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IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 368220-III

JENS RICHTER, as an individual d/b/a GLOBAL EQUINE SIRES
and A-1 PERFORMANCE SIRES, Plaintiff/Appellant

vs.

ALLIE HELINSKI and BRENT HELINSKI, individually and the marital
community thereof, Defendants/Respondents

On Appeal from the Superior Court of Spokane County
The Honorable Julie M. McKay
Superior Court Docket Number 18-2-03782-9

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE ISSUES

A. Did the trial court abuse its discretion by vacating the default and default judgment against Allie Helinski under CR(60)(b)(1), CR60(b)(4) or CR(60)(b)(11)? Answer: No.

B. Did the trial court abuse its discretion by vacating the default and default judgment against Brent Helinski under CR(60)(b)(1), CR60(b)(4) or CR(60)(b)(11)? Answer: No.

C. Did Allie Helinski present a prima facie defense to the allegations in the Complaint, thus justifying the trial court's decision to vacate the default and default judgment against her? Answer: Yes.

D. Did Brent Helinski present a prima facie defense to the allegations in the Complaint, thus justifying the trial court's decision to vacate the default and default judgment against him? Answer: Yes.

II. STATEMENT OF THE CASE

A. Order Vacating Orders of Default and Default Judgment.

On May 10, 2019, the Honorable Julie M. McKay entered an order vacating: (1) a default order entered against Allie Helinski without notice; (2) a default order entered against Brent Helinski without notice; and (3) a default judgment entered against both Allie Helinski and Brent Helinski without notice. Prior to signing that order Judge McKay stated: "Again, I want to make sure the record is very clear that I have contemplated the

facts in this case, as well as the law that has been provided by counsel, to reach my decision to grant the motion to vacate the two defaults, as well as the default judgment.” RP 26.

B. Substantive Facts.

On or around March 2015, Allie Helinski (hereinafter “Allie”), owner of A-1 Performance Sires¹, entered into an agreement with Plaintiff Jens Richter (hereinafter “Richter”) of Global Equine Sires (hereinafter “GES”) to receive a shipment of equine semen to sell on behalf of GES for commission. CP 139. This relationship expanded over the next few months to where Allie was selling a significant amount of GES semen on commission for GES/Richter in addition to selling the semen she personally owned through A-1 Performance Sires. *Id.* In the spring of 2016, Allie and Richter began discussing the merger or sale of A-1 Performance Sires to GES because the businesses were already closely linked. *Id.* Despite Richter’s claims, Allie was acting as an employee of GES doing marketing, sales, and distribution. *Id.*

On June 2, 2016, Jens Richter/GES purchased some, but not all, of the assets of A-1 Performance Sires. CP 140. Under the agreement, A-1 Performance Sires sold all of the cryo-storage tanks, shipping containers,

¹ A-1 Performance Sires is in the business of selling horse semen and was, at the time, a general partnership with husband Brent Helinski. CP 139.

customers, business license, website, media and A-1 Performance Sires documentation to Richter for \$7,000, plus an additional \$7,000 worth of semen to be owned by Allie outright. CP 140, 146. Not included in the sale was the semen inventory owned by A-1 Performance Sires and Allie, financial responsibilities, and legal obligations of A-1 Performance Sires. *Id.* The agreement further provided that Allie would continue working for Richter/GES **as an employee** for 10% sales commission per sale and a \$50 flat fee for packing and shipping the product she sold on behalf of Richter. *Id.* (Emphasis added). The cryo-storage tanks and shipping containers sold to Richter were to remain at Allie's residence to ease her ability to ship the semen to customers on behalf of Richter. *Id.* Allie was also to be responsible for expanding Richter's businesses' foreign sales and maintaining relationships with the customers she had while owning A-1 Performance Sires. *Id.*

Allie continued to work for Richter in the above mentioned capacity without issue. CP 140. On April 28, 2018, Richter travelled to Spokane to retrieve his cryo-tanks, shipping containers, and semen inventory for consolidation at his residence in California. *Id.* Unfortunately, prior to Richter's arrival, two of his dry-shippers failed and lost the ability to properly maintain temperature during transit. *Id.* That resulted in the loss of a significant amount of Richter's product. *Id.*

Richter became extremely angry when he learned of the lost product. *Id.* There was nothing Allie could have done to prevent the dry-shippers from failing. *Id.* In addition to the failed dry-shippers, one of the five cryogenic storage tanks Richter kept at Allie's home in Spokane also failed (Tank #5), again through no fault of Allie's. *Id.*

When Richter arrived in Spokane, he and Allie separated Allie's semen from the semen Richter intended to take with him to California. CP 141. Richter left some semen for one order for Allie to package and ship to Richter's customer. *Id.* Unfortunately, Allie failed to tell Richter about the failure of his cryo-tank (Tank #5). *Id.* Allie had placed the failed tank, which contained a considerable amount of perished and decommissioned product, in a separate location from the other tanks to prevent inadvertent use. *Id.* There was, and remains, no viable product in the failed cryo-tank. *Id.* Richter left Spokane without the failed tank. *Id.* Thereafter, Allie completed the final shipment of the semen that Richter left in Spokane and then continued to be available to assist Richter with his international sales and shipping. *Id.* Allie's employment with Richter ended with the closing of outstanding orders on May 29, 2018. *Id.* Throughout the entire employment relationship with Richter/GES, Allie continued to acquire and sell her personally owned semen inventory. *Id.* Allie did not steal any of

Richter's semen or sell any of his inventory for her sole financial benefit.

Id.

C. Procedural History.

Allie Retains Attorney Robert Sargent on Behalf of Herself, Brent, and their Marital Community.

Around the beginning of August 2018, Allie received a letter asking her to stop selling GES/A-1 Performance Sire semen and to return all semen owned by Richter. CP 141. Because Allie no longer possessed any of Richter's viable semen, she had already stopped selling semen on Richter's behalf. *Id.* Consequently, she did not respond to the letter. *Id.* Plaintiff, thereafter, filed his Complaint against the Defendants on August 29, 2018. CP 1-11. Allie was personally served with the Summons and Complaint on or around August 31, 2018. CP 13. Service was on Allie only. *Id.* Allie immediately began searching for a lawyer to assist in defending against Richter's claims because they were false. CP 142.

On September 15, 2018, Allie met with Spokane attorney Robert Sargent and retained his services to defend her and her husband in this lawsuit. CP 142, 152. Allie provided Mr. Sargent with a copy of the Summons and Complaint, the letter she received, and a list of the semen contained in the decommissioned tank. CP 142. She also paid Mr. Sargent

a \$1,500 retainer for his services². *Id.* A few days after retaining Mr. Sargent, Allie received a letter from the Plaintiff's attorney requesting the immediate return of semen belonging to Richter. *Id.* Allie contacted Mr. Sargent about the letter. *Id.* Mr. Sargent indicated that he was in contact with Richter's attorney and would take care of the matter. *Id.* (Emphasis added). Mr. Sargent contacted Allie a few weeks later stating that Richter only wished for the return of the semen, dead or alive, and that Richter was attempting to find someone who could come to Spokane and verify the tank and its contents. *Id.* Since legal matters can take a long time to complete and the semen was dead, Allie thought nothing of the fact that she did not hear from Mr. Sargent for several months. *Id.*

Mr. Sargent's Contacts with Richter's Counsel.

In the course of Mr. Sargent's representation of the Helinskis, he made several attempts to contact Plaintiff's counsel, some which were before entry of the default orders and all before entry of the default judgments. CP 152-153. Specifically, Mr. Sargent made several phone calls and left several messages with Plaintiff's counsel, including one on October 5, 2018, but did not receive a return call. CP 152, 206. After not receiving a return phone call, Mr. Sargent went in-person to Richter's

² Mr. Sargent deposited the retainer on September 17, 2018. CP 148.

attorney's office, Roberts Freebourn, PLLC, on two occasions with the intent to speak with an attorney about this matter. *Id.* On each occasion, Mr. Sargent was met by a secretary who took his business card and the reason for his visit. *Id.* In the meantime, and despite Mr. Sargent's efforts to make contact, Richter's counsel — without providing notice to Mr. Sargent or the Defendants — proceeded to obtain a Default Order against Allie on September 24, 2018 and a separate Default Order against her husband Brent Helinski (hereinafter "Brent") on October 17, 2018 (hereinafter the "Default Orders"). CP 21-22, 31-32, 153. Mr. Sargent had attempted to make contact with Plaintiff's counsel, without response, and at minimum prior to the default filing on October 17, 2018. 152-153.

On October 25, 2018, counsel for Richter, Victoria Johnston, finally called Mr. Sargent and they discussed the "claims alleged in this case, potential settlement, and the status of the strain inventory and whether any viable inventory existed to return to the [Plaintiff.]" CP 152. Ms. Johnston did not tell Mr. Sargent that the Default Orders had been entered against the Helinskis. CP 131, 153. (Emphasis added). On October 30, 2018, Ms. Johnston sent an e-mail message to Mr. Sargent regarding the possibility of settlement and the status of viable inventory. CP 156. Again, Ms. Johnston made no mention of the Default Orders or that Plaintiff intended to seek a default judgment. CP 153. (Emphasis added).

Allie and Brent Discover Default Orders and Default Judgment.

On March 9, 2019, Brent noticed that his bank account had been drained of funds pursuant to a legal order. CP 133. After contacting the bank, Brent immediately contacted Allie to see if she knew anything about it; which she didn't. CP 133-134. That day while checking the mail, Allie found an envelope containing a copy of the Default Orders and Default Judgment entered in this case, along with an Application, Notice and Writ of Garnishment, and an Exemption Claim. CP 142-143. This was the Helinskis' first notice of the Default Orders. CP 133-134, 142-143. The Helinskis were in complete shock as they rightfully believed their attorney, Mr. Sargent, was protecting their interests in this lawsuit. *Id.* Allie immediately contacted Mr. Sargent, told him about the paperwork she received in the mail, and that Brent's bank account had been emptied pursuant to a legal order. CP 143. After a few phone calls, Mr. Sargent indicated that he didn't know what was going on and recommended that Brent remove all money from his bank accounts. *Id.* Mr. Sargent told Allie that he could get the judgement overturned, that he would go to the Plaintiff's counsel's office in the morning of Monday, March 10, 2019, to find out what happened, and then update her. *Id.* Allie, however, did not receive a call from Mr. Sargent on Monday morning as promised so she called him. *Id.* Allie asked what Mr. Sargent knew about the case and what

the process was to overturn the judgement. *Id.* Mr. Sargent then stated that he doesn't usually handle these types of cases, that Allie needed to hire a different attorney, and that he would refund the retainer. *Id.* Allie immediately contacted the law office of Paukert and Troppmann, PLLC and scheduled a Tuesday, March 12, 2019, 9:00 a.m. consultation. *Id.* During the consultation, Brent and Allie retained Paukert and Troppmann to represent them in this matter. *Id.* Over the next several days, Paukert & Troppmann attorneys spoke with Richters's counsel who eventually released the Helinskis' bank account from the Garnishment Order, but refused to voluntarily vacate the Default Orders and Judgments. CP 131. A Motion to Vacate the Default Orders and Default Judgment immediately followed, with a hearing taking place pursuant to the court's calendar on May 10, 2019, before the Honorable Judge Julie McKay. CP 114-129.

The Trial Court's Ruling.

Brent and Allie Helinski promptly moved the trial court for an Order Vacating the Defaults and Default Judgment entered against them under two main theories: (1) they were entitled to notice of the default proceedings, but did not receive such notice and therefore the Default Orders and Default Judgment should be set aside in accordance with CR 55(a)(3); and alternatively, (2) that good cause existed to set aside the

Default Orders and Default Judgment under CR 55(c)(1) and CR 60(b)(1), (4), and (11). CP 114-129. After listening to the arguments of counsel and considering the briefs and written testimony submitted by counsel, Judge McKay focused the rationale for her decision upon three cases cited by counsel: *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), *Meade v. Nelson*, 174 Wn. App. 740, 300 P.3d 828 (2013), and *White v. Holm*, 73 Wn. 2d 348, 438 P.2d 581 (1968). RP 19, 26. Recognizing that defaults are not favored and that a case should be heard on its merits, Judge McKay spent time analyzing the relevant authority prior to rendering her decision. RP 19-20. She first considered whether Mr. Sargent substantially complied with the notice of appearance requirements. RP 20-23. Judge McKay noted that there was no dispute that Allie contacted Mr. Sargent for legal representation, that she paid a retainer to Mr. Sargent, and that Mr. Sargent failed to enter a formal notice of appearance. RP 20. After noting that a fact dispute existed with respect to the timing and content of contacts made between Mr. Sargent and Richter's counsel, the Court ultimately found that there was not enough evidence to show substantial compliance by Mr. Sargent with the notice of appearance requirements before the default was entered against Allie; but later inferred that there may have been an appropriate notice of appearance prior to entry of the default against Brent. RP 20-23; 26. Judge McKay

noted that, as of at least October 5, 2018, Richter’s counsel was aware that there was a lawyer out there making contact on the Helinski’s behalf — 12 days prior to the date the default order was entered against Brent. RP 21-22. Judge McKay, however, could not “conclusively indicate that substantial compliance has been had,” and thereafter turned to an analysis of the matter under CR 60 and the *White v. Holm* factors. RP 23.

As an initial matter, Judge McKay recognized that there were communications, including settlement communications, between Mr. Sargent and Richter’s counsel after service of the Complaint and prior to entry of the Default Judgment wherein the defaults weren’t mentioned by Plaintiff’s counsel. RP 23-24. Turning to the *White v. Holm* factors, the Court first discussed the defense to Richter’s main claim that “semen was converted, taken, and not returned.” RP 24. Judge McKay concluded that there is at least a prima facie defense to Richter’s conversion claim based on the declaration of Allie Helinski that the “semen wasn’t converted, it was not viable.” RP 24-25. Judge McKay found that there was evidence of mistake, inadvertence, surprise, and excusable neglect, noting that the Helinskis had “done what they need to,” and for whatever reason Mr. Sargent did not file a proper notice of appearance, but did make contact with Appellant’s counsel in his own way. RP 25-26. The Court went on to state, “I analyze that by looking at this case from the prospective of

coming back to the purpose of and the overall liberal application of setting aside defaults, and the purpose that really is to go to resolution of cases on their merits versus defaults.” RP 25. Judge McKay then vacated the default orders and the default judgment which gave rise to this appeal. RP 26.

III. LAW & ARGUMENT

A. Standard of Review.

“Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.” *Showwalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). The decision whether or not to vacate a default is reviewed for abuse of discretion. *Id.* “Discretion is abused when it is exercised on untenable grounds or for untenable reasons.” *DeCaro v. Spokane County*, 198 Wn. App. 638, 642, 394 P.3d 1042 (2017). In other words, abuse of discretion only exists when it can be held that no reasonable person would side with the trial court’s decision. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). Historically, a court is more likely to find abuse of discretion when there is refusal to vacate a default. *DeCaro* , 198 Wn. App. at 642, 394 P.3d 1042. As stated by our Washington Supreme Court in *White v. Holm*:

[W]e early took occasion to endorse the proposition that in such proceedings the court, in passing upon an application which is not manifestly insufficient or groundless, 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.

73 Wn. 2d 348, 351, 438 P.2d 581 (1968).

Based on the foregoing, absent a finding that the trial court made its decision on untenable grounds or for untenable reasons, the Order Vacating the Defaults and Default Judgments must be upheld. In this case, it cannot be said that no reasonable person would side with the trial court's decision; therefore, the Court's Order must stand.

B. The Facts and Evidence Presented Support the Trial Court's Decision to Vacate the Default and Default Judgment against Allie Helinski.³

Allie sought relief from the Default Orders under several subsets of CR 60(b)⁴ including, “mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;” “fraud, misrepresentation, or other misconduct of an adverse party,” and “any

³ The brief of Appellants only addresses the default and default judgment entered against Allie Helinski. Thus it appears that Appellants have not appealed the Order as it relates to Brent Helinski. To the extent the appeal applies to Brent Helinski, the arguments made herein apply the same.

⁴ Upon good cause shown, “the court may set aside an entry of default, and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).” CR 55(c)(1).

other reason justifying relief from the operation of judgment.” CR 60(b)(1), (4), and (11)(emphasis added). The trial court properly analyzed these subparts of CR 60. In its analysis of CR(60)(b)(1) the trial court applied the factors of *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), which required Allie to prove:

(1) that there was substantial evidence 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.

The first two “primary” factors were at issue, while the latter “secondary” factors were undisputedly met by Allie. RP 25; *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007).

1. Evidence supports the finding of mistake, inadvertence, surprise and/or excusable neglect under CR60(b)(1).

Excusable neglect “is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 395, 113 S. Ct. 1489 (1993). The notion that the “sins of the lawyer” are imputed to the client doesn’t apply to defaults and default judgments. *Ha v. Signal Electric, Inc.*, 182 Wn. App. 436, 452-53, 332 P.3d 991 (2014). When it

comes to defaults, “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.” *Id.* at 453, 332 P.3d 991.

Richter’s reliance on *Johnson v. Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003) is misplaced as this is not a case dealing with the breakdown of internal office procedures. *See also TMT Bear Creek Shopping Ctr. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 212-13, 165 P.3d 1271 (2007). Instead, this is a case of misunderstanding, which pursuant to *Ha v. Signal Electric, Inc.* and *White v. Holm* constitutes mistake for purposes of CR 60(b)(1).

In *Ha*, a complaint for a personal injury action was served on the defendant’s bankruptcy attorney and unintentionally forwarded by the defendant’s bankruptcy financial advisor to the wrong insurance company. 182 Wn. App. at 444, 332 P.3d 991. The Court vacated the default and default judgment finding, in part, that a mistake caused the defendant’s failure to appear. *Id.* at 450-53, 332 P.3d 991. The Court distinguished several cases, including *Johnson v. Cash Store*, agreeing that a breakdown of internal procedures is not excusable. *Id.* at 450-51, 332 P.3d 991. However, the Court held that mistake will be found “where a defendant’s failure to timely answer results from a misunderstanding, like here.” *Id.* at

451, 332 P.3d 991. There were no facts to show failure to answer was deliberate or neglectful. Instead, there was a genuine misunderstanding over whether the bankruptcy attorney could accept service followed with a mistake by a non-attorney over where the pleadings were sent. *Id.* at 451-52, 332 P.3d 991.

In *White*, there was a misunderstanding over who would be providing interim legal counsel while liability insurance coverage was being questioned, resulting in a failure to answer the complaint and a default being entered. 73 Wn.2d at 350, 438 P.2d 581. The Court in finding mistake and vacating the default, held that the Defendant himself remained blameless, therefore it was unnecessary to determine whether or not there was culpability on behalf of the insurance agents who had possession of the Complaint. *Id.* at 354, 428 P.2d 581. Similar to this case, the *White* Court reasoned:

Clearly this should be so where it appears, as it does here, that Mr. Holm promptly notified the insurance agent of plaintiff's outstanding claim, expeditiously consulted with an attorney and with the appropriate insurance adjuster, relied in good faith upon the assurances of the insurance agent and the attorney as to the insurer's responsibility in furnishing counsel, diligently complied with all requires of the insurance adjuster relative to furnishing information concerning the accident and the plaintiff's claim, executed the 'nonwaiver' agreement with the advice of the attorney he had consulted, and justifiably entertained a bona fide belief that the insurer would provide counsel to defend the action at least until such time as the extent of coverage was determined.

73 Wn. 2d at 354-55, 438 P.2d 581.

Here, the Helinskis did not intentionally ignore their obligation to appear and respond. It is undisputed that Allie retained attorney Robert Sargent to represent she and her husband's interests in this matter. RP 20. Allie rightfully relied on that representation with respect to the litigation process. At all times relevant, the Helinskis believed that Mr. Sargent was representing their interests in this matter. CP 142. They had no knowledge that Mr. Sargent may not have been representing them properly or that default proceedings were occurring. CP 142-43. The Helinskis acted as any reasonably prudent people would by retaining a lawyer to represent them in this matter and there is no evidence that could establish their fault for the entry of the Default Orders. Further, there is no evidence or argument that Mr. Sargent's failure to enter a formal notice of appearance was a "willful intent to ignore the lawsuit." *See Showwalter*, 124 Wn. App. at 514, 101 P.3d 867. In fact the opposite is true – Mr. Sargent attempted and did make contact with Richter's counsel, even having settlement discussions where no mention of the defaults was had. Based on the foregoing, the evidence supports a finding of mistake, inadvertence, surprise, excusable neglect and/or irregularity, justifying vacation of the Default Orders.

2. The trial court properly contemplated *Morin* in support of vacating the default orders under CR60(b)(4).

Despite claims to the contrary, evidence in this case supports the notion that Mr. Sargent's communications with Richter's counsel entitled Mr. Sargent to notice of the default proceedings. Specifically, the Helinskis asked the Court to look at whether Richter had done something that would render enforcing the judgment inequitable under CR 60(b)(4). *Morin*, 160 Wn.2d at 758, 161 P.3d 956.

It is undisputed that during communications in October 2018, Richter's counsel concealed from Mr. Sargent that default orders had already been entered and that a motion for a default judgment was going to be filed. RP 22; CP 152-159. Richter's counsels' concealment of the existence of the default order from Mr. Sargent supports Judge McKay's vacation of the default on equitable grounds. *Morin*, 160 Wn.2d at 758, 161 P.3d 956. In *Morin*, the insurance adjuster called Plaintiff's counsel on two occasions to discuss the case, but neither Plaintiff's counsel nor the paralegal disclosed that litigation had commenced or that a motion for default had already been taken against the defendants. *Id.* The Court held that Plaintiff's counsel had no duty to inform the insurance adjuster about all of the details of litigation, however, "counsel's failure to disclose the fact that the case has been filed and that a default judgment was pending

when the ... claim representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation.” *Id.* at 759, 161 P.3d 956 (referring to CR60(b)(4)).

Identical to the facts set forth in *Morin*, in this case Richter’s “counsel’s failure to disclose the fact that [default orders had been entered] and that a default judgment was pending when [Mr. Sargent] was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation.” 160 Wn. 2d at 759, 161 P.3d 956. Based on the foregoing, the trial court properly vacated the Default Orders and Default Judgment for good cause on equitable grounds. CR 55 (c)(1) and CR 60 (b)(4).

C. The Facts and Evidence Presented Support at Least a Prima Facie Defense to Richter’s Claims.

Prior to evaluating whether a prima facie defense exists, Courts are mindful that:

When the defense is strong or virtually conclusive, scant time will be spent inquiring into the reasons which occasioned entry of the default if it was not willful and the request to vacate is timely made. Conversely, where the defendant promptly moves to vacate and has a strong case for excusable neglect, the actual strength of the defense is less important to the reviewing court. The overriding concern is to ensure that justice is done.

DeCaro, 198 Wn. App. at 643, 394 P.3d 1042, citing *White*, 73 Wn. 2d at 352-53, 438 P.2d 581. In essence, when one of the two primary *White* factors is strong, the other primary factor need not be carefully considered. *DeCaro*, 198 Wn. App. at 643, 394 P.3d 1042. It is well settled that “if a strong or virtually conclusive defense is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the moving party timely moved to vacate and the failure to appear was not willful.” *Showwalter*, 124 Wn. App. at 512, 101 P.3d 867.

When deciding the adequacy of a defense, the trial court need only determine that a defendant is able to demonstrate any set of circumstances that, if believed, would entitle the defense to relief. *TMT Bear Creek Shopping Ctr. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 203, 165 P.3d 1271 (2007). Even a tenuous defense may support a motion to vacate. *White*, 73 Wn.2d at 353, 438 P.2d 581. Evidence is reviewed in light most favorable to the moving party, in this case Allie. *Showwalter*, 124 Wn. App. at 512, 101 P.3d 867.

Here, the trial court properly ruled that the Defendants have, at minimum, a prima facie defense to the Plaintiff’s claims. RP 24-25. As explained by Allie in her sworn declaration, liability, causation, and

damages are all in dispute. CP 139-151. Allie stopped selling Richter's product as his employee, on his behalf, or around May 29, 2018, and had no further association with Richter or his businesses. She did continue to sell and acquire her own personally owned semen inventory, which directly disputes Richter's claim that Allie was selling semen under Richter's name. Further, Mrs. Helinski testified that she had no fault in the failed cryo-tank (Tank #5) that resulted in a considerable amount of Richter's lost product. Richter owned the tank at issue calling Allie's legal liability as his employee into question.

Further, with respect to defense of Richter's primary claim that "semen was converted, taken, and not returned," the trial court made clear that there is at least a prima facie defense to that claim based on the declaration of Allie Helinski that the "semen wasn't converted, it was not viable." (RP 24-25). Plainly, Allie testified via declaration that she did not steal any of Richter's inventory or product, which is directly contradictory to Richter's claims. "Significantly, the trial court does not act as a trier of fact in a hearing on a motion to vacate; thus, the court cannot conclusively determine which parties' facts control." *Showwalter*, 124 Wn. App. at 512, 101 P.3d 867. In essence, it is for a trier of fact to determine credibility. The trial court properly decided to allow such a determination be made by vacating the defaults.

Allie also denies the amount of damages awarded to Plaintiff under the Default Judgment. In *Calhoun v. Merritt*, the Court acknowledged the difficult nature of developing a defense to damages without discovery in the matter. 46 Wn. App. 616, 7 P.2d 1094 (1986). The amount of damages awarded may also be a relevant factor considered by a court when setting aside a default judgment. For example in *White*, the court held “where, as here...the damages sought are substantial and unliquidated” even a “tenuous” defense could support vacation of a default. 73 Wn.2d at 353, 438 P.2d 581.

As indicated, much, if not all, of the damage Richter claims was for semen destroyed after his cryo-tank failed through no fault of his employee Allie. The claims at issue are unique and presumably there are few individuals with the requisite knowledge to testify as to such matters. In this case, Allie is the only individual who can dispute Richter’s claims, which she did via declaration. As argued before the trial court, the Defendants have had no opportunity to conduct formal discovery to flush out what Plaintiff’s claims really are or had the opportunity to develop any of their defenses to the claims. The first *White* factor is not strictly applied when the case is new and no discovery has commenced. *Calhoun v. Merit*, 46 Wn. App. 616, 620, 731 P.2d 1094 (1986). As such, the trial court

properly held that Allie’s testimony was enough to create a prima facie defense to Richter’s claims.

D. The Facts and Evidence Presented Support Vacation of the Default Orders and Default Judgment Under CR 60(b)(11).

While Judge McKay did not specify the precise court rule that supported her order, the record clearly supports Judge McKay’s decision to vacate the Default Orders and Default Judgment under CR 60(b)(11). CR 60(b)(11) gives the court discretion to vacate an order or final judgment for “[a]ny other reason justifying relief from the operation of the judgment.” Here, Judge McKay considered all of the evidence presented by counsel. Notably, Judge McKay also considered arguments and evidence presented by Plaintiff’s counsel during the Default Judgment hearing — a hearing that Plaintiff’s concealed from the Helinskis and their attorney: “I do have some recollection, and I will be very honest with counsel, I have some recollection of the default judgment hearing and the testimony taken.” RP 24. Judge McKay noted that the Plaintiffs presented testimony at the default judgment hearing that semen had been converted. RP 24. She then noted that “[t]he declaration provided by Allie Helinski states the semen wasn’t converted, it was not viable, **and why those things weren’t addressed when the plaintiff was here in Spokane, I don’t know.**” RP 24.

Clearly Judge McKay sensed that something was not right about the manner in which the default orders and default judgment were obtained by Plaintiff's counsel. Accordingly, she vacated the default orders and default judgment without citation to a specific court rule or a specific list of facts.

Judge McKay, however, clearly considered all facts of the case presented by counsel as well as extraneous facts submitted during the Default Judgment hearing. She also considered the law presented by the Helinskis that urged the Court to vacate the default orders and judgment under CR 60(b)(11). RP 26. Which particular fact or set of facts support her order is not clear from the transcript of her oral ruling. Perhaps it was Plaintiff's failure to mention the Default Orders during settlement negotiations. Or it could have been Plaintiff's failure to provide Mr. Sargent notice of the default judgment hearing that was held after Plaintiff's counsel knew Mr. Sargent was representing the Helinskis. RP 23 - 24. "The lawyer, again, I'm certainly not excusing [sic] he hasn't done what he's supposed to do, he at least is out there, and this is known before the default is taken." RP 22. Or it could have been Plaintiff's counsel's failure to advise the court during the default judgment hearing that they had engaged in settlement negotiations with Mr. Sargent. Although the precise factual and legal justifications for her decision were

not stated in a succinct manner as she simultaneously contemplated and announced her decision from the bench, it is abundantly clear that Judge McKay determined that the facts she considered — including those mentioned during her oral ruling as well as the written testimony and facts submitted by counsel — gave her a reason or reasons to justify the relief requested by the Helinskis, including relief under CR 60(b)(11).

The primary concern in reviewing a trial court's decision on a motion to vacate is whether the decision is just and equitable. *TMT Bear Creek Shopping Ctr., Inc.*, 140 Wn.App. at 200, 165 P.3d 1271. “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 v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (quoting *Widucus v. Sw. Elec. Coop., Inc.*, 26 Ill.App.2d 102, 109, 167 N.E.2d 799 (1960)).

Judge McKay’s order vacating the Default Orders and Default Judgment was just and equitable under the circumstances and should be affirmed.

IV. CONCLUSION

Judge McKay did not abuse her discretion by granting the Helinskis’ motion to vacate the Defaults and Default Judgment. As such, the Helinskis ask this Court to affirm the trial court’s ruling, dismiss this

appeal, and award the Helinskis their reasonable attorneys' fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED this 4th day of October, 2019.

PAUKERT & TROPPMANN, PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of October, 2019, I caused to be served via the Court of Appeals filing system a true and correct copy of the foregoing document to the following:

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