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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

**NO. 34201- 8-III**

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FRANK DECARO, as personal representative for the ESTATE OF  
JESSICA ALVARADO;

Plaintiff-Appellant,

v.

SPOKANE COUNTY,

Defendant-Respondent.

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**RESPONDENTS/DEFENDANT SPOKANE COUNTY'S  
RESPONSE BRIEF**

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## I. INTRODUCTION

Plaintiff entered a Default Judgment on December 2, 2015. (CP 189-190) Spokane County became aware of the Default Judgment on December 3, 2015 and a Notice of Appearance was filed the next day. (CP 191-193) Spokane County filed an Answer on December 9, 2015 (CP 194-199) It also filed a Motion to Show Cause five business days later on December 10, 2015. (CP 200-202) On December 21, 2015, Spokane County filed its Motion to Set Aside Default and Default Judgment, along with its supporting Memorandum and supporting Affidavits and Declarations. (CP 203-295)

The hearing to Show Cause was noted for December 22, 2015. (CP 200-202) Plaintiff stipulated to the Motion to Show Cause and the Show Cause hearing was set for Friday, January 8, 2016.

The trial court heard oral argument on January 8, 2016 and made an oral ruling on that date. The Order granting Defendant Spokane County's Motion to Set Aside Default and Default Judgment was filed on March 3, 2016. (CP 374)

Plaintiff's entered this Notice of Appeal appealing the trial court's decision to set aside the default and vacating the default judgment on March 15, 2015. (CP 377) Plaintiff's Opening Appeal only addresses the first two of the four factors considered by Washington courts as set out in

*White v. Holm*, et seq. Plaintiff argues the trial court abused its discretion because it did not use the correct standard to set aside the verdict. (Plaintiff's Opening Brief)

## II. STATEMENT OF THE CASE

On August 11, 2012, Ms. Jessica Alvarado was arrested and booked into the (then) Spokane County Jail (now Spokane County Detention Services). She was arrested for an outstanding felony bench warrant for prescription forgery out of Grant County as well as other local warrants.

On August 11, 2012, Ms. Alvarado booked into Spokane County's jail. She was housed in 2W10 with Helen Garlinghouse.(CP 227-230)

When an inmate is booked into the Spokane County Jail, the inmate is placed in a cell on 2West. 2W is typically known as the classification floor and inmates are held there until classified onto the correct floor in general population. Rounds are completed every thirty minutes by corrections officers, more if the inmate is on a suicide or medical watch. (CP 238-247)

On August 12, 2012 at approximately 7:45 a.m., Officer Blair (formerly known as Shaw) had just started her shift and went to 2W10 shortly thereafter. (CP 228) Ms. Garlinghouse came to the door as requested. Ms. Alvarado did not and remained lying on the top bunk. (CP

228) Ms. Garlinghouse informed Officer Shaw that Ms. Alvarado had just been seen by the nurse but that Ms. Alvarado didn't tell the nurse that she had taken "a bunch of oxy's" On the morning of August 12, 2012 at approximately 0800 Nurse Ordaz responded to a call for an evaluation of Ms. Alvarado from Officer Blair and went to Ms. Alvarado's cell, 2W10. (CP 248-251) Officer Blair reported that Ms. Garlinghouse stated to her that Ms. Alvarado had told her that she had taken a bunch of oxys, but didn't tell the nurse. (CP 228) Officer Blair then asked Ms. Alvarado what she was withdrawing from and first heard her say, "meth," but when she asked her to clarify Ms. Alvarado stated, "no meds." (CP 228) When Nurse Ordaz arrived at the cell he asked Ms. Alvarado to come to the door so that Nurse Ordaz could speak with her. (CP 249) Given a report of vomiting, Nurse Ordaz specifically asked Ms. Alvarado if she had used drugs or alcohol. Ms. Alvarado also denied any drug use. (emphasis added) (CP 249) Nurse Ordaz then checked Ms. Alvarado's vitals, which include temperature, pulse, blood pressure and oxygen saturation. (CP 250) Ms. Alvarado's temperature was 97.0, pulse was 89, blood pressure was 110/70, and oxygen saturation was 98% at room air. All of these were well within normal ranges. Ms. Alvarado exhibited no physical symptoms that gave any indication she was in need of further care, suffering from dehydration or required additional monitoring. (CP 250) Ms. Alvarado did

not have any difficulty in answering Nurse Ordaz questions. (CP 250) Specifically, Ms. Alvarado refused any further medical attention, and informed Nurse Ordaz that she would notify medical if she had any concerns and went back to her bunk to lay down. (CP 250)

As with any adult who is mentally competent, when adult inmates, who do not appear to be under any mental or physical incompetence, refuse medical care, jail staff are unable to insist that the inmate accept medical attention. (CP 250)

Nurse Ordaz confirmed with Officer Blair that Ms. Alvarado had not disclosed any drug use and that she refused any medical care and he could not place her on a drug withdrawal monitor. (CP 228) Officer Blair stated that was fine and that Ms. Alvarado would remain on 2W until she was feeling better and could be classified and moved to general population. (CP 229)

At approximately 1:00 p.m. on August 12, 2012, Officer Fishbaugh went to Ms. Alvarado's cell to obtain her personal bra, underwear and tank top. (CP 231) Ms. Alvarado was asleep when Officer Fishbaugh arrived at the cell, but was able to be awakened with voice commands (CP 232) Ms. Alvarado was able to follow Officer Fishbaugh's commands and did not exhibit any difficulty in removing her clothing items. (CP 232) Ms. Alvarado did not request any medical care. (CP 232)

During each shift change, every inmate is required to provide a verbal and/or physical response to oncoming staff. (CP 224) On August 12, 2012, at approximately 11:00 P.M., during Officer Torres' physical count, Ms. Alvarado raised her arm in the air indicating she was "okay." (CP 224)

Another round occurred at approximately 11:30 p.m., during this check Ms. Alvarado was in her bunk and appeared to be breathing normally. (CP 224) At approximately 12:02 a.m., less than thirty minutes after the 11:30 round was completed Officer Torres found Ms. Alvarado unresponsive on the floor next to her bunk. (CP 224)

There is no evidence of damages. There is no evidence of the Estate's wage loss claim provided, no income tax returns, W-2s, or expert opinions showing a future wage loss; there is no evidence of Ms. Alvarado's employment or education; there is nothing to establish other than the paternal grandfather's statement that there was any sort of a relationship with the child.

Conversely, the evidence establishes that Ms. Alvarado expired from a drug overdose, she had track marks on her neck and a history of incarcerations. (CP 217-218)

### III. STANDARD OF REVIEW

Appellate courts review a decision to vacate a default judgment for abuse of discretion. *Brooks v. Univ. City, Inc.*, 154 Wash. App. 474, 478, 225 P.3d 489, 491 (2010); *C. Rhyne & Assocs. v. Swanson*, 41 Wash.App. 323, 325, 704 P.2d 164 (1985); *In Re Estate of Stevens*, 94 Wn.App. 20, 29, 971 P.2d 58 (1999)(A trial court's ruling on a motion to vacate a default judgment is reviewed for an abuse of discretion). “Abuse of discretion is less likely to be found if the default judgment is set aside.” *Ha v. Signal Elec., Inc.*, 182 Wash. App 436, 449 (Div. 1 2014)(citing, *White v. Holm*, 73 Wash.2d 348, 351-352, 438 P.2d 581, 584 (1968) (Div. 2 1968) A trial court abuses its discretion if it exercises discretion based on untenable grounds or reaches a decision based on untenable reasons. *Morin v. Burris*, 160 Wash.2d 745, 753, 161 P.3d 956 (2007). Accordingly, if a trial court's ruling “is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld.” *Stevens*, 94 Wash. App. at 30 (quoting *Lindgren v. Lindgren*, 58 Wash. App. 588, 595, 794 P.2d 526 (1990)).

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#### IV. ARGUMENT

##### A. The Trial Court Did Not Abuse Its Discretion In Setting Aside The Default Judgment

Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits. See, e.g. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

The primary concern is that a trial court's decision on a motion to vacate a default judgment is just and equitable. The Supreme Court in *Griggs* stated in pertinent part;

The 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...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 Wash.2d at 581, 599 P.2d 1292, (internal citations omitted)(emphasis added); *see also, Little v. King*, 160 Wash.2d 696, 703, 161 P.3d 345, 350 (2007)(en banc)(it is the policy of the law that controversies be determined on the merits rather than by default) It has long been the rule that in considering a motion to set aside an entry of

default judgment “which is not manifestly insufficient or groundless” a court should “exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.” *White v. Holm*, 73 Wash.2d at 351, 438 P.2d at 584 (internal citations omitted)

When reviewing a motion to vacate a default judgment, the trial court determines whether the movant has demonstrated four factors. The primary factors are: (1) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; (2) the reason for the party's failure to timely appear, i .e., whether it was the result of mistake, inadvertence, surprise or excusable neglect. The secondary factors are: (3) the party's diligence in asking for relief following notice of the entry of the default; and (4) the effect of vacating the judgment on the opposing party. *Calhoun v. Merritt*, 46 Wash. App. 616, 619, 731, P.2d 1094, 1096 (Div. III 1986), (relying on *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)); see also CR 55(c)(1); CR 60(b)(1).

“These factors are interdependent; thus the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors.” *Norton v. Brown*, 99 Wash. App. 118, 123, 992 P.2d 1019 (Div. III 1999)(citing *White*, 73 Wash.2d at 352-53, 438 P.2d 581); *Little v. King*, 160 Wash.2d at 703, 161 P.2d at 350 (This

analysis is flexible and dependent upon the facts of each case and the court must consider the potential outcomes)

Here, Plaintiff argues that the facts here are somehow analogous to where a Plaintiff misses a statutory deadline for filing a notice of claim. (Plaintiff's Opening Brief, p. 14-15) This is not a useful analogy. All lawsuits are subject to a statute of limitations, the statutory notice of claim simply adds an additional sixty days to the statute of limitations for municipal entities. The purpose of the statutory claim-filing requirement is to protect government funds by allowing government entities time to investigate, evaluate, and settle claims before they are sued. *Woods v. Bailet*, 116 Wash. App. 658, 663, 67 P.3d 511, 514 (2003); *citing, Medina v. Pub. Util. Dist. No. 1 of Benton County*, 147 Wash.2d 303, 310, 53 P.3d 993 (2002); *Hardesty v. Stenchever*, 82 Wash. App. 253, 261, 917 P.2d 577 (1996). There are numerous statutorily mandated claim periods not solely for municipalities. *See e.g., Bennett v. Seattle Mental Health*, 150 Wash. App 455, 208 P.3d 578 (2009), *citing* RCW 7.70.100(1)(90 day waiting period is mandatory); *Greenhalgh v. Dept. of Corrections*, 170 Wash.App 137, 153 282 P.3d 1175 (Div. II, 2002) *citing*, RCW 42.56.550(6)(PRA's one year statute of limitation provision is mandatory where triggered); *Judson v. Assoc. Meats and Seafoods*, 32 Wash. App 794, 651 P.2d 222 (Div. II 1982) *citing* 11.40.010 et seq. (probate non-claim statute is to be

more strictly enforced than general statute of limitations and it is mandatory, not subject to enlargement and cannot be waived); *Dept. of Labor & Ind. v. Estate of MacMillan*, 117 Wash.2d 222, 229, 814 P.2d 194 (1991)(en banc), *citing* RCW 51.28.055 (worker’s compensation notice requirement is mandatory.)

Plaintiff also argues that the trial court made an error of law because it found [in]excusable neglect and a prima facie case. However, this misstates the trial court’s oral ruling. The trial court specifically stated “the county has shown that they have a prima facie defense even under a strong or virtually conclusive defense.” Nothing in this statement establishes that the trial court’s decision was not an abuse of discretion. It weighed the four prong test in *White*. (RP 40) Plaintiff simply appears to have left off the end of the trial court’s statement when it filed this appeal arguing, that the trial court made an error in finding “excusable neglect and prima facie defense.” That language is not in the trial court’s ruling – in fact it specifically referenced the strong or virtually conclusive standard (RP 39). The trial court did, however, go on to state that “when I go through that and weigh those four prongs, the court would have to find all of the four prong test in *White* have been met in this case. 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... then the judgment is obviously vacated.” (RP 40)

That the trial court’s language may not have been as clear as Plaintiff would have liked does not establish an abuse of discretion. Nor can Plaintiff interpret the trial court’s plain language.<sup>1</sup> The trial court properly vacated the default judgment and did not abuse its authority in doing so.

**B. A Decision to Vacate must be Just And Equitable And Does Not Permit A Specific Test.**

Initially, in order to vacate an entry of judgment under CR 60(b) a party must show;

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

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<sup>1</sup> In a footnote, Plaintiff inexplicably tells this Court what the trial court “meant” to say, which was “an excusable,” where it specifically reads “inexcusable.” However, the transcript clearly reads “inexcusable.” (RP 38)

*Ha v. Signal Elec., Inc.*, 182 Wash. App. 436, 448-49 332 P.3d 991, 997 (Div. 1 2014). However, the primary concern of review of a trial court's decision on a motion to vacate is to determine whether that decision was just and equitable. *TMT Bear Creek Shopping Center v Petco*, 140 Wash. App. 191, 201, 165 P.3d 1271 (Div. I, 2007), citing *White v. Holm*, 73 Wash.2d at 352, 438 P.2d at 584; *Little v. King*, 160 Wash.2d at 704, 161 P.3d at 350. (this is not a mechanical test; whether or not a default should be set aside is a matter of equity.)

The Supreme Court reiterated this “proof” of defense in *White v. Holm* and specifically elaborated that the “proof” varies depending on the circumstances:

[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 reason as which occasion entry of the default, provided the moving party is timely with his application and 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 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 finder of facts 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 Wash.2d at 352-53.

Plaintiff wholly ignores this fluidity of the analysis set out by the Supreme Court. Instead, he argues that there are only two options, either a prima facie defense or a “strong or virtually conclusive” defense. Plaintiff argues Spokane County was required to establish a “strong or virtually conclusive defense and failed to do so.” (infra § C) (Plaintiff’s Brief, p. 18)

It is accurate that the courts hold that the nature of the inquiry depends upon whether there is a strong defense, or a prima facie defense, but that the four elements, “vary in dispositive significance as the circumstances of the particular case dictate.” *TMT Bear Creek Shopping Center*, 140 Wash. App. at 201, 165 P.3d at 1278. There is no hard and fast analysis. In fact, *TMT Bear Creek Shopping Center*, which Plaintiffs rely on extensively, repeats this need for flexibility throughout the opinion;

Our primary concern in reviewing a trial court's decision on a motion to vacate is whether that decision is just and equitable. *Calhoun*, 46 Wash. App. at 619, 731 at P.2d

1090. “Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted.” *Johnson v. Cash Store*, 116 Wash. App. 833, 841, 68 P.3d 1099 (2003). “This system is flexible because ‘[w]hat 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.’ ” *Little*, 160 Wash.2d 696, ¶ 16, 161 P.3d 345 (quoting *Griggs*, 92 Wash.2d at 582, 599 P.2d 1289).

*TMT Bear Creek Shopping Ctr., Inc.*, 140 Wash. App. at 200, 165 P.3d at 1277. What is not in *TMT Bear Creek Shopping Center, Inc.* is any support for Plaintiff’s argument that where a defendant fails to establish excusable neglect, a default judgment may be set aside. *TMT Bear Creek Shopping Center, Inc.* merely quotes *White*, 73 Wash.2d at 352, 438 P.2d at 581 stating in pertinent part:

On the other hand, where 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 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 reasonability of his application and the element of potential hardship on the opposing party.”

*Id.* at 201, 165 P.3d at 1278.

Here, the trial court did not make an error of law. It, as much as can be determined by its oral opinion, weighed the factors recognizing the variability of them. It is not an “either or” analysis and the trial court properly recognized it as such.<sup>2</sup> Further, Plaintiff’s argument that the trial court applied an incorrect analysis is not supported in the record, absent Plaintiff’s rewriting of what the trial court said to what it “meant” to say. (Plaintiff’s Opening Brief, p. 19) (RP 39, 40) Even that does not establish an abuse of discretion.

**C. Plaintiff Fails To Acknowledge The Flexibility Granted To The Court On Motions To Set Aside Defaults**

Plaintiff goes on to argue, as at the trial court level, that the analysis can be only one of two standards. (Plaintiff’s Opening Brief, p. 16) It is either (1) that the defendant offers no excuse for its failure to answer or appear, then the defendant must provide a “strong or conclusive” defense;

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<sup>2</sup> In fact, Plaintiff appears to vaguely acknowledge this fluidity when he states, “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.” (Plaintiff’s Opening Brief, p. 23, see also p. 18)

or (2) if the defendant establishes excusable neglect the defendant is only required to provide evidence of a prima facie defense. (Plaintiff's Opening Brief, p. 17) Plaintiff goes on to argue that the trial court made an error of law because it used the lower standard. (Plaintiff's Opening Brief, p. 21) Yet, as previously noted supra, this is patently incorrect. The trial court specifically noted that the County established its burden even under the strong or virtually conclusive standard. (RP 39)

Yet at the same time, Plaintiff also appears to acknowledge that this Court should consider the relationship between the culpability of the Defendant in failing to appear and the relative strength of the defense. (Plaintiff's Opening Brief, p. 18) That is precisely what was done by the trial court in this case and its analysis was proper.

*i. The County Did Not Admit To Excusable Neglect But That It Made A Mistake.*

Plaintiff argues there is no distinction between the language of CR 60(b)(1) which states "mistakes, inadvertence, surprise, excusable neglect or inequality in obtaining a judgment and or orders." (emphasis added) Yet offers virtually no legal support for the same. If such were the case and excusable neglect was to be the same as mistake or inadvertence, the

additional grounds would not have been added, nor separated with commas and “or,” all of which have independent meanings.

Plaintiff’s entire argument is built around its mistaken understanding of what Spokane County argued. It is correct that Spokane County says it wasn’t a case of excusable neglect<sup>3</sup> in a solitary sentence at the hearing (RP 11) However, what Plaintiff wholly ignores is that 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.

For that reason, it is understandable that Plaintiff would like to pigeonhole this into “excusable neglect” which requires a “higher” standard, but that is not what Spokane County ever argued. It is also precisely for this type of factual scenario that the Courts have reiterated the importance of discretion and flexibility in weighing the factors.

This was not excusable neglect - a breakdown of internal procedures - as defined by *TMT Bear Creek Shopping Center, Inc. See TMT*, 140 Wash. App at 212-213. Rather this was a mistake, inadvertent and unintentional and not wilful. A mistake as defined by the English language is; “a wrong action or statement proceeding from faulty judgment, inadequate knowledge or inattention.” (Websters Ninth New Collegiate

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<sup>3</sup> Excusable Neglect has been defined by Washington case law. Case law has not defined or addressed mistake or inadvertence.

Dict., 1983)(emphasis added) Spokane County made a mistake – a wrong action – not forwarding the lawsuit to legal counsel – because of inattention. (CP 268-269) Nothing more, nothing less. This was not a case of an insurer trying to blame the insured (or vice versus). It is not a breakdown of internal procedures. CR 60(b)(1) includes additional possibilities to set aside a default other than just “excusable neglect.” While there is no case law defining “mistake” in this context the courts will look at the plain language.<sup>4</sup>

Plaintiff’s reliance then on *TMT Bear Creek Shopping Center, Inc.* is misplaced. (Plaintiff’s Brief, p. 19-20) Indeed, even in *TMT Bear Creek Shopping Mall, Inc.*, the Court noted, “Where the party in default finds itself in that position as the result of excusable neglect, mistake, surprise, or inadvertence, it is most likely equitable to grant that party relief, provided, however, that a trial would not be a useless exercise. Hence, the “prima facie defense” inquiry.” *TMT Bear Creek Shopping Ctr., Inc.*, 140 Wash. App. at 205, 165 P.3d at 1280.

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<sup>4</sup> See e.g. *Home Street, Inc. v. State, Department of Revenue*, 66 Wash.2d 444, 445, 210 P.3d 297, 301 (2009)(en banc)(when interpreting statutes courts first look to the plain language and can look to the dictionary for undefined terms)

ii. *Spokane County Made a Mistake And Is Thus Entitled to the “Lower Standard” of Prima Facie Defense*

It is thus, undisputed by either party that the County need only establish a prima facie case by the plain language of the case law, if it is excusable neglect, mistake or inadvertence. (emphasis added)<sup>5</sup>

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.

*TMT Bear Creek Shopping Ctr., Inc.*, 140 Wash. App. at 204, 165 P.3d at 1280. Prima facie is defined as “evidence good and sufficient on its face. Evidence which, if unexplained or un-contradicted, is sufficient to sustain

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<sup>5</sup> Plaintiff omits from his argument, without support for the same, the entirety of the CR 60(b)(1) phrase as quoted by *White* and *TMT*, which includes “excusable neglect, mistake or inadvertence.”

a judgment in favor of the issue which it supports. (Black's Law Dictionary, abridge 6<sup>th</sup> Ed. (1991)) This prima facie evidence must also be taken in the light most favorable to the movant, in this case, Spokane County. *TMT*, 140 Wash. App at 202 165 P.3d at 1279. (internal citations omitted)

iii. *Spokane County Has Established A Strong Or Virtually Conclusive Defense.*

Even assuming arguendo, this Court agrees with Plaintiff that the test is an “either, or” test and finds that Spokane County must establish a strong or virtually conclusive defense, Spokane County has done so.

First, the Court is not required to determine the facts. Second, Plaintiff attempts to argue that the phrase “strong or virtually conclusive,” has a single meaning. (Plaintiff's Opening Brief, p. 26) It is obviously a single phrase. However, what Plaintiff then attempts to do is revise its plain meaning. The phrase is exactly that, “a phrase” which contains a conjunctive, defined by Black's law dictionary as; “[a] disjunctive participle used to express an alternative or to give a choice of one among two or more things.” (Black's Law Dict., abridged 6<sup>th</sup> Ed., 1991)(emphasis added) “Strong” also has its own definition; “not mild, or weak.” (Black's Law Dict., abridged 6<sup>th</sup> Ed. 1991)

Contrary to Plaintiff's argument that "strong or virtually conclusive" has only one meaning means and that "strong" becomes mere surplusage, Plaintiff's argument only highlights the courts' use of a spectrum, not two distinct tests. (*See* Plaintiff's Opening Brief, p. 27) "Where 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 reason as which occasioned entry of the default...." *White*, 73 Wash.2d At 352-53, 438 P.2d at 584. (emphasis added)<sup>6</sup>

Thus, by virtue of the plain language and the fluidity of the analysis recognized by the Supreme Court if a case is "strong," a court may spend more time weighing the reasons for the inaction. If it is virtually conclusive a court may spend less time, weighing the inaction.

It is the same as the conjunctive language of CR 60(b)(1), excusable neglect, mistake or inadvertence. Unless language is specifically defined, the courts will follow the plain language. Here, that plain language includes a conjunctive – there is a choice, or an alternative between "strong" and "virtually conclusive." (*supra*) Here, the evidence is clearly strong or virtually conclusive. Not as Plaintiff argues virtually conclusive, which

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<sup>6</sup> Defendants submit that there are no cases which define strong and virtually conclusive as synonymous.

apparently necessitates some legal grounds for dismissal. Again, while a novel argument there is no evidence to support this argument.

Plaintiff's reliance on *Akhavuz v. Moody* is also misdirected. It appears that it is offered to argue Plaintiff's theory that "strong or virtually conclusive," requires some legal grounds which would be case dispositive. Again, that argument is nonsensical, clearly the plain language developed by the courts "strong or virtually conclusive," acknowledges that there are exceptionally defensible positions, based simply on facts, not only that there are legal grounds for a dismissal.<sup>7</sup> In *Akhavuz*, the issue was whether the default could be attributed to the insured and the deciding issue on default was whether or not the negligence of the insurer and the assigned counsel could be assigned to the insured. *Akhavuz v. Moody*, 178 Wash. App. 526, 540, 315 P.3d 572, 579 (Div. 1, 2013)(inexcusable neglect was the factor that the court should have considered)

Here, the evidence, at minimum, is very strong that Spokane County would defeat Plaintiff's claims on the merits. As this Court previously noted in the 1986 *Calhoun v. Merritt* decision,

Here, the default was entered before any such discovery could take place. Moreover, presenting a defense to

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<sup>7</sup> Indeed, if there were a legal theory that permits for a dismissal when a Motion to Set Aside A Default has been filed, it would seem that the lawsuit should never have been filed.

damages for pain and suffering is always complicated by the subjective as opposed to objective nature of such damages. Given these circumstances, it would be inequitable and unjust to deny the motion to vacate the damage portion of the judgment on the ground that [defendant] did not present a prima facie defense. Thus, we look to the remaining considerations set out in *White*.

(*Calhoun v. Merritt*, 46 Wash. App 616, 620-621, 731 P.2d 1094, 1097 (1986).

While *Calhoun v. Merritt* is factually distinguishable from the facts here, by analogy the same principle of inequity or injustice would result in this case if the trial court's order was overturned. Plaintiff's Complaint alleges only general negligence. By their very nature, negligence claims are generally very fact specific. While Plaintiff argues that Spokane County failed to dispute the evidence submitted by Plaintiff in their Reply to the Motion to Set Aside the reality is that without discovery including depositions and cross examinations and documentary proof, both parties could submit declaration after declaration of opposing opinions, without even concluding anything. This again showcases the necessity of the "strong or virtually conclusive" standard.(emphasis added) "Strong," clearly allows for the reality that many Motions for Default are taken

before discovery commences. If that is the case how would courts ever be able to overturn defaults taken before answers are even filed?

Plaintiff's even submitted contradictory facts to the superior court in his own submitted *Findings of Fact and Conclusions of Law in Support of Entry of Default Judgment* (hereinafter "Findings of Fact") which demonstrates Spokane County's defense. As noted by the facts, Ms. Alvarado refused medical care. Further, paragraph 13 of the Findings of Fact states, "The jail personnel knew, at least by the morning of August 12, 2012, that Ms. Alvarado was medically unstable and going through withdrawal. Still, they provided no medical care whatsoever until attempting to resuscitate her after she passed away early the next morning." (CP 182) Yet the same Findings of Fact also states, "The only medical service provided pre-death to Ms. Alvarado was a single brief exam by a nurse on the morning of August 12, 2012, roughly sixteen hours before Ms. Alvarado's death." (CP 183) It is a logical impossibility that both of these paragraphs are true.

Plaintiff's Counsel also submitted the Declaration of Helen Garlinghouse. (CP 33-35) Ms. Garlinghouse was also interviewed by Detective Pannell immediately following Ms. Alvarado's death on August 12, 2012. The summary of Ms. Garlinghouse's testimony taken contemporaneously with Ms. Alvarado's death on August 12, 2012, is

much different than her current Declaration. (CP 259) For instance, Ms. Garlinghouse told Detective Pannell that Ms. Alvarado told her that Ms. Alvarado told the jail nurse that she was okay and just sick from her medications and was not going through withdrawals. (CP 259) Ms. Garlinghouse also told Detective Pannell that she was not in the cell with Ms. Alvarado after 0800 on Sunday August 12, 2012. (CP 259) None of which is included in Ms. Garlinghouse's current and self-serving Declaration.

**D. Plaintiff Does Not Appeal The Third or Fourth Factors to Set Aside a Default.**

Plaintiff does not specifically address the third or fourth factors in this appeal. However, the four factors “vary in dispositive significance and if a defendant has a strong defense, the other factors are not as significant. “[Conversely], if a party shows a minimal prima facie defense, the court will scrutinize the other considerations more carefully.”

The third and fourth remaining factors that this Court must consider are the party's diligence in asking for relief following notice of the entry of the default; and the effect of vacating the judgment on the opposing party.

A defendant against whom a default judgment has been entered must act with due diligence after receiving notice of the judgment being

entered. *Sacotte Const., Inc. v. National Fire and Marine Insurance Co.*, 143 Wash. App. 410, 418, 177 P.3d 1147, 1151 (Div. I, 2008). In *Norton*, the court found the defendant acted with due diligence when filing his answer and motion to vacate the default judgment more than thirty days after discovery of the default judgment. *Norton v. Brown*, 99 Wash. App. 118, 121, 992 P.2d. 1019 (Div. III 1999). In *Leavitt v. De Young* the court found the defendant acted diligently in responding to the default judgment when motion to vacate the judgment was filed almost a month after discovery of the default judgment. *Leavitt v. De Young*, 43 Wash. 2d 701, 705, 263 P.2d 592 (1953). In *Berger*, the court concluded that the defendant acted diligently not because of the amount of time that between discovery of the judgment and its motion to vacate but rather because counsel for the defendant “promptly contacted [plaintiff’s] counsel, filed an appearance and motion to set aside the default judgment.” *Berger v. Dishman Dodge*, 50 Wash. App. 309, 312-13, 748 P.2d 241, 242 (Div. III, 1987). In *Calhoun*, the court found the defendant “acted promptly in moving to vacate the default” when he filed the motion to vacate approximately thirty-two days after discovery. *Calhoun*, 46 Wash. App. at 621, 731 P.2d at 1097.

In the present case, Spokane County began to prepare the Motion to Vacate the Judgment immediately upon learning of the Default Judgment

on Thursday December 3, 2015. Counsel was retained and contact was made with Plaintiff's Counsel and a Notice of Appearance was filed all on December 3, 2015. This was the same day that Spokane County learned about the Default. Spokane County filed an Answer, denying all allegations contained in Plaintiff's Complaint, within four business days of learning of the Default Judgment on December 9, 2015. The Order to Show Cause was filed within ten business days and the Motion to set it aside was filed five business days after receiving the Stipulation.

Under these facts there can be no doubt that Spokane County immediately and diligently sought relief from the excessive default judgment.

Finally, the courts finally look to see "that no substantial hardship will result to the opposing party." *White v. Holm*, 73 Wash. 2d at 352, 438 P.2d at 584. The Division Three Court of Appeals has placed this burden on the non-moving party to show substantial hardship. *Berger*, 50 Wash. App. at 313. "Nothing in *White* suggests that [the moving party] has this burden. [The non-moving party] has not shown any other hardship exists other than the incurring of attorney fees for which he was compensated." 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. Plaintiff did not

establish any hardship. Indeed Plaintiff did not address the third and fourth factors at all in this Appeal. However, they are part of the analysis to set aside defaults in general. The trial court specifically considered all four factors in setting aside the default. In considering all four factors there is no abuse of discretion.

#### V. CONCLUSION

The trial court did not abuse its discretion. There is no evidence in the record to support Plaintiff's argument. Further, case law does not support Plaintiff's argument that Spokane County must establish a "virtually conclusive" defense. Rather the trial court properly weighed the four factors set out in *White v. Holm* using the fluidity recognized by the courts. This court should deny Plaintiff's Appeal and not disturb the order vacating the default judgment.

DATED THIS 7 day of September, 2016.

EVANS, CRAVEN & LACKIE, P.S.

By: 

HEATHER C. YAKELY #28848  
Attorney for Respondents/Defendants

DECLARATION OF SERVICE:

On the 7th day of September, 2016, I caused the foregoing document described as Respondent's Response Brief to be served via Electronic Delivery as agreed upon on the parties Stipulation for E-Service at the email address listed below on all interested parties to this action as follows:

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