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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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Court of Appeals File No. 34201-8-III

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COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION III

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

*Plaintiff-Appellant,*

vs.

SPOKANE COUNTY, DOE,

*Defendant-Respondents.*

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BRIEF OF APPELLANT

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Matthew C. Albrecht, WSBA No. 36801  
David K. DeWolf, WSBA No. 10875  
ALBRECHT LAW PLLC  
421 W. Riverside Ave., STE 614  
(509) 495-1246

Attorneys for Appellant

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## **INTRODUCTION**

This case arises from the failure of Spokane County to respond to any of three notices of a claim against them. 138 days after service of the tort claim form, and 75 days after service and filing of the summons and complaint, the County's failure to answer or appear resulted in entry of a default judgment against the County.

After the County brought a motion to set aside the default judgment, the trial court abused its discretion in setting aside the judgment. The rules with respect to vacating a default judgment require that the moving party establish either a "strong or virtually conclusive defense" to the plaintiff's claim or else show that the failure to appear was a result of excusable neglect. The County admitted it had no excuse for its neglect, and failed to assert anything more than, in its own words (and as described by the trial court), a prima facie defense. Because the trial court's decision was based on a mistaken legal standard (assuming a prima facie defense was adequate), this appeal seeks a reversal of the trial court's decision and a reinstatement of the default judgment.

### **ASSIGNMENTS OF ERROR**

1. The trial court erred in ruling on a motion to set aside a default judgment without determining the proper standard to apply in a case involving inexcusable neglect.
2. The trial court abused its discretion in applying a “prima facie defense” standard to the County’s motion to set aside the default.
3. The trial court erred in failing to find that the County did not satisfy the standard of a “strong or virtually conclusive” defense

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The County admitted it could not show excusable neglect for its failure to timely appear or answer this lawsuit. In the absence of excusable neglect, was the trial court required to apply a different standard compared to the one that would apply if excusable neglect had been established?
2. The trial court found that the County had presented a prima facie defense. In light of the County’s admission that it did not satisfy the excusable neglect standard, should the court have applied the “strong or virtually conclusive defense” standard?
3. If the “strong or virtually conclusive defense” standard is applied to the County’s evidence, has the County shown that Plaintiff’s lawsuit was without merit?

## STATEMENT OF THE CASE

*Alvarado's Death.* On Friday, August 11, 2012 Jessica Alvarado was arrested and booked into the Spokane County Jail. CP 182. She was arrested pursuant to a Grant County bench warrant for failure to appear on a single charge alleging she had obtained a controlled substance by a fake prescription. CP 146. The County had notice of her addiction through the nature of the charges themselves and because the "Nursing Clinical Data" sheet kept by Spokane County for Alvarado noted Alvarado "appears under the influence of stimulants" in February 2012 (CP 116), and the morning before her death noted "I/M had reportedly been vomiting and there was a concern for W/D." CP 116. The next note claims that "I/M denies drug and/or Alcohol Use," but this note is contradicted by the sworn statement of Officer Shaw that Alvarado on her last day alive told him she was withdrawing from meds, and that Alvarado's cellmate Garlinghouse told him Alvarado was withdrawing from "Oxy's." CP 102. Garlinghouse testified she and Alvarado had kept pressing the emergency call button (20-30 times) asking for help. CP 34-5. Officer Shaw also confirmed Nurse Ordaz was aware Alvarado was going through withdrawals but the nurse refused to place her on a drug withdrawal monitor because Alvarado "didn't tell him *what* she was

withdrawing from.” CP 102. Officer Shaw then removed the cellmate (Garlinghouse) who had been complaining that Alvarado needed medical attention from the cell, told the nurse if he wouldn’t put her on a drug withdrawal monitor then the guard would instead find an empty cell for her and she would “just be left housed alone on 2 west until she was feeling better.” *Id.*

Dr. Kenneth Coleman opined that a patient such as Ms. Alvarado suffering intractable vomiting, repeated bouts of diarrhea, and an inability to keep oral fluids down is medically unstable and must be under active medical care with or without drug withdrawals, but drug withdrawal is itself a potentially life-threatening condition that also requires medical monitoring. CP 38-9. Alvarado was given no further medical attention after the nurse and Officer Shaw decided to leave her alone in the cell the morning of August 12th, and she died about midnight that night of aspiration pneumonia alone in that cell as a secondary complication of intravenous drug use. CP 174. Dr. Coleman testified that Alvarado suffered through over sixteen hours of needless pain and anxiety after the standard of care required that she be provided medical care, that she died of asphyxiation, that such a death has been described by survivors as terrifying, that he has

personally witnessed this terror in patients, and that more likely than not she would have survived without aspirating vomit if the County had provided medical monitoring or care. CP 39-40.

*Damages.* Alvarado is survived by her son A.D., who is the sole beneficiary of her estate. CP 57-58. Alvarado's minor son was nine years old at the time he lost his mother, and his grandfather Frank DeCaro (who is now A.D.'s guardian) explained that prior to her death she was primarily a stay at home mother and that A.D. had lived with and been very close with his mother. CP 57-58. Mr. DeCaro explained A.D. still, years later, regularly misses and talks about his mother and their favorite things to do together when she was still with him. CP 58. Alvarado's pre-death pain and suffering, caused by the County's refusal to provide medical care, took place over an extended period of time and included extreme levels of pain and anxiety (CP 39) and her then nine-year old son lost his mother and at the time had no father so went to the care of his grandfather—\$8,000,000 was a reasonable and likely conservative amount for the combination of pain and suffering and loss of consortium general damages in such a case. CP 43; CP 56.

*Facts relating to the entry of default.* On July 17, 2015, a standard Tort Claims Form was submitted by Frank DeCaro (the personal representative of the Estate of Jessica Alvarado) to the Spokane County Department of Risk Management. CP 64. The County's risk manager, Stephen Bartel, recognized the significance of the claim but decided not to respond because he believed the claim was not resolvable at the claims stage. CP 268:23. On September 18, 2015 the Estate filed a Complaint in Spokane County Superior Court. CP 1. The second notice to the County of a claim against them occurred when the Summons and Complaint were served upon Denise Toutloff in the Spokane County Auditor's Office on September 18, 2015. CP 11. In order to be sure that the defendant was properly served, the Estate served the Summons and Complaint – the third notice to the County – on September 22, 2015, evidenced by an acceptance of service by Todd Taylor, who verified his authority to accept service on behalf of the Spokane County Auditor on September 22, 2015. CP 9. The County's written "Notice of Process Policy" identifies both Ms. Toutloff and Mr. Taylor as two of the five individuals who the County has "authorized to accept service of summons." CP 172. This same written policy requires the person receiving service to deliver the original documents served to the Spokane County Risk Management Department, and it is undisputed that this step

was followed in the present case. CP 173. Stephen Bartel, the County Risk Manager, received the summons and complaint but did not forward it to legal counsel. CP 268. Mr. Bartel admits he had previously received Alvarado's Notice of Tort Claim on July 17, 2015, but failed to attempt any resolution of the claim "[g]iven the enormity of the demand."<sup>1</sup> CP 268.

Receiving no response to any of the three notices to the County of its claim, on November 6, 2015 (more than 40 days following the service of the Summons and Complaint) the Estate of Jessica Alvarado filed a motion for default, which order was granted and filed the same day. CP 17. Plaintiff then waited almost another full calendar month without any contact by the County before filing a motion for entry of default judgment on December 1, 2015. CP 20. The following day in an open court hearing, Judge Annette Plese entered Findings of Fact and Conclusions of Law finding Alvarado was entitled to default judgment in the amount of \$8,000,000. CP 181. This amount consisted of \$4,000,000 for Alvarado's surviving minor child for loss of consortium and companionship of his

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<sup>1</sup> Alvarado's Notice of Tort Claim put the County on notice of the precise amount of damages owed to the Alvarado Estate, which was the same amount later awarded by the trial court, \$8,000,000. CP 65. Alvarado's Notice of Tort Claim undisputedly satisfied all statutory requirements, and included 107 pages of evidence, in large part much of the same evidence relied on by the trial court in granting Alvarado's motion for default judgment. CP 64-171.

mother, \$4,000,000 for Alvarado's pre-death pain and suffering caused by the County's negligence, and statutory fees and costs. CP 184. Judgment was entered accordingly on December 2, 2015. CP 187.<sup>2</sup> The Alvarado Estate arranged service of the judgment on the Spokane County Auditor on December 3, 2015. After more than two months of silence, Spokane County then entered a notice of appearance on December 3, 2015. CP 191.

*The Motion to Set Aside the Default Judgment.* On December 21, 2015 the County filed a Motion and Supporting Memorandum to Set Aside the Default and the Default Judgment. CP 203; 205. The County's brief stated, "Spokane County has a Prima Facie Defense." CP 211:24; it further claimed, "Spokane County Has a Prima Defense as to Liability." CP 212:5. The County further claimed that its failure to enter a notice of appearance "Constitutes Inadvertent Mistake and Excusable Neglect."<sup>3</sup> CP 218:13. Nonetheless, the County failed to provide any evidence that would support a finding of excusable neglect. On the other hand, the County submitted numerous declarations setting forth the County's

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<sup>2</sup> The amended judgment was the result of a clerical error in the first judgment that left the first page summary incomplete. The amended judgment was entered the same day once the clerk brought this to the attention of the court and Alvarado's counsel.

<sup>3</sup> A claim later abandoned by the County when it admitted it had no reasonable excuse for its failure to answer or defend the lawsuit. RP 11.

prima facie defense. (CP 223-297) Because the plaintiff had provided extensive evidence of the County's liability in support of the motion for default, the County's declarations attempted to discredit the plaintiff's liability claims. For example, the County offered testimony that Alvarado told jail personnel she was withdrawing from "meds," but never identified the medication she was withdrawing from. (CP 228:26-28) A nurse employed by the jail evaluated Alvarado on Saturday after hearing reports that she had been vomiting; when asked whether she had used drugs or alcohol Alvarado allegedly denied doing so. CP 249:26-27. The County offered testimony from its' nurse claiming that Alvarado "exhibited no physical symptoms that gave any indication she was in need of further care, or even additional monitoring." CP 250:4-5. The County also offered a declaration by a jail guard claiming that on Saturday afternoon, between 1 and 3 pm (less than 12 hours before her death), Alvarado responded to requests to remove unauthorized clothing by doing so "without assistance, or difficulty." CP 232:9-10. Another County employee (Sgt. Pannell) described an interview with Alvarado's cell-mate after the incident in which he omitted any reference to Alvarado's dire condition or the lack of medical attention. CP 253:22-28. The County also offered expert medical opinions contradicting the claims

made by plaintiff's expert witnesses concerning both the standard of care and the cause of death. CP 274:22-276:19; 286:1-289:1.

Plaintiff timely filed a memorandum in opposition to the motion to vacate the default judgment, pointing out that the moving party must either establish that there is a strong or virtually conclusive defense to the plaintiff's claim, or else that there was excusable neglect. Plaintiff also submitted extensive evidence rebutting the evidence of a prima facie defense offered by the County in support of its motion.<sup>4</sup> For example, the plaintiff offered supplemental declarations by plaintiff's medical experts contradicting the claims made by the defense medical experts. CP 320-326 (regarding the standard of care); CP 327-335 (concerning the manner and cause of death). In addition, plaintiff provided a transcript of an interview with Alvarado's cell-mate that directly contradicted Sgt. Pannell's account of what the cell-mate reported to him following Alvarado's death, and reiterated both the knowledge of Alvarado's condition and the failure of jail personnel to respond appropriately to Alvarado's obvious distress. CP 336.

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<sup>4</sup> Plaintiff also responded to the allegation in the County's motion and memorandum claiming that the default judgment result from a violation of the civil rules and rules of professional conduct by plaintiff's counsel. After receiving Plaintiff's responsive briefing, the County retracted and apologized for those unsupported allegations.

In response to the County's declaration by Officer Fishbaugh (claiming Alvarado followed all commands "without assistance, or difficulty"), Plaintiff provided evidence of the contradictory sworn statement Officer Fishbaugh had previously signed on August 13, 2012 (the day following Alvarado's death). CP 304:1-9. Officer Fishbaugh's 2012 sworn statement described Ms. Alvarado the afternoon before her death as "groggy" and acknowledged the officer needed three separate times opening and closing the door and giving instructions to Alvarado just to carry out the simple instruction that she "take off all her own clothes and give them to me." *Id.* Furthermore, while the County's experts had both claimed there was no evidence Alvarado was suffering from either confusion or diarrhea, Plaintiff rebutted this with the 2012 statement by Officer Fishbaugh (CP 103) and the Affidavit of Helen Garlinghouse (Alvarado's cellmate). CP 34-5.

The County filed a reply memorandum that attempted to qualify the Risk Manager's error as a mistake (CP 362) and argued that it was not required to respond to the evidence submitted by Plaintiff because it was only required to show "a 'strong defense,' or prima facie evidence of a defense." CP 359. On the other hand, the County elsewhere characterized its burden as showing either a strong or a virtually conclusive defense (CP 362:8).

*The Hearing on the Motion.* The trial court heard oral argument on the motion to set aside the default judgment on January 8, 2016. The County admitted that this was not a case of excusable neglect (RP 8:10-11), but argued that it had presented a “strong defense.” RP 9:5-6. The trial court recognized the County’s admission of inexcusable neglect but vacated the default judgment nonetheless because the County had established a prima facie defense and had therefore met the other prongs of the test established in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). This appeal followed.

## ARGUMENT

A motion to set aside a default judgment is addressed to the trial court's discretion. *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997) (citation omitted). A trial court's decision is manifestly unreasonable and an abuse of discretion if it is not based on the correct legal standard. *Id.* at 47.

**I. In evaluating a motion to set aside a default judgment, the court must exercise its discretion in light of the reason for the defendant's failure to appear or answer.**

In this case the County motion to vacate the default judgment relied exclusively on CR 60(b)(1), which provides in relevant part:

On motion and upon such terms as are just, the court may relieve a party or the party's 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.

Significantly, CR 60 by its terms only contemplates setting aside a default judgment based upon excusable neglect (and other provisions inapplicable to this case)—it provides no alternative short

of fraud in the absence of excusable neglect. Although *Little* and other cases authorize a trial court to set aside a default judgment where the plaintiff's claim is meritless, the basis upon which the County requested relief from the default judgment—CR 60—has no application here.

*1. In exercising its discretion, a trial court should balance the importance of the principles of finality and justice satisfied by following and enforcing court rules against the general preference for deciding cases on the merits.*

While default judgments are not favored because of the preference to have controversies decided on the merits, courts “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.” *Little*, 160 Wn.2d at 703, 161 P.3d at 349. The exercise of the court's discretion should balance these competing policies to insure that justice is being done. *Id.*, 160 Wn.2d at 703, 161 P.3d at 350.

While the County will continue to emphasize the preference for deciding cases on the merits, rather than by procedural shortcuts, it is significant that the County is the beneficiary of important procedural rules that prevent a trial on the merits for claimants who fail to follow the rules. For example, if the plaintiff in this case had filed the

Complaint on September 25 instead of September 18, the County could have successfully prevented a trial on the merits because the plaintiff would have failed to comply with the claim filing requirements established in RCW § 4.96.020(4). In the case of an untimely filing by the plaintiff, the County would correctly point out that the interests of determining cases on their merits were outweighed by the interests of finality and consistency satisfied by imposition of a firm deadline. Just as the plaintiff may forfeit the right to a trial on the merits by failing to follow the rules, the County may also, as it did in this case, lose its right to a decision on the merits by inexcusably failing to follow court rules. In this case the County had far more notice than the average defendant receives. The County received first an advance tort claim notice of Plaintiff's intent to sue, then two additional services of Plaintiff's summons and complaint—one of which included a signed acceptance of service by an authorized County agent. Yet the County without reasonable excuse failed to enter appearance or answer the complaint until more than 75 days had passed from the initial service of the complaint. The same rules that apply to any other defendant or would be applied to the Plaintiff should be applied equally to the County. Indeed, as the Supreme

Court stated in *Lybbert v. Grant County*, 141 Wn.2d 29, 37-38, 1 P.3d

1124, 1129 (2000) (emphasis added by the Supreme Court):

While we agree with the basic proposition that the government should be just when dealing with its citizens, [footnote omitted] we do not believe that an attorney representing the government has a duty to maintain a standard of conduct that is higher than that expected of an attorney for a private party. If we were to impose such a heightened duty on attorneys for the government we would be creating a two-tiered system of advocacy, one for legal representatives of the government and the other for counsel of private parties. We are loathe to do so, particularly in light of the generally recognized view, embodied in the Preliminary Statement to the Rules of Professional Conduct, to the effect that "the rules should be uniformly applied to all lawyers, *regardless of the nature of their professional activities.*"

2. *Motions to set aside a default should be evaluated by one of two standards, depending upon the reason for the defendant's failure to appear or answer.*

Although the standard for evaluating a motion to vacate a default judgment is usually described as being governed by a four-part test,<sup>5</sup> there are actually two different tests that govern such

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<sup>5</sup> *Little*, 160 Wn.2d at 703-704, 161 P.3d at 350:

A party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

cases, depending upon the reason for the defendant's failure to appear or answer.<sup>6</sup> If the defendant offers no excuse for its failure to answer or appear, the defendant must provide a "strong or conclusive defense" to the plaintiff's claim. By contrast, if the defendant can establish excusable neglect, the defendant is only required to provide evidence of a prima facie defense:

[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 [*sic*], 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, as will the seasonability of his application and the element of potential hardship on the opposing party.

*White v. Holm*, , 73 Wn.2d at 352-53, 438 P.2d at 584. In other words, in exercising its discretion concerning the equities of the case, the Court

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This test is clearly inapplicable in cases where element (2) cannot be satisfied, which the County admits is the case here.

<sup>6</sup> There is actually third type, quite rare, in which the defendant's failure to appear results not merely from inexcusable neglect, but from willful refusal. In such a case, "equity will not afford that party relief, even if the party has a strong or virtually conclusive defense to its opponents' claims." *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn.App. 191, 205, 165 P.3d 1271 (2007). Although the County offers no excuse for its failure to answer or appear, plaintiff asks the court to apply the "strong or conclusive defense" standard to this case.

considers the relationship between the culpability of the defendant in failing to appear or answer and the relative strength of the defense; the threshold for the strength of the defense that must be shown increases as the inexcusability for defendant's failure to follow court rules increases. While the County below objected to the characterization of this analysis as a dichotomous one (CP 358:11), even if there is a "spectrum" as the County contends (358:9), or some sort of sliding scale, the burden on the defendant varies with the excusability (or inexcusability) of the defendant's failure to appear or answer a lawsuit.

The proper procedure for a case lacking evidence of excusable neglect was further addressed in *TMT Bear Creek Shopping Center*, 140 Wn. App. 191 (hereinafter "*TMT Bear Creek*"). A defendant who can establish excusable neglect is only required to present a prima facie defense to the plaintiff's claim, viewing the evidence in a light most favorable to the defendant. By contrast, where the defendant fails to establish excusable neglect, a default judgment may only be set aside if the defendant presents a "strong or virtually conclusive defense" to the claim upon which the default judgment was based. *Id.* at 205, 165 P.3d at 1280. In determining whether the defendant has presented a "strong or virtually conclusive" defense, the court in *TMT Bear Creek*

recognized that the evidence should not be viewed in a light most favorable to the defendant. *Id.* at 207, 165 P.3d at 1281.

3. *The County admits its neglect was inexcusable; therefore, a strong or virtually conclusive defense must be established.*

In the hearing on the County's motion to set aside the default, the County admitted that its neglect was not excusable: "This wasn't a case of excusable neglect, . . ." RP, 11:20-21.<sup>7</sup> The trial court agreed: "I would agree the County has already said this is [inexcusable] neglect on the part of the County."<sup>8</sup> RP 38:15-16. Consequently, under the rule established in *TMT Bear Creek*, the County is required to establish a strong or virtually conclusive defense before the trial court would be justified in setting aside the default judgment.

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<sup>7</sup> Although the County at times attempted to justify its failure to appear as a "mistake," suggesting that it offered an alternative to excusable neglect (CP 364:6; 365:18-19; 366:5), it cited no authority for permitting a judgment to be set aside for a "mistake" made by the defendant. Moreover, by his own admission the risk manager Stephen Bartel neglected to forward the summons and complaint to legal counsel. It was clearly neglect. The only question is whether it is excusable or not. If "mistake" were an alternative way to characterize what was clearly neglect, and thereby qualify for the less rigorous standard for setting aside a default, the entire jurisprudence distinguishing excusable from inexcusable neglect would be rendered meaningless.

<sup>8</sup> The initial verbatim report contains the phrase "an excusable" where it should read "inexcusable." The Court's meaning is clear from the subsequent comment that the County was required to show a "strong or virtually conclusive defense" and from the Court's acknowledgement that the County "already stipulated to that [neglect]." RP 39:25. If the County attempts to reverse its position on the inexcusability of its neglect, further briefing will be provided on this point and correction of the verbatim transcript will be requested.

**II. In this case, the trial court abused its discretion by applying a “prima facie defense” standard to the County’s evidence.**

1. *It is an abuse of discretion to apply the wrong legal standard.*

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, ie., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.

*Schwarz v. Schwarz*, 192 Wn.App. 180, 211-212, 368 P.3d 173, 189 (2016), quoting *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). Although a trial court’s decision to set aside a default judgment is reviewed under an abuse of discretion standard, it is an abuse of discretion to apply an incorrect legal standard. In *Akhavuz v. Moody*, 178 Wn.App. 526, 315 P.3d 572 (2013) (discussed later in this brief), the appellate court reversed a trial court’s decision to set aside a default judgment and reinstated a default judgment because the trial court failed to apply the correct legal standard.

2. *The trial court applied the “prima facie defense” standard to the County’s motion.*

In ruling that the default should be set aside, the trial court clearly found that the County had presented a merely prima facie defense: “As I go through this and I look at the case, itself, and

whether or not there is substantial evidence showing a prima facie defense, the Court would have to say at this point, I don't weigh – they say this is their defense." RP, 38:23-39:1. "The Court has to say is there enough that this could actually be a defense at trial...". RP 39:2-4. In effect, the trial court applied the lower test that would only be appropriate for cases in which the defendant established excusable neglect, but applied it to a case where no excusable neglect was shown. This decision was an abuse of discretion because it applied the incorrect legal standard.

**III. Employing the "strong or virtually conclusive defense" test, the evidence below would not support setting aside the default judgment**

Even though the trial court applied the incorrect legal standard, the default judgment could have been set aside if the defendant had offered evidence satisfying the correct legal standard—a "strong or virtually conclusive defense," but the County's alleged defense did not rise beyond a prima facie defense in this case.

*1. In order to establish a "strong or virtually conclusive" defense, the County was required to establish that the Plaintiff's claim is meritless.*

In *TMT Bear Creek* the court explained the reason for drawing a sharp distinction between the level of proof sufficient to set aside a default judgment in a case of excusable neglect from the level of proof

required where the defendant has failed to establish excusable

neglect:

[T]he rationale for viewing the evidence in the light most favorable to the movant in determining the existence of a prima facie defense is inapplicable to a determination of whether there exists a strong or virtually conclusive defense to the plaintiff's claim.

As previously discussed, the purpose of requiring the defendant to demonstrate the existence of a prima facie defense is simply to avoid a useless subsequent trial. *Griggs*, 92 Wash.2d at 583, 599 P.2d 1289. If a defendant is able to proffer evidence which, if proved, would entitle that defendant to relief, a trial on the merits would be useful to determine the truth of the factual evidence proffered by the defendant, regardless of the existence of countervailing evidence. It is for this reason that the evidence is viewed in the light most favorable to the defendant in conducting that inquiry.

In contrast, the purpose of determining whether there exists a strong or virtually conclusive defense is not to avoid a useless subsequent trial but, rather, to serve principles of equity. *See Cash Store*, 116 Wash.App. at 841, 68 P.3d 1099 ("In determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are preserved and justice is done."). If a default judgment **on a meritless claim** is allowed to stand, justice has not been done.

*TMT Bear Creek*, 140 Wn.App. at 204-05, 165 P.3d at 1279-80

(emphasis added). The court's discussion suggests a certain

symmetry to the standards applied in the two types of cases.

Excusable neglect requires the court to view the evidence in a light

most favorable to the defendant, denying a motion to vacate only in those circumstances where a trial would produce a result no different from the default judgment. By contrast, if there is no excusable neglect, the plaintiff is entitled to the default judgment unless the defendant can prove that a trial would certainly result in a judgment for the defendant, because the defendant has produced evidence that establishes the lack of merit in the plaintiff's case:

Where the actions resulting in default are excusable, vacating a default judgment and allowing for trial is likely an equitable result, unless the trial would be a useless formality. However, where the actions resulting in default do not qualify as excusable, the concern is different. Hence, trial would not be warranted unless allowing a judgment to stand would itself be an inequitable result because of the existence of a conclusive defense to the claim.

*TMT Bear Creek*, 140 Wn.App. at 206, 165 P.3d at 1280. In both cases the court is guided toward attempting to prevent a palpable injustice from occurring, but it does not blindly prefer a trial on the merits to the default judgment.

The logic of *TMT Bear Creek* analysis it clear that a court would abuse its discretion if it did not consider the plaintiff's evidence before concluding that the plaintiff's case is meritless. Thus, even though the language of the cases refers to the defendant establishing a "strong or

conclusive defense,” the defendant’s burden is not merely to show that it has a defense – even a strong defense – but rather the defendant must demonstrate the lack of merit in the plaintiff’s case. For example, the defendant might show that the plaintiff’s claims are barred by the applicable statute of limitations, or were extinguished in a bankruptcy proceeding. Alternatively, the defendant might demonstrate that the plaintiff’s evidence is fraudulent, or can be countered by unrebutted evidence from the defendant that leaves no doubt as to the lack of merit in the plaintiff’s claims.<sup>9</sup>

*Akhavuz v. Moody*, 178 Wn.App. 526, 315 P.3d 572 (2013), is an example of an abuse of discretion where the trial court set aside a default judgment without considering the plaintiff’s evidence. The plaintiff was injured in a fall after slipping on fake blood used by the performers at a nightclub. The plaintiff obtained a default judgment

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<sup>9</sup> One might compare this process to the burden-shifting procedure in an employment discrimination case. The defendant has the opportunity to offer a non-discriminatory reason for the adverse employment decision, after which the plaintiff must either show that the reason was pretextual or else suffer dismissal. In an analogous way, the defendant has the opportunity in a case such as this one to establish a conclusive defense (such as a discharge in bankruptcy, or accord and satisfaction), or alternatively to produce evidence that contradicts an essential element of the plaintiff’s claim. If the plaintiff fails to establish at a minimum the existence of a genuine issue of material fact with respect to each element of the plaintiff’s claim, then a court could find that the claim was meritless.

against the nightclub, and a motion to set aside the default was granted by the trial court. On appeal the nightclub defended the trial court's decision to set aside the default by pointing out its evidence that the nightclub had no notice of the dangerous condition. However, the appeals court noted that the plaintiff had rebutted this evidence with evidence supporting its claim that the nightclub did have notice, and thus the nightclub had failed to carry its burden of establishing a conclusive defense: "Based on this record, we conclude Studio Seven did not present a conclusive defense, but rather a prima facie defense sufficient to carry the issue of liability to trial." *Id.* at 534, 315 P.3d at 576. Because the nightclub failed to establish excusable neglect (similar to the case at bar), Division 1 reversed the trial court's ruling setting aside the default judgment, and remanded the case for reinstatement of the default judgment.

*2. Unless the court considers the plaintiff's evidence, the distinction will be lost between excusable and inexcusable neglect*

As a further reason for imposing a higher burden to establish a "strong or virtually conclusive defense," the court in *TMT Bear Creek* recognized that a failure to do so would effectively collapse the distinction between excusable and inexcusable neglect:

[I]t is readily apparent that were a trial court required to view the evidence in the light most favorable to the movant both in determining the existence of a strong or virtually conclusive defense and in determining the existence of a prima facie defense, there would be no reasonable distinction between the two inquiries. Viewed in such a light, evidence sufficient to demonstrate the existence of a prima facie defense would also, of necessity, demonstrate the existence of a strong or virtually conclusive defense as well. [footnote omitted] We do not read the rule articulated in *White v. Holm* to indicate that our Supreme Court intended such a state of affairs.

*TMT Bear Creek*, 140 Wn.App. at 203-04, 165 P.3d at 179. As emphasized earlier, a sharp distinction between the types of cases is a necessary consequence of the requirement to balance the need for adherence to court rules with the desire to see cases decided on the merits.

3. *“Strong or virtually conclusive” is a single phrase, not an alternative standard*

As noted previously, the trial court appears to have applied a “prima facie defense” standard to defendant’s evidence, although at other times the court made reference to the “strong or virtually conclusive” standard. RP 39:15-16. The County contended that the standard of a “strong or virtually conclusive” defense permitted the defendant to meet that standard by presenting *either* a strong *or* a

virtually conclusive defense.<sup>10</sup> CP 358:28; 362:10-14; 362:26-363:2 (“Thus, Spokane County need only show that it has a strong defense, *not* that it is virtually conclusive that it would ultimately prevail”). This interpretation of the standard should be rejected for two reasons. First, it would render the words “virtually conclusive” mere surplusage, since a “virtually conclusive” defense would necessarily be a “strong” one.<sup>11</sup> Second, it would be difficult to determine whether a defense was “strong” (as distinguished from being merely a “prima facie” defense) if the court failed to consider the plaintiff’s evidence. Instead, as the court emphasized in *TMT Bear Creek*, the point of the analysis of the “strong or virtually conclusive defense” is to evaluate whether the plaintiff’s case has merit. Unless the defendant succeeds in establishing either a “strong or virtually conclusive” defense (such as the statute of limitations) or a lack of

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<sup>10</sup> Adding to the confusion that may have led the trial court astray, at CP 358-359 the County also seemed to conflate a “strong defense” with a “prima facie defense.”

<sup>11</sup> Significantly, in the language quoted above explaining the distinction between the two standards, the court in *TMT Bear Creek* dropped the reference to a strong defense and simply described the test for inexcusable neglect as resting upon a “conclusive defense.” 140 Wn.App. at 206, 165 P.3d at 1280.

merit in the plaintiff's claim, the motion to set aside the default should be denied.

4. *The County failed to provide a "strong or virtually conclusive defense"*

Significantly, in its initial memorandum supporting its motion to set aside the default judgment, the County characterized its defense as a "Prima Facie Defense" (CP, 211:24) and later as a "Prima Facie Defense as to Liability." (CP, 212:5) Although it later claimed that it had a "strong" defense (CP 212:12) or a "strong prima facie defense" (214:20), the County was unable to establish that the plaintiff's claim was meritless. In fact, when the plaintiff responded to the County's motion and its evidence with strong rebuttal evidence discrediting the County's evidence and witnesses, the County did not attempt to reply, but instead claimed in its reply brief that it had no duty to respond to the plaintiff's evidence:

For the same reason, Spokane County has not responded to Plaintiff's additional declarations because the Court [sic]. Thus, the Plaintiff's argument essentially starts on page 9 of his Responsive Memorandum. It need only determine if there is a "strong defense," of prima facie evidence of a defense.

CP 358:26-359:3.

In responding to the County's motion to set aside the default judgment, the plaintiff went to considerable length to establish the

merits of its claim and to rebut the evidence offered by the County in support of its motion. Rather than respond with evidence showing the lack of merit in the plaintiff's claim, the County effectively conceded that all it had was a prima facie defense, or a "strong prima facie defense," which could only be judged to be "strong" without consideration of the plaintiff's evidence. The trial court committed error by following the County's suggestion and refusing to consider Plaintiff's evidence. RP 38-9.

The cases leave open the question of the exact standard by which a "strong or virtually conclusive defense" should be measured. *TMT Bear Creek* equates it to a showing that the plaintiff obtained the default judgment on a meritless claim. 140 Wn.App. at 204-05, 165 P.3d at 1279-80. Nonetheless, *TMT Bear Creek* does not explain how a trial court should proceed to evaluate whether a claim is meritless. A variety of analogies suggest themselves: One procedure might be the same one that is applied in evaluating a motion for summary judgment (CR 56): Has the plaintiff created a genuine issue of material fact with respect to each of the elements of the plaintiff's claim? Alternatively, the standard for judgment as a matter of law (CR 50(a)) might be applied: is there no legally sufficient evidentiary basis

for a reasonable jury to find for the plaintiff? Finally, a court might employ something akin to the standard for granting a new trial (CR 59(a)) based on the moving party's claim that "substantial justice has not been done."

If any of these three tests, or some similar adaptation of an existing standard, is applied to the facts of this case, there can be no doubt that the County's evidence falls far short of establishing that it has a "strong or conclusive defense"—or in other words, that the plaintiff's claim was meritless. Consequently, it was error to set aside the default judgment.

**IV. Plaintiff is entitled to an award of compensatory terms of fees and costs for this appeal.**

Pursuant to the Civil Rules, the County's stipulation, and RAP 18.1, Plaintiff is entitled to an award of fees and costs for this appeal. CR 55(c) permits the court to set aside an order of default "[f]or good cause shown and upon such terms as the court deems just...." Similarly, CR 60(b) permits a court to grant relief from a final judgment "[o]n motion and upon such terms as are just...." Because the proceeding to vacate or set aside a default judgment is based on equitable principles, *Fowler v. Johnson*, 167 Wn.App. 596, 273 P.3d

1042 (2012), an award of terms is generally required to fulfill the requirements of equity.

In this case, in addition to the Civil Rules and caselaw supporting an award of terms to Plaintiff, in order to bolster its claim that Plaintiff would suffer no hardship from the County's failure to comply with the rules and subsequent vacating of the default judgment, the County stipulated to Plaintiff's entitlement to fees and costs:

Said another way, the attorney fees incurred by the non-moving party do not constitute "substantial hardship" when terms are imposed against the moving party in amount equal to the same attorney fees.

Spokane County readily concedes that justice requires the imposition of terms in order to prevent Plaintiff from the burden of attorney fees incurred to bring its motion for default judgment and respond to the present motion. There is therefore no evidence that Plaintiff will be substantially prejudiced.

CP 219:21-28.

Regardless of the outcome of this appeal, it is made to respond to the County's motion to set aside the default and vacate the default judgment, and was made necessary only by the County's failure to comply with the Civil Rules. Having relied on its assurance to obtain

the relief it sought, the County should be held to its stipulation.  
Plaintiff should be awarded compensatory terms on this appeal.

### **CONCLUSION**

The trial court in this case abused its discretion by (1) failing to apply the correct legal standard to a case involving inexcusable neglect; and (2) failing to consider the plaintiff's evidence in determining whether the defendant had presented a "strong or virtually conclusive defense." Because there is admittedly no excusable neglect and no evidence to show that Plaintiff's claim was without merit, the trial court erred in setting aside the default judgment. This case should be remanded with instruction to reinstate the default judgment.

Submitted this 8th day of July, 2016.



Matthew C. Albrecht, WSBA No. 36801  
David K. DeWolf, WSBA No. 10875  
ALBRECHT LAW PLLC  
421 W. Riverside Ave., STE 614  
(509) 495-1246

Attorneys for Appellant

**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 8th day of July, 2016 by email as per the stipulation for electronic service to:

Evans, Craven & Lackie, P.S  
Heather C. Yakely - Hyakely@ecl-law.com  
J. Winkler - jwinkler@ecl-law.com  
Adrien Plummer - aplummer@ecl-law.com

Signed at Spokane, Washington, this 8th day of July 2016.

  
Matthew C. Albrecht, WSBA No. 36801