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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION THREE**

NUMERICA CREDIT UNION, Plaintiff-Respondent,

v.

STEVEN F. SCHROEDER, Defendant-Appellant

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On Appeal from Stevens County Superior Court  
Case No. 14-2-00565-1

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**RESPONDENT'S OPENING BRIEF**

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## **I. INTRODUCTION:**

The Court should affirm the decision of the trial court granting summary judgment to Plaintiff-Respondent Numerica Credit Union (“Numerica”) and denying the motion by Respondent Stephen F. Schroeder (“Schroeder”) to set aside the judgment.

## **II. RESTATEMENT OF THE ISSUES**

1. The Trial Court Did Not Abuse Its Discretion By Granting Summary Judgment to Numerica after Schroeder failed to File an Amended Answer within the Court-Mandated Period
2. Numerica Did Not Waive the Requirement for an Agreement in Writing to Accept Electronic Service
3. Numerica Gave Proper Notice of Hearing on the Motion for Summary Judgment
4. The Trial Court Neither Entered a Default Judgment against Schroeder nor Dismissed an Action Filed by Schroeder Involuntarily Pursuant to CR 41
5. Schroeder Failed to Meet the Standard for a Motion to Vacate Default under CR 60(b)(1)
6. The Orders and Judgment Entered by the Judge Pro Tem were Proper under Washington Law
7. Schroeder is Not Entitled to Fees on Appeal because There is No Basis to Reverse the Trial Court’s Judgment

### **III. RESTATEMENT OF THE CASE**

#### **A. Factual Background of Numerica's Motion for Summary Judgment**

The case below involves the judicial foreclosure of real property commonly known as 1004 Williams Lake Rd, Evans, WA 99126 (the "Property"). Numerica filed a Complaint on December 17, 2014. (CP 1-44). Schroeder filed an answer through counsel on October 26, 2015. (CP 45-46).

Numerica served its Motion for Summary Judgment (CP 81-88), Note for Motion Docket (CP 89-90), Declaration in Support (CP 91-138), and Statement of Attorney's Fees (CP 139-140) by mail on November 10, 2016. The Declaration of Service was filed on November 14, 2016 (CP 141-142), and the hearing on the Motion for Summary Judgment was set for December 13, 2016 (CP 89-90), or 33 days after service of the motion for summary judgment.

Schroeder had not responded to the Motion for Summary Judgment as of December 7, 2016, so Numerica filed a notice of Non-Opposition to the Motion and proof of service. (CP 143-146) Schroeder finally filed a Motion for Continuance of Summary Judgment Hearing on December 9, 2016 (CP 147-149, 151-153) and noted it for hearing on December 12, 2016 (CP 150) Numerica opposed the continuance (CP 154-157), and the trial court heard argument on December 12, 2016 (CP 158).

The trial court denied the motion to continue, but permitted Schroeder to appear telephonically at the summary judgment hearing already noticed for December 13, 2016 (CP 158).

Schroeder also moved on December 13, 2016, to file an Amended Answer. (CP 159-163). The trial court initially granted the summary judgment brought by Numerica and denied the motion to amend the answer at the hearing on December 13, 2016, but then *sua sponte* reconsidered that ruling. (RP 26) The trial court held further argument on December 20, 2016, and changed its position, denying Numerica's motion for summary judgment on December 29, 2016, solely to permit the amended answer. (RP 26) The trial court denied Numerica's motion for summary not due to some disputed issue of material fact or law, but in connection with granting Schroeder leave to file an Amended Answer. (CP 192-193)

The trial court's order dated December 29, 2016, specified that Schroeder had to file and serve his amended answer not later than 14 days after entry of the order. (CP 193). At the oral argument on December 29, 2016, Schroeder's counsel advised the Court that "14 days is no problem" to file the Amended Answer. (RP 23) The trial court separately entered an order of default as to the non-appearing defendants. (CP 176-177).

Schroeder did not file his amended answer by 14 days after the entry of the December 29, 2016, order. After that 14 day period had expired, Numerica filed a “Motion for Entry of Summary Judgment Order Upon Defendant’s Failure to Comply with Court Order”. (CP195-203) Numerica moved for an order entering summary judgment on its originally noticed motion because Schroeder had neither opposed the motion nor filed an amended answer by 14 days after the December 20, 2016, order. Numerica concurrently filed a motion for entry of judgment and decree of foreclosure. (CP 204-205). Numerica served these motions on January 17, 2017 (CP 202-203), and filed them with the Court on January 23, 2017.

Numerica noted these motions for hearing on January 31, 2017. (CP 219-220) Schroeder neither opposed the motions nor appeared at the hearing on January 31, 2017. The trial court granted Numerica’s motion for summary judgment by an order dated January 31, 2017. (CP 229-230) The court separately entered an order for judgment and decree of foreclosure that same day (CP 231-232), as well as a Judgment (CP 233-239).

Judge Allen C. Nielsen signed the order dated January 31, 2017, as a Judge Pro Tem. The two other Superior Court Judges for Stevens County had entered separate orders of recusal. (CP 225-228) Judge Nielsen announced on the record at the January 31, 2017, hearing that the two Superior Court

judges in Stevens County had recused themselves due to personal relationships with Schroeder. (RP 29, 52)

**B. Post-Judgment Motions**

Schroeder filed a Motion Reconsideration of Summary Judgment and Order of Default on February 10, 2017. (CP 241-247) Schroeder also filed an Amended Answer, Affirmative Defenses, and Counterclaim on February 23, 2017. (CP 248-250). At oral argument, the trial court found that Schroeder's service of the motion for reconsideration was not sufficient (RP 51-52), and found cause to enter an order striking the amended answer and counterclaim (RP 52).

Schroeder's counsel admitted at the March 1, 2017, oral argument on the Motion to Vacate the Judgment, that the "Court did order us to file an amended answer in lie – instead of the proposed answer that we had filed, and I overlooked that, and agree that it should have been done." (RP 31) Instead, Schroeder did not file the Amended Answer until February 23, 2017 (CP 248-250), or six weeks after the deadline set by the trial court.

Schroeder's counsel also admitted at the March 1, 2017, oral argument on the Motion to Vacate the Default, that his office had received notice of the January 31, 2017, hearing on Numerica's Motion for Entry of Summary Judgment. (RP 32).

Schroeder's counsel further explained that "I, quite frankly, overlooked that." (RP 32) Schroeder's counsel acknowledged later in that same hearing "[w]hat was happening was due to oversight, which I explained, we didn't respond, and we had enough notice". (RPfs 49)

The trial court entered an Order Denying Defendants' Motion for Reconsideration of Summary Judgment and Order of Default on March 17, 2017. (CP 276-277) The trial court added written rulings on that order specifying that "The Motion to Reconsider Summary Judgment is denied as a response has yet to be filed. The Amended Answer filed February 23, 2017, is stricken as defendant failed to file the amended answer within the 14 day time period." (CP 277)

#### **IV. ARGUMENT**

##### **A. Standard of Review**

The trial court granted summary judgment in favor of Numerica after Schroeder failed to file a response to the summary judgment motion and failed to file an amended answer to Numerica's complaint. This court reviews a summary judgment ruling *de novo*, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is

entitled to a judgment as a matter of law. CR 56(c). The Court reviews all reasonable facts and inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993).

The trial court denied a Motion to Vacate the Judgment sought pursuant to CR 60(b)(1). A trial court's denial of a motion to vacate is reviewed for manifest abuse of discretion, and this Court does not consider the underlying judgment. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000); *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). A trial court abuses its discretion where its decision “is manifestly unreasonable or based upon untenable grounds or [untenable] reasons.” *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

To the extent that the issues before the court raise questions of statutory interpretation, these are questions of law reviewed de novo. *Beal Bank, SSB v. Sarich*, 161 Wash. 2d 544, 547, 167 P.3d 555, 556 (2007) (En Banc).

**B. The Trial Court Did Not Abuse Its Discretion By Granting Summary Judgment to Numerica after Schroeder failed to File an Amended Answer within the Court-Mandated Period**

Schroeder’s contention that the trial court abused its discretion by striking its amended answer and granting summary judgment to Numerica is both procedurally and

substantively inaccurate. Indeed, Schroeder mischaracterizes the nature of the Judgment entered against him in the trial court as one by default rather than on summary judgment, and similarly misinterprets the striking of his belatedly filed amended answer.

The record below establishes that the Court entered an order for summary judgment in favor of Numerica pursuant to CR 56 on January 31, 2017. The procedural propriety of the notice and service of the motion or summary judgment are discussed in section III. D. *infra*. Numerica's motion for summary judgment was supported by a declaration containing admissible evidence and exhibits demonstrating its entitled to judgment under CR 56 (CP 91-138), and Schroeder never filed an opposition to the motion on its merits. Therefore, the trial court properly entered an order granting summary judgment to Numerica (CP 229-230) and a separate Judgment (CP 233-239).

Schroeder purported to file an amended answer in the trial court on February 23, 2017 (CP 248-250), in connection with a motion to vacate the January 31, 2017, Judgment (CP 241-251). The trial court struck the amended answer because Schroeder filed it well beyond the deadline of 14 days from December 29, 2016, a deadline the trial court had specified in an order entered on that date. (CP 192-193).

Schroeder's contention that the trial court should have issued a lesser "sanction" misapprehends the nature of the proceedings below, and his reliance on *Will v Frontier Contractors, Inc.*, 121 Wash.App. 119, 128 (2004) for his argument is misplaced. The court in *Will* granted a plaintiff leave to amend his complaint and did not set any deadline for the filing of the amended pleading. 121 Wash.App. at 130. The *Will* court found that the attorney for the plaintiff appeared to "misinterpret" an "arguably imprecise procedural rule" by failing to file an amended complaint in a timely manner. *Id.* Since the trial court dismissed the plaintiff's action pursuant to CR 41(b), the Court of Appeal appropriately considered whether a lesser sanction than striking the belatedly-filed amended complaint should be applied. *Id.* at 249-50.

The case at bar presents substantially different facts and court rules than *Will*. The trial court did not dismiss a complaint filed by Schroeder involuntarily or even cite to CR 41. Instead, the trial court denied a post-judgment motion to vacate and struck a belatedly filed amended answer. No ambiguity existed as to the deadline for Schroeder to file his amended answer. In its December 29, 2016, order (CP 192-193), the trial court ordered that "Defendant's Amended Answer is filed and serve no more than **14** days after this order is entered". (Emphasis in original)

As a result, the facts in this case align much more closely with those in *Jewell v. Kirkland*, 50 Wn. App. 813, 817, 750 P.2d 1307 (1988). The court in *Jewell* ordered payment of a deposit for preparing a court record within thirty (30) days of “this date”, November 18, 1986. *Jewell*, 50 Wn.App at 815. The *Jewell* Court appropriately concluded that “[t]he Jewells were afforded due process because they were given an opportunity to pursue the review of the land use decision, providing they met certain reasonable conditions. Their complaint was dismissed, not because they were denied an opportunity to be heard, but because they, without justification, failed to meet certain reasonable conditions imposed by the trial court.” 50 Wn.App. at 820.

Unlike *Will*, the trial court in the present case specified a deadline for Schroeder to act – i.e., it gave him 14 days to file an Amended Answer. No dispute exists that Schroeder failed to file an Amended Answer until 6 weeks after the order permitting such a pleading. By that time, the trial court had already entered summary judgment in favor of Numerica and Schroeder had filed a motion for reconsideration of the Judgment. Schroeder undisputedly had time to file his Amended Answer and did not do so timely. He does not argue that Numerica somehow prevented him from filing; he just has other excuses. Consequently, the case below did not involve a

dismissal under CR 41(b), and also did not involve any deprivation of procedural or substantive due process to Schroeder; he simply failed to act promptly.

Even if CR 41(b) applied to this case, that rule gives a trial court authority to dismiss an action for noncompliance with a court order or court rules. *See Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166, 169, 750 P.2d 1251 (1988); *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 37 823 P.2d 518 (1992) (under the first sentence of CR 41(b), a trial court may exercise its discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order); *Jewell v. Kirkland*, 50 Wash. App. 813, 817, 750 P.2d 1307 (1988) (the trial court is vested with the authority to impose reasonable sanctions for the breach of reasonable rules). *See also Woodhead v. Discount Waterbeds, Inc.*, 78 Wash.App. 125, 129, 896 P.2d 66 (1995). As a result, the trial court appropriately struck the belatedly-filed amended answer after granting summary judgment to Numerica, and did not abuse its discretion by ruling in favor of Numerica.

**C. Numerica Did Not Waive the Requirement for an Agreement in Writing to Accept Electronic Service:**

At page 12 of his Brief, Schroeder argues that Numerica waived its objection to service of his Motion for Reconsideration of Summary Judgment by email by

purportedly accepting service by email in December of 2016. As set forth below, Schroeder's argument fails both factually and legally to establish waiver.

**1. Schroeder Cannot Meet the Legal Standard to Establish Waiver under Washington Common Law**

Under the common law, waiver is the intentional abandonment or relinquishment of a known right. *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993). Waiver must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive. *Dep't of Revenue v. Puget Sound Power & Light Co.*, 103 Wn.2d 501, 505, 694 P.2d 7 (1985).

Schroeder has not and cannot set forth a factual basis to support the application of the common law waiver standard. Schroeder's purported evidence of the intentional abandonment of the right to demand service by mail derives from Numerica purportedly emailing on December 9, 2016, a response to Schroeder's late-filed Motion to Continue the Summary Judgment motion, not objecting to Schroeder emailing a note for motion on December 13, 2016, and both parties emailing last minute pleadings filed one day prior to the December 20, 2016, hearing. (Schroeder's Brief, p. 12) Schroeder cannot

point to an explicit agreement by Numerica to accept service of all pleadings by email.

Further, Schroeder cannot demonstrate that Numerica's conduct is inconsistent with any intention other to waive. Instead, Schroeder filed pleadings late and on sought to set hearings on shortened notice – he created issues that required some email correspondence, but not the intentional and voluntary relinquishment by Numerica of the right to demand service by mail. Indeed, Numerica's counsel specified at oral argument on March 1, 2017, that “at no time has Plaintiff agreed to accept service electronically.” (RP 39) As a result, Schroeder cannot establish waiver by Numerica under Washington common law.

## **2. Schroeder Cannot Establish the Agreement for Service by Other Means under the Washington Civil Rules**

Washington Civil Rule 5 governs the “Service and Filing of Pleadings and Other Papers”. CR (b)(7) governs “Service by Other Means” and provides that “Service under this rule may be made by delivering a copy by any other means, including facsimile or electronic means, consented to in writing by the person or as authorized under local court rule.” No local court rule governs service by other means in the case at bar. Therefore, Schroeder had the burden to establish that Numerica

consented in writing to accept service of pleadings by email. The record below simply does not support such a conclusion. Consequently, this Court must reject Schroeder's argument that Numerica waived the requirement for Schroeder to serve the Motion for Reconsideration by mail.

**D. Numerica Gave Proper Notice of Hearing on the Motion for Summary Judgment**

Schroeder's contention that Numerica did not provide sufficient notice of its motion for summary judgment under CR 56 (Schroeder's Brief at p. 14) misstates the procedural history in the trial court. In fact, Numerica complied with CR 56 in its notice of the summary judgment motion, and later sought entry of an order granting summary judgment on notice after Schroeder failed to comply with the deadline to file an Amended Answer to the Complaint.

**1. Procedural History of Numerica's Motion for Summary Judgment**

Numerica served its Motion for Summary Judgment (CP 81-88), Note for Motion Docket (CP 89-90), Declaration in Support (CP 91-138), and Statement of Attorney's Fees (CP 139-140) by mail on November 10, 2016. The Declaration of Service was filed on November 14, 2016 (CP 141-142), and the hearing on the Motion for Summary Judgment was set for

December 13, 2016 (CP 89-90), or 33 days after service of the motion for summary judgment.

Schroeder had not responded to the Motion for Summary Judgment as of December 7, 2016, so Numerica filed a notice of Non-Opposition to the Motion and proof of service. (CP 143-146) Schroeder finally filed a Motion for Continuance of Summary Judgment Hearing on December 9, 2016 (CP 147-149, 151-153) and noted it for hearing on December 12, 2016 (CP 150) Numerica opposed the continuance (CP 154-157), and the trial court heard argument on December 12, 2016 (CP 158). The trial court denied the motion to continue, but permitted Schroeder to appear telephonically at the summary judgment hearing already noticed for December 13, 2016 (CP 158). Therefore, no dispute could exist that Numerica gave proper notice of its motion for summary judgment and Schroeder had filed a substantive response to the motion by December 13, 2016.

Schroeder moved on December 13, 2016, to file an Amended Answer. (CP 159-163). Based on that motion, the hearing on the motion for summary judgment was continued to December 20, 2016. Numerica opposed the motion to amend the answer. (CP 165-171). At the December 20, 2016, hearing, the trial court granted the motion to file an amended answer and denied the motion for summary judgment without prejudice.

(CP 178) The trial court denied Numerica's motion for summary not due to some disputed issue of material fact or law, but in connection with granting Schroeder leave to file an Amended Answer. (CP 192-193) The trial court's order dated December 29, 2016, specified that Schroeder had to file and serve his amended answer not later than 14 days after entry of the order. (CP 193). At the oral argument on December 29, 2016, Schroeder's counsel advised the Court that "14 days is no problem" to file the Amended Answer. (RP 23)

Schroeder did not file his amended answer by 14 days after the entry of the December 29, 2016, order. After that 14 day period had expired, Numerica filed a "Motion for Entry of Summary Judgment Order Upon Defendant's Failure to Comply with Court Order". (CP195-203) Numerica moved for an order entering summary judgment on its originally noticed motion because Schroeder had neither opposed the motion nor filed an amended answer by 14 days after the December 20, 2016, order. Numerica concurrently filed a motion for entry of judgment and decree of foreclosure. (CP 204-205). CP served these motions on January 17, 2017 (CP 202-203), and filed them with the Court on January 23, 2017. Numerica noted these motions for hearing on January 31, 2017. (CP 219-220)

Schroeder neither opposed the motions nor appeared at the hearing on January 31, 2017. The trial court granted

Numerica's motion for summary judgment by an order dated January 31, 2017. (CP 229-230) The court separately entered an order for judgment and decree of foreclosure that same day (CP 231-232), as well as a Judgment (CP 233-239).

**2. Numerica Provided the Required Notice for Summary Judgment Pursuant to CR 56**

CR 56(c) requires a moving party to file and serve a motion for summary judgment not later than 28 days before the hearing date. Numerica complied with this rule by servicing its motion for summary judgment on November 10, 2016, 33 calendar days prior to the December 13, 2016, hearing date.

Schroeder never opposed Numerica's summary judgment motion on the merits. Instead, he sought to continue the hearing, and then filed a motion for leave to file an Amended Answer. Schroeder's counsel assured the Court that the Amended Answer would be filed within 14 days of December 29, 2016, when the Court entered the written orders. (CP 190-191, CP 192-193)

The 14 day period for Schroeder to file his amended answer expired on January 12, 2017. On January 17, 2017, Numerica filed its "Motion for Entry of Summary Judgment Order Upon Defendant's Failure to Comply with Court Order". (CP 195-203) The motion explained that Numerica "moves the Court for entry of the previously presented summary judgment"

(CP 195, emphasis added), that “there remain no genuine issues of material fact” (CP 195, emphasis added). The issue presented as identified in that motion was whether the trial court should grant “Plaintiff’s motion for summary judgment previously presented to the Court in light of Defendant’s failure to timely file and serve their Amended Answer pursuant to court order.” (CP 199-200) The hearing on the renewed motion was set for January 31, 2017, and the motion pleadings were served by mail on January 18, 2017. (CP 223-224)

Consequently, Numerica did not file and serve a new summary judgment motion on January 18, 2017, as to Schroeder. Instead, after Schroeder failed to comply with the Court deadline to file an Amended Answer, Numerica re-set the hearing on its motion for summary judgment originally served on November 10, 2016. Numerica’s re-set hearing on the motion for summary judgment did not raise any new facts or present any new evidence; instead, it relied on the same facts and legal arguments. Schroeder never opposed the original motion on its merits, and did not respond to the Motion for Entry – indeed, Schroeder’s counsel did not even attend the hearing.

At oral argument on the Motion for Entry on January 31, 2017, the trial court noted that it had originally granted the summary judgment brought by Numerica and denied the

motion to amend the answer at the hearing on December 13, 2016, but then *sua sponte* reconsidered that ruling. (RP 26) The trial court then noted that it changed its position and denied Numerica's motion for summary judgment on December 29, 2016, solely to permit the amended answer. (RP 26) Based on this procedural background, and in light of Numerica explaining it noted the motion on 10 days' notice pursuant to CR 55 since it had re-set the originally filed motion for summary judgment (RP 28), the trial court agreed that summary judgment should be entered. (RP 28)

Based on the foregoing, Numerica complied with CR 56 in giving notice of its summary judgment motion and then re-setting the hearing on the motion after Schroeder failed to comply with the deadline to file an Amended Answer or to appear at the January 31, 2017. Under Schroeder's formulation, he has no obligation to respond timely under the Civil Rules and binding court orders, and instead are entitled to notices beyond the scope of those set forth under Washington law. This Court should therefore reject the premise that Numerica did not provide sufficient notice of its motion for summary judgment.

**E. The Trial Court Neither Entered a Default Judgment against Schroeder nor Dismissed an Action Filed by Schroeder Involuntarily Pursuant to CR 41.**

Schroeder erroneously argues at pages 15 and 16 of his Brief that the trial court entered “an order of default” against him. Schroeder attempts to equate his failure to file an Amended Answer, or to respond to Numerica’s January 23, 2017, Motion for Entry of Summary Judgment Order Upon Defendant’s Failure to Comply with Court Order” (CP 195-203) as the equivalent of an order of default or a default judgment. This characterization flies in the face of the facts below and Washington law.

The record below establishes that the trial court entered an order granting summary judgment against Schroeder (CP 229-230), and only after a series of briefs in which Schroeder had the opportunity to present his legal position in opposition to summary judgment under CR 56. Indeed, the trial court entered that order not by default, but only after:

service of the motion for summary judgment and supporting pleadings (CP 81-146);

Schroeder’s Motion for Continuance of the Summary Judgment Hearing (CP 147-153);

Numerica’s Opposition to the Continuance (CP 154-157);

an initial hearing on these motions (CP 158); a Motion to Amend the Answer (CP 159-163);

Numerica's response to the Motion to Amend the Answer (CP 165-171);

a Supplemental Memorandum by Schroeder on his Motion to Amend the Answer (CP 174-175);

oral argument on the motions on December 29, 2016 (CP 194);

a denial of the motion for summary judgment based upon Schroeder to file an Amended Answer (CP 190-191); and,

an Order permitting an Amended Answer to be filed within 14 days of December 29, 2016 (CP 192-193).

The trial court did enter a default against other defendants who never responded to the Complaint. (CP 176-177). However, no dispute can exist that summary judgment was entered against Schroeder, and only after a motion on notice filed when Schroeder failed to file his Amended Answer within the time filed by the Court. *See* discussion in section III. D. *supra*. Since the trial court did not enter a default judgment against Schroeder, no basis exists to reverse the Judgment as Schroeder argues.

**F. Schroeder Failed to Meet the Standard for a Motion to Vacate Default under CR 60(b)(1)**

Schroeder argues that the Court should have vacated the judgment under CR 60(b)(1), contending that Schroeder met all four elements required to vacate what he terms a "default judgment". (Opening Brief, p. 17) Schroeder contends that the entry of summary judgment resulted from neglect that "was

excusable”. (Schroeder’s Brief, p. 19) Schroeder does not argue the existence of mistake or inadvertence as grounds for relief from judgment either in the trial court or on this appeal.

As set forth herein, Schroeder cannot establish the existence of excusable neglect in failing to file the amended answer in the time required by the Court order, or for failing to respond to the Motion for Entry of judgment filed by Numerica, because the failures to act resulted from admitted attorney error. Based on the record below, the trial court's denial of Schroeder’s motion to vacate was not manifest abuse of discretion. *See Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). Therefore, Schroeder cannot establish the entitlement to relief under CR 60(b)(1).

### **1. Legal Standard for Excusable Neglect:**

Excusable neglect based on the error of an attorney is not grounds to vacate or modify a judgment under CR 60(b)(1). *See Haller v. Wallis*, 89 Wn.2d 539, 544-46, 573 P.2d 1302 (1978); *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996). “Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The ‘sins of the lawyer’ are visited upon the client.” *Ha v. Signal Elec., Inc.*, 182 Wn.App. 436, 453, 332 P.3d 991 (2014),

*citing Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002) (footnote omitted).

The present case does not involve a default judgment notwithstanding Schroeder's argument. Schroeder answered the complaint, and then failed to respond to the motion for summary judgment on the merits, failed to file an Amended Answer within the time period required by Court order, and then failed to respond to the Motion for Entry of an Order on Summary Judgment. As a result, decisional authority for excusable neglect in the context of a default judgment does not apply to the case at bar.

## **2. Schroeder Provided No Grounds for Failing to Respond to the Motion for Summary Judgment**

Schroeder did not provide any excuse for not opposing the Motion for Summary Judgment served on November 10, 2016, on its merits. He filed a Motion to Continue the hearing on the motion for summary judgment on December 9, 2016, and set forth legal theories on which Schroeder might oppose the motion. However, Schroeder did not explain why he could not respond to the motion on the merits or provide a declaration from one of the Schroeder parties in opposition to the motion. Ultimately, the trial court gave Schroeder time to file an Amended Answer in lieu of granting summary judgment, as the trial court originally contemplated. Nevertheless, the record

establishes that Schroeder never provide any factual or legal basis for failing to respond to Numerica’s Motion for Summary Judgment served on November 10, 2016.

**3. Schroeder’s Counsel Admitted the Failure to File the Amended Answer was due to Attorney Neglect**

Schroeder’s counsel admitted at the March 1, 2017, oral argument on the Motion to Vacate the Judgment, that the “Court did order us to file an amended answer in lieu – instead of the proposed answer that we had filed, and I overlooked that, and agree that it should have been done.” (RP 31) Instead, Schroeder did not file the Amended Answer until February 23, 2017 (CP 248-250), or six weeks after the deadline set by the trial court. Consequently, Schroeder offers only an explanation of attorney neglect as the grounds for the proffered excusable neglect. This does not meet the legal standard under Washington law, and therefore cannot provide a basis to reverse the judgment of the trial court.

**4. Schroeder’s Counsel Admitted the Failure to Respond to the Motion for Entry of Summary Judgment was due to Attorney Neglect**

Schroeder’s counsel admitted at the March 1, 2017, oral argument on the Motion to Vacate the Default, that his office had received notice of the January 31, 2017, hearing on Numerica’s Motion for Entry of Summary Judgment. (RP 32).

Schroeder's counsel further explained that "I, quite frankly, overlooked that." (RP 32) Schroeder's counsel acknowledged later in that same hearing "[w]hat was happening was due to oversight, which I explained, we didn't respond, and we had enough notice". (RP 49) Once again, Schroeder presents only attorney neglect as the basis for excusable neglect under CR 60(b)(1). The admitted attorney error simply does not meet the legal standard for excusable neglect under Washington law, meaning this Court must affirm the trial court's judgment.

**G. The Orders and Judgment Entered by the Judge Pro Tem were Proper under Washington Law**

Schroeder contends the Judge Pro Tem who heard the motion for entry of the order granting summary judgment and to set aside default was not authorized to make rulings because Schroeder did not stipulate to his hearing those matters. Schroeder's argument misapprehends Article 4, § 7 of the Washington State Constitution and the facts of this case.

Judge Allen C. Nielson was the Superior Court Judge who issued the rulings in this case through December 29, 2016. Judge Nielson announced on the record at the hearing on December 20, 2016, that he was retiring (RP 23-24) However, the two other Superior Court Judges for Stevens County had entered separate orders of recusal. (CP 225-228)

As Schroeder acknowledges in his Opening Brief, Stevens County has only two elected Superior Court judges. Judge Nielson announced on the record at the January 31, 2017, hearing that the two Superior Court judges in Stevens County had recused themselves due to personal relationships with Schroeder. (RP 29, 52) Therefore, Judge Nielson heard the oral arguments and issued the remaining rulings after his retirement as a Judge Pro Tem.

Under the circumstances, Schroeder's consent to Judge Nielson hearing argument and issuing rulings as a Judge Pro Tem was not required. As the Washington Supreme Court noted in *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 670, 869 P.2d 1078, 1080 (1994), Article 4, Section 7 of the Washington Constitution was amended in 1987 to add a sentence that eliminated the requirement that the parties to the litigation stipulate to a Judge Pro Tem. The final sentence to the section provides that "However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement." *Zachman*, 123 Wn.2d at 760.

The *Zachman* court explained that the amendment to Section 7 was intended to change Washington law. "Amendment 80 dispensed with the requirement of consent and

"created a new means for appointing a judge pro tempore in a very limited set of circumstances". *Zachman* at 760, citing *State v. Belgarde*, 119 Wn.2d 711, 723, 837 P.2d 599 (1992). *Zachman* then turned on whether a Judge who had lost re-election met the definition of a retired Judge for purposes of this Constitutional section. No such dispute over the retired status of Judge Nielson existed in the court below.

Schroeder's attempt to avoid the application of Section 7 based on two Judges being assigned and then recusing themselves is simply untenable. Under Schroeder's rationale, the exception to agreement of the parties added to the Washington Constitution would simply be read out for his convenience. This interpretation is inconsistent with both the meaning and intention of this Constitutional provision. As a result, Judge Nielson properly entered rulings in the trial court as a Judge Pro Tem, and no basis exists to reverse the Judgment or other orders on that alleged basis.

**H. Schroeder is Not Entitled to Fees on Appeal because There is No Basis to Reverse the Trial Court's Judgment**

Schroeder seeks attorney's fees on appeal at page 25 of his Opening Brief. Since no legal or factual basis exists to reverse the Judgment of the trial court, or any post-judgment ruling, Schroeder has no entitlement to attorney's fees.

V. CONCLUSION

Based on the foregoing arguments, Numerica requests that this Court affirm the judgment of the trial court, and grant such other and further relief as the Court deems proper.

Respectfully submitted,

Dated: April 23, 2018

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## CERTIFICATE OF SERVICE

Peter J. Salmon certifies as follows:

On April 23, 2018, I served the attached Respondent's Opening Brief through the court's portal on the attorney for the Defendant/Appellant as follows:

John C. Perry  
707 W. Main Ave. B1  
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Dated this 23<sup>rd</sup> day of April, 2018, at San Diego, California.

By: /s/ Peter J. Salmon  
PETER J. SALMON, WSBA No. 31382

**ALDRIDGE PITE, LLP**

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