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Court of Appeals File No. 34201-8-III

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III

Frank DeCaro, as personal representative for the ESTATE OF JESSICA
ALVARADO,

Plaintiff-Appellant,

vs.

SPOKANE COUNTY, DOE,

Defendant-Respondents.

REPLY BRIEF

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INTRODUCTION

After three different notifications of a wrongful death claim against it, Spokane County failed, without excuse, either to appear or answer the complaint served upon them. The plaintiff then presented a well-documented motion for a default judgment, which was granted by the trial court. In its motion to set aside the default judgment, the County presented only a prima facie defense, and offered no excuse for its failure to appear. The plaintiff responded to the factual claims made in the County's response, and asked the trial court to apply the "strong or conclusive defense" standard specified by *White v. Holm* and *Little v. King*. Although the County conceded at oral argument (and further concedes on this appeal) that there was no evidence of excusable neglect, the County urged the trial court to set aside the default judgment based upon a finding of "mistake." The trial court did so.

In this appeal, plaintiff's opening brief presented the reasons for finding that the trial court abused its discretion in setting aside the default. The County's response brief asks this court to apply a legal standard that departs in three significant particulars from the one previously applied to motions to set aside a default:

1. The County asks this Court to focus solely on the preference for deciding cases on the merits, rather than considering that preference alongside the need to insure compliance with court rules;

2. The County asks this Court to permit a default to be set aside whenever the moving party presents a prima facie defense and characterizes its failure to appear as a “mistake”; previous caselaw has interpreted CR 60(b)(1) to require a showing either of excusable neglect or a “bona fide mistake.”

3. The County asks this Court to collapse the distinction between a prima facie defense and a “strong or virtually conclusive defense.” Previous caselaw has held that a “strong or virtually conclusive defense” is qualitatively different from a prima facie defense, and requires the Court to consider the plaintiff’s evidence to determine whether it is “meritless.”

SUMMARY OF ARGUMENT

This Court should reject the County’s invitation to depart from existing principles governing the consideration of motions to set aside a default judgment.

First, it would be a mistake to focus solely on the preference for a trial on the merits. CR 60 permits judgments to be vacated, but it does so only to the extent that due consideration is given to the importance of the finality of judgments.¹ In the same way that a

¹ “The finality of judgments is an important value of the legal system. However, in both civil and criminal cases, circumstances arise where finality must give way to the even more important value that justice be done between the parties. CR 60 is the mechanism to guide the balancing between finality and fairness.” *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 313, 863 P.2d 1377, 1383 (1993).

plaintiff may forfeit the right to a trial on the merits by failing to comply with the rules that specify when an action must be brought, a defendant may forfeit the right to a trial on the merits when it fails (without excuse) to comply with the applicable rules.

Second, this Court should reject the invitation to adopt a rule that would permit a default to be set aside whenever the moving party characterizes the failure to appear as a “mistake.” CR 60(b)(1) includes mistake along with excusable neglect as reasons for vacating a judgment, but if the defendant cannot show a “strong or virtually conclusive defense,” it is appropriate that “the reasons for [the defendant’s] failure to timely appear in the action before the default will be scrutinized with greater care.”² Unless the moving party is able to show that the failure to appear was excusable (whether denominated neglect or mistake), vacating a default judgment merely upon a showing of a prima facie defense would ignore the need to balance finality with fairness.

Third, the County’s request to evaluate a “strong or virtually conclusive defense” on the same terms as the test used for a prima facie defense would be inconsistent with the emphasis on doing justice. The prima facie defense standard is designed to determine whether a trial on the merits would be useless (because the outcome would be the same). The “strong or virtually conclusive defense” standard serves a very different purpose, which is to determine

² *White v. Holm*, 73 Wn.2d 348, 353, 438 P.2d 581, 584 (1968).

whether the initial default judgment was premised upon a demonstrably meritless claim.

ARGUMENT

- I. **In considering whether to vacate a default judgment, the trial court should consider the value placed on the finality of judgments as well as the preference for trial on the merits.**
 - A. **The “overriding policy” is to do justice, and following the analytical framework established by *TMT Bear Creek and White* is necessary to fulfill that policy.**

In its attempt to justify the trial court’s decision to set aside the default judgment in this case, the County begins its argument by stating that there is “an overriding policy which prefers that parties resolve disputes on the merits.”³ The County may advocate that this should be the standard, but it is not the existing law.⁴ What is “overriding” is the goal of seeing that justice is done:

³ Respondent’s Brief at 7.

⁴ The County cites *Griggs v. Averbeck Realty*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) to support this claim. However, in the actual language of that case, the court uses the term “overriding” not to describe the preference for a trial on the merits, but to characterize the principle that justice be done.

[T]he overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.

Griggs, 92 Wn.2d at 582, 599 P.2d at 1292, quoting *Widucus v. Southwestern Elec. Cooperative, Inc.*, 26 Ill.App.2d 102, 109, 167 N.E.2d 799, 803 (1960). As the quoted

As a general matter, default judgments are not favored because " [i]t is the policy of the law that controversies be determined on the merits rather than by default." But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.⁵

Indeed, CR 60 has been described as an attempt to balance finality and fairness.⁶

B. The County proposes a "hard and fast" rule in place of a careful balance of equitable considerations.

The County points to language in *Griggs* rejecting a "hard and fast" rule when a court is exercising its equitable discretion.⁷ It suggests that the trial court should be free to disregard the procedure spelled out in cases such as *Little v. King* or *White v. Holm*, in which the test used to evaluate the strength of the moving party's defense will be varied according to the reasons offered for the failure to appear. However, it would abandon the emphasis on equity altogether if the trial judge focused solely on the preference for a trial on the merits, as was done here.⁸ Instead, the trial court is required to consider *both*

language suggests, there is equal consideration for the intolerance for "continued delays" as there is a distaste for "hurried defaults." Both threaten the goal of doing justice.

⁵ *Little v. King*, 160 Wn.2d at 703, 161 P.3d at 349 (citations omitted).

⁶ *Suburban Janitorial Services*, 72 Wn. App. at 313, 863 P.2d at 1383.

⁷ Respondent's brief at 13.

⁸ "The courts, in fact, all three divisions and the Supreme Court, want cases to be heard on their merits, and so in that, the Court has no choice but to vacate the default at this point." RP 40:3-6.

the preference for a trial on the merits *as well as* the concern for the finality of judgments and the need to insure compliance with court rules. Although CR 60(b)(1) does not spell out a specific procedure, the courts have developed a four-factor test to guide the trial court in determining whether a motion to vacate should be granted.⁹ That four-part test has been further refined to distinguish between cases in which the moving party can present a “strong or virtually conclusive defense” and those in which the moving party is only able to present a prima facie defense.¹⁰

⁹ *White*, 73 Wn.2d at 352, 438 P.2d at 584.

The discretion which the trial court is called upon to exercise in passing upon an appropriate application to set aside a default judgment concerns itself with and revolves about two primary and two secondary factors which must be shown by the moving party. These factors are: (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 entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

This appeal focuses on the trial court's misapplication of factors (1) and (2).

¹⁰ The fundamental rule was set down in *White v. Holm*, 73 Wn.2d at 352-53, 438 P.2d at 584:

[W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, . . .

Instead of applying a rule that focuses only on the value of resolving cases on the merits, the rule that should be applied to this case is the one that the courts have developed to implement CR 60: compare the strength of the moving party's defense to the reason(s) presented for the failure to answer or appear, and apply equitable principles to ensure that justice is done.

II. Unless "mistake" results in excusable neglect, it does not entitle the moving party to relief absent a strong or virtually conclusive defense.

The County bases its first main argument on the claim that mistake serves as an independent basis for setting aside a default judgment, even if there is no excusable neglect. The County admits that it did not argue excusable neglect, and disclaims any reliance upon that basis for relief.¹¹ However, it claims that it was entitled to relief on the basis of mistake, and makes the claim – no mistake this time, since it was repeated three times¹² – that “[c]ase law has not defined *or addressed* mistake or inadvertence.”¹³

In addition, the procedure for evaluating a “strong or virtually conclusive defense” was further explained in *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (2007).

¹¹ Respondent's Brief at 17.

¹² In addition to the language quoted, the County makes the same claim in two other places: “While there is no case law defining ‘mistake’ in this context . . .” (Respondent's Brief at 18); “Spokane County argues throughout its briefing is that what did occur was a mistake, or was inadvertent, neither of which are addressed by Washington case law.” (Respondent's Brief at 17).

¹³ Respondent's Brief at 17 n.3 (emphasis added).

A. “Mistake” under CR 60(b)(1) *has been* addressed by Washington case law.

1. *CR 60(b)(1) applies to all judgments, not just default judgments.*

The County objects to the Plaintiff’s focus on “excusable neglect” as the only basis for using the prima facie defense standard in ruling on a motion to set aside a default. Doing so, claims the County, would effectively read “mistake” or “inadvertence” out of the rule.¹⁴ The first flaw in this argument is that the County ignores the fact that CR 60(b)(1) applies to *all* judgments, not exclusively or even primarily default judgments. Thus, even if “mistake” never applied to default judgments, it would still be an important part of CR 60(b)(1). Moreover, what is demonstrably true of all default judgments is that they always involve a type of neglect – the failure to answer or appear.¹⁵ There may be times when mistake is also a reason for the failure, and the mistake may be one that is excusable, but it is logical

¹⁴ The County fails even to cite the rule correctly, quoting the rule as follows: “the language of CR 60(b)(1) which states ‘mistakes, inadvertence, surprise, excusable neglect or inequality [sic] in obtaining a judgment and or orders.’” Respondent’s Brief at 16. Irregularity, not inequality, is the basis for relief.

¹⁵ In fact, it is such a common element that it is assumed to be the primary basis for setting aside a default judgment. For example, *Griggs v. Averbek*, 92 Wn.2d at 582, 599 P.2d at 1292 (“Relief from a judgment is governed by the above stated principles, but the grounds and procedures are set forth in CR 60. Under CR 60(b)(1) there must be excusable neglect in allowing the default to be taken”).

for courts to focus – as they generally do – on whether the failure to appear or answer (neglect) was excusable or inexcusable.

Contrary to the County’s claim that mistake has not been addressed by Washington case law, there are numerous cases in which a mistake plays a role in the defendant’s failure to appear or answer. There may be a miscommunication between the defendant and a person the defendant thought was going to respond to the summons and complaint.¹⁶ There may be a mistake in believing that the summons and complaint was the commencement of a new action, as distinguished from a copy of pleadings in a proceeding already commenced. Often mistake is commingled with neglect.¹⁷ But simply

¹⁶ For example, *Norton v. Brown*, 99 Wn. App. 118, 992 P.2d 1019 (1999); *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 748 P.2d 241 (1987).

¹⁷ For example:

“A genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a **mistake** for purposes of vacating a default judgment.” *Norton v. Brown*, 99 Wn.App. at 124, 992 P.2d at 1022 (emphasis added).

“Thomas’s failure to appear for trial was the result of **mistake** or inadvertence, **and is excusable neglect** because the trial court created irregularities in the proceedings when it permitted Walkins to withdraw and gave Thomas improper notice of the continuance.” *In re C.T.*, 192 Wn. App. 1046 (Div. II Unpublished, 2016).

“The trial court made the findings necessary to authorize vacation of a judgment based on **mistake** or **excusable neglect**, and those findings are verities on appeal.” *Rush v. Blackburn*, 190 Wn. App. 945, 960, 361 P.3d 217, 223 (2015) (emphasis added).

“Similarly, a genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint constitutes **mistake** and **excusable neglect**.” *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 451 332 P.3d 991, 998 (2014) (emphasis added).

labeling a failure to appear or answer as a “mistake” rather than neglect does not change the burden on the defendant to show that, notwithstanding the defendant’s failure to appear, there was an effort to comply with court rules sufficient to excuse the mistake. In effect, the defendant is required to show some mitigating circumstance that justifies relieving the defendant of the consequences of the failure to answer or appear. Otherwise, the trial court would fail to fulfill the purpose of CR 60, which is “balancing between finality and fairness.”¹⁸

2. *This case does not involve “mistake,” but rather inexcusable neglect.*

Even assuming mistake standing alone could justify vacating a default judgment where the defendant presented only a prima facie case, the County would still be required to show that it applies to this case. The evidence would not support such a finding.

First, the facts of the case point to a characterization of the defendant’s conduct as neglect, not mistake. Unlike the cases in which mistake formed part of the basis for vacating the default judgment, in this case no third party led the defendant to believe that the suit was

“[T]he Johnsons’ conduct here constituted a **mistake** and **excusable neglect**.” *Gutz v. Johnson*, 128 Wn. App. 901, 919, 117 P.3d 390, 399 (2005) (emphasis added)

“The record demonstrates that Wild Oats’ failure to timely answer Showalter’s complaint was a **mistake**, the result of a misunderstanding, and **excusable neglect**, not a willful intent to ignore the lawsuit.” *Showalter v. Wild Oats*, 124 Wn. App. 506, 514, 101 P.3d 867, 871 (2004) (emphasis added).

¹⁸ *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. at 313, 863 P.2d at 1383.

being defended;¹⁹ nor is this a case where the defendant tried to secure a defense of the case but was unsuccessful because the effort went awry.²⁰ The only evidence submitted by the County as to why it failed to answer or appear was the Affidavit of Stephen Bartel, who admitted that he simply failed to do what the rules required him to do.²¹ While it is understandable that the County did not even attempt to justify its conduct as excusable neglect, it should not change the analysis by labeling it as “mistake” rather than “neglect.” The question should be whether it is excusable.

Moreover, it is significant that the trial court never referred to “mistake” as the basis for requiring only a prima facie defense. The transcript of the trial court’s oral ruling contains only two references to the word “mistake” and they are both in the context of listing the contents of CR 60(b)(1). There is no finding as to whether the County’s failure to answer or appear was a mistake—whether excusable or not. By contrast, there are numerous references to neglect and whether it was excusable.²²

¹⁹ For example, in *White v. Holm, supra*, there was confusion between the insured and the insurer as to who would defend the case.

²⁰ For example, in *Berger v. Dishman Dodge, Inc.*, the defendant sent the wrong case file to the law firm he was expecting to defend him.

²¹ CP 268:25-28. Bartel calls his failure to respond “an inadvertent, and most unfortunate, mistake,” but there is no claim that he attempted (mistakenly) to respond, or that there was some misunderstanding. It is neglect, pure and simple. The question is whether it was excusable or not.

²² The County disputes the plaintiff’s interpretation of the trial court’s meaning when she said that “this is [in]excusable neglect on the part of the County.” RP

The rule proposed by the County—application of the prima facie defense standard whenever the moving party claims their failure to answer or appear was a “mistake”— would abandon the well-established procedure used in cases applying CR 60(b)(1) to default judgments. If an appeal to the language of “mistake” in CR 60(b)(1) would relieve the moving party of the burden of showing a reasonable excuse for its failure to appear or answer, then no defendant would bother to argue excusable neglect. Virtually every default judgment, viewed in hindsight, could be characterized as a “mistake.” Instead, even if mistake were considered an independent ground for setting aside a default judgment, and even if it applied to this case, the cases require evaluation of the “reason” for the mistake and whether it is excusable or not: “[W]here the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the

38:15-16. But there is no other reasonable interpretation of this comment. As the County’s own brief repeatedly asserts, the County never argued that there was excusable neglect. (Respondent’s Brief at 17.) In fact, although the County admits making the statement at oral argument before the trial court that “[t]his wasn’t a case of excusable neglect,” (RP at 11) the County now claims it was just a “solitary sentence.” (Respondent’s brief at 17.) Regardless of whether the County misspoke or actually intended to concede that there was no excusable neglect, the beginning of the sentence in the trial court’s oral ruling (“I would agree that the County has already said this is [in]excusable neglect on the part of the County.” RP at 38) is tied to something the County said, and the formulation suggests that it was a concession on the part of the County. Moreover, the trial court subsequently refers to the “strong or virtually conclusive defense” standard – the one that Plaintiff had urged should be used when inexcusable neglect is found. Even if the transcript correctly reflects what the trial court actually said, it does not help the County, because they have not argued, either at the trial court and on this appeal, that the record supports a finding of excusable neglect.

finder of the facts in a trial on the merits, the *reasons for his failure* to timely appear in the action before the default will be scrutinized with greater care . . .”²³ In other words, while the failure to appear usually falls under the category of neglect, even if the defendant argues mistake or inadvertence the court must still “scrutinize” the reason for the default to assess whether or not the defendant should be excused from the duty to comply with court rules.²⁴ When the reason for the County’s failure is scrutinized in this case, the record reveals nothing that would justify setting aside the default – unless the County meets the more stringent burden of establishing a strong or virtually conclusive defense.

III. The County failed to present a “strong or conclusive” defense.

The County argues in the alternative that, even if the prima facie defense standard does not apply, the trial court was justified in vacating the default judgment because the County presented a “strong or conclusive” defense. The evidence does not support such a finding.

²³ *White v. Holm*, 73 Wn.2d at 352-53, 438 P.2d at 584 (emphasis added).

²⁴ In *White v. Holm* the court refers to the “plausibility and excusability of the defaulted defendants’ reason for failing to initially and timely appear,” 73 Wn.2d at 353-54, 438 P.2d at 585. It is clear from that opinion that when the reasons for the defendant’s failure to answer or appear are “scrutinized,” it is for the purpose of distinguishing culpable from innocent reasons for the default. Similarly, in *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986), the court found that a prima facie defense standard should be used because the defendant “made a bona fide mistake.” Even though mistake was the basis for setting aside the default judgment, the court considered whether it was *bona fide* or what might be called an inexcusable mistake.

A. The “strong or virtually conclusive” defense standard functions as a threshold to prevent default judgments on meritless claims.

In determining whether the trial court would have been justified in finding that the “strong or virtually conclusive” defense standard was met, it is important to recognize the reason this standard has been developed in evaluating motions to set aside a default judgment. As noted previously, the application of equitable principles requires a consideration of two distinct values—the preference for resolving disputes on the merits along with the importance of insuring compliance with court rules.²⁵ If the moving party can establish excusable neglect, or otherwise show that it tried (albeit unsuccessfully) to comply with court rules, then it is entitled to a trial on the merits so long as it can show that the trial would not be useless—*i.e.*, that it has a prima facie defense. By contrast, where the “strong or conclusive” defense standard applies—that is, where the moving party cannot show a reason for its failure to comply with court rules—then the default judgment should not be set aside *unless the defendant can show that to do so would be unjust because the plaintiff’s claim is meritless.*²⁶ In other words, because the overriding

²⁵ Section I(A) above.

²⁶*TMT Bear Creek*, 140 Wn. App. at 204-05, 165 P.3d at 1279-80 (emphasis added):

[T]he purpose of determining whether there exists a strong or virtually conclusive defense is not to avoid a useless subsequent trial but, rather, to serve principles of equity. *See Cash Store*, 116 Wn. App. at 841, 68 P.3d 1099 (“In determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are

policy is to do justice, a default judgment should be set aside *either* because the plaintiff's claim is meritless, *or* because the defendant has established both a prima facie defense and excusable neglect.

Because the County has asked the court to focus only on the preference for a trial on the merits, it fails to acknowledge the distinct purpose served by the "strong or virtually conclusive defense" standard, and asks this court to interpret "strong or virtually conclusive defense" to mean simply a prima facie defense standing on tiptoes.

B. A strong or virtually conclusive defense can be shown either by demonstrating a fatal flaw in the plaintiff's case, or by establishing a dispositive affirmative defense.

Washington cases use the phrase "strong or virtually conclusive defense," but as previously noted the focus should be on the merits of the plaintiff's claim, rather than on the defendant. The defendant can satisfy its burden of showing a strong or virtually conclusive defense in one of two ways: the moving party may either (1) demonstrate a fatal flaw in the plaintiff's case; or (2) establish a dispositive affirmative defense. To illustrate the first type, suppose the plaintiff obtains a default judgment in a medical malpractice case, but the defendant offers (unrebutted) evidence that the testimony used to establish medical malpractice was provided by an expert who was not qualified to testify. In such a case, affirming the default

preserved and justice is done."). If a default judgment **on a meritless claim** is allowed to stand, justice has not been done.

judgment would be a clear miscarriage of justice. Showing such a lack of merit in the plaintiff's case would constitute a "strong or conclusive defense." As an example of the second scenario, suppose the plaintiff obtains a default judgment in a motor vehicle collision, but the defendant produces evidence that the plaintiff had signed a release covering the accident in question. Again, the defendant would have satisfied the standard of a "strong or conclusive defense." The point is that, although the standard is denominated a "strong or virtually conclusive defense," the actual application of the test focuses on what is left of the plaintiff's case after the defendant has had an opportunity to demonstrate its lack of merit.

C. The trial court abused its discretion in failing to consider plaintiff's evidence.

The trial court declined to weigh the evidence.²⁷ It appears that the trial court either was unaware of the distinction between a prima facie defense and a strong or conclusive defense, or it felt it was unnecessary to distinguish the two.²⁸ Such a procedure is clearly at

²⁷ "The Court can't go in and actually weigh that and say well, do I really think that's a great defense based on your countering what they said because I agree there's not been any discovery in this case, but have they shown it. Based on all the cases that I went through, are there different parts of that that they can show that might be a defense at trial or a jury could reasonably say maybe we don't find the County negligent?" RP 39:17-20.

²⁸ "[T]he County as a defendant has shown that they have a prima facie defense even under a strong or virtually conclusive defense." RP 39:14-16. This comment suggests the same confusion as the appellate court noted in *Akhavuz v. Moody*, 178 Wn. App. 526, 533, 315 P.3d 572, 575 (2013): "It is not clear whether the court deemed the defense virtually conclusive or merely a prima facie defense." In that case the appellate court determined that the defendant had failed to provide a

odds with the direction provided by *TMT Bear Creek*. In contrasting the standard for a prima facie defense with that of a “strong or virtually conclusive defense,” Division 1 pointed out that viewing the evidence in a light most favorable to the defendant “would not be sensible.”²⁹ In the first place, doing so would collapse the distinction between the two tests.³⁰ Second, unlike the prima facie defense test, which is aimed at determining whether a trial on the merits would be useless because it would simply produce the same result, the “strong or virtually conclusive defense” standard is applied to insure that a default judgment is not entered on a “meritless claim.”³¹ In determining whether or not the plaintiff’s claim is meritless, the trial judge should consider all of the evidence presented by the parties, not just the evidence submitted by the defendant, and should view the evidence in its totality, not simply in a light most favorable to the defendant.³²

D. The County failed to distinguish *Akhavuz*.

In its opening brief Appellant cited *Akhavuz v. Moody*. Decided six years after *TMT Bear Creek*, it also considered whether or not the

virtually conclusive defense and remanded the case to reinstate the default judgment.

²⁹ *TMT Bear Creek*, 140 Wn. App. at 203, 165 P.3d at 1279.

³⁰ *Id.*

³¹ *TMT Bear Creek*, 140 Wn. App. at 205, 165 P.3d at 1280.

³² *Id.*

defendant had provided a “strong or virtually conclusive defense” and concluded that it had not. Just as in this case, the trial court had granted the motion to set aside the default judgment and the plaintiff appealed that finding as an abuse of discretion. On appeal, Division 1 held that the trial court had abused its discretion, and ordered that the default judgment be reinstated. The County has failed to provide any distinguishing feature that would avoid the application of *Akhavuz* to require reinstatement of the default judgment in this case.

The County’s response brief argues that, even if it does not qualify for the “prima facie defense,” the trial court could set aside the default so long as the County presented a “strong” defense; to require a *conclusive* defense, they claim, would render “strong” mere surplusage.³³ In a footnote the County claims “there are no cases which define strong and virtually conclusive as synonymous.”³⁴ However, *Akhavuz* is just such a case. It begins by citing the case law requiring the “strong or virtually conclusive defense” standard in cases involving inexcusable neglect, but in applying the test it uses the word “conclusive” to describe the test to be applied.³⁵ Although *Akhavuz* does not cite *TMT Bear Creek* or use the word “meritless,” it follows a procedure that reflects the distinction drawn between the

³³ Respondent’s Brief at 21.

³⁴ *Id.* at 21, n. 6.

³⁵ *Akhavuz*, 178 Wn. App. At 534, 315 P.3d at 576 (“[W]e conclude [the defendant] did not present a conclusive defense”); *id.* at 534. (“Where a defendant is unable to show a conclusive defense . . .”); *id.* at 539 (“Where a party’s defense is prima facie but not conclusive, . . .”).

two types of defenses in *TMT Bear Creek*. Because *Akhavuz* is similar both in the procedural posture that was presented, as well as the finding that the trial court abused its discretion in setting aside the default judgment, the County's failure to distinguish *Akhavuz* should be dispositive of this case.

The County characterizes *Akhavuz* as deciding only the issue of "whether or not the negligence of the insurer and the assigned counsel could be assigned to the insured."³⁶ If *Akhavuz* were being relied upon for that proposition, it of course would be distinguishable. But plaintiff cited *Akhavuz* to demonstrate how the "strong or virtually conclusive defense" standard should be applied.³⁷ The County offers no rebuttal as to why a similar approach should not be followed in this case if the County is unable to establish excusable neglect or otherwise qualify for the prima facie defense standard.

IV. The County failed to respond or object to Plaintiff's request for fees and costs on appeal.

Pursuant to RAP 18.1, Plaintiff devoted a section of his opening brief³⁸ to his entitlement to an award of fees and costs for this appeal, regardless of the outcome, under CR 55(c) and the County's stipulation. The County failed entirely to respond or object to

³⁶ Respondent's Brief at 22.

³⁷ Appellant's Opening Brief, at 24-25.

³⁸ Appellant's Opening Brief, at 30-32.

Plaintiff's request. Plaintiff is entitled to fees and costs on this appeal just as he was at the trial court.

CONCLUSION

Unless the well-established law governing motions to vacate default judgments is itself to be vacated, it was error for the trial court to vacate the default judgment in this case. The County failed to present evidence sufficient to prove the Plaintiff's case was frivolous or unfounded, and has abandoned even attempting to show its neglect was excusable (offering instead that merely calling it a mistake eliminates the consequences of inexcusable neglect). This case should therefore be remanded for reinstatement of the default judgment.

Submitted this 28th day of October, 2016.



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CERTIFICATE OF SERVICE

I certify under oath and penalty of perjury of the laws of the State of Washington that I caused a copy of the foregoing brief to be served by on the 28th day of October, 2016 by email as per the stipulation for electronic service to:

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Signed at Spokane, Washington, this 28th day of October 2016.



Melanie A. Evans