

62852-6

62852-6

No. 62852-6

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

---

LAKEWEST CONDOMINIUM OWNERS ASSOCIATION,

Plaintiff/Appellant,

v.

TOKIO MARINE & NICHIDO FIRE INSURANCE COMPANY, LTD

Defendant/Respondent.

---

**RESPONDENT'S BRIEF**

---

1001 Fourth Avenue, Suite 3900  
Seattle, Washington 98154-1051  
Tel (206) 625-8600  
Fax (206) 625-0900

CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
Steven W. Fogg, WSBA No. 23528  
Seann C. Colgan, WSBA No. 38769  
Attorneys for Respondent

COPIES FILED  
STATE OF WASHINGTON  
2009 AUG -3 PM 4:44

ORIGINAL

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 3

III. STATEMENT OF THE CASE..... 4

    A. Respondent..... 4

    B. The Underlying Action and Default Judgment..... 5

IV. STANDARD OF REVIEW ..... 8

V. ARGUMENT..... 10

    A. Standard for Vacating Default Judgment..... 10

    B. The Default Judgment Was Void ..... 11

    C. The Default Judgment Was Properly Vacated ..... 14

        1. Amendment of the Default Order and Complaint..... 16

        2. Multiple Defendants..... 16

        3. Appellant’s Run-Out-The-Clock Strategy ..... 19

    D. Appellant’s Claim of Damages is Unreasonable. .... 27

VI. CONCLUSION..... 30

## TABLE OF AUTHORITIES

### **Cases**

<i>Allard v. First Interstate Bank, N.A.</i> , 112 Wn.2d 145, 768 P.2d 998 (1989).....	28, 29
<i>Allison v. Boondock's, Sundecker's &amp; Greenthumb's</i> , 36 Wn. App. 280, 673 P.2d 634 (1983).....	19, 20
<i>Allstate Ins. Co. v. Khani</i> , 75 Wn. App. 317, 324, 877 P.2d 724 (1994).....	11, 12
<i>Boss Logger, Inc. v. Aetna Casualty &amp; Surety Co.</i> , 93 Wash. App. 682, 970 P.2d 755 (1998).....	22
<i>Brenner v. Port Bellingham</i> , 53 Wn. App. 182, 188, 765 P.2d 1333 (1989).....	12
<i>Dobbins v. Mendoza</i> , 88 Wn. App. 862, 947 P.2s 1229 (1997) .....	9
<i>Estate of Osborn v. Gerling Global Life Ins. Co.</i> , 529 So.2d 169 (Miss. 1988).....	25
<i>Frow v. De La Vega</i> , 82 U.S. 552, 21 L. Ed. 60 (1872).....	17
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	10
<i>Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc.</i> , 740 F.2d 1499, 1512 (11th Cir. 1984) .....	18
<i>Johnson v. Cash Store</i> , 116 Wn. App. 833, 68 P.3d 1099 (2003).....	24
<i>Lee v. Western Processing Co.</i> , 35 Wn. App. 466, 667 P.2d 638 (1983).....	10
<i>Nichiro Gyogyo Kaisha, Ltd. v. Norman</i> , 606 P.2d 401, 403 (Alaska 1980).....	17

<i>Nielson v. Chang (In re First T.D. &amp; Inv. Inc.),</i> 253 F.3d 520, 532-33 (9th Cir. 2001) .....	17, 18
<i>Otis Housing Ass'n, Inc. v. Ha,</i> 165 Wash.2d 582, 587, 201 P.3d 309 (2009).....	19
<i>Peoples State Bank v. Hickey,</i> 55 Wn. App. 367, 777 P.2d 1056, review denied, 113 Wn.2d 1029 (1989).....	10
<i>Pfaff v. State Farm Mutual Automobile Insurance Co.,</i> 103 Wn. App. 829, 14 P.3d 837 (2000).....	25
<i>Prest v. American Bankers Life Insurance Co.,</i> 79 Wn. App. 93, 900 P.2d 595 (1995).....	22
<i>Sacotte Const., Inc. v. National Fire &amp; Marine Ins. Co.,</i> 143 Wash. App. 410, 419, 177 P.3d 1147 (2008).....	27
<i>Zurich Ins. Co. v. New York State Tax Commission,</i> 534 N.Y.S.2d 515, 516 (App. Div. 1988), app. den., 541 N.Y.S.2d 985 (1989).....	14
<i>Showalter v. Wild Oats,</i> 124 Wn. App. 506, 101 P.3d 867 (2004).....	21
<i>Smith v. Behr Process Corp.,</i> 113 Wn. App. 306, 333, 54 P.3d 665 (2002).....	27
<i>Smoot v. Mazda Motors of Am., Inc.,</i> 469 F.3d 675 (7th Cir. 2006) .....	12, 13
<i>Sofie v. Fiberboard Corp.,</i> 112 Wn2d 636, 667, 771 P.2d 711 (1989).....	9
<i>Suburban Jan. Serv. v. Clarke American,</i> 72 Wn. App. 302, 863 P.2d 1377 (1993).....	10, 24
<i>TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.,</i> 140 Wn. App. 191 (2007) .....	23, 24

<i>Venetsanos v. Zucker, Facher &amp; Zucker,</i> 628 A.2d 1333, 1339 (N.J. Super. 1994) .....	26
<i>Wash. Schs. Risk Mgmt. Pool v. Am. Prot. Ins. Co.,</i> 2004 U.S. Dist. LEXIS 28647, * 3 (W.D. Wash. 2004) .....	26
<i>White v. Holm,</i> 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968).....	9, 20
<i>Wilma v. Harsin,</i> 77 Wn. App. 746, 893 P.2 686 (1995).....	10
<i>Wright, Miller &amp; Kane,</i> <i>Federal Practice and Procedure: Civil 3d</i> § 2690 (2008).....	17

## I. INTRODUCTION

Appellant obtained a judgment by default in excess of \$7.5 million. The company named in the judgment, Respondent and defendant below Tokio Marine & Nichido Fire Insurance Company, Ltd., did not write the insurance policies in question and had no obligation to pay the claims which are the subject of the lawsuit. Allowing the judgment to stand would thus have resulted in gross injustice and the trial court correctly vacated it.

Vacation was warranted because: (1) service was not made on Respondent; and (2) Appellant acted inequitably in obtaining the default judgment. First, concerning service, Respondent is the party named in the judgment. However, Appellant attempted service through the Insurance Commissioner for the State of Washington not on Respondent, but on its U.S. affiliate, which is a separate entity. Respondent does not do any business in the United States, and has not authorized the Insurance Commissioner to accept service on its behalf. Appellant's attempted service of the Summons and Complaint was thus ineffective, and, because service was not properly made, the Court lacked personal jurisdiction at the time the default judgment was entered. Under those circumstances, the trial court had a non-discretionary duty to vacate.

Second, a proceeding to vacate a default judgment is equitable in character and the circumstances under which the default judgment was obtained in this case were patently unjust. The Insurance Commissioner sent the Summons and Complaint to Respondent's U.S. affiliate. A mailroom employee of the U.S. affiliate received the pleadings, but they never reached the general counsel to whom they were addressed (the affiliate's designated agent), and thus the general counsel remained ignorant of the lawsuit. When no appearance was entered, Appellant quickly obtained a default order, and then presented a default judgment ex parte, both without providing any notice. In addition, Appellant moved to amend the initial complaint (and the order of default, after it had been entered), changing the name of the defendant to Respondent and amending the asserted claims, also without providing any notice. The judgment, which was entered as presented, made Respondent liable for all of Appellant's alleged damages in an amount of almost \$5 million, despite the fact that it was only one of a number of insurance companies named as defendants in the lawsuit. In addition, the judgment awarded a staggering \$2.6 million in attorneys' fees to Appellant.

Having obtained this outsized judgment, Appellant still made no effort to notify Respondent, waiting until one year had passed before demanding payment. Appellant thus presumably hoped to foreclose the

defendant from moving to vacate on grounds of mistake or excusable neglect under CR 60(b). In short, Appellant cynically sought to take advantage of the letter of the civil rules, while ignoring the principles of fair play and justice that underlie them. By (1) serving the wrong entity, (2) attempting to cure the defects in the Complaint and Default Order after the fact by amending without giving notice, and (3) lying in the weeds for a year in order to limit the grounds on which vacation would be available, Appellant acted in an inequitable manner that warranted vacation below. Respondent has a meritorious defense and should not be prevented by Appellant's inequitable conduct from addressing the allegations against it.

Finally, even if the default judgment had not been properly vacated, the damages award contained in the judgment – which awarded Appellant all of the damages it claimed against multiple defendants in an amount of \$5 million, and tacked on an additional \$2.6 million for attorneys' fees – was unreasonable on its face.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Appellant's statement seeks to reduce the issues to a series of questions phrased so as to narrow the facts and circumstances of this case in a manner that benefits Appellant's arguments. There are, in fact, only two overarching issues this Court should consider, as follows:

1. Under a *de novo* standard of review, was vacation of the default judgment warranted under CR 60(b)(5) because it was void?
2. Under an abuse of discretion standard of review, was vacation of the default judgment warranted for “other reason[s] justifying relief” under CR 60(b)(11)?

### **III. STATEMENT OF THE CASE**

#### **A. Respondent.**

Appellant obtained a default judgment in this matter against Tokio Marine & Nichido Fire Insurance Company, Ltd. (hereinafter “Tokio Japan”), a Japanese insurance company. CP 354-55. Alien insurers such as Tokio Japan are not permitted by law to be directly licensed to transact the business of insurance in the United States. CP 678. Accordingly, alien insurers must establish a U.S. branch, which is then independently licensed under its own name. *Id.* All policies written in the U.S. must be issued by the U.S. branch, which is required to maintain reserve funds in the U.S. to support its business. *Id.* The U.S. branch must be managed by a U.S. manager, which has full authority for the U.S. branch operations. *Id.* Once formed and licensed in one state, the U.S. branch may seek licensing in other states. *Id.* The alien insurer itself may not be licensed. *Id.*

Tokio Marine & Nichido Fire Insurance Company, Ltd. (U.S. Branch) (hereinafter “Tokio U.S.”) was formed and licensed in New York, and subsequently applied for and was licensed in other states, including the State of Washington. *Id.* Pursuant to that license, only Tokio U.S., and not Tokio Japan, may solicit or issue policies of insurance in Washington. *Id.* Accordingly, Tokio U.S. has authorized the Insurance Commissioner of the State of Washington to accept service on its behalf. CP 390-94. The Uniform Consent to Service of Process was executed for “Tokio Marine & Nichido Fire Insurance Company, Ltd. (U.S. Branch),” *i.e.*, Tokio U.S., and was signed by the President and Secretary of the U.S. manager of Tokio U.S., and not by anyone as an officer of Tokio Japan. CP 679. In short, only Tokio U.S. is licensed in Washington, and it is only Tokio U.S. to which the Consent to Service applies.

**B. The Underlying Action and Default Judgment.**

Appellant filed the Complaint in this action against various insurers on May 21, 2007, originally naming “Tokio Marine and Fire Insurance Company, Ltd.” as a defendant. This entity was the predecessor corporation to Tokio Japan. Appellant served the Insurance Commissioner with a copy of the Summons and Complaint. The Insurance Commissioner forwarded duplicate copies to Steven Goldstein, General Counsel for Tokio Marine Management, Inc., as the agent for

receipt of service of process on Tokio U.S. (Tokio Marine Management manages the operations of Tokio U.S. CP 384.) The pleadings were received in the mailroom of Tokio Marine Management on June 15, 2007, but Mr. Goldstein never personally received the documents, and remained unaware of the lawsuit. CP 386-87. This is the only time in Mr. Goldstein's 19 years as General Counsel for Tokio Marine Management that this type of mishap has occurred. CP 387.

On August 8, 2007, Appellant obtained an Order of Default against "Tokio Marine and Fire Insurance Company, Ltd.," the predecessor corporation to Tokio Japan. Appellant did not serve or otherwise provide any notice of its Motion for Order of Default, or of the Order itself. On October 9, 2007, the plaintiff then filed a motion for leave to amend the Complaint and the Order of Default. CP 357-67. The motion to amend admitted that Appellant had named the incorrect entity, and sought to correct that error by changing the name "Tokio Marine and Fire Insurance Company, Ltd." to "Tokio Marine & Nichido Fire Insurance Co., Ltd.," i.e., Tokio Japan, in both the Complaint and previously-issued Order of Default. The Amended Complaint also changed the identification of the policies under which liability was alleged. Appellant did not serve or provide any notice of the motion to amend, the Amended Complaint or the Court's Order granting the motion.

On October 18, 2007, Appellant presented findings of fact, conclusions of law, and a default judgment *ex parte*, all of which were entered as proposed. The judgment held Tokio Japan liable for the entire amount of Appellants' alleged damages: \$4,843,219.00, plus \$48,375.60 for costs and expenses. In addition, the judgment held Tokio Japan liable for \$2,633,935.55 in attorney's fees, yielding a total judgment amount of \$7,525,530.15. Appellant did not serve or otherwise provide any notice of its motion for default judgment.

Having obtained the default judgment, Appellant took no further action and made no attempt to enforce the judgment until Appellant's counsel sent a letter that was received by Mr. Goldstein on November 17, 2008. CP 384, 396-97. In that letter, Appellant demanded payment in full of the amount of the default judgment. *Id.* Upon receiving it, Mr. Goldstein became aware of the lawsuit for the first time. CP 384.

Appellant's claim against Tokio Japan is based on an allegation that Tokio Japan wrongfully failed to pay for property damages allegedly covered by certain insurance policies, as follows: "Tokio issued policies of insurance (originally issued by Traders & Pacific Insurance Company) insuring Lakewest, including [three specific enumerated policies]." CP 25. This allegation is false. The policies identified were issued by Traders and Pacific Insurance. *See* CP 459-68 (declaration pages for the

policies). Neither Tokio Japan nor Tokio U.S. issued those policies, nor does either entity possess any potential liability to any insured under those policies. Tokio Marine and Fire Insurance Company Ltd., which was the predecessor corporation to Tokio Japan, previously owned Traders and Pacific, but it sold Traders and Pacific to Commercial Union plc, a United Kingdom corporation, on January 1, 1998. CP 385. As part of this transaction, Commercial Union and Tokio U.S. entered into a reinsurance agreement, and Tokio U.S. became a reinsurer for Traders and Pacific. *Id.* It has no direct liability on the policies. CP 681.

#### **IV. STANDARD OF REVIEW**

Appellant urges the Court to employ a *de novo* standard of review to all issues in this case. This is contrary to the oft-repeated standard of review in such cases:

[W]e take note . . . of the established principle that a motion to vacate or set aside a default judgment . . . is in the first instance, addressed to the sound judicial discretion of the trial court, and that this court, sitting in appellate review, will not disturb the trial court's disposition of the motion unless it be made to plainly appear that sound discretion has been abused. In this vein, however, it is pertinent to observe that where the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues.

*White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968) (internal citations omitted). This Court should find an abuse of discretion “when no reasonable judge would reach the same conclusion.” *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989).

Appellant’s reliance on *Dobbins v. Mendoza*, 88 Wn. App. 862, 947 P.2d 1229 (1997), for a contrary standard of review is misplaced. *Dobbins* simply noted (as has been noted in many other cases) that because vacation of a judgment on grounds of lack of jurisdiction is mandatory, a trial court does not exercise its discretion when it vacates a judgment as void, and abuse of discretion is therefore not the appropriate standard of review. Here, vacation of the default judgment was warranted both on grounds of lack of jurisdiction, and on grounds which called for the exercise of the trial court’s discretion. The issue of lack of jurisdiction should thus be reviewed *de novo*, while the remaining issues should be reviewed under the abuse of discretion standard.

Appellant asserts, however, that all possible grounds for the trial court’s ruling must be reviewed *de novo*, even those that require the use of the trial court’s discretion below. App Br. at 16. Appellant reaches this proposition by seizing on the use of the word “decision” in *Dobbins*, i.e., “a trial court’s decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed *de novo*.” App. Br.

at 16, n. 57 (emphasis added by Appellant). This is, to say the least, a hopeful interpretation. In fact, neither *Dobbins* nor any other Washington case supports Appellant's conclusion. *Dobbins* did not even purport to address the issue of what standard applies to review of a trial court's vacation of default judgment on any grounds other than lack of jurisdiction.

There are two issues in this case: whether vacation of the default judgment was warranted because the judgment was void; and whether vacation was warranted for other equitable reasons. The first issue is subject to a *de novo* standard of review, the second to abuse of discretion.

## V. ARGUMENT

### A. Standard for Vacating Default Judgment.

Because the law prefers the determination of controversies on their merits, default judgments are disfavored. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581-582, 599 P.2d 1289 (1979).<sup>1</sup> Thus, while the finality of judgments is an important value of the legal system, "circumstances arise where finality must give way to the even more important value that justice be done between the parties." *Suburban Jan. Serv. v. Clarke American*, 72 Wn. App. 302, 313, 863 P.2d 1377 (1993).

---

<sup>1</sup> See also *White*, 73 Wn.2d at 351; *Wilma v. Harsin*, 77 Wn. App. 746, 749, 893 P.2 686 (1995); *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371, 777 P.2d 1056, *rev. den.*, 113 Wn.2d 1029 (1989); *Lee v. Western Processing Co.*, 35 Wn. App. 466, 468, 667 P.2d 638 (1983).

CR 55(c) provides that:

For good cause shown and upon such terms as the court deems just, 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 60(b) lists the circumstances in which a court may grant relief from an order of default and default judgment “on motion and upon such terms as are just,” including:

- (5) The judgment is void; . . . or
- (11) Any other reason justifying relief from the operation of the judgment.

**B. The Default Judgment Was Void for Lack of Personal Jurisdiction.**

Appellant obtained a default judgment against Tokio Japan, yet Tokio Japan never consented to service through the Insurance Commissioner, and service has not been made upon it in any other manner. Under Washington law: “Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void.” *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 324, 877 P.2d 724 (1994). Because Tokio Japan never consented to service through the Insurance Commissioner, service was not properly made. Nor did Tokio Japan receive service by any other means.

The requirements of service are exacting, and the failure to properly effect service is strictly construed against a plaintiff seeking to enforce a default judgment. In *Khani*, the Court of Appeals reversed a trial court's denial of a motion to vacate a default judgment even though the defendant had actual notice of the default judgment for a period of four-and-a-half years before filing the motion to vacate. Similarly, in *Brenner v. Port Bellingham*, 53 Wn. App. 182, 188, 765 P.2d 1333 (1989), the plaintiff's failure to strictly comply with the requirements of service by publication rendered a 16-year-old default judgment void. Here, Appellant failed to effect (or even attempt) service against the correct party, i.e., the party against which it ultimately obtained a default judgment. When service has not been properly made, a default judgment against the party improperly served is void under CR 60(b)(5). Under such circumstances, the trial court has a "non-discretionary duty to vacate a void judgment." *Khani*, 75 Wn. App. at 325.

Appellant argues to the contrary that Tokio Japan and Tokio U.S. are the same legal entity, and that, therefore, service directed to Tokio U.S. was sufficient to establish jurisdiction of the trial court over Tokio Japan. App. Br. at 17-20. In making this argument, Appellant relies heavily on a Seventh Circuit case, *Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675 (7th Cir. 2006). However, *Smoot* is not authoritative on this

point. Neither party in that case raised jurisdiction or service as an issue at the trial court level. On appeal, however, the Seventh Circuit Court of Appeals *sua sponte* chastised the parties for filing insufficient jurisdictional statements, which were required by local rule. Upset by the repeated failures of attorneys practicing before it to adequately comply with the local rule, the Seventh Circuit decided to make an example of the counsel who appeared in *Smoot*.<sup>2</sup> In the course of responding to the court's demand to show cause why sanctions should not be entered, the attorney for Tokio Japan noted that service had been made through Tokio U.S. However, service in *Smoot* was effected via a registered agent, not via a consent arrangement with an Insurance Commissioner.<sup>3</sup>

More fundamentally, Appellant's argument seeks to brush aside the basic fact that it attempted service on one entity, but obtained a default judgment against a different entity. The simple fact is that Tokio Japan and Tokio U.S. are not co-extensive. Only Tokio U.S. is licensed to transact the business of insurance in the United States. It is thus regulated as an independent entity in the U.S. and its statutory financial reporting is restricted to business written by Tokio U.S. and related assets and

---

<sup>2</sup> See *Smoot*, 469 F.3d at 677-78 (“We have been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases. It is time . . . that this malpractice stopped.”) (internal citation omitted).

<sup>3</sup> See CP 694-97 (*Smoot* Answer).

liabilities. *See* CP 678-79. Accordingly, it has been held that the United States branch of a foreign insurance company “is treated as a separate entity” for tax purposes. *Zurich Ins. Co. v. New York State Tax Commission*, 534 N.Y.S.2d 515, 516 (App. Div. 1988), *app. den.*, 541 N.Y.S.2d 985 (1989).

Because only Tokio U.S. is subject to the regulatory jurisdiction of the Washington Insurance Commissioner, only Tokio U.S. has consented to service through the Commissioner. *Id.* Appellant’s attempt to serve Tokio Japan via the Insurance Commissioner was ineffective.

**C. The Default Judgment Was Properly Vacated Under CR 60(b)(11).**

Under CR 60(b)(11), a judgment may be vacated for any “reason justifying relief from the operation of the judgment.” The trial court’s authority to vacate a judgment under this provision is not subject to any specific time limit, provided the motion to vacate is made within a “reasonable time.”<sup>4</sup> CR 60(b). Like other discretionary grounds for vacation of default judgment, equity guides whether vacation under CR 60(b)(11) is proper.

---

<sup>4</sup> Respondent moved diligently to set aside the default judgment once it became aware of the lawsuit, and Appellant does not claim otherwise.

Here, a number of factors concerning the circumstances under which Appellant obtained the default judgment support vacation under this rule.

First, as discussed in the foregoing section, Appellant: (1) attempted service through the Insurance Commissioner on Tokio U.S., (2) of a Complaint naming, as a defendant, “Tokio Marine and Fire Insurance Company, Ltd,” and (3) subsequently obtained a default judgment over Tokio Japan.

Second, Appellant subsequently amended the Complaint and a prior issued Default Order to name Tokio Japan and amend its claims, without providing notice.

Third, Appellant obtained a default judgment against Tokio Japan for the full amount of damages that Appellant claimed against multiple defendants, in an amount of \$7.5 million, including \$2.6 million in attorneys’ fees.

Fourth, Appellant subsequently sat on the judgment for a year before contacting Tokio Japan and demanding payment on the judgment.

This is not an outcome the civil rules were intended to achieve.

### **1. Amendment of the Default Order and Complaint.**

Particularly significant is the fact that that Appellant amended both the Default Order and Complaint, without providing notice. The amendments made were not inconsequential – Appellant changed both the name of the Defendant and the policy numbers of the policies under which coverage was alleged. Appellant nevertheless argues that Respondent has failed to prove “by clear and convincing evidence” that the amendments resulted in failure of service. App. Br. 29-30. The authorities cited by Appellant, however, concern vacation of default judgment on grounds of fraud under CR 60(b)(4). Respondent did not allege that Appellant committed fraud below, and does not do so now. What is at issue is not deception, but Appellant’s bending of the civil rules to achieve a patently inequitable result. In this context, amending both a previously entered Default Order and Complaint in order to later obtain a Default Judgment, without providing any notice, tips the equities strongly in favor of Respondent.

### **2. Multiple Defendants.**

An important aspect of Appellant’s default strategy for present purposes is that Appellant obtained a default judgment only against Tokio Japan, which is one of multiple defendants in the case, for the full amount of the damages claimed, despite the fact that its claims against the

remaining defendants were (and are) still pending. This outcome is grossly inequitable on its face.

Moreover, that inequity is recognized by the so-called *Frow* doctrine,<sup>5</sup> which is applicable here. The doctrine holds that it is error to enter a default judgment against only one defendant in a multi-defendant case, where the defendants are similarly situated with respect to the claims and defenses in the case. See 10A *Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d* § 2690 (2008) (In “situations in which several defendants have closely related defenses . . . entry of judgment . . . should await an adjudication of the liability of the nondefaulting defendants.”); e.g., *Nielson v. Chang (In re First T.D. & Inv. Inc.)*, 253 F.3d 520, 532-33 (9th Cir. 2001) (reversing entry of final default judgment entered against fewer than all defendants in a multi-defendant case).

The *Frow* doctrine is well-developed in federal case law, and has been accepted by state courts to consider the issue.<sup>6</sup> The reasons for the rule are: (1) To prevent an absurd result, such as a plaintiff obtaining a judgment against one defendant on grounds identical to those that are held

---

<sup>5</sup> The doctrine originates with *Frow v. De La Vega*, 82 U.S. 552, 21 L. Ed. 60 (1872).

<sup>6</sup> E.g., *Nichiro Gyogyo Kaisha, Ltd. v. Norman*, 606 P.2d 401, 403 (Alaska 1980) (“It is a widely accepted principle of civil procedure that, when there are multiple parties, the entry of default as to one party should not result in a default judgment prior to the termination of the matter with the non-defaulting parties.”).

insufficient with respect to other defendants; and (2) To prevent gross unfairness to the defaulting defendant that would follow from such a result. As the Eleventh Circuit Court of Appeals stated in *Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc.*, 740 F.2d 1499, 1512 (11th Cir. 1984): “It would be incongruous and unfair to allow [the plaintiff] to collect a half million dollars from [the defaulting defendant] on a contract that a jury found was breached by [the plaintiff].” *See also Nielson*, 253 F.3d at 532 (following *Gulf Coast Fans*, and finding: “It would likewise be incongruous and unfair to allow [the plaintiff] to prevail against Defaulting Defendants on a legal theory rejected by the . . . court with regard to the Answering Defendants in the same action.”).

That is precisely the outcome Appellant attempted to obtain here, and would have obtained had the trial court not vacated the default judgment. Appellant filed identical claims against multiple defendants. The default judgment obtained nevertheless held Tokio Japan liable for the entire amount of Appellants’ alleged damages, despite the fact that the legal arguments Appellant asserts against Tokio Japan are the same as those it asserts against the remaining defendants, as shown by a comparison between Appellants’ motion for partial summary judgment against the remaining defendants, and the Findings of Fact and Conclusions of Law prepared by Appellant in support of the motion for

default judgment against Tokio Japan.<sup>7</sup> This case thus presents textbook circumstances for application of the rule, and the trial court's vacation of the default judgment cures the problems of incongruity in verdicts and gross unfairness to a defaulting defendant that the rule is designed to avoid.<sup>8</sup>

### 3. Appellant's Run-Out-The-Clock Strategy.

Appellant argues that it is permitted to wait a year before coming forward with a default judgment, relying for that proposition on *Allison v. Boondock's, Sundecker's & Greenthumb's*, 36 Wn. App. 280, 673 P.2d 634 (1983). *Allison* did not involve the attendant circumstances that are at issue in this case, however. There was no allegation that the plaintiff in that case, like Appellant here, amended both a default order and complaint that named the incorrect party, without providing notice, before obtaining

---

<sup>7</sup> Cf. CP 721 (Pl. Motion for Partial Summary Judgment) ("All of the Policies exclude 'weather conditions,' but only if 'weather conditions' combine with 'earth movement,' 'power failure,' and other perils listed in Section B.1 of the Policies.") with CP 742 (Findings of Fact and Conclusions of Law) ("Tokio's Policies exclude 'weather conditions' only when 'weather conditions' combine with 'earth movement,' 'failure of power,' and other perils excluded under paragraph B.1 of Form CP 10 30 10 91.").

<sup>8</sup> Applicability of the *Frow* doctrine was not raised below, however, this court may affirm on any grounds established by the pleadings and supported by the record. *Otis Housing Ass'n, Inc. v. Ha*, 165 Wash.2d 582, 587, 201 P.3d 309 (2009). The grounds supporting application of the doctrine were established by the pleadings and record below, and the trial court was certainly made aware of the equitable issues raised by holding one of multiple defendants responsible for all of Appellant's claimed damages.

a default judgment. Nor did the plaintiff in *Allison* obtain a judgment against only one of multiple defendants in an amount equal to all of its damages sought. Nor, for that matter, was there any issue of excusable neglect, as the plaintiff there “made in-hand service upon an officer of the defendant corporation.” *Id.* at 285. The point is, Appellant’s decision to lie in the weeds should not be looked at in isolation. It must be looked at with an eye toward doing equity, and in light of all the circumstances – including Appellant’s amendment, without notice, of the Default Order and Complaint, and attempt to impose liability in the full amount of its claimed damages against only one of multiple defendants.

Also relevant to the overall balance of the equities is that fact that, but for Appellant’s run-out-the-clock tactics, the trial court would have had grounds for vacation under CR 60(b)(1), the availability of which is limited to one year from entry of judgment. Four factors guide the exercise of the trial court’s discretion under CR 60(b)(1): the two primary factors – which are the only two that Appellant disputes – are whether the party’s failure to appear was the result of mistake, inadvertence, surprise or excusable neglect and whether there is evidence of a *prima facie* defense to the claim asserted. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

a. Mistake or Excusable Neglect.

*Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (2004), is on point. The registered agent for the corporate defendant in *Showalter* received service of a summons and complaint and forwarded them to the defendant's legal department. *Id.* at 509. Because of a miscommunication between employees of the defendant, however, the pleadings did not reach the individual whose job it was to hire outside counsel. *Id.* Thus, no answer was made, and the plaintiff obtained a default order and judgment. *Id.* Unlike in the present case, however, counsel for the plaintiff did not wait a year before demanding payment; rather, counsel sent a letter to the defendant 20 days later. *Id.* The court granted the defendant's subsequent motion to vacate, and the Court of Appeals affirmed, finding that the defendant's failure to timely answer "was a mistake, the result of a misunderstanding, and excusable neglect, not a willful intent to ignore the lawsuit." *Id.* at 514.

Precisely the same is true here. Although a copy of the Complaint and Summons was delivered to Tokio Marine Management, the documents never reached the person whose job it was to respond to the lawsuit, i.e., Mr. Goldstein. CP 386-87. In *Showalter*, the Court of Appeals found that this type of mistake warranted vacating a default

judgment where the judgment at issue was for \$28,000. 124 Wn. App. at 509. Tokio Japan faced a default judgment in excess of \$7.5 million.

Appellant takes aim at *Showalter* by asserting that Respondent must explain why the Summons and Complaint were not delivered to Mr. Goldstein, and that, “[o]n this record, [the mailroom employee] may have simply thrown the lawsuit in the trash.” App. Br. 25. However, this is a circumstance of Appellant’s own making. By waiting a year, it foreclosed any realistic possibility that Mr. Goldstein would be able to determine what happened to a single piece of mail delivered to a busy mailroom in June of 2007.

Also directly on point is *Boss Logger, Inc. v. Aetna Casualty & Surety Co.*, 93 Wash. App. 682, 970 P.2d 755 (1998). In that case, as happened here, “someone in the process lost the papers.” *Id.* at 689. Finding that the “failure to respond was not a systemic failure which would prevent all litigants from achieving actual notice to the insurer,” this Court affirmed the trial court’s vacation of default judgment on grounds of mistake. *Id.* In fact, *Boss Logger* distinguished *Prest v. American Bankers Life Insurance Co.*, 79 Wn. App. 93, 900 P.2d 595 (1995), on precisely this point. Appellant quotes *Prest* at length, highlighting the court’s comment that “[i]t is an important part of the business of an insurance company to respond to legal process.” App. Br.

at 27. That quote, however, must be understood in the context of the insurer's argument in that case, which is that the individual who was named on the consent to service form filed with the Insurance Commissioner had been transferred by the defendant to a different location. *Prest* thus held that it was incumbent upon the insurer to notify the Commissioner of the change. 79 Wash. App. at 599. In the present case, there was no similar "systemic failure." Indeed, this is the only time in Mr. Goldstein's 19 years with Tokio Marine Management that this has occurred. CP 387. Like in *Boss Logger*, "someone in the process lost the papers." As in that case, the failure to respond to service was thus the result of mistake, or excusable neglect.<sup>9</sup>

The other case relied upon by Appellant - *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191 (2007) – likewise supports a finding of mistake or inequitable conduct. In *TMT*, the plaintiff served the defendant's registered agent, and, when the defendant did not appear, called to notify the defendant that it was in danger of default. *Id.* at 197. Then, as here, the plaintiff later filed an amended complaint naming the defendant's parent company in addition to

---

<sup>9</sup> Appellant makes a point of noting that *Showalter* was decided by Division II of the Court of Appeals. App. Br. at 26, n. 92. The case upon which it most heavily relies, however – *Prest* – is likewise a Division II decision. *Boss Logger*, which distinguished *Prest* on facts that apply equally to this case, is a Division I decision.

the defendant. However, unlike here, the plaintiff served the amended complaint on both the registered agent of the defendant and the registered agent of the parent company. *Id.* at 197-98. Only when the defendant still made no appearance did the plaintiff move for default. In fact, *TMT* distinguished *Showalter*, on precisely these facts, as follows: “[T]he failings at issue were more egregious than those at issue in *Showalter* and involved more than the single omission at issue in that case.” *Id.* at 213, n. 11 (emphasis added). The present case, like *Showalter*, involves only a “single omission,” not a failure to respond to three separate receipts of service and a phone call.<sup>10</sup>

b. Prima Facie Defense.

Whether Respondent had a *prima facie* defense to the claims likewise bears on the overall equities. The standard for establishing a colorable defense, however, is very slight, as

[t]he purpose of this inquiry is to prove to the court a meritorious defense to the claim exists and a subsequent trial would not be useless. Any *prima facie* defense to the plaintiff’s claim, albeit tenuous, is sufficient to support a motion to vacate a default judgment.

*Suburban*, 72 Wn. App. at 305; *see also White*, 73 Wn.2d at 351-352;

*Pfaff v. State Farm Mutual Automobile Insurance Co.*, 103 Wn. App. 829,

---

<sup>10</sup> Appellant also quotes *Johnson v. Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003). App. Br. at 26. However, the court in *Johnson* relied on *Prest* for the quoted language. As discussed above, *Prest* was distinguished by this Court in *Boss Logger* on grounds that apply to the circumstances of this case as well.

834, 14 P.3d 837 (2000). As the *Pfaff* court recognized, “[w]hen a trial court is considering whether a CR 60 movant has presented ‘facts constituting a defense’ the trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant.” 103 Wn. App. at 835.

Here, Appellant does not dispute that Tokio U.S. is merely a reinsurer of the policies at issue. Rather, it argues that the reinsurance agreement was written in such a way that Tokio U.S. is directly liable to the insured. Specifically, Appellant discusses at length a 1988 decision from the Mississippi Supreme Court, which held that an original insured may bring a direct action against a reinsurer based on a third-party beneficiary theory “[w]here such an insurance agreement is drawn so as to indemnify against liability.” App. Br. at 37 (quoting *Estate of Osborn v. Gerling Global Life Ins. Co.*, 529 So.2d 169 (Miss. 1988)).

In order to fall within the rule stated in *Osborn*, however, the contract of reinsurance must be “more than a mere contract of indemnity, and [must be] made for the benefit of the policyholders of the reinsured [such that] the reinsurer assumes the liability of the latter on its policies.” *Osborn*, 529 So.2d at 171. Appellant points to language in the reinsurance agreement that it claims shows that Tokio U.S. direct accepted “liability” under the policies at issue. In fact, however, the agreement clearly states

in the first sentence of Article I that: “By this Agreement . . . the Reinsurer [i.e., Tokio U.S.] obligates itself to accept 100% quota share reinsurance of the Reinsured’s net liability.” CP 806.

Moreover, *Osborn* is not authoritative. Other courts, including one cited by Appellant, have held “an original insured does not enjoy a right of direct action against a true reinsurer” unless “the reinsuring agreement itself provides, or the conduct of the reinsurer demonstrates, that it takes charge of and manages the defense of suits against the original insured.” *Venetsanos v. Zucker, Facher & Zucker*, 628 A.2d 1333, 1339 (N.J. Super. 1994).<sup>11</sup> Nothing in the reinsurance agreement demonstrates such control. And, to the degree there is any question on this point, Appellant has done no more than raise a factual issue, which must be resolved in Respondent’s favor. *Pfaff*, 103 Wn. App. at 835.

Finally on this issue, Appellant’s assertions that Respondent failed to come forward with “substantial evidence” of a *prima facie* defense are poorly taken. In addition to the declarations of Mr. Goldstein, Respondent submitted a declaration from Dennis Smith, the Secretary of Houston General Insurance Company, which is the owner of the policies at issue and a party to the reinsurance agreement. Mr. Smith stated unequivocally

---

<sup>11</sup> See also *Wash. Schs. Risk Mgmt. Pool v. Am. Prot. Ins. Co.*, 2004 U.S. Dist. LEXIS 28647, \* 3 (W.D. Wash. 2004) (same).

that “any claims against [the] policies . . . should be tendered to Houston General, not to Tokio Marine, which is only a reinsurer.” CP 681.

Testimonial evidence is evidence. Moreover, Mr. Smith’s declaration is perfectly consistent with the reinsurance agreement that Appellant has submitted.<sup>12</sup>

**D. Appellant’s Claim of Damages is Unreasonable, and the Attorneys’ Fee Portion of the Award is Outrageous on its Face.**

Assuming solely for the purposes of argument in this section that the default judgment was not properly subject to vacation, the judgment nevertheless constituted only an admission of factual allegations necessary to establish the claims alleged. A default judgment “does not, however, admit any conclusions of law contained within the complaint or the amount of damages.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333, 54 P.3d 665 (2002). “Thus, following default, the trial court must conduct a reasonable inquiry to determine the amount of damages.” *Id.*; CR 55(b)(2); *see also Sacotte Const., Inc. v. National Fire & Marine Ins. Co.*, 143 Wash. App. 410, 419, 177 P.3d 1147 (2008) (noting that the trial

---

<sup>12</sup> For this reason, Respondent does not contest this evidence on appeal, despite the fact that it was not put before the trial court below until after the motion to vacate had been entered, and the time for reconsideration had expired. (Appellant introduced this evidence in support of a motion to the trial court to reconsider staying the case.) It should also be noted that the reinsurance agreement was not in any manner withheld from Appellant, which makes much of the fact that it was obtained pursuant to a FOIA request. The simple fact is that Appellant did not ask for it.

court failed to conduct a reasonable inquiry to determine the amount of damages before entering a default judgment).

In *Behr*, the trial court conducted this reasonable inquiry “by way of a jury trial where [the defaulted party] could cross-examine witnesses, present evidence and argument, and have jury instructions on issues relevant to the amount of damages.” 113 Wn. App. at 333. No less would have been required in this case, where the full amount of damages claimed by Appellant – nearly \$5 million – was entered against Respondent, despite the fact that Appellant brought substantially similar claims against six other defendants. Under those circumstances, Respondent should have been afforded the opportunity to test whatever evidence Appellant may have in support of that figure.

In addition, the default judgment awarded Appellant in excess of \$2.6 million in attorneys’ fees. Appellant claims a right to his amount under *Allard v. First Interstate Bank, N.A.*, 112 Wn.2d 145, 768 P.2d 998 (1989). App. Br. at 9. In *Allard*, the Supreme Court held that the trial court acted reasonably when it considered the factors set forth in RPC 1.5(a) concerning the reasonableness of attorneys’ fees in determining the amount of a fee award, and also took into account the existence of a fee arrangement between the plaintiffs and their counsel. *Allard* explicitly held, however, that a trial court “should not rely solely on the terms of [a

contingent fee] arrangement in determining the amount” of fees to award. *Id.* at 150. Furthermore, such an agreement “should not control the size of the burden placed on a defendant[,]” and “the existence of a contingent fee arrangement between and attorney and client says nothing about the reasonableness of the award of attorney’s fee[s].” *Id.* at 151. “The attorney’s fee awarded should be neither enhanced or diminished by the presence of such an arrangement.” *Id.*

The fees awarded to Appellant in the default judgment were solely determined by the contingent fee arrangement between Appellant and their counsel, a fact that Appellant readily admits. App. Br. at 9. That is precisely the outcome that *Allard* forbids. Moreover, it is outrageous that Appellant’s counsel would seek to collect more than \$2.6 million for obtaining a default judgment. For instance, the first factor under RPC 1.5(a) concerning the reasonableness of attorneys’ fees requires consideration of “[t]he time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly.” *Allard*, 112 Wn.2d at 149. Appellant cannot reasonably maintain that the labor and skill involved in obtaining the default judgment supports an award of this magnitude.

## VI. CONCLUSION

Vacation of the default judgment was proper under both CR 60(b)(5) or CR 60(b)(11), and this Court may affirm on either basis. Under CR 60(b)(5), the judgment was void because Appellant failed to serve the entity against which it later asked the trial court to exercise jurisdiction for purposes of entering a default judgment. Vacation was likewise warranted under CR 60(b)(11) because, taking the circumstances in their totality, equity demanded it. Accordingly, Respondent respectfully requests that this Court affirm the ruling of the trial court below.

Respectfully submitted this 3rd day of August, 2009,



CORR CRONIN MICHELSON  
BAUMGARDNER & PREECE LLP  
Steven W. Fogg, WSBA No. 23528  
Seann C. Colgan, WSBA No. 38769  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece  
LLP, attorneys of record for TOKIO MARINE & NICHIDO FIRE  
INSURANCE COMPANY, LTD., Respondent herein.

On August 3, 2009, I caused a true and correct copy of the foregoing  
document entitled RESPONDENT'S BRIEF to be duly served via Legal  
Messenger, on the following parties:

Gregory L. Harper  
Todd C. Hayes  
Charles Davis  
Harper Hayes PLLC  
One Union Square  
600 University Street, Suite 2420  
Seattle, WA 98101  
Attorneys for Plaintiff/Appellant

James Thornton Derrig  
Eklund Rockey Stratton PS  
521 2<sup>nd</sup> Avenue W.  
Seattle, WA 98119  
Attorneys for St. Paul Fire and Marine

Thomas Lether  
Cole Lether Wathen & Leid PC  
1000 2<sup>nd</sup> Avenue, Suite 1300  
Seattle, WA 98104  
Attorneys for Truck Insurance Exchange

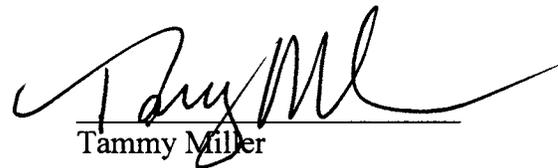
Dennis Smith  
Wilson Smith Cochran Dickerson

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 AUG -3 PM 4:44

1215 4<sup>th</sup> Avenue, Suite 1700  
Seattle, WA 98161  
Attorney for Safeco Insurance

I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED: August 3, 2009, at Seattle, Washington.



Tammy Miller