

Court of Appeals No. 351815  
Superior Court Case No. 14-2-00565-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION III  
NUMERICA CREDIT UNION, its successors in interest and assigns  
Appellants

v. STEVEN F. SCHROEDER  
Respondent

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BRIEF AND APPENDIX OF APPELLANT

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John C. Perry WSBA 16041  
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## STATEMENT OF THE CASE

This is a mortgage foreclosure case in which the lender, Numerica, after waiting for a year brought a motion for summary judgment against the borrower, Mr. Schroeder. During this period two of Mr. Schroeder's counsel withdrew before current counsel appeared in January of 2016. Prior counsel had entered a basic answer and denial even though Mr. Schroeder had counterclaims against the Numerica for violations of the consumer protection act, the Federal Truth in Lending Act, (15 U.S.C.1601 et seq), and the Washington State Mortgage brokers' Practices Act (WAC-208-600-500. These claims were asserted in the Amended Answer and Counterclaims of defendant (CP 74). Mr. Schroeder appeals the summary judgment of foreclosure and the denial of Mr. Schroeder's motion for reconsideration of the summary judgment order.

Mr. Schroeder obtained a loan from Numerica for his home and sixty acres of land in 2007 in the amount of \$308,000 secured by both a Mortgage and Deed of Trust (Plaintiff's Complaint, CP 1, Ex B and C). Mr. Schroeder fell behind in his payments resulting in a loan modification in 2011 (CP 1 ex D) in the amount of \$323, 411.39. Mr. Schroeder again fell behind on this loan and Numerica filed suit on December 17, 2014 (CP 1 id). An answer

was filed by prior counsel on October 26, 2015 which was sufficient to put the defense in controversy but contained no counterclaims (CP 25). Mr. Schroeder's first two counsel withdrew. . .Mr. Schroeder's first Counsel, Robert Caruso was ill and unable to represent Mr. Schroeder and was replaced by Attorney Steven Eugster who filed the first Answer (CP 25). Mr. Caruso and Mr. Eugster withdrew within a month of each other, Mr. Eugster on December 4, 2015 and Attorney Caruso on January 4, 2016 (CP 47, 55). Current counsel appeared on January 21, 2016 (CP 57). After doing nothing to advance its case for over a year from the time the first answer was filed in October of 2015, Numerica moved for Summary Judgment on November 14, 2016 seeking judicial foreclosure of the Mortgage and Deed of Trust. (CP 31, 32, 33). Numerica noted the hearing for December 13, 2017.

Mr. Schroeder filed a motion for continuance of the summary judgment hearing on December 9, 2016 (CP 147). Mr. Schroeder had argued that counsel needed more time to prepare a response and that he had counterclaims based on the manner in which the loans were made and stated that wanted the opportunity to amend his answer to add counterclaims (Memorandum in Support of Continuance...(CP 151). The Court denied the motion for a continuance on December 13 and Mr. Schroeder filed a proposed amended answer and affirmative defenses on December 16 (CP 161). In the adjourned summary judgment hearing on December 29, 2016,

the Court granted Mr. Schroeder's Motion to amend and struck the summary judgment hearing. (CP 192). The Court's Order provided that the amended complaint be filed within fourteen days of the order (*id.*). Due to oversight, counsel for Mr. Schroeder did not get file the amended answer until Feb. 23., 2017 (CP 248 ), (Certification of Counsel in support of Motion for Reconsideration (CP 24). The amended answer was identical to the proposed answer except that it eliminated the word "proposed" (CP 161, 248). On January 17, less than a month after the Court's order, Numerica filed a motion for summary judgment of foreclosure alleging that Mr. Schroeder had failed to file an amended answer (CP 204) Numerica noted the hearing for January 31, 14 days after noting the motion (CP 219). On January 31, before counsel for Mr. Schroeder became aware of the hearing, the Court entered an Order Granting Summary Judgment (CP 229), an Order for Judgment and Decree of Foreclosure and Order for Sale (CP 231). Counsel had just happened to check the court record on February 1 and noticed that the order had been entered the day before (See Declaration of John C. Perry in support of Motion for Reconsideration filed February 10, 2017 (CP 241). Although the according to plaintiff, the motion was mailed on January 17, counsel did not locate it until January 31 ( Declaration of John C. Perry, *id.*). In his motion for Reconsideration of the Court's January 31 Order Mr. Schroeder argued that the Motion for summary judgment violated

CR 56 because Plaintiff claimed to have served the motion by mail on January 18 which given the 5 day presumption of receipt provided by CR 5 (2) (A). Receipt would have been January 23 (a weekend was involved) which was eight days before the scheduled hearing. The Court denied Reconsideration, entering an order of default based on Mr. Schroeder's alleged failure to respond to the January Summary judgment motion on March 17, 2017 (CP 276). The order states the court denied the motion for reconsideration as the defendant had not filed the amended answer within the fourteen day period. (id). The court also stated in its order that the motion was denied because a response had yet to be filed. A response was filed as the Amended answer had been filed on February 23, prior to the March 1 hearing. The Court also held verbally that due to the fact that Mr. Schroeder served the Amended Answer on Numerica electronically and Numerica hadn't consented to electronic service as required by the court rule CR5(7). Prior to that, Numerica had accepted electronic service numerous times without objection and has served counsel with electronic documents on the eve of hearings.( See Certification of John C. Perry attached).

The property was sold at a Sheriff's sale with Numerica making the only bid.

## ASSIGNMENTS OF ERROR

- I. The trial court abused its discretion by failing to consider lesser sanctions prior to striking the amended answer and granting summary judgment..
- II. Numerica waived its argument that the motion for reconsideration must be denied because the motion was served on it electronically be stricken because it was served electronically.
- III. The summary judgment hearing should have been stricken or continued because Numerica failed to provide sufficient notice of the hearing under CR 56.
- IV. The Court improperly granted an order of default.
- V. All four criteria for vacating a judgment under Rule 60(b) have been met in this case.
- VI. The Court's orders are void because the trial judge sat as a pro tem judge without the consent of the parties.
- VII. Mr. Schroeder is entitled to attorney fees on appeal and in the trial court.

## ARGUMENT

- I. The trial court abused its discretion by failing to consider lesser sanctions prior to striking the amended answer and granting summary judgment.

The appellate court reviews an order of dismissal under CR 41(b) for an abuse of discretion. Will v. Frontier Contractors, Inc., 121 Wash. App. 119, 128, 89 P.3d 242, 247 (2004) citing Rivers v. Washington State Conference of Mason Contractors, 145 Wash.2d 674, 684–85, 41 P.3d 1175 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, *id.*, citing Hizey v. Carpenter, 119 Wash.2d 251, 268, 830 P.2d 646 (1992). A trial court's dismissal of an amended pleading without considering lesser sanctions constitutes an abuse of discretion. Id. In Will, the court granted plaintiff's request to amend his complaint to include a cause of action for breach of contract after the court had dismissed other claims. The Defendant had served Plaintiff with the proposed amended complaint prior to the

summary judgment but failed to serve the actual amended complaint until seven months later after four requests by plaintiff. Plaintiff objected noting that the amended complaint still contained parties and causes of action that had been dismissed. The trial court dismissed the case because Defendant had failed to serve Defendant with the amended complaint. The Court of the fact that plaintiff did not serve amended complaint on defendant appeals held that did not warrant dismissal of the breach of contract claim Will, id at 121 Wash. App. 128. The Court also held that although the rule requires that an amended pleading be served after the order permitting it is entered, that there was no specific date ordered by the trial court for service that the trial court had abused its discretion because it had not considered lesser sanctions before dismissing. The Court also held that there was no prejudice because Defendant had the proposed amended complaint that was identical. Similarly, in the present case, the answer and proposed answer are identical.

Will's failure to serve Frontier delayed the proceeding at the most something less than the six months between the time in May 2002, when the court granted the motion to amend and Will's December faxing of the copy of the amended complaint. Given that Frontier had a copy of the proposed amended complaint and knew that Will could proceed only on his breach of

contract claim, Frontier's contention that the claim was completely new and that it did not understand the claim is unsupported.

Will v. Frontier Contractors, Inc., 121 Wash. App. 119, 132, 89 P.3d 242, 249 (2004)

The court's striking of Mr. Schroeder's answer and the resultant summary judgment are also analogous to the discovery violation line of cases following Burnet v. Spokane Ambulance, 131 Wash.2d 484, (1997) The trial court has broad discretion to select an appropriate sanction for violation of discovery orders Burnett, id at 131 Wn2d 494. In Burnett, the plaintiffs in a medical negligence action were ordered by the court to provide a list of experts by a certain date. Months after that date, the plaintiffs filed a supplemental answer to interrogatories stating a claim that the hospital was negligent on a specific theory. The defendants obtained an order excluding evidence on that theory (negligent credentialing of physicians by defendant hospital). The Supreme Court held that although the trial court had broad discretion in fashioning a remedy, when the court selects one of the harsher remedies under CR 37 (b) (the discovery sanctions rule), it must appear from the record that the court considered less severe sanctions, whether the conduct leading to the party's disobedience of a discovery order was willful

or deliberate and whether the violation substantially prejudiced the opponent's ability to prepare for trial Burnett, id. As a default judgment for discovery violations raises due process concerns, the court must find willfulness. and substantial prejudice Smith v. Behr Process Corp., 113 Wn. App. 306, 324–25, (2002) citing White v. Kent Med. Ctr., Inc., 61 Wn. App. 163, 176, (1991); Assoc. Mortgage Investors v. G.P. Kent Constr.Co., 15 Wn. App. 223, 227–28 (1976). The Burnet Court stated,

“When the trial court selects one of the ‘harsher remedies’ under CR 37(b), it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,’ and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial”. (quoting Snedigar v. Hodderon, 53 Wash. App. 476, 487, 768 P.2d 1 (1989), rev'd in part sub nom., Snedigar v. Hoddersen, 114 Wash.2d 153, 786 P.2d 781 (1990)). Further, as a default judgment for discovery violations raises due process concerns, the court must first find willfulness and substantial prejudice.

Washington courts have applied Burnet to a trial court's orders excluding witnesses Teter v. Deck, 174 Wash.2d 207, 212, 274 P.3d 336 (2012); Blair v. TA–Seattle E. No. 176, 171 Wash.2d 342, 346, 254 P.3d 797 (2011) (Blair II ); In re Dependency of M.P., 185 Wash. App. 108, 114–18,

340 P.3d 908 (2014). dismissing claims, Rivers v. Wash. State Conference of Mason Contractors, 145 Wash.2d 674, 683, 41 P.3d 1175 (2002) (dismissing claims for violating discovery orders). and granting a default judgment, Magaña v. Hyundai Motor Am., 167 Wash.2d 570, 581–82, 220 P.3d 191 (2009) (ordering default judgment for discovery violations); Smith v. Behr Process Corp., 113 Wash.App. 306, 315, 54 P.3d 665 (2002) (same).

Striking an amended answer is an abuse of discretion if plaintiff has failed to show prejudice. Walla v. Johnson, 50 Wash. App. 879, 884–85, 751 P.2d 334, 337 (1988). In Walla, if the trial court's decision was based on undue delay, such a decision was an abuse of discretion. Unlike an attempt to amend the pleadings less than 1 week before trial, a motion to amend brought 3 months before a trial date allows sufficient time to conduct adequate discovery and prepare a case for trial, absent special circumstances. The affidavit submitted by Walla provided the trial court with no specific facts to support a finding of prejudice, but simply stated that it would be impractical or impossible to prepare for trial. Such conclusory assertions do not rise to the level of showing actual prejudice.

The Court found that no prejudice was shown by plaintiff stating that if the trial court been concerned about the length of time necessary to prepare for trial, it was within the court's discretion to grant a continuance. Quackenbush v. State, 72 Wash.2d 670, 434 P.2d 736 (1967).

The courts must apply a similar test in determining whether to disqualify counsel for discovery and other violation. Before disqualifying counsel, based on access to privileged information, the court must consider (1) prejudice; (2) counsel's fault; (3) counsel's knowledge of claim of privilege; and (4) possible lesser sanctions. Foss Marine. Co. v. Brandewiede, 190 Wash. App. 186, 194–95, 359 P.3d 905, 909 (2015), review denied, 185 Wash. 2d 1012, 367 P.3d 1083 (2016), citing In re Firestorm 1991, 129 Wash.2d 130, 140, 142 (1996), Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp 129 Wash.2d 299, 335-336, (1996).

I. Numerica waived its argument that the motion for reconsideration must be denied because the motion was served on it electronically be stricken because it was served electronically.

Waiver has been applied to a defendant's objection to insufficient service or to other procedural defect. Waiver can occur in two ways. It can occur if the defendant's (or) other parity's) assertion of the defense is inconsistent with the defendant's previous behavior. It can also occur if the defendant's counsel has been dilatory in asserting the defense. Lybbert v. Grant County., State of Wash., 141 Wash. 2d 29, 39, 1 P.3d 1124, 1129

(2000) citing Romjue v. Fairchild 60 Wash. App 278, 281,803 P 2d 57 (1991) (waiver applied to objection to plaintiff's incorrect notice of claim to a municipality).

Numerica argued and the court found that the amended answer in this case were served by email without the prior consent of Numerica. However on numerous occasions, Numerica received emailed pleadings from Mr. Schroeder without objection. ( see Certification of Counsel herein at Appendix ). On February 10, 2017 Mr. Schroeder sent a Motion and Memorandum for Reconsideration which was heard by the court on March 1. It was this motion that for the first time, Numerica objected to based in part on the fact that it was served by email. On December 19, 2016, Numerica served an email response to Mr. Schroeder's Motion to amend by email for a December 20, 2016 hearing. ( Appendix ).

During the course of these proceedings, Schroeder had on numerous occasions, provided pleadings to Numerica by email. On December 9, 2017, Numerica emailed a response to Schroeder's motion to continue the summary judgment hearing. Numerica also accepted a note for hearing for a motion to continue summary judgment without objection. On December 13, Schroeder sent Numerica the proposed amended answer as well as a supplemental memorandum on December 19. On December 19, Numerica

sent by email a response to Schroeder's motion to Amend<sup>1</sup>. Numerica never objected until the final hearing when it argued that it had received the motion for consideration by email and hadn't consented to electronic service as required by the rule. Numerica failed to advise the court that it had had received emailed pleadings prior to this hearing and had responded both in writing and by argument at prior hearings without objection. Numerica also served pleadings to Schroeder by email immediately prior to hearings with no possibility of a mailed pleading reaching Schroeder in time for the hearing. Based on the prior course of communication between the parties, Schroeder did not object and the court considered Numerica's pleading, relied on the course of communication between counsel in serving the motion for reconsideration to which Numerica objects. Not only did Numerica fail to object to receiving pleadings by email until the final hearing, it also proceeded with argument on the merits prior to moving that the hearing be stricken for lack of prior notice.

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<sup>1</sup> See argument of Schroeder's counsel at March 1 hearing (RP 46-47). Numerica's counsel did not refute these facts.

III. The summary judgment hearing should have been stricken or continued because Numerica failed to provide sufficient notice of the hearing under CR 56.

When Numerica didn't receive a copy of the amended answer by January 17, 2017, it filed a Motion for Summary Judgment noting the hearing for January 31, 2017, 14 days later. Summary Judgment motions must be filed and notice must be given at least 28 days before the hearing CR 56 (c). Prior to this filing, the hearing had been stricken by the Court's granting of Schroeder's motion to amend its answer. There was no pending motion that Numerica could simply note for hearing. Schroeder was prejudiced by the court's hearing this motion without proper notice. As noted in counsel's declaration (CP 24) counsel wasn't able to locate the motion until July 31 which happened to be the date of the hearing at which summary judgment was granted and the order of default was entered. Proper notice would have required Numerica to note the hearing for February 14, 28 days after the hearing was noted. That would have given Schroeder sufficient time under the rule to prepare a response to the motion and to correct the technical error of not filing the amended answer in lieu of the identical proposed amended answer which had been filed previously.

IV The Court improperly granted an order of default.

The Court denied Reconsideration, entering an order of default based on Mr. Schroeder's alleged failure to respond to the January Summary judgment motion on March 17, 2017 (CP 276). Default judgments are not favored by the Courts because the "policy of the law" is that controversies be determined on the merits Norton v. Brown, 99 Wn.App. 118, 992 P.2d 1019 (Div. 3 1999) quoting . Griggs v. Averbek Realty, Inc., 92 Wash.2d 576, 581 599 P.2d 1289 (1979). Id. at, (quoting Dlouhy v. Dlouhy, 55 Wash.2d 718, 721, 349 P.2d 1073 (1960)).

A default judgment is normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party. Brown, 99 Wn.App. 118, 992 P.2d 1019 (Div. 3 1999) citing Gage v. Boeing Co., 55 Wash.App. 157, 160-61, 776 P.2d 991 (citing H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C.Cir.1970)), review denied, 113 Wash.2d 1028, 784 P.2d 530 (1989).

In Brown, the Court held that it was not a case where the defaulted party had failed to respond the defendant had been negotiating with the plaintiff through his insurance company and only when the parties failed to settle did the plaintiff file his lawsuit which was served on the defendant. The court held that the Plaintiff should have understood that the defendant had intended to defend the claim. On this basis the court reversed the default judgment and remanded for trial. Similarly, in this case, Mr. Schroeder's

failure to file an amended answer instead of a proposed amended answer does not indicate an unwillingness to defend. If anything, it is a technical or procedural error, less serious than the complete failure to answer that the Brown court found insufficient to support a default judgment. The failure to file the amended answer was simply an inadvertent error on the part of counsel for Mr. Schroeder. The failure to respond was also based on an error by counsel and shouldn't be the basis for a Foreclosure of Mr. Schroeder's property.

This is not a case where there was a failure to answer or appear at all. In those cases the concern is that the defendant has failed to defend its case and the mere missing of a single a hearing does not indicate a failure to defend. In cases where there has been no appearance or answer, the defendant's intentions are unknown and further proceedings may be meaningless and the moving party would be prejudiced by undue delay. Schroeder on the other hand initially appeared and filed an answer back in 2015. When Numerica filed its first motion for summary judgment, Schroeder responded requested additional time and filed a successful motion to amend his answer. After being made aware of the court's default judgment, Schroeder timely filed a motion for reconsideration. Schroeder has thus been very active in defending this case and any presumption that he would not actively defend was inaccurate.

The proceedings were certainly irregular under the rule. First, Plaintiff's sought and obtained a summary judgment without proper notice (See Declaration of Counsel, herein). Secondly, the sole basis for the court's order was the failure to delete the word "proposed" from his amended answer.

II. All four criteria for vacating a judgment under Rule 60(b) have been met in this case.

A party is entitled to relief from a final judgment under the Washington Rules for superior court provides as follows if the judgment if it is entered due to inadvertence, mistake, surprise, excusable neglect or irregularity in obtaining the judgment or order CR 60(b)(1).

Refusal to vacate a default judgment is more likely to amount to an abuse of discretion because default judgments are generally disfavored. Wash. Super. Ct. Civ. R. 60(b)(1). DeCaro v. Spokane Cty., 198 Wash. App. 638, 642, 394 P.3d 1042, review denied, 189 Wash. 2d 1024, (2017)

There are four factors to consider when hearing a motion to vacate a default judgment: (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. Wash. Super. Ct. Civ. R. 60(b)(1).

DeCaro id, citing White v. Holm, 73 Wash. 2d 348, 352, 438 P.2d 581, 584 (1968).

Applying these factors to the present case, there was no opportunity for Mr. Schroeder to present facts to support his amended answer and counterclaims since the judgment was entered shortly after he was granted the right to amend. Discovery on these issues hadn't even begun. There was however sufficient information from the pleadings to demonstrate at least a prima facie defense to the claims. The loan documents demonstrated the loans and fees which Mr. Scxjroeder claimed increased dramatically in amount from the first to the second loan, also even though Mr. Schroeder was unable to repay the first loan, he was compelled to agree to a new loan with a 2 year balloon. Mr. Schroeder alleged in his amended answer that he was ked to believe by Numerica's agents that he would receive a rewritten loan at the end of the two year period that would be manageable for him and did not receive this promised modification. (Amended Answer, id). If given sufficient time, Mr. Schroeder were able to prove these and other allegations, he could prevail. His defense and counterclaims although not at his early

stage of the proceedings may have yet been conclusive, certainly set out a prima facie case.

The second factor is also in Mr. Schroeder's favor. Counsel for Mr. Schroeder set out the reasons for not seeing the summary judgment motion until the day it was entered (Declaration in Support of motion for reconsideration). The Motion didn't provide enough notice under the rule and had it done so, a response would have been prepared on a timely (under Rule 56c) basis. Any neglect in this case error was excusable. In DeCaro the court found excusable neglect where insurance company did not get notice to counsel on a timely basis. The Court held that the trial court abused its discretion by refusing to vacate a default judgment DeCaro, id. In White, the Supreme Court reversed a trial court denial of a motion to vacate a default judgment where the basis of default was inadvertence or neglect of an insurance carrier who failed to timely retain counsel for the insured after being presented with the summons and complaint. The White Court also held that where the trial court's determination results in a denial of trial, the reviewing court may more readily find an abuse of discretion than in a case where a default is set aside and a trial on the merits is held. White, id at 73 Wn. 2d 348, 351-52 citing Agricultural & Livestock Credit Corp. v. McKenzie, 157 Wash. 597, 289 P. 527 (1930); Graham v. Yakima Stock

Brokers, Inc., 192 Wash. 121, 72 P.2d 1041 (1937); Yeck v. Department of Labor & Indus., 27 Wash.2d 92, 176 P.2d 359 (1947);

As to the third factor Mr. Schroeder acted with due diligence after becoming aware of the judgment filing his motion for reconsideration within 10 days of becoming aware of the order. Finally, Numerica has failed to demonstrate that it would be prejudiced by the setting aside of the order. Numerica waited more than a year after the filing of the answer in this case to move for summary judgment. Numerica engaged in no discovery during that period and failed to even note the case for trial. In many of the default cases, the court examines whether trial will be substantially delayed by the vacation of the default order. In this case, the motion for reconsideration was filed immediately, the Court had stricken the summary judgment motion and at most a delay of a month in the proceedings would have occurred. Since Numerica hadn't noted the case for trial for over a year, it can't now complain that vacation of a default order would delay trial.

Each of the White factors is in favor of setting aside the default. As the White Court held, where the trial court's determination results in a denial of trial, the reviewing court may more readily find an abuse of discretion than in a case where a default is set aside and a trial on the merits is held. White, *id* at 73 Wash. 2d 348, 351–52 citing Agricultural & Livestock Credit Corp. v. McKenzie, 157 Wash. 597, 289 P. 527 (1930); Graham v.

Yakima Stock Brokers, Inc., 192 Wash. 121, 72 P.2d 1041 (1937); Yeck v.

Department of Labor & Indus., 27 Wash.2d 92, 176 P.2d 359 (1947);

VI The Court's orders are void because the trial judge sat as a pro tem judge without the consent of the parties.

If the basis of the judge's appointment is consent of the parties and there has been no consent, the judge "is without jurisdiction to hear the case, and the entire proceedings before him are void." Washington v. McCrillis, 15 Wash.2d 345, 359, 130 P.2d 901 (1942); In re Dependency of K.N.J., 171 Wash. 2d 568, 578, 257 P.3d 522, 528 (2011), as modified on denial of reconsideration (Aug. 2, 2011). The basis of a protem's appointment is the consent of the parties. In Burton v. Ascol, 105 Wash. 2d 344, 351–52, 715 P.2d 110, 114 (1986), the Court stated:

The essential requirement for the valid appointment of a judge pro tem is the parties' consent. *State v. McNairy*, 20 Wash.App. 438, 440, 580 P.2d 650 (1978). The parties may consent to the appointment of the judge pro tem either orally in open court or by written stipulation. *National Bank of Washington v. McCrillis*, 15 Wash.2d 345, 356, 130 P.2d 901 (1942); *State ex rel. Congill v. Sachs*, 3 Wash. 691, 29 P. 446 (1892). If a party has not consented, the judge pro tem lacks jurisdiction. \*352 *McCrillis*, 15 Wash.2d at 359, 130 P.2d 901.

Judge Nielson retired from the bench at the end of 2016 (TR p. 23). He was assigned to this case after the two sitting judges recused themselves. He had made rulings in this case before his retirement. Unlike the cases cited above and the constitutional provision which contemplate a retired judge to simply continue with a particular case, a sitting judge was assigned to the case after Judge Nielsen's retirement. Two sitting judges recused themselves before Judge Nielsen was appointed. Judge Patrick Monnasmith was then assigned and she recused herself. Judge Jessica Reeves was assigned the case initially and she recused herself before the date of the first hearing. Unlike the situation where a judge continues on a case after retirement, there were intervening appointments of other judges between the time of Judge Nielson's retirement and his assignment as a pro tem judge.<sup>2</sup>

Mr. Schroeder did not consent to this assignment and objected to it. Mr. Schroeder was not aware that Judge Nielson had been assigned until he became aware of the default proceedings on January 31 which had already occurred. In fact, Judge Nielson advised the parties in open court that, due to his retirement, he would no longer be handling the case (TR p 23). Given that Mr. Schroeder wasn't aware of the January 31 hearing until it was over, he had no opportunity to raise this with the court prior to the entry of the

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<sup>2</sup> Stevens County has two elected Superior Court Judges.

Court's order of that date. Mr. Schroeder was thus left with the impression that another Judge would be handling the proceedings as of January 1, 2017.

A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule.

Washington State Constitution art. IV, § 7., National Bank of Washington, Coffman-Dobson Branch v. McCrillis, 15 Wn.2d 345, 356, 130 P.2d 901 (1942)

Defendant is cognizant of the constitutional provision that permits a retired Judge to hear a case if the judge had made discretionary rulings on the case but this case was assigned to the other judges in the county both of whom recused themselves. The case was therefore assigned to other judges first which distinguishes it from the constitutional provision.

VII Mr. Schroeder is entitled to attorney fees on appeal and in the trial court.

This is a judicial foreclosure action. The contract between the parties provides for an award of attorney fees to the prevailing party in the event of

litigation. Mr. Schroeder requests attorney fees and costs on appeal and an order remanding to the trial court for a determination of attorney fees and costs at that level. Paragraph 16 of the 2007 Mortgage provides for an award of attorney fees and costs to the Mortgagee (Numerica) in the event legal action is necessary to enforce the Mortgage. RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Should Mr. Schroeder be considered the prevailing party, he is entitled to attorney fees and costs.

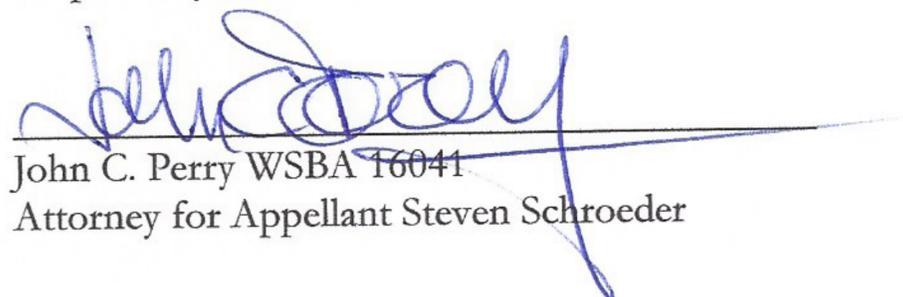
#### CONCLUSION

Mr. Schroeder was denied the opportunity to present his case on the merits due to the mistakes of the court in riling on the motion for Summary judgment and Order of default. An opportunity strongly favored by the Courts in Washington. The policy of the Courts in Washington and throughout the country disfavor default judgments. The Washington Courts more readily find an abuse of discretion in the denial of a motion to vacate a default judgment. This Court should reverse the trial court and give Mr. Schroeder this opportunity. The Court failed to consider lesser sanctions before striking Mr. Schroeder's Answer and ordering a default summary judgment of foreclosure on his land. He never got the chance to provide

evidence to support his defenses and counterclaims as the default judgment was entered a month after the court granted Mr. Schroeder's motion to amend his complaint. Mr. Schroeder was entitled to vacation of the order of default and resultant orders striking his answer and entering summary judgment under Rule 60(b). Mr. Schroeder's motion met each of the criteria set forth by the White case and those that follow it. Numerica waived its objection to electronic service by accepting it throughout these proceedings before objecting at the final hearing and on at least one occasion serving electronically itself. Since the time between the order granting permission to amend the complaint and the hearing on default was approximately two months (the delay in setting the hearing was occasioned by the necessity of the Superior Court making arrangements with the retired judge who was assigned to the case), Numerica would be hard pressed to argue it was prejudiced since it waited a year to note the summary judgment after taking no action in the interim and failing to note the case for trial.

Mr. Schroeder is entitled to an order reversing the trial court and remanding for trial on all the issues. Mr. Schroeder is also entitled to an award of attorney fees and costs incurred both before this court and at the trial court level.

Respectfully Submitted February 2, 2018

  
John C. Perry WSBA 16041  
Attorney for Appellant Steven Schroeder

CERTIFICATE OF SERVICE

John C. Perry certifies as follows:

On February 2, 2018, I served the attached Appellant's Opening Brief and Appendix through the court's portal on the attorneys for Plaintiff/ Respondents as follows:

Peter Joseph Salmon  
Aldridge Pite PLLC  
4375 Jutland Drive Suite 200  
San Diego, CA 92117  
psalmon@aldridgepite.com  
c/o Anne Penaloza apenaloza@aldridgepite.com

Dated this 2<sup>nd</sup> day of February, 2018

By   
\_\_\_\_\_  
John C. Perry WSBA 16041  
Attorney for Appellant

APPENDIX  
CERTIFICATION OF JOHN C. PERRY

John C. Perry Certifies as follows:

I am the attorney for Defendant/Appellant Steven F. Schroeder in this matter. I have been representing Mr. Schroeder throughout the period of time discussed in this brief. Specifically I have been Mr. Schroeder's counsel during the period of time beginning with the filing of Numerica's Motion for Summary Judgment in November of 2015 through the present. I am familiar with these proceedings and the communications between counsel. The purpose of this Certification is to outline the service of pleadings by myself to Counsel for Numerica by email without objection by Numerica until the final hearing on March 1, 2016 when Numerica for the first time objected to being served by email. On March 1, 2016, in response to this objection after reviewing the file, I advised the court as follows:

On December 9, 2016, Numerica emailed a response to Schroeder's motion to continue the summary judgment hearing. Numerica also accepted a note for hearing for a motion to continue summary judgment without objection. On December 13, Schroeder sent Numerica the proposed amended answer as well as a supplemental memorandum on December 19. On December 19, Numerica sent by email a response to Schroeder's motion to Amend<sup>3</sup>. Numerica never objected until the final hearing when it argued

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<sup>3</sup> See argument of Schroeder's counsel at March 1 hearing (RP 46-47). Numerica's counsel did not refute these facts.

that it had received the motion for consideration by email and hadn't consented to electronic service as required by the rule. Numerica failed to advise the court that it had had received emailed pleadings prior to this hearing and had responded both in writing and by argument at prior hearings without objection. Numerica also served pleadings to Schroeder by email immediately prior to hearings with no possibility of a mailed pleading reaching Schroeder in time for the hearing. Based on the prior course of communication between the parties, Schroeder did not object and the court considered Numerica's pleading, relied on the course of communication between counsel in serving the motion for reconsideration to which Numerica objects. OI believe these facts to be true and they have not been challenged by Numerica. The Court didn't address the issue of waiver at the hearing despite my request that it do so.

Dated this 2<sup>nd</sup> day of February, 2018 at Spokane, Washington



John C. Perry

**JOHN C. PERRY P.S.**

**February 02, 2018 - 3:59 PM**

**Transmittal Information**

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**Superior Court Case Number:** 14-2-00565-1

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