disputed* that Pinson and Vinson have strong defenses to OB-1's underlying claims. "Scant time," accordingly, need be spent on the reasons for the default.

Second, many of the arguments raised by OB-1 on appeal are issues that were not raised in a timely manner below. This Court should refuse to address these improperly preserved theories.

Third, even if OB-1's new issues are considered, OB-1 has failed to demonstrate a clear abuse of discretion. The trial court properly viewed the facts and inferences in Pinson and Vinson's favor and found that had OB-1 fully disclosed all relevant information to the trial court when presenting the motion for default, the default may not have been entered.

Under the established precedents of our appellate courts, the trial court employed the proper analysis and did not act unreasonably. Its order vacating the default judgment should be affirmed.

II. STATEMENT OF THE CASE

A. The Trial Court Orders OB-1 Not to Collect the Debt Allegedly Due from Pinson and Vinson

This case currently on appeal (the “OB-1 Case”), is closely related to a separate case pending before Grant County Superior Court: *Cascades Food Group, Inc. v. Basin Frozen Foods, et al.*, Grant County Superior Court Case No. 04-2-00447-7 (the “Cascades Case”). In the Cascades Case, Cascades Food Group, Inc. (“CFG”)—a corporation owned by Pinson and Vinson—alleges that it suffered substantial damages as a consequence of breaches of a lease it had entered into with a number of defendants, including OB-1,¹ for a potato processing facility in Warden, Washington. Those breaches include a failure to abide by Pinson and Vinson’s “right of first refusal” to purchase the facility should OB-1 ever decide to offer it for sale.

In January 2005, CFG filed an amended complaint in the Cascades Case, and in response OB-1 filed an amended answer alleging counterclaims against CFG. CP 46-60. The crux of OB-1’s counterclaims was that CFG had allegedly breached the lease by not making certain payments due to OB-1 under the lease. CP 53-57.

¹ Because it does not make a material difference to the issues presented on this appeal, for clarity all the defendants in the Cascades Case will be referred to collectively as “OB-1.”

In that same pleading in the Cascades Case, OB-1 also brought third-party claims against Pinson and Vinson. CP 57-59. OB-1 alleged that Pinson and Vinson were individually liable for CFG's alleged debt since the debt was supposedly incurred before CFG's incorporation. CP 58-59.

A few months later, on June 3, 2005, OB-1 moved for leave to again amend its answer to add a "piercing the corporate veil" third-party claim against Pinson and Vinson. CP 476-91. The new third-party claim argued the theory that CFG was allegedly a shell corporation being used to evade duties to OB-1. CP 489-90. In support of its motion, OB-1's attorney, Jerry Aiken, the same attorney representing OB-1 in this matter on appeal, explained his reasoning for adding the piercing claim:

I believe there is a chance that the defendants [OB-1] will obtain a substantial judgment in this case in excess of \$200,000.00 against plaintiffs [sic]. This judgment would be virtually impossible to collect against Cascades. Therefore, we are adding a claim to pierce the corporate veil to go against the principals of Cascades [Pinson and Vinson]. I submit this is the only equitable way that the defendants are going to be compensated for their loss in this case. Therefore, we have added an additional claim to our Third Party Complaint seeking to pierce the corporate veil against the Third Party Defendants Vinson and Pinson.

CP 479.

The motion to amend was opposed by CFG. CP 65-69. OB-1 filed a reply brief in support of its motion to amend asserting that piercing the corporate veil to reach Pinson and Vinson was necessary *to enforce a judgment* against CFG: "should the defendants obtain a judgment in this

case they will not be able *to enforce the judgment against plaintiffs* [sic].” CP 492 (emphasis added).

In support of its reply brief, OB-1 submitted another declaration from Mr. Aiken. CP 72-77. In that declaration, Mr. Aiken again asserted that the sole reason OB-1 was pursuing claims against Pinson and Vinson was to seek an alternative avenue of collection for the debt CFG allegedly owed to OB-1. CP 73-76. Mr. Aiken also stated that, with respect to the service of the third-party complaint on Pinson and Vinson in the Cascades Case, “[i]t is my understanding that now at least one of them has been served at the time that I am drafting this affidavit.” CP 76.

In a subsequent summary judgment motion, Mr. Aiken represented to the trial court that “Mr. Vinson and Mr. Pinson . . . just recently have been served.” CP 539. OB-1 sought summary judgment in the Cascades Case on its third-party claims against Pinson and Vinson² for all allegedly past due amounts. CP 539-40.

In its opening brief in this appeal, OB-1 asserts that it “considered” bringing the third-party complaint, but then decided “not to pursue” it. OB-1’s Appeal Brief (“AB”) at 5-6. This is misleading, at best. When a party files two separate third-party complaints in court and a party moves for summary judgment against the third-party defendants, CP 481-91; 539-40, the party is certainly “pursuing” the claims.

² Although in its memorandum in support of its motion for summary judgment OB-1 claimed that “at this time” it was not moving for summary judgment against Pinson and Vinson, OB-1 then went on to ask for the exact relief it claimed it was not asking for. CP 539-40.

OB-1 subsequently decided to dismiss its third-party claims against Pinson and Vinson. OB-1 first filed a motion to dismiss.³ CP 542-43. Then Mr. Aiken drafted a stipulation dismissing the third-party complaint, which counsel for CFG signed on July 19, 2005. CP 79-80.

However, Mr. Aiken did not present the signed stipulation dismissing Pinson and Vinson to the trial court until *17 months* later. *Id.*

After the stipulation dismissing the third-party complaint was signed by all counsel but before it was presented to the trial court, an intensive motions practice continued in the Cascades Case throughout 2005 and 2006. On September 7, 2006, the trial court issued its “Order Re: Defendants’ Motion to Clarify Ruling on Defendants’ Motion for Summary Judgment.” CP 82-83 (the “September 2006 Order”). The trial court Judge (The Honorable Evan Sperline) had previously ruled that CFG was liable for payments due to OB-1 under the lease, but concluded that OB-1’s potentially much larger liability to CFG on the primary claims made collection of the debt deemed due to OB-1 under the counterclaim inequitable until the entire dispute was fully resolved. The court accordingly issued an order directing OB-1 to refrain from taking any actions to enforce the judgment it had obtained on the counterclaims:

Although the Defendants are awarded judgment in the above amount, *the Defendants shall not take steps to enforce that judgment* until final resolution of this matter.

³ It is unclear from the record in the Cascades Case when or how the motion to dismiss was eventually stricken.

CP 83 (emphasis added). At that point in time, the stipulation dismissing the third-party claims against Pinson and Vinson had not been filed—they were still parties in the Cascades Case.

On December 13, 2006, after holding the signed stipulation for well over a year, Mr. Aiken finally presented the stipulation and order dismissing Pinson and Vinson from the Cascades Case to the trial court; it was filed with the clerk the next day. CP 79.

B. OB-1 Ignores the Trial Court’s Order and Starts a New Case

Just six days after filing the stipulation and order dismissing Pinson and Vinson from the Cascades Case, OB-1 filed its complaint in the OB-1 Case against Pinson and Vinson; this is the case currently pending before this Court. CP 86-90. Mr. Aiken did not inform counsel for CFG in the Cascades Case that the new case had been filed. CP 139. The new case alleged the *same* claims and theories against Pinson and Vinson that OB-1 had alleged in the Cascades Case, based upon the *same* sums allegedly due under the *same* lease, and seeking collection of the exact *same* debt. *Compare* CP 57-59 (OB-1’s first amended third party complaint in the Cascades Case) *and* CP 481-91 (OB-1’s second amended third party complaint in the Cascades Case) *with* CP 86-90 (OB-1’s complaint in the OB-1 Case).

Specifically, in the OB-1 Case, OB-1 claimed that CFG was merely a shell corporation used by Pinson and Vinson to evade their alleged duties to OB-1. CP 88. OB-1 asserted that if it was not able to collect sums allegedly due from CFG under the lease, it would lead to an

inequitable result. *Id.* Based on those allegations, OB-1 contended that CFG's corporate veil should be pierced and Pinson and Vinson held liable for sums due under the lease, along with all of OB-1's costs and fees incurred in the Cascades Case. CP 90. Indeed, OB-1 sought recovery of \$268,618.55 from Pinson and Vinson—the exact same amount the trial court had determined to be due to OB-1 in the Cascades Case, and the amount the trial court specifically commanded that “[OB-1] shall not take steps to enforce.” *Compare* CP 90 with CP 83.

Pinson and Vinson's spouses were served with the new complaint on January 18, 2007. CP 36 and 39. Both gentlemen briefly scanned the complaint, but did not believe it required a response since the trial court had previously and specifically ordered in the Cascades Case that OB-1 not take any steps to collect the debt allegedly owed until CFG's claims against OB-1 were resolved. In fact, both Pinson and Vinson erroneously believed the papers to be related to the Cascades Case, not a new or different lawsuit. *Id.*

OB-1 did not file its motion for a default judgment until October 2007—over ten months after it commenced the new suit. CP 92-95. No notice of this motion was provided to Pinson or Vinson or to CFG's attorneys, with whom Mr. Aiken was in regular contact.

Critically, in its default judgment moving papers, OB-1 never informed the trial court that that the OB-1 Case was directly related to the Cascades Case, involved the same debt, and was subject to a previous order from the trial court. CP 43.

Nor did OB-1 remind the trial court that the trial court had entered a specific order in the Cascades Case directing OB-1 to refrain from taking any steps to enforce the amounts due under the lease. *Id.*

Nor did OB-1 tell the trial court in its moving papers that it was seeking to recover in the OB-1 Case the costs and attorneys fees it allegedly incurred in defending the Cascades Case. *Id.*

Indeed, the *only* piece of paper OB-1 filed with the trial court in the OB-1 Case that tied it to the Cascades Case was OB-1's complaint. But in its default order and moving papers, OB-1 *never attached the complaint to any of its briefs or affidavits—thus at the time the default was entered by the trial court, it had no reason to know that the OB-1 Case was related in any way to the Cascades Case.* CP 92-95. The trial court Judge (The Honorable Evan Sperline), the same Judge who entered the September 2006 Order one year earlier in the Cascades Case, signed the order of default and default judgment on October 8, 2007. CP 97-98. OB-1 did not provide the default judgment to Pinson and Vinson or to CFG's attorneys in the Cascades Case.

Pinson and Vinson did not receive notice of anything regarding the OB-1 Case until late May 2009, when they learned a judgment had been entered in Washington and that OB-1 was attempting to enforce the judgment in Pinson and Vinson's home state of South Carolina. CP 36-37, 39-40.

In late May 2009, undersigned counsel appeared for CFG in the Cascades Case and were retained to attempt to vacate the default judgment in the OB-1 Case as well. *Id.*

Pinson and Vinson filed a motion in the South Carolina Court asking the court to refuse to enforce the default judgment. In response to Pinson and Vinson's motion, OB-1 submitted a memorandum, which stated:

The [Cascades Case] involved numerous parties including OB-1 and Cascades but the Defendants [Pinson and Vinson] were not named as parties in that lawsuit nor were they pursued as parties in the lawsuit. The lawsuit that was later brought against Defendants on December 20, 2006 was based on piercing the corporate veil. The Honorable Judge Evan Sperline was involved in both lawsuits. Judge Sperline was familiar with both actions including the stay of execution in the [Cascades Case] and still signed the default judgment against Defendants. Judge Sperline presumably found no conflict between the two cases.

CP 102 (emphasis added). As explained below, these statements are false.

C. The Trial Court Grants Pinson and Vinson's Motion to Vacate

On June 10, 2009—less than six weeks after they first learned of the default judgment—Pinson and Vinson filed a motion to vacate the default judgment along with supporting declarations and exhibits. CP 22-105. They argued: (1) the default was obtained through misconduct and in violation of the court order in the Cascades Case because OB-1 did not disclose relevant materials and information to the trial court when presenting the default judgment, CP 28-31; and (2) Pinson and Vinson had strong defenses on the merits, CP 31-35.

With respect to their defenses, Pinson and Vinson articulated and offered evidence of at least four to the trial court. First, there was no basis to pierce CFG's corporate form since that remedy is only available if a party is employing a corporate form to evade a duty. CP 32. There was no evidence to support such a claim. CP 32, 37, 40. Second, piercing the corporate veil would have violated the trial court's wait-and-see approach in the Cascades Case—in other words, since OB-1 potentially owed CFG much more in damages than CFG owed OB-1, it did not make sense to allow OB-1 to collect on its judgment until the entire matter was resolved. CP 31, 83. Third, Pinson and Vinson were not individually liable on the lease even though they allegedly signed the lease in their individually capacities. Pinson and Vinson explained that all parties understood that OB-1 was going to look solely to CFG for payment on the lease. CP 32-33, 37-38, 40-41. And fourth, even if there was liability, Pinson and Vinson were entitled to substantial offsets based upon investments made in the property that OB-1 benefited from. CP 34, 38, 41.

Pinson and Vinson also specifically advised the trial court that OB-1's representation to the South Carolina Court—that Pinson and Vinson were never parties to the Cascades Case—was not true. CP 26-27.

Finally, Pinson and Vinson explained that there was no reason to believe or know that Judge Sperline had any knowledge that the OB-1 Case was related to the Cascades Case. OB-1 did not bring the Cascades Case to the trial court's attention when it moved for entry of the default judgment and did not bother to attach its complaint to the moving papers.

Id. As discussed more fully below, this fact alone justifies vacation of the default.

OB-1 filed a brief in opposition, CP 106-19, and a supporting declaration from Mr. Aiken, CP 120-28. Of relevance to this appeal, in these opposing papers OB-1 argued that: (1) the motion to vacate was untimely, CP 112-116; (2) there was no misconduct related to Pinson and Vinson's service and failure to appear, CP 116-18; and (3) the equities favored OB-1, CP 118-19.

OB-1 *did not dispute* that Pinson and Vinson had strong defenses on the merits.

Nor did OB-1 claim that Pinson and Vinson were not served or made parties to the Cascades Case and thus that they were somehow exempted from relying on the trial court's September 2006 Order in the Cascades Case that prevented OB-1 from taking steps to enforce its judgment.

Nor did OB-1 contend that if its actions constituted misconduct, Pinson and Vinson's motion to vacate should still fail because Pinson and Vinson did not "rely" on the misconduct.

Nor did OB-1 argue that the trial court should conclude that Judge Sperline knew about the connection between Cascades Case and the OB-1 Case when the motion for entry of default was granted.

In fact, OB-1 attempted in the trial court to distance itself from the assertion of its South Carolina counsel that Pinson and Vinson were never parties to the Cascades Case. Mr. Aiken explained that the South Carolina

attorney was not knowledgeable about the history of the Cascades Case, and that Mr. Aiken did not review the South Carolina brief before it was filed. CP 124. OB-1 has now, on appeal, proffered a contrary version of events.

After the initial hearing on the motion to vacate, OB-1 submitted an additional brief. CP 143-44. This brief contended that the September 2006 Order in the Cascades Case did not apply to Pinson and Vinson because they were not listed on the caption in the Order. CP 143. OB-1 did not claim, as it does now, that Pinson and Vinson were never parties because of OB-1's own failure to serve. Second—despite Mr. Aiken's previous assertions to the contrary, CP 73-76, 492, and despite the fact it was seeking the exact same amount it was awarded in the Cascades Case—OB-1 argued that obtaining the default was not an “enforcement” of the amount owed by CFG. *Id.*

The trial court issued a letter decision on October 8, 2009, explaining that it would grant the motion to vacate the default judgment. CP 156-60. The court reasoned that: (1) Pinson and Vinson were entitled to relief under the theory of excusable neglect because OB-1 was dilatory in enforcing the default judgment and accordingly waived objections to the motion to vacate's timeliness under Civil Rule (“CR”) 60(b)(1)⁴,

⁴ Although Pinson and Vinson did not argue the application of CR 60(b)(1) below, a respondent on appeal may present an argument, even if it was not presented below, to support the lower court's ruling if a full record on the issue has been developed. RAP 2.5(a). The facts concerning Pinson and Vinson's actions have been fully developed, and like the trial court, this Court can consider the application of CR 60(b)(1).

CP 158-59; (2) under CR 60(b)(4), OB-1 breached its duty to disclose relevant information to the trial court when presenting the default motion, CP 159; (3) had OB-1 disclosed relevant materials from, and the existence of, the Cascades Case to Judge Sperline when presenting the motion for default it may have led Judge Sperline to deny the motion, CP 160; and (4) Pinson and Vinson's motion was brought within a reasonable time, CP 160. On December 8, 2010, the trial court entered a formal order incorporating its letter decision. CP 154-55.

After the order was entered, but before the parties received notice that the order had been entered, both parties submitted briefing regarding the form of the proposed order vacating the default judgment—OB-1 proposed a CR 54(b) certification be added to the order. In that briefing *after* the order had been entered and the issue had been resolved, OB-1 (in a clear attempt to raise new arguments that it had failed to make in a timely manner beforehand) for the first time presented many of the arguments it now raises on appeal. CP 161-66.

Because more than 30 days had passed between the time the December order was entered and the time the parties received notice of that order from the trial court, Pinson and Vinson agreed not to oppose OB-1's motion for the entry of an order identical to the December 8, 2010 Order *solely* for the purposes of allowing OB-1 to file a timely appeal. CP 183, 192.

D. OB-1's Brief Mischaracterizes the Record on Appeal

As explained more fully below, both the trial court and this Court must view all facts and reasonable inferences in favor of Pinson and Vinson. There are a number of factual assertions in OB-1's Appeal Brief that either lack any evidentiary support or are contradicted by the evidence submitted by Pinson and Vinson and accordingly should not be credited. More troubling, many of the assertions in OB-1's Appeal Brief are demonstrably false. Specifically, OB-1 asserts that:

- The attorney for CFG refused to accept service for Pinson and Vinson. AB at 1, 8, 22. This is contradicted by Pinson and Vinson's evidence. CP 139.
- There was no evidence establishing misconduct. AB at 2, 17, 22. As explained more fully below, this is false. CP 43, 79-84, 92-105, 138-40, 157-60.
- OB-1 "decided not to pursue the third-party complaint against [Pinson and Vinson]" and the allegations against Pinson and Vinson were "*never . . . at issue.*" AB at 6 (emphasis added); *see also* AB at 25. OB-1 cites Clerk's Papers 121 and 162 as support for these contentions. OB-1's contentions are false. Clerk's Papers 121 is a portion of a declaration from Mr. Aiken, where he states "[OB-1] *included* a Third-Party Complaint against [Pinson and Vinson]" in the Cascades Case (emphasis added). Clerk's Papers 162 is merely a brief from OB-1 with no actual evidence cited. The record shows that OB-1 asserted the claims against

Pinson and Vinson, later pursued the claims in a motion for summary judgment, and eventually thought it necessary to dismiss the third-party claims against Pinson and Vinson CP 57-59, 72-77, 542-43. If Pinson and Vinson were never parties to the Cascades Case, as OB-1 asserts in its brief here, there would have been no need to file a motion to dismiss and no need to file a stipulation to dismiss the claims against them.

- At no time did anyone in the Cascades Case move to dismiss or resolve the third party claims. AB at 6. OB-1 cites Clerk's Papers 123 and 163 for support. Clerk's Papers 123 is a portion of a declaration from Mr. Aiken and contains no support for OB-1's assertion. Clerk's Papers 163 is merely a brief from OB-1 with no actual evidence cited. In fact, OB-1 moved to resolve the third-party claims on the merits, later moved to dismiss the claims, and eventually stipulated to the dismissal of the third-party claims. CP 79-80, 539-43.
- The September 2006 Order in the Cascades Case only instructed OB-1 to not enforce the judgment against CFG. AB at 1. The order does not say that—it instead states more generally that OB-1 shall not take steps to enforce the judgment. The order plainly does *not* contain the limitation OB-1 now contends. CP 83.
- There was no evidence Pinson and Vinson knew about the September 2006 Order in the Cascades Case. AB at 20-21. This is false. CP at 36, 39.

III. ARGUMENT

A. **This Court Should Not Consider Issues Raised for the First Time on Appeal**

OB-1 raises a number of issues that were not presented to the trial court when it ruled on the motion to vacate. With limited exceptions found in Rule of Appellate Procedure (“RAP”) 2.5, parties cannot raise new issues or present new evidence on appeal. *See, e.g., Am. Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867 (1962) (“[I]t would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record—no more and no less—considered by the trial court.”). This is a broad rule, and includes not only general issues, but also specific theories and contentions. *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 412-13, 814 P.2d 243 (1991).

To preserve an argument for appeal, a party must raise it before the court rules on the underlying issue—new theories of the case offered after a decision has been rendered are not properly preserved and cannot be raised on appeal. *See, e.g., JDFL Corp. v. Int’l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (explaining that a party cannot “suddenly propose a new theory” after an adverse ruling); *Marquis v. City of Spokane*, 76 Wn. App. 853, 860-61, 888 P.2d 753 (1995) (same); *see also Leen v. Demopolis*, 62 Wn. App. 473, 484, 815 P.2d 269 (1991) (holding that a party failed to preserve an issue concerning the vacation of a default when the party did not include it in its briefing on the motion to vacate).

Here, it was only after the trial court had issued its letter decision and entered its order vacating the default judgment that OB-1 raised its new theories concerning: (1) OB-1's failure to serve Pinson and Vinson in the Cascades Case and accordingly that the prohibition on enforcement in September 2006 Order in the Cascades Case did not apply to Pinson and Vinson; (2) whether, if OB-1's actions constituted misconduct, Pinson and Vinson motion to vacate should still fail because Pinson and Vinson did not "rely" on OB-1's misconduct; and (3) whether the trial court should presume that Judge Sperline knew about the connection between Cascades Case and the OB-1 Case when the motion for entry of default was granted. Since these theories are untimely, they should not be considered.⁵

B. Standard of Review

1. This Court cannot reverse unless there has been a clear abuse of discretion

This Court cannot reverse the trial court's decision to vacate the default judgment unless "it clearly appears that discretion has been abused." *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 305, 863 P.2d 1377 (1993). An abuse of discretion "is less likely to be found if the default judgment has been set aside" as it was in this case. *Id.* (quotation marks omitted). *Id.* A trial court does not abuse its discretion unless the exercise of its discretion is manifestly unreasonable

⁵ These new case theories are addressed below, however, in the event this Court does decide to consider them.

or based upon untenable grounds or reasons. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994). A trial court’s decision is only manifestly unreasonable if it is outside the range of choices give the facts and legal standards—merely disagreeing with the trial court is not enough. *Lawrence v. Lawrence*, 105 Wn. App. 683, 20 P.3d 972 (2001). Put another way, an abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. *Ebsary v. Pioneer Human Servs.*, 59 Wn. App. 218, 225, 796 P.2d 769 (1990). Furthermore, even if the motion to vacate is decided only on the briefing and without any live testimony, the highly deferential standard still applies:

[W]e note that the discretionary judgment of a trial court of whether to vacate a judgment is a decision upon which reasonable minds can sometimes differ. For this reason, if the discretionary judgment of the trial court is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld.

Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

2. Defaults are strongly disfavored

It is the long-standing and “overriding” policy of this state that cases must be determined on their merits rather than by default. *Gutz v. Johnson*, 128 Wn. App. 901, 916, 117 P.3d 390 (2005); *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960). As the Supreme Court has explained, “for more than a century, it has been the policy of this court to set aside default judgments *liberally*.” *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007) (emphasis added).

A trial court's determination of whether to vacate a default judgment is based upon equitable principles. *Wilma v. Harsin*, 77 Wn. App. 746, 749, 893 P.2d 686 (1995). The trial court should ensure that the substantial rights of the parties are preserved and that justice is done. *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.34d 1099 (2003). When examining the record and potential defenses involved, the trial court must review the evidence and all inferences in the light most favorable to the moving party—in this case, Pinson and Vinson. *Gutz*, 128 Wn. App. at 917; *Johnson*, 116 Wn. App. at 841.

Default judgments are set aside under the auspices of CR 55 and 60. CR 55(c) allows default judgments to be set aside “for good cause”; default judgments may also be set aside in accordance with CR 60. CR 60 states in relevant part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

....

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

....

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

There are different tests depending on which subparts of the rule are being examined.

With respect to CR 60(b)(1), an “irregularity” occurs when there is a failure to do something “that is necessary for the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner.” *Port of Port Angeles v. CMC Real Estate Corp.*, 114 Wn.2d 670, 674, 790 P.2d 145 (1990) (quoting *In re Ellern*, 23 Wn.2d 219, 222, 160 P.2d 639 (1945)). The other criteria in CR 60(b)(1)—relating to excusable neglect, mistake, or inadvertence—are met when the moving party can show:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of the entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

Mosbrucker v. Greenfield Implement, Inc., 54 Wn. App. 647, 650-51, 774 P.2d 1267 (1989) (citation omitted). The third factor is the only factor in dispute on this appeal.

With respect to subparts (4) and (11) of CR 60(b), courts apply a slightly different test. To determine whether to vacate the default, the trial court must evaluate the equities and the procedural history, misconduct, or irregularity in the case, as well as whether the moving party has a defense to the matter. *See, e.g., id. at 652-54*. Additionally, the terms of CR 60(b)(4) should be interpreted broadly to include any sort of misrepresentation or misconduct, whether it be extrinsic or intrinsic. *Suburban Janitorial Services*, 72 Wn. App. at 309 n.8.

All tests under CR 60(b) follow the same underlying principle, however:

The primary duty of the courts in considering motions to set aside default judgments is to inquire whether or not the moving party against the default has a defense on the merits. If it clearly appears that a strong defense on the merits exists, the court will spend *scant time* inquiring into the reasons which resulted in the entry of the order of default.

Id. at 305 (emphasis is added and quoting *Yeck v. Dep't of Labor & Indus.*, 27 Wn.2d 92, 97, 176 P.2d 359 (1947)). Indeed, because the various tests cited above are so similar, this brief will analyze subparts (1), (4), and (11) of CR 60(b) together.

C. Pinson and Vinson Have Strong and Unchallenged Defenses on the Merits

The first step a court must take under CR 60(b) is to determine whether evidence exists to support a defense on the merits. *Suburban Janitorial Services*, 72 Wn. App. at 305. The standard imposed on the moving party in this instance is low:

Any prima facie defense to the plaintiff's claim, albeit tenuous, is sufficient to support a motion to vacate a default judgment. A strong defense requires less of a showing of excuse, provided the failure to appear was not willful.

Id. (citations and internal quotation marks omitted).

Here, as explained above, Pinson and Vinson have strong defenses on the merits. Neither below nor on appeal has OB-1 disputed this contention in any way. The trial court and this Court accordingly need to spend "scant time" examining the other issues presented by this appeal.

D. The Trial Court Did Not Clearly Abuse Its Discretion When It Determined that OB-1's Default Judgment Was Obtained

Without Disclosing Relevant Facts to the Trial Court Which Might Have Led the Trial Court to Deny the Motion for a Default Judgment

1. OB-1's actions were improper

In the Cascades Case, the trial court clearly ordered OB-1 and its counsel not to “take steps to enforce that judgment.” Despite this order, in the OB-1 Case, OB-1 sought relief *for the same debt* the trial court plainly instructed OB-1 *not* to take steps to collect. Were there any doubt about the relief OB-1 requested in the OB-1 case, OB-1 made clear in its complaint that it was seeking to pierce CFGs’ corporate veil—an argument that arises directly from CFGs’ liability referenced in the September 2006 Order in the Cascades Case—as well as recovery of the costs it incurred in the Cascades Case. CP 86-90. These constitute “steps” to enforce the amounts allegedly owed by CFG to OB-1. OB-1’s disregard of the trial court’s instructions in the September 2006 Order are, alone, sufficient to meet the requirements of CR 60(b)(1), (4), and/or (11).

The impropriety by OB-1 here is even starker because the order granting summary judgment to OB-1 on its counterclaim in the Cascades Case was not a final order subject to appeal as of right. No partial judgment was entered under CR 54. Accordingly, CFG has not yet had an opportunity to appeal the trial court’s decision in the Cascades Case that it was obligated to OB-1, yet OB-1 has used that liability as a theory to impose liability against Pinson and Vinson. This is unjust and inequitable.

But OB-1’s improper attempts to ignore the trial court’s explicit order go even further. In its motion for a default judgment in the OB-1

Case, OB-1 never mentioned or put the trial court on notice that the OB-1 suit against Pinson and Vinson was related to the Cascades Case or that it related to the same debt. OB-1 did not attach the complaint to its moving papers. OB-1 likewise never disclosed that the default judgment it sought might violate the trial court's order in the Cascades Case. And OB-1 misrepresented the facts to the court in South Carolina by asserting that Pinson and Vinson were never parties to the Cascades Case (which they were) and by implying that Judge Sperline was made aware by OB-1 of the relationship between two cases (which he was not). The trial court's decision to vacate the default at issue in this appeal recognized that this type of hide-the-ball irregularity should not be rewarded.⁶

The trial court determination that this conduct mandated relief under CR 60(b)(1) and (4) was not manifestly unreasonable or an abuse of discretion. Even if this Court would have reached a different result, the Court should still affirm the order vacating default judgment since the trial court's determination is well within the bounds of reasonableness and since Pinson and Vinson have undisputedly strong defenses on the merits.

2. Washington cases support the trial court's decision

The case of *Wingard v. Heinkel*, 1 Wn. App. 822, 464 P.2d 446 (1970), is instructive. In 1967, the Supreme Court ruled that a deed to Leo

⁶ Throughout its brief, OB-1 continually claims that there is no factual basis to support a finding of misconduct. AB at 2. OB-1 is simply ignoring the evidence instead of responding to it. Indeed, it is telling that not once in its brief does OB-1 ever attempt to justify its silence to the trial court when seeking the default judgment.

Wingard for certain real property was insufficient and void. *Id.* at 822. Notwithstanding that ruling, Mr. Wingard filed a subsequent suit seeking to quiet title to the same property based upon the same deed. *Id.* at 822-23. His new suit was somewhat different because he also added claims concerning real property not subject to the deed. *Id.* at 823. Mr. Wingard obtained a default judgment, but when doing so he did not disclose the previous Supreme Court decision to the trial court.

The trial court eventually granted defendants' motion to vacate the default judgment because "plaintiff had failed to disclose to the court relevant facts within his knowledge"—that is, the plaintiff failed to bring the previous ruling to the court's attention. *Id.* at 823. The court of appeals affirmed, also noting that the defendants had demonstrated a defense to the matter that warranted vacation of the default judgment. *Id.* at 823-24.

The current case is similar. Like Mr. Wingard, OB-1 filed a new suit seeking judgment on the *same debt* on which it had obtained a summary judgment ruling in the Cascades Case. Like Mr. Wingard, OB-1 failed to disclose to the trial court, either in person or in its motion for default, the facts of the Cascades Case and the September 2006 Order that were relevant for the trial court to consider. And, like in *Wingard*, Pinson and Vinson have strong defenses on the merits.

Mosbrucker is also on directly on point. There, the plaintiffs were lessors of business properties that they leased to a corporate defendant. 54 Wn. App. at 648. The other defendants were personal guarantors on the

lease. *Id.* At the time the complaint was filed, however, the signature of one of the individual defendants (Mr. Clark) on a guaranty had been crossed out and the initials of another defendant added. *Id.*

A default judgment was obtained against Mr. Clark, and Mr. Clark eventually moved to set it aside under, among other theories, CR 60(b)(4). *Id.* at 649. Mr. Clark contended that the plaintiff had failed to disclose to the court that his signature was crossed off on the guaranty. *Id.* at 650.

The superior court denied the motion to vacate. The court of appeals reversed, concluding that there was an irregularity when the crossed-out signature was not brought to the trial court's attention, and that there was ample case law (including *Wingard*) that a default judgment should be vacated in such a circumstance. *Id.* at 652-53. Since the default judgment "may" not have been granted had all of the information been brought to the trial court's attention, and since there were *prima facie* defenses, it was an abuse of discretion *not* to grant the motion to vacate. *Id.* at 651-54.

Again, OB-1's default judgment is analogous. At the time the complaint in this action was filed seeking to recover, *inter alia*, sums due under a lease, OB-1 had been ordered in the Cascades Case not to take any steps to collect those very same sums under the very same lease. This information was not brought to the trial court's attention nor was the link to the previous case even revealed to the trial court in the motion. And while there can be no guarantees regarding what the trial court may have done had it been properly advised of all the facts, as *Mosbrucker* explains,

this uncertainty is *in and of itself* sufficient reason to vacate the default judgment. *See also Kennewick Irrigation District v. 51 Parcels of Real Property*, 70 Wn. App. 368, 371, 853 P.2d 488 (1993) (holding that the superior court abused its discretion when it failed to vacate a default judgment because the superior court judge was not made aware of all pertinent facts before signing the default judgment and the failure to disclose facts made it “unlikely” the default would have been entered); *Wilson v. Henkle*, 45 Wn. App. 162, 168-69, 724 P.2d 1069 (1986) (affirming the decision of the superior court to vacate a default judgment when the party obtaining it did not disclose all relevant facts); *Smith v. Smith*, 36 Wn.2d 164, 174-75, 217 P.2d 307 (1950) (reversing the trial court’s denial of a motion to vacate a judgment when not all facts had been brought to the trial court’s attention).

These cases also refute OB-1’s new and improperly preserved causation argument. In its brief, OB-1 states repeatedly that because there was allegedly no misrepresentation made *to Pinson and Vinson* that Pinson and Vinson relied on and caused Pinson and Vinson’s failure to appear, there can be no relief. Put another way, OB-1 claims that any misconduct or irregularity in its dealings with the trial court cannot meet the standard for vacation since there was no misconduct directed *toward* Pinson and Vinson. *See* AB at 2. If one take’s OB-1’s theory to its logical conclusion, as long as the defendant was not induced to sit on its rights,

any misconduct directly only toward the trial court cannot be the basis for vacation.⁷

This is simply wrong. In *Wingard, Mosbrucker, and Kennewick Irrigation District*, the misrepresentation/misconduct/irregularity was made to and/or just involved interaction between the trial court and the plaintiff, yet all these cases found that vacation of the default was warranted.

3. OB-1 misreads *Hickey*

The only case on which OB-1 offers any substantive analysis is *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989). In that matter, the plaintiff brought a foreclosure action, the defendant never responded, and a default judgment was entered. *Id.* at 369. In *Hickey*, the plaintiff knew that its lien was not superior to the defendant's lien, but the plaintiff did not disclose that legal conclusion to the court. *Id.* at 371. The plaintiff purchased the property at a sheriff's sale, and later sold it to a bona fide purchaser. *Id.* at 369. Only after the sale did the defendant move to challenge the default. *Id.* at 370. The trial court denied the motion, holding that even after judgment the defendant had ample opportunity to challenge the plaintiff's position. *Id.*

⁷ Another way to analyze the same issue is as follows: OB-1's argument is that the acts of OB-1 had to cause Pinson and Vinson failure to appear. But if some sort of misconduct or misrepresentation of a plaintiff has caused the defendant not to appear, the defendant would almost uniformly be able to make the case of excusable neglect under CR 60(b)(1). The provisions of subparts (4), (6), and (11) of CR 60(b) would be superfluous. That reading of CR 60(b) would "unreasonably and unfairly cramp the application of a remedial rule" and accordingly is impermissible. *Suburban Janitorial Services*, 72 Wn. App. at 309.

Over a dissent, the court of appeals affirmed. The court of appeals reasoned that the motion to vacate was not timely. *Id.* at 371. The court also reasoned that the plaintiff's act of misleading the trial court on the merits was not "connected" to the defendant's failure to appear. *Id.* at 371-372. The court explained that CR 60(b)(4) does not protect against factually incorrect judgments, but instead judgments obtained where *the process* for obtaining the judgment was unfair: "[t]he rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. *For that reason*, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense." *Id.* at 372 (emphasis added).

Lindgren further clarifies this point:

Subparagraph (4) of CR 60(b) authorizes a trial court to vacate a judgment for fraud, misrepresentation, or other misconduct of an adverse party. The rule 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. . . . Thus, the fraudulent *conduct or misrepresentation* must *cause* the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.

58 Wn. App. at 596 (emphasis in original). In other words, the process of *causing* the entry of the default is critical act, because once that is complete it prevents a full and complete hearing of any defenses.

Here OB-1's misconduct goes directly to the process, not the underlying merits, and accordingly is distinguishable from *Hickey*. In *Hickey*, the misconduct concerned counsel's misrepresentations on the underlying merits—the plaintiff's lien was not in fact senior to the

defendants' lien. 55 Wn. App. at 372. That misrepresentation, however, was not related to the default judgment process.

OB-1 did not misrepresent⁸ some fact concerning the lease or OB-1's piercing the corporate veil claim when it filed its complaint. Instead, the misconduct and irregularity occurred when it failed to notify the trial court that there was another case that was directly related to the OB-1 Case and an order in that other case may be violated by entry of the default. As the trial court determined below, the motion for default may have been denied had that fact been disclosed. And Pinson and Vinson undisputedly thought that the September 2006 Order obviated the need for them to respond to the new pleading. OB-1's misconduct occurred via its *acts* (or more properly, failure to act) when obtaining default, not because its legal theories on the merits were false on their face. And by obtaining the default, OB-1 obviously prevented Pinson and Vinson from presenting a defense to the claims.

The record before this Court on appeal is similar to *Wingard* and *Mosbrucker*, where in both of those cases the misconduct was not a misrepresentation concerning the merits, but instead of procedural misconduct that may have affected the trial court's decision. In *Wingard*, the misconduct occurred when the plaintiff failed to disclose the ruling of another court that could affect the default. Similarly, in *Mosbrucker*, the

⁸ That is not to say that Pinson and Vinson agree with the allegations in the complaint in the OB-1 Case, but instead merely that OB-1's assertions in the OB-1 Case are not irrefutably false as they were in *Hickey*.

misconduct occurred when the plaintiff failed to attach the key document to the default moving papers. Those cases are analogous to OB-1's failures. *See also Kennewick Irrigation District*, 70 Wn. App. 371 (finding an irregularity that led to a default when the procedures of CR 55(b)(3) were not followed).

The plaintiff in *Hickey* did not fail to disclose a document or another court decision that may have led to denial of the default—the plaintiff in *Hickey* instead merely misrepresented the merits. There was no procedural act or failure to disclose that led to the entry of the default. The present controversy is much more akin to *Wingard*, *Mosbrucker*, and *Kennewick Irrigation District* where, after showing a defense to the matter, a default was overturned when all relevant facts were not brought to the trial court's attention. *See also Coauette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993) (“In our judgment, [CR 60(b)(11)] supports vacation of a default order and judgment that is based upon incomplete, incorrect or conclusory factual information.”).

But even if this Court does believe *Hickey* to be instructive, there are still a number of differences between *Hickey* and the case before this Court. First, and most obviously, the *Hickey* court was reviewing, under the abuse of discretion standard, the trial court's decision *not* to vacate a default judgment. The court of appeals could only reverse if the trial court's decision was manifestly unreasonable. That is the converse of the posture presented by OB-1's appeal: here, this Court can only reverse if it finds the trial court's decision to grant the motion to vacate was manifestly

unreasonable. *Hickey* presented a different question, and does not control the issues on this appeal.

Second, unlike in *Hickey*, Pinson and Vinson have not sat on their rights for years knowing the judgment existed. In *Hickey*, the judgment was effectuated via a sale of the relevant property to a bona fide third party, making vacation of the judgment especially unjust. 55 Wn. App. at 371. Here, however, the trial court held that Pinson and Vinson acted promptly upon learning of the default judgment. CP 160. And there is no innocent third party that would be severely prejudiced by vacation of the judgment.⁹

Third, even if the Court does consider *Hickey* analogous and controlling, the misrepresentations of OB-1 *are* directly related to Pinson and Vinson's failure to appear. As stated in their declarations, the reason Pinson and Vinson failed to respond to this action was because they believed the September 2006 Order in the Cascades Case barred any efforts by OB-1 to collect on the debt, and they thought this matter was part of the Cascades Case.¹⁰ CP 36, 39. This is the exact same order that

⁹ OB-1 makes a passing reference to the time it took Pinson and Vinson to make its motion to vacate, asserting that Pinson and Vinson were dilatory. AB at 16. But the key period of time for purposes of CR 60(b) is the time between when the defaulting party first *learned* of the judgment and when the motion to vacate was made. *Suburban Janitorial Services*, 72 Wn. App. at 308. Here, as the trial court determined, six weeks is a reasonable time.

¹⁰ In its brief, OB-1 alleges that "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." AB at 2. This is inaccurate. Pinson and Vinson did not respond to the complaint for two reasons. First, they thought the September 2006 Order prevented any collection, and (footnote continued)

OB-1 failed to disclose to this trial court when moving for a default. Unlike *Hickey*, Pinson and Vinson’s unfortunate failure is not based on a completely separate issue—in *Hickey*, the defendant failed to respond because she did not understand certain words in the complaint. 55 Wn. App. at 370, 372.

Pinson and Vinson were relying on the same order that OB-1 improperly hid from the trial court when presenting the default papers. Washington appellate courts have instructed trial courts to evaluate motions to vacate liberally in favor of the moving party; here there was no abuse of discretion when the trial court vacated the default judgment. *See, e.g., Suburban Janitorial Services*, 72 Wn. App. at 308-09 (considering the “fully and fairly presenting their case” language repeatedly relied upon by OB-1 and yet still affirming the decision of the trial court to vacate a default judgment under CR 60(b)(4) because of the remedial nature of the rule).

Finally, this Court should not forget the underlying rationale of the trial court when it entered the September 2006 Order. The trial court ordered OB-1 to refrain from collection for a reason: the amount allegedly due to OB-1 on its counterclaim paled in comparison to the potential liability of OB-1 to CFG on the primary claims. Engaging in a collection action before all the disputes between the parties were fully resolved made little sense. OB-1 and its counsel pursued an end-run around that order,

second, they thought the pleading was filed in the Cascades Case. CP at 36, 39. OB-1 ignores the first reason.

and started a new case in which it attempted to collect the very same debt. It hid facts from the trial court, and obtained a default judgment by doing so. At a minimum, this violated the spirit of the trial court's previous order in the Cascades Case, and raises questions about whether the default would have been entered. That there is a question about how the trial court may have ruled is enough. Equity demands that these matters be heard on the merits. Equity also demands that OB-1 not be rewarded for its efforts to evade, ignore or circumvent the dictates of the trial court in the Cascades Case.

E. OB-1's New "Service" Argument is Irrelevant and Misconstrues the Record

As explained above, OB-1's new argument that, because it failed to serve Pinson and Vinson, the September 2006 Order in the Cascades Case did not apply to them, was not raised in a timely manner and is accordingly waived. But even if the Court does consider it, the argument does not change the outcome.

First, OB-1's service argument is undercut by its own actions. If Pinson and Vinson were never parties to the Cascades Case, there would have been no need for OB-1 to move to dismiss the claims against them and no need to later stipulate to their dismissal from the case. CP 57-59, 72-77.

Second, the argument is irrelevant. Even if Pinson and Vinson were never served in the Cascades Case, there is a reasonable question of fact regarding whether the trial court in the OB-1 Case would have signed

the default papers knowing that the September 2006 Order in the Cascades Case existed—especially since the theory proposed by OB-1 in the OB-1 Case was to pierce the corporate veil of *CFG* and collect the fees incurred in the *Cascades Case*. Even Mr. Aiken described the theories against Pinson and Vinson as “enforcing” the judgment, which is exactly what the September 2006 Order prohibited. CP 479, 492. The trial court did not clearly abuse its discretion when it ruled that there was at least a doubt regarding whether the default would have been entered had these facts been disclosed.

Third, OB-1 only cites Clerk’s Papers page 162 for its proposition that Pinson and Vinson were never served. Page 162 is merely a brief with no actual evidence cited. Mr. Aiken twice asserted to the trial court in the Cascades Case, however, that Pinson and Vinson *were* served. CP 76, 539. There is simply no basis on this record to accept OB-1’s latest theory and OB-1’s latest attempt to rewrite the facts.

Fourth, the equities cannot be ignored here. OB-1 is employing its own alleged failure to serve Pinson and Vinson as a sword against them. The undisputed fact is that OB-1 held the stipulation and order dismissing Pinson and Vinson for 17 months, and because of OB-1’s delay, Pinson and Vinson were still parties to the case at the time the September 2006 Order was entered. OB-1 is attempting to use one of its failures (its alleged failure to serve), as a reason to negate the effect of its other failure (its failure to timely file the stipulation dismissing Pinson and Vinson

from the Cascades Case). This is unjust and inequitable, and should not be rewarded.

F. OB-1's New "Speculation" Argument Ignores the Proper Legal Standard

OB-1's argues that the trial court improperly speculated regarding what Judge Sperline might have done had OB-1 acted properly and disclosed all relevant facts to the judge when presenting the default moving papers. AB at 29-31. Even if the Court considers this improperly preserved theory, it fails.

First, OB-1 misunderstands the correct legal standards. OB-1 contends that it is "more probable than not, or at least as probable, that Judge Sperline was fully aware of Defendants' connection to the Cascades [Case]". AB at 27-28; *see also* AB at 30. But all facts and reasonable inferences must be viewed in favor of Pinson and Vinson, not OB-1. *Gutz*, 128 Wn. App. at 917; *Johnson*, 116 Wn. App. at 841. No one can be certain about what Judge Sperline was aware of at the time he entered the default *because OB-1 did not disclose all the facts to him when presenting the default papers*. Because the trial court had to view all facts and reasonable inferences in Pinson and Vinson's favor, the trial court had to assume Judge Sperline did *not* make the connection between the OB-1 Case and the Cascades Case.

Second, when a party such as OB-1 creates a doubt regarding whether a trial court would have entered a default by failing to disclose relevant materials, it is entirely proper for the trial court to presume that the default would not have been entered if all the facts had been disclosed.

Wingard, 1 Wn. App. at 823-24. Indeed, had the trial court failed to make this presumption in favor of Pinson and Vinson, it would have been an abuse of discretion. *Mosbrucker*, 54 Wn. App. at 651-54.

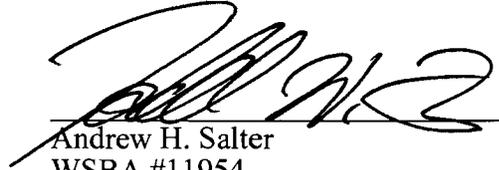
IV. CONCLUSION

Cases should be decided on their merits. The trial court properly viewed the evidence in Pinson and Vinson's favor and vacated the default judgment that had been entered against them. The burden on OB-1 in this appeal is to show not merely that the trial court was wrong, but that it acted completely unreasonably. That standard has not even been approached on this record.

With hindsight, Pinson and Vinson now certainly wish they formally responded to this new action filed by OB-1. But their failure to act was based upon an order that had been entered just weeks before by the trial court in the Cascades Case. Rather than bring this September 2006 Order to the trial court's attention in the new case, OB-1 tried to evade the Order by neglecting to mention it in its motion for default judgment. At a minimum, there is a question regarding whether the trial court would have signed the default judgment had it properly been apprised of this case's relationship with the Cascades Case. And under the case law, that uncertainty alone is sufficient to vacate the judgment. The decision of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of December, 2010.

SALTER JOYCE ZIKER, PLLC

A handwritten signature in black ink, appearing to read "A. H. Salter", written over a horizontal line.

Andrew H. Salter

WSBA #11954

Todd W. Wyatt

WSBA #31608

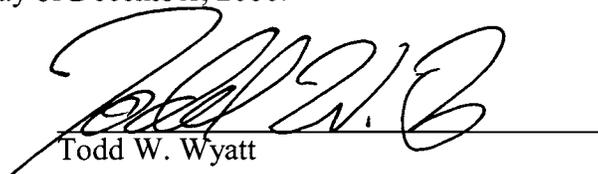
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on Monday, December 6, 2010, a copy of this BRIEF OF RESPONDENT was sent via first class mail, postage prepaid, to the last known address for attorneys for appellant as follows:

Jerome R. Aiken
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DATED this 6th day of December, 2010.


Todd W. Wyatt