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NO. 63877-7-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

WARREN WESTLUND BUICK-GMC TRUCK, INC.,

Appellant,

v.

CROW ROOFING & SHEET METAL, INC.

Respondent.

OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION

This is an appeal of an order vacating a default judgment. Appellant Westlund obtained the default judgment in this case after Respondent Crow failed to appear or answer a properly served summons and complaint. Crow never claimed that it was unaware of the lawsuit or unaware that an appearance or response was required. Nor did Crow ever claim that it did not know that the penalty for failing to answer was that a default judgment would be entered against it. Rather, Crow simply claimed that it did not respond because it assumed its insurer would. However, the insurer never indicated in any manner that it would defend, and Crow never requested a defense from the insurer or even asked whether it would defend.

The factual underpinnings of this dispute are straightforward. Plaintiff Westlund Buick-GMC Truck, Inc. contracted with defendant Crow Roofing & Sheet Metal, Inc. for the installation of a waterproof roofing system atop its outdoor parking garage which would also provide a showroom quality surface for Westlund's outdoor display of automobiles. Crow installed material and provided a five-year warranty for its roofing work. The roofing system failed leaving the roof unsuitable for its intended purpose, and damaging the concrete deck beneath it. Westlund wrote Crow and demanded a repair. Crow refused to repair the

deficiencies and damage. Unable to reach a satisfactory resolution of its claim, Westlund filed and served this lawsuit on Crow.

After being properly served, Crow never contacted or hired a lawyer to enter an appearance or defend it. Instead, Crow's response to the service of the summons and complaint was cavalier: it allegedly faxed the bare summons and complaint to a number that it assumed belonged to its insurance adjuster. Crow never requested a defense from its insurer, it just faxed the complaint. Then, assuming without reasonable basis that its insurer would defend – despite having received no response to the fax – Crow did nothing. Crow never called to confirm whether the insurer received the documents nor did Crow ever inquire whether the insurer would defend. Though the insurer received the complaint it did not enter an appearance, answer the complaint, or otherwise defend. In fact, the record demonstrates that the insurer never intended to defend at all.

The insurer did nothing. Although the correct insurance adjuster received a courtesy copy of the filed complaint from plaintiff's counsel days after it was filed, the insurer did not hire a lawyer; filed no answer; and made no attempt to contact its policyholder. Instead Crow and its insurer sat back with full knowledge and disclosure of the lawsuit while the deadline to answer came and went.

A party who takes no action to ensure its interests are being protected acts with inexcusable neglect. No reasonable basis exists to assume an insurer is providing a defense when the policyholder: (1) never requests a defense, (2) never confirms whether the insurer received the complaint, and (3) never receives any assurance or implication from the insurer that it would defend.

This appeal involves a defendant who failed to appear and answer without any reasonable excuse. Other than mere argument, Crow failed to offer any *actual evidence* in the trial court supporting its claim of “excusable neglect.” Because Crow acted with inexcusable neglect as a matter of law, Westlund respectfully requests that this Court reverse the trial court’s ruling and reinstate its default judgment.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in granting Crow’s motion to vacate Westlund’s default judgment.

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

**Issue No. 1:** Does a defendant act with inexcusable neglect by not answering or appearing in response to a properly served summons and complaint assuming its liability insurer will defend when (1) the defendant received no confirmation that the insurer received the complaint; (2) the defendant received no assurances from the insurer that it would defend;

(3) the defendant had no communication with the insurer between the time the defendant sent the summons and complaint and the time the trial court entered judgment; and (4) the insurer was under no legal obligation to provide a defense because the defendant never affirmatively requested a defense?

**Issue No. 2:** Is it improper for a trial court to consider a non-party insurer's conduct for purposes of vacating a default judgment against the defendant policyholder when the policyholder failed to properly tender defense of the lawsuit in the first instance (and therefore never made the insurer its agent)?

**Issue No. 3:** Even if the insurer's acts are imputed to the defendant, does an insurer act with inexcusable neglect by not hiring defense counsel or making contact with the policyholder despite knowledge a lawsuit has been filed against its policyholder?

#### **IV. STATEMENT OF THE CASE**

This appeal arises out of a construction dispute Westlund has with Crow. Crow agreed in a written contract to install a watertight membrane on the roof of an outdoor parking structure at Westlund's North Seattle car

dealership.<sup>1</sup> The agreement, which the parties signed in January 2005, included a five year warranty for Crow's work:

Crow Roofing [g]uarantees that during the period of [5] years from the date of completion of aforesaid roof, they will, at their own cost and expense, make or cause to be made such repairs to said roof resulting solely from faults or defects in workmanship applied by them, as the contractor, as may be necessary to maintain the said roof in **watertight condition.**<sup>2</sup>

Deficiencies in Crow's work allowed water to penetrate and damage the roof's underlying substrate.<sup>3</sup> Westlund alleges Crow failed to properly install this roofing membrane and, as a result, that Crow violated its written contract and other promises, and that these breaches caused property damage and consequential business damages.<sup>4</sup>

Westlund hired an expert in commercial roofing systems to assess the roof condition and the resulting damage. After conducting destructive and non-destructive tests, the expert determined that the roofing failures and leaks resulted from severe contamination of the roofing control joints with loose debris, such as dirt and old sealant materials.<sup>5</sup> Crow's written contract with Westlund specifically required Crow to "[c]lean the

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<sup>1</sup> CP 57-58 ¶ 3.

<sup>2</sup> CP 231 (emphasis added).

<sup>3</sup> CP 51 ¶ 6.

<sup>4</sup> CP 57-58 ¶ 3.

<sup>5</sup> CP 264-65 ¶¶ 13-17.

substrate and dispose of loose debris” prior to the installation of the roofing system.<sup>6</sup>

On November 5, 2008, Westlund sent a formal demand to Crow regarding the deficiencies to Crow’s work.<sup>7</sup> In this letter, Westlund informed Crow that failure to reach an acceptable resolution would result in a lawsuit against Crow:

If an acceptable resolution of this issue is not in place by the end of fourteen days, Westlund will have no choice but to move forward with repairs and commence legal action to enforce the terms of the agreement and warranty.<sup>8</sup>

Crow did not respond to this letter.<sup>9</sup>

When Crow failed to respond, Westlund sent courtesy notice of the defects and damage directly to Crow’s liability insurer, Continental Casualty Company (“CNA”).<sup>10</sup> CNA adjuster Sarah Rapolas responded to Westlund’s claim by phone on November 25, 2008, requesting further information.<sup>11</sup> On December 1, 2008 Westlund forwarded information about the roofing-related damage and cost to repair it directly to

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<sup>6</sup> CP 234.

<sup>7</sup> CP 58 ¶ 5; CP 62-63.

<sup>8</sup> CP 63.

<sup>9</sup> CP 58 ¶ 5.

<sup>10</sup> CP 58 ¶ 6.

<sup>11</sup> CP 58 ¶ 6.

Ms. Rapolas at CNA.<sup>12</sup> On December 15, 2008, Westlund's counsel contacted Ms. Rapolas and indicated that Westlund would be forced to sue Crow absent resolution of the claim.<sup>13</sup> Neither Crow nor CNA offered to resolve the claim.

On February 27, 2009, Westlund filed this lawsuit for Breach of Contract and Property Damage against Crow.<sup>14</sup> On March 3, 2009, Westlund's counsel forwarded a courtesy copy of the filed lawsuit, along with a copy of the Order Setting Civil Case Schedule, to Ms. Rapolas by email.<sup>15</sup> Westlund advised Ms. Rapolas that it remained willing to try and negotiate a settlement of the claims.<sup>16</sup>

On March 4, 2009, Westlund served Crow with the Summons and Complaint via personal service.<sup>17</sup> The summons informed Crow that an answer was due within 20 days or a default judgment would be entered:

A lawsuit has been started against you in the above-entitled Court by plaintiff. . . .

In order to defend against this lawsuit, *you must respond* to the Complaint by stating your defense in writing, and serve a copy upon the undersigned attorney for the plaintiffs *within 20 days after the service of this*

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<sup>12</sup> CP 58 ¶ 7; CP 67.

<sup>13</sup> CP 58 ¶ 8; CP 69.

<sup>14</sup> CP 59 ¶ 11.

<sup>15</sup> CP 59 ¶ 12; CP 71.

<sup>16</sup> CP 59 ¶ 12; CP 71.

<sup>17</sup> CP 60 ¶ 14; CP 75.

***Summons . . . or a default judgment may be entered against you without notice.***<sup>18</sup>

Crow claimed in the trial court that, two days after receiving the summons and complaint, it faxed the documents to CNA to the attention of Ms. Rapolas, but erroneously utilized the fax number for a previously assigned claims handler, Thomas Howell.<sup>19</sup> However, no evidence in the record shows that Mr. Howell or anyone else at CAN received the fax. Neither Crow nor CNA gave any explanation why the documents never made it from Mr. Howell – if he got them – to Ms. Rapolas, but it is undisputed that documents Crow faxed did not reach Ms. Rapolas.

Moreover, it is undisputed that Crow never affirmatively requested that CNA provide it with a defense to Westlund’s lawsuit. Instead, Crow’s president testifies in her declaration merely that “Crow faxed the summons and complaint to CNA.”<sup>20</sup>

It is similarly undisputed that Crow had no contact with Ms. Rapolas or anyone else at CNA. The record demonstrates that Crow never even attempted to contact anyone at CNA between the time it faxed

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<sup>18</sup> CP 1-2.

<sup>19</sup> CP 165.

<sup>20</sup> CP 165 ¶ 8.

the documents on March 6, 2009, and the time it learned of the judgment against it on May 27, 2009.<sup>21</sup>

On March 4, 2009, CNA adjuster Sarah Rapolas contacted Westlund's counsel by phone to report that CNA was "denying the claim" in its entirety.<sup>22</sup> CNA took the position that Crow had no liability to Westlund.<sup>23</sup> Although it is undisputed that Ms. Rapolas was aware as of March 3, 2009, that a lawsuit had been filed against Crow, CNA did not hire defense counsel for Crow and did not contact Crow at any time between learning of the lawsuit and May 27, 2009, the date it learned of the judgment.

In its motion to vacate in the trial court, Crow argued that "CNA has engaged plaintiff's counsel in settlement discussions since [January 2009]." But Crow offered no actual evidence of negotiations. The only evidence in the record shows that CNA never offered any money to settle the claim at any time.<sup>24</sup> In fact, the record demonstrates that CNA's sole, substantive discussions with Westlund's counsel about the claim were

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<sup>21</sup> See CP 165.

<sup>22</sup> CP 59 ¶ 13.

<sup>23</sup> CP 153 ¶ 8.

<sup>24</sup> CP 229 ¶ 4.

limited to: (1) requesting information; and (2) telling Westlund that CNA was “denying the claim” in its entirety.<sup>25</sup>

Despite being properly served, Crow failed to appear or answer Westlund’s Complaint.<sup>26</sup> At no time did any person or entity appear (formally or informally) on behalf of Crow in the action.<sup>27</sup> At no time did any person or entity associated with or acting on behalf of Crow express or even imply an intent to defend the action.<sup>28</sup> On April 7, 2009, Westlund obtained an order of default.<sup>29</sup> On April 27, 2009, the trial court entered Final Judgment by default against Crow in the amount of \$172,611.75.<sup>30</sup>

On May 27, 2009, Westlund wrote to Crow and CNA and demanded payment of the judgment.<sup>31</sup> CNA then retained counsel for Crow, who filed a motion to set aside the default judgment on June 3, 2009. By order dated June 26, 2009, the trial court granted Crow’s motion to vacate the default judgment.<sup>32</sup>

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<sup>25</sup> CP 229 ¶ 4.

<sup>26</sup> CP 60 ¶ 16.

<sup>27</sup> CP 60 ¶ 16.

<sup>28</sup> CP 60 ¶ 16.

<sup>29</sup> CP 60 ¶ 17; CP 77.

<sup>30</sup> CP 229 ¶ 9; CP 260-61.

<sup>31</sup> CP 177-78.

<sup>32</sup> CP 327-28.

## V. ARGUMENT

### A. STANDARD OF REVIEW

A trial court's disposition of a motion to vacate a default judgment is reviewed for abuse of discretion.<sup>33</sup> A court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds."<sup>34</sup> A court's decision is "manifestly unreasonable" if, "despite applying the correct legal standard to supported facts," the court "adopts a view 'that no reasonable person would take.'"<sup>35</sup> Additionally a "discretionary decision 'is based on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record."<sup>36</sup> Finally, a decision "based on an erroneous view of the law *necessarily* constitutes an abuse of discretion."<sup>37</sup>

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<sup>33</sup> Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007); Farmers Ins. Co. v. Waxman, 132 Wn. App. 142, 145, 130 P.3d 874 (2006) ("[E]ven an order granting a motion to vacate will be reversed if the trial court exercises its discretion on untenable grounds.").

<sup>34</sup> Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

<sup>35</sup> Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

<sup>36</sup> State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

<sup>37</sup> Sales v. Weyerhaeuser Co., 163 Wn.2d 14, 19, 177 P.3d 1122 (2008) (emphasis added); *see also* Little v. King, 160 Wn.2d 696, 703, 161 P.3d 345 (2007) ("Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law"); Green v. City of Wenatchee, 148 Wn. App. 351, 368, 199 P.3d 1029 (2009) ("[A]n incorrect legal analysis or other error of law can constitute [an] abuse of discretion.") (quoting State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007)).

Although a trial court's decision to vacate a default judgment upon a finding of excusable neglect is reviewed for abuse of discretion, whether certain conduct constitutes excusable neglect is a conclusion of law, and thus is reviewed under a *de novo* standard.<sup>38</sup>

**B. CROW BEARS THE BURDEN OF PROVING EXCUSABLE NEGLIGENCE**

According to CR 55(c), a trial court may vacate a default judgment only if “good cause” exists *and* the moving party establishes a reason to vacate the judgment under CR 60(b).<sup>39</sup> A party may vacate a default judgment under CR 60(b)(1) only if it demonstrates that the judgment was entered due to “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.”<sup>40</sup> The burden of proving

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<sup>38</sup> Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552 (1986) (“Although a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and will not be disturbed unless the trial court has abused its discretion, whether excusable neglect has been shown is a question of law – not of fact.”) (citation omitted); 47 Am.Jur.2d § 689 (2006) (“Whether conduct constitutes excusable neglect for purposes of the relief from-judgment-rule presents a conclusion of law, fully reviewable on appeal”); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441 n.2, 191 P.3d 879 (2008) (“This court reviews conclusions of law *de novo* whether or not they are styled as ‘findings of fact.’”).

<sup>39</sup> CR 55(c) (“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).”); Friebe v. Supancheck, 98 Wn. App. 260, 265, 992 P.2d 1014 (1999) (“Relief from a default judgment is governed by these equitable principles, ***but the grounds and procedures for vacating a judgment are provided in CR 60.***”) (emphasis added).

<sup>40</sup> CR 60(b)(1); Griggs v. Averbek Realty, 92 Wn.2d 576, 599 P.2d 1289 (1979) (“Under CR 60(b)(1) there must be excusable neglect in allowing the default to be taken.”).

excusable neglect rests squarely on the party seeking to vacate the judgment.<sup>41</sup>

A party seeking to set aside a default judgment must satisfy four conjunctive factors:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.<sup>42</sup>

"The first two are the major elements to be demonstrated by the moving party."<sup>43</sup> Failure to satisfy either of these two "major elements" is fatal to the defendant's motion to vacate.<sup>44</sup> In other words, unless Crow carried its burden of establishing a defense *and* that its actions amounted

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<sup>41</sup> Commercial Courier Serv. v. Miller, 13 Wn. App. 98, 106, 533 P.2d 852 (1975) ("[A]lways the burden is on the party seeking the relief to show that his failure was not so negligent as to be wholly inexcusable") (quoting Jacobsen v. Defiance Lbr. Co., 142 Wash. 642, 253 P. 1088 (1927)); Johnson v. Cash Store, 116 Wn. App. 833, 849, 68 P.3d 1099 (2003) (defendant "did not satisfy *its burden* of demonstrating that its failure to appear and answer was occasioned by mistake, inadvertence, surprise, or excusable neglect") (emphasis added).

<sup>42</sup> Morin, 160 Wn.2d at 755.

<sup>43</sup> White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

<sup>44</sup> *See, e.g., Waxman*, 132 Wn. App. at 148 ("Because Waxman lacked tenable grounds for asserting that its defenses were meritorious, the trial court abused its discretion in granting Waxman's motion to vacate."); Cash Store, 116 Wn. App. at 849 (motion to vacate properly denied despite evidence of prima facie defense because defendant "did not satisfy its burden of demonstrating that its failure to appear and answer was occasioned by mistake, inadvertence, surprise, or excusable neglect").

to *excusable* neglect – as opposed to mere carelessness or *inexcusable* neglect – the judgment should not have been vacated.

**C. CROW FAILED TO ESTABLISH MISTAKE OR EXCUSABLE NEGLIGENCE**

By vacating Westlund’s default judgment, the trial court abused its discretion because Crow’s failure to take any steps to ensure its interests were being protected amounts to inexcusable neglect. There is no dispute that Crow was properly served with the summons and complaint and therefore aware of the lawsuit and the penalty for default. There is similarly no dispute that Crow neglected to personally retain counsel to appear or answer the complaint and also neglected to follow up in any way with CNA after faxing the documents. The facts and circumstances in this case can support no finding other than Crow failed to take any reasonable action to protect its interests. Crow’s bare arguments that it reasonably relied on CNA to protect it are similarly unavailing – as the record shows only the opposite – that CNA had no intention to defend or otherwise protect Crow. Based on the record presented this Court must reverse the trial court’s ruling.

**1. Crow’s Baseless Assumption that Its Insurer Was Defending Defines Inexcusable Neglect**

A defendant acts with inexcusable neglect when it fails to respond to a lawsuit on the grounds it assumes someone else is going to defend it,

*unless* the defendant receives some assurance that its interests are being protected. For example, in In re Estate of Stevens,<sup>45</sup> an order of default was entered against a trust beneficiary who failed to timely respond to a summons.<sup>46</sup> In moving to vacate, the beneficiary argued that she acted with excusable neglect<sup>47</sup> because she was relying on one of the co-trustees to protect her interests.<sup>48</sup> In rejecting her argument, the court distinguished the case relied on by the defaulting defendant:

In Mims,<sup>49</sup> the beneficiary had been in contact with the personal representative and/or his attorney during the pendency of the proceeding. Unlike Mims, ***Curtis had not made contact with either Knight or her attorney and, thus, could not reasonably believe they were representing her interests.***<sup>50</sup>

Additionally, in Mosbrucker v. Greenfield Implement,<sup>51</sup> the defendant failed to appear and defend in part because “he assumed the bank would defend the lawsuit.”<sup>52</sup> The court of appeals agreed with the

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<sup>45</sup> In re Estate of Stevens, 94 Wn. App. 20, 971 P.2d 58 (1999).

<sup>46</sup> In re Estate of Stevens, 94 Wn. App. at 27.

<sup>47</sup> Although Stevens involved an order of default rather than a default judgment, “excusable neglect” is required to vacate either one. In re Estate of Stevens, 94 Wn. App. at 31 (“[A]lthough the requirements for setting aside an order of default are not entirely the same as those for setting aside a default judgment, two factors to be considered are the same, excusable neglect and due diligence.”).

<sup>48</sup> In re Estate of Stevens, 94 Wn. App. at 33.

<sup>49</sup> Mims v. Miller, 513 So.2d 1120 (Fla. Dist. Ct. App. 1987).

<sup>50</sup> In re Estate of Stevens, 94 Wn. App. at 34 (emphasis added).

<sup>51</sup> Mosbrucker v. Greenfield Implement, 54 Wn. App. 647, 774 P.2d 1267 (1989).

<sup>52</sup> Mosbrucker, 54 Wn. App. at 649.

trial court that the defendant's belief the bank would defend it was not "excusable neglect."<sup>53</sup>

Moreover, a party's failure to act is inexcusable neglect when it is the result of merely an unsupported, subjective belief.<sup>54</sup> Such is the case here.

Authority around the country similarly holds that a trial court abuses its discretion by vacating a judgment based on the policyholder's unsupported, unilateral assumption that its insurer would hire defense counsel.<sup>55</sup> In a case with virtually identical facts to this one, the defendant

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<sup>53</sup> Mosbrucker, 54 Wn. App. at 651 ("That court also determined that Mr. Clark's failure to timely appear or answer, based on his belief the bank would defend the suit, did not constitute excusable neglect. . . . We find no abuse of discretion in the court's application of the White factor as to Mr. Clark's claim of excusable neglect.").

<sup>54</sup> Commercial Courier, 13 Wn. App. at 105 ("Defendant has offered no excuse or justification for not so appearing *save for a statement of his purely subjective belief* that he thought the action was 'merely a bluff' . . . .") (emphasis added).

<sup>55</sup> *See, e.g., BellSouth Telcoms., Inc. v. Future Communs., Inc.*, 293 Ga. App. 247, 249, 666 S.E.2d 699 (2008) ("Future did nothing to ensure that the complaint was received by its insurer, and it did not attempt to obtain its insurer's assurance that it was handling the suit. Thus, the trial court was not authorized to open the default on the ground of excusable neglect."); Baskerville v. Philadelphia Newspapers, Inc., 278 Pa. Super. 59, 419 A.2d 1355 (1980) ("[T]he insured's failure to inquire of the insurer as to the status or posture of the case in light of certain events which should have reasonably alerted it to a possible problem, precluded it from asserting a *justifiable* belief that its interests were being protected.") (emphasis in original); Johnson-Olson Floor Coverings, Inc., v. Branthaver, 94 Ill. App. 2d 394, 401, 236 N.E.2d 903 (1968) ("What we are deciding, however, is that the defendant who ignores the summons and takes no action whatsoever, in reliance on nothing more than his own evaluation of his legal rights, is guilty of inexcusable negligence . . . ."); Ellis v. Five Star Dodge, 242 Ga. App. 474, 477, 529 S.E.2d 904 (2000) ("The record contains . . . no evidence that any officer or employee of the defendant took any affirmative action to ensure that an answer was filed in this lawsuit; and no evidence of communication from the insurance company that it had received the complaint, had undertaken to defend this case, or otherwise had contacted the

faxed the legal papers to her insurer, never confirmed that the insurer had received them, and never heard anything back from the insurer.<sup>56</sup> The court of appeals reversed the trial court's order setting aside the default judgment as an abuse of discretion because no excusable neglect existed as a matter of law:

It is well established that *a defendant's unconfirmed belief that her insurer had timely received suit papers and was preparing a defense on the defendant's behalf is not sufficient to constitute excusable neglect* that would authorize the trial court to set aside a default judgment. To authorize the setting aside of a default under circumstances where the defendant believes her insurer is handling the case, the defendant must demonstrate her own diligence *and the insurer's assurance that it is handling the case*. Neither aspect is present in this case.

First, Mann cannot establish that she, in fact, forwarded the complaint to the insurance company. She has failed to produce any document confirming that the fax was successfully transmitted, and her insurance company denies that it received the faxed complaint. Most importantly, it is undisputed that *Mann did nothing to ensure that the complaint had been received by the insurance company or that an answer would be filed*. According to Mann, “[s]he never heard anything from the insurance carrier and assumed that a defense was being provided for her.” . . . [T]his Court cannot condone such inaction.<sup>57</sup>

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defendant about the case. . . . This ruling [vacating the judgment] was an abuse of discretion, because the defendant's actions failed to demonstrate excusable neglect as a matter of law.”).

<sup>56</sup> Wright v. Mann, 271 Ga. App. 832, 611 S.E.2d 118 (2005).

<sup>57</sup> Wright, 271 Ga. App. at 833 (emphasis added) (citations omitted).

Similarly, in Bethlehem Apparatus Co. v. H. N. Crowder, Jr., Co.,<sup>58</sup> the defendant attempted to vacate a default judgment on the ground of excusable neglect arguing that “it believed that it was being properly represented by its counsel or its insurance carrier.”<sup>59</sup> The court found, however, that the defendant had “not acted in a manner which would have enabled it to rely justifiably upon legal representation by the insurance carrier” because it “failed to inquire as to the status of its claim or even to seek any assurances from the insurance carrier that it was being represented.”<sup>60</sup>

Additionally, the defendants in Wagner v. Sulka<sup>61</sup> attempted to vacate a default judgment arguing excusable neglect when “upon being served with summons they mailed the summons to an insurance broker from whom they purchased their insurance ‘and assumed that the said summons would be forwarded to the proper source and that a defense would be undertaken of the action in their behalf.’”<sup>62</sup> The court found that the defendants were not justified in relying on their baseless assumption:

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<sup>58</sup> Bethlehem Apparatus Co. v. H. N. Crowder, Jr., Co., 242 Pa. Super. 451, 364 A.2d 358 (1976).

<sup>59</sup> Bethlehem Apparatus, 242 Pa. Super. at 455.

<sup>60</sup> Bethlehem Apparatus, 242 Pa. Super. at 455.

<sup>61</sup> Wagner v. Sulka, 336 Ill. App. 101, 82 N.E.2d 922 (1948).

<sup>62</sup> Wagner, 336 Ill. App. at 105.

[T]he burden was upon the defendants to make inquiry as to whether or not the summons had reached the hands of those under obligation to file an appearance and *to have had some reasonable assurance a defense had been made*.<sup>63</sup>

This approach is consistent with federal cases interpreting Fed. R. Civ. P 60(b), which hold that the defendant was “culpable,” and thus did *not* act with excusable neglect, if he received notice of the filing of the action and failed to answer.<sup>64</sup> Federal courts also hold that when a defendant fails to ensure that its interests are being protected, it will not be relieved from judgment.<sup>65</sup>

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<sup>63</sup> Wagner, 336 Ill. App. at 105-06 (emphasis added).

<sup>64</sup> *See, e.g., Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 690 (9th Cir. 1988) (“If a defendant ‘has received actual or constructive notice of the filing of the action and failed to answer’ his conduct is culpable. Here, it is apparent that Eclat, through its president, Mr. Bujkovsky, had actual notice of the summons and complaint at the latest a day after it was served. Mr. Bujkovsky, as a lawyer, presumably was well aware of the dangers of ignoring service of process. For these reasons, we do not believe that the district court abused its discretion by refusing to vacate the default judgment.”) (citations omitted); Meadows v. Dominican Republic, 817 F.2d 517, 521-22 (9th Cir. 1987) (“A defendant’s conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer.”); Benny v. Pipes, 799 F.2d 489, 494 (9th Cir. 1986) (“Here, the guards do not contest that they received the summonses and complaints from Lee and Wolf. Indeed, the guards’ motions to extend their time to answer Benny’s complaint prove conclusively that they had actual notice of the complaint and were aware of its contents. Because they had notice of the complaint, and because the service by Lee and Wolf was valid, the guards’ failure to answer was culpable.”).

<sup>65</sup> Florida Physician’s Ins. Co. v. Ehlers, 8 F.3d 780, 784 (11th Cir. 1993) (“Ehlers, as a defendant in a suit alleging millions of dollars in damages, had a *duty to act with some diligence to ensure that his attorney was protecting his interests*. He did not do so, and we find that the district court did not abuse its discretion in finding that Ehlers did not establish good cause for his default.”) (emphasis added).

Moreover, treatises agree that failure to act based on the belief a defense is being provided by someone else is excusable only where the defendant received some sort of assurance to that effect:

Negligence may be excusable where it is caused by failure to receive notice of the action or the trial, [or] *by reliance on assurances given by those on whom the party had a right to depend* . . . . On the other hand, a simple disregard of legal process is not excusable neglect.<sup>66</sup>

Despite its bare assertion to the contrary,<sup>67</sup> Crow had *no justifiable reason* to believe CNA had hired (or even would hire) a lawyer to represent it in this lawsuit, and therefore acted inexcusably by failing to take any measures to protect its interests. Upon faxing the summons and complaint to CNA, Crow received no response. CNA never assured Crow that CNA would provide a defense. Crow never inquired whether CNA received the documents or would hire defense counsel. In fact, the record is devoid of *any* evidence of *any* contact or communication whatsoever between the time Crow faxed the summons and complaint and when the court entered judgment.<sup>68</sup>

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<sup>66</sup> 49 C.J.S., Judgments, § 416 (2009) (emphasis added).

<sup>67</sup> CP 201 (“Crow had no reason to believe its interests were not being protected after promptly forwarding legal documents to its insurer.”).

<sup>68</sup> Cf. Memorial Hosp. System v. Fisher Ins. Agency, Inc., 835 S.W.2d 645, 652 (Tex. App. 1992) *overruled on other grounds by* Michiana Easy Livin’ Country, Inc. v. Holten, 168 S.W.3d 777, 791-92 (Tex. 2005) (“It is reasonable to assume that when a prudent person is served with a petition concerning a lawsuit and is relying on his agent to represent his interest, *he is going to make sure that his agent is using due diligence in handling the lawsuit.*”) (emphasis added).

Like the defendant in Wright v. Mann, Crow “did nothing to ensure that the complaint had been received by the insurance company or that an answer would be filed.”<sup>69</sup> Absent an assurance from the insurer that it is defending, such inaction is inexcusable and will not support the vacation of a default judgment.<sup>70</sup>

This is consistent with White v. Holm,<sup>71</sup> which Crow cited in support of its motion to vacate. In White, the defendant received assurances from both the insurer and his own attorney that the insurer would defend.<sup>72</sup> The court was clear that Holm’s *reliance on these assurances* justified his “bona fide belief that the insurer would provide counsel.”<sup>73</sup> Unlike the facts in White, the record demonstrates that Crow never received any assurances regarding a defense at any time from any person or entity.

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<sup>69</sup> See Wright, 271 Ga. App. at 833.

<sup>70</sup> See, e.g., BellSouth Telcoms., Inc. v. Future Communs., Inc., 293 Ga. App. 247, 249, 666 S.E.2d 699 (2008) (“Future did nothing to ensure that the complaint was received by its insurer, and it did not attempt to obtain its insurer’s assurance that it was handling the suit. Thus, the trial court was not authorized to open the default on the ground of excusable neglect.”)

<sup>71</sup> White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968).

<sup>72</sup> White, 73 Wn.2d at 354 (“Mr. Holm was assured by his insurance agent, as well as the attorney he consulted, that his insurer would properly defend the action on behalf of defendants, at least until the extent of insurance coverage was ascertained.”).

<sup>73</sup> White, 73 Wn.2d at 355. See also id. at 354 (“The trial court felt, as do we, that Mr. Holm was entitled to rely upon these assurances.”).

Crow's "understanding that CNA insurance would retain defense counsel"<sup>74</sup> is even more unreasonable when considered in the context of Crow's responsibilities under Washington insurance coverage law. Washington cases recognize a distinction between providing notice to a liability insurer and requesting a defense. Before an insurer's duty to defend becomes a legal obligation for which it can be held in breach, the policyholder must "tender" the request, which requires "affirmatively request[ing] the insurer's participation."<sup>75</sup>

Crow provided no evidence that it affirmatively requested that CNA defend the lawsuit. Instead, Crow's president testified only that "Crow faxed the summons and complaint to CNA, to the attention of Sarah Rapolas."<sup>76</sup> Therefore, even if the terms of the CNA policy gave

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<sup>74</sup> See CP 165.

<sup>75</sup> Unigard Ins. Co. v. Leven, 97 Wn. App. 417, 426-27, 983 P.2d 1155 (1999) puts the insurer on notice of the claim, while others have determined that an insurer's duty to defend does not arise *unless the insured specifically asks the insurer to undertake the defense of the action*. . . . We agree with the federal court that an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; *the insured must affirmatively inform the insurer that its participation is desired*." (emphasis added); Griffin v. Allstate, 108 Wn. App. 133, 141, 29 P.3d 777 (2001) ("Certainly breach of the duty to defend cannot occur before tender."); Mut. of Enumclaw Ins. Co. ("MoE") v. USF Ins. Co., 164 Wn.2d 411, 421, 191 P.3d 866 (2008) ("The duties to defend and indemnify do not become legal obligations until a claim for defense or indemnity is tendered.").

<sup>76</sup> CP 165.

rise to a duty to defend,<sup>77</sup> because Crow had not *requested* a defense, CNA had no obligation to provide counsel.

Thus, because Crow merely attempted to put CNA on notice of the lawsuit rather than requesting a defense, Crow's purported "understanding" that CNA would hire counsel and defend is manifestly unreasonable, and its failure to inquire or take any other steps to protect its interests is inexcusable.<sup>78</sup>

## 2. Crow Committed No "Mistake"

Moreover, Crow's argument that faxing the summons and complaint to the wrong number is an excusable "mistake" also fails. Washington courts have held that a "genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a mistake for purposes of vacating a default judgment."<sup>79</sup> Seeking to capitalize on this language, Crow

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<sup>77</sup> See Woo v. Fireman's Fund Ins. Co., 161 Wn.2d 43, 52-53, 164 P.3d 454 (2007) ("An insurer has a duty to defend 'when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.'").

<sup>78</sup> Sound policy reasons support the rule that an insurer has no legal obligation until a claim for defense or indemnity is tendered. See Leven, 97 Wn. App. at 421-22 ("Selective tender preserves the insured's right to invoke or not to invoke the terms of its insurance contracts. An insured may choose not to tender a claim to its insurer for a variety of reasons. . . . Whatever its reasons, an insured has the prerogative not to tender to a particular insurer.").

<sup>79</sup> Norton v. Brown, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999).

argued below that “Crow’s faxing of the summons and complaint to the incorrect fax number was a result of a genuine misunderstanding.”<sup>80</sup>

But the rule does not say “*any* genuine misunderstanding between an insured and his insurer,” is sufficient. Rather the misunderstanding must be over “who is responsible for answering the summons and complaint.” A “genuine misunderstanding of the correct fax number”<sup>81</sup> does not fall within the rule.

Additionally, although CR 60(b)(1) allows vacation of a judgment due to “mistake,” the mistake must be the *cause* of the defendant’s failure to appear and defend.<sup>82</sup> Here, the evidence does not establish that Crow’s faxing of the summons and complaint to the wrong number *caused* Crow’s default. This is true because regardless of which fax number Crow used, the correct person at CNA received the complaint the day it was served anyway (because Westlund’s counsel provided Ms. Rapolas with a courtesy copy). Because CNA had a copy of the filed complaint in hand, something other than Crow’s faxing error must have caused the default.

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<sup>80</sup> CP 318-19.

<sup>81</sup> See CP 318.

<sup>82</sup> See Prest v. American Bankers Life, 79 Wn. App. 93, 97, 900 P.2d 595 (1995) (“[T]he trial court is called upon to consider whether the moving party has met its burden of showing that . . . [its] failure to timely appear in the action, and answer the opponent’s claim, *was occasioned by mistake*, inadvertence, surprise or excusable neglect”) (emphasis added).

3. **The Division III Cases That Crow Cited Below are Distinguishable and Conflict with White and Leven**

Crow also cited in support of its motion to vacate three cases decided by Division III of the Court of Appeals<sup>83</sup> – Berger v. Dishman Dodge, Inc.,<sup>84</sup> Norton v. Brown,<sup>85</sup> and Calhoun v. Merritt.<sup>86</sup> But these cases are all factually distinguishable.

In Berger, the court found that the policyholder “had no reason to believe that his interests were not being protected after promptly forwarding the documents to the insurer.”<sup>87</sup> The decision is silent regarding whether the insurer acknowledged receipt of the complaint, whether the insurer assured the policyholder it would defend, or whether the policyholder ever followed up with the insurer.<sup>88</sup> However, *the insurer did attempt to defend*, but sent the wrong case file to the attorney.<sup>89</sup>

In this case, however, Crow made no attempt to determine whether CNA received the papers or would defend, and CNA, despite being put on notice of the suit when it received a courtesy copy of the complaint, made

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<sup>83</sup> See CP 201.

<sup>84</sup> Berger v. Dishman Dodge, Inc., 50 Wn. App. 309, 748 P.2d 241.

<sup>85</sup> Norton v. Brown, 99 Wn. App. 118, 992 P.2d 1019 (1999).

<sup>86</sup> Calhoun v. Merritt, 46 Wn. App. 616, 731 P.2d 1094 (1986).

<sup>87</sup> Berger, 50 Wn. App. at 312.

<sup>88</sup> See Berger, 50 Wn. App. at 310.

<sup>89</sup> Berger, 50 Wn. App. at 311.

no effort to secure counsel to defend. A single phone call from either Crow or CNA to the other would have confirmed that the suit had been served and an answer was required.

Norton and Calhoun are likewise distinguishable. In Norton, the court found the policyholder “was under the impression that his interests were being protected by his insurer through settlement negotiations” and that the policyholder was confused about what to do with the complaint.<sup>90</sup> Similarly, in Calhoun, the court found “the fact that his insurer was already involved in the case and dealing with Mr. Calhoun’s attorney caused him to believe that the insurer knew of the lawsuit and would respond to it.”<sup>91</sup>

Here, no evidence in the record shows that Crow was aware of any discussions between CNA and Westlund’s counsel. Also, while Crow offers bare argument that CNA “negotiated” with Westlund in a strained attempt to make inapposite holdings fit its predicament, no actual evidence of negotiation exists. Similarly, no evidence exists showing that Crow believed that settlement discussions between CNA and Westlund relieved it of the responsibility to answer the complaint.

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<sup>90</sup> Norton, 99 Wn. App. at 124.

<sup>91</sup> Calhoun, 46 Wn. App. at 621.

This court should also disregard these Division III cases because, to the extent they hold a policyholder acts reasonably by doing nothing in response to a properly served summons and complaint under the unsupported belief that its insurer will appear and defend, that reasoning would contradict decisions from both the Supreme Court and this Division.<sup>92</sup>

In White, the Washington Supreme Court determined that the policyholder was justified in assuming his insurer would defend *because of* the assurances from his insurer, assurances from his own attorney, his compliance with the insurer's requests for information, and his execution of documents at the request of the insurer.<sup>93</sup> This demonstrates that a belief the insurer will defend must be supported by *something*.<sup>94</sup> If an unsupported, unilateral belief by the policyholder that the insurer was defending was sufficient, the White court would not have needed to so meticulously enumerate everything Holm did to ensure his interests were being protected.

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<sup>92</sup> See State v. Johnston, 143 Wn. App. 1, 15, 177 P.3d 1127 (2007) (decision by one division of Court of Appeals not binding on other divisions, but merely persuasive authority).

<sup>93</sup> White, 73 Wn.2d at 354-55.

<sup>94</sup> BellSouth Telcoms., 293 Ga. App. at 249 ("It is well settled that merely assuming that a complaint is being handled by an insurer is insufficient to establish excusable neglect as a matter of law.").

In Unigard v. Leven this court held that an insurer is under no legal obligation to retain counsel and cannot be held in breach of its duty to defend absent an affirmative request by the policy holder for a defense.<sup>95</sup> It defies logic to hold on the one hand that a policyholder is justified in assuming its insurer is defending despite failing to affirmatively request a defense, while holding on the other hand that the policyholder has no remedy against the insurer for not defending *because* the policyholder did not affirmatively request a defense.

**D. CROW CANNOT AVOID THE JUDGMENT DUE TO CNA'S ACTIONS**

Even though Crow's failure to act was unreasonable and therefore, inexcusable, the question remains whether CNA's actions may be imputed to Crow for the purposes of CR 60(b)(1), and if so, whether CNA's actions amount to excusable or inexcusable neglect. Because Crow never properly tendered the claim, CNA's actions should *not* be imputed to Crow, and thus, only Crow's inaction is relevant. However, because CNA's failure to take any action is similarly inexcusable, even if the Court does impute its actions to Crow, the judgment was wrongfully vacated.

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<sup>95</sup> Leven, 97 Wn. App. at 427 (“[T]he insured must affirmatively inform the insurer that its participation is desired.”). *See also*, Griffin, 108 Wn. App. at 141 (“Certainly breach of the duty to defend cannot occur before tender.”); MoE, 164 Wn.2d at 421 (“The duties to defend and indemnify do not become legal obligations until a claim for defense or indemnity is tendered.”).

## 1. CNA's Actions Should Not be Imputed to Crow

Courts are split on whether an insurer's conduct should be imputed to the policyholder for the purposes of vacating a default judgment.<sup>96</sup> Cases in Washington have held both ways.<sup>97</sup> In determining that an insurer's actions could be imputed to the policyholder, the Berger court relied solely on out-of-state cases.<sup>98</sup> Such cases largely employ an agency theory when deciding an insurer's actions should be imputed to the policyholder.<sup>99</sup> For example, in Leslie v. Spencer,<sup>100</sup> the court found that

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<sup>96</sup> Compare Colletti v. Schrieffer's Motor Service, Inc., 38 Ill. App. 2d 128, 134, 186 N.E.2d 659 (1962) ("However, defendant's reliance on [the agent] is not a ground for relieving defendant of the consequence of [the agent's] negligence, because [the agent's negligence, being the negligence of defendant's insurance company, *is chargeable to defendant.*") (emphasis added) and Greitzer v. Eastham, 254 N.C. 752, 756, 119 S.E.2d 884 (1961) ("[T]he defendant made the insurance company and its agent his agents, to look after and defend the action, and *their negligence was imputable to the defendant.*") (emphasis added) with Hinz v. Northland Milk & Ice Cream Co., 237 Minn. 28, 31, 53 N.W.2d 454 (1952) ("[T]he negligence of the insurer . . . *is not to be imputed to defendant* so as to bar the opening of a default judgment . . .") (emphasis added) and Tasea Inv. Corp. v. Dale, 222 Md. 474, 479-80, 160 A.2d 920 (1960) (judgment cannot be vacated due to mistake when only "mistake" alleged was caused by insurer, not defendant).

<sup>97</sup> Compare White, 73 Wn.2d at 354 ("[T]he instant circumstances do not warrant an imputation of any such fault (of the insurer) to defendants, who were otherwise found to be blameless.") with Berger, 50 Wn. App. at 312 ("The acts or omissions of an insurance carrier will be imputed to the insured for purposes of vacating a default judgment.").

<sup>98</sup> Berger, 50 Wn. App. at 312 ("While no Washington case has directly so held, one can conclude that the acts or omissions of an insurer can be imputed to the insured defendant. Several other jurisdictions have adopted this premise.").

<sup>99</sup> See, e.g., Leslie v. Spencer, 170 Okla. 642, 646, 42 P.2d 119 (1935) ("The principal himself may not be neglectful, but if his agent is so, such negligence of the agent must be imputed to the principal."). See also Greitzer, 254 N.C. at 756 ("[T]he defendant made the insurance company and its agent his agents, to look after and defend the action, and *their negligence was imputable to the defendant.*").

<sup>100</sup> Leslie, 170 Okla. 642.

the policyholders had made the insurer their agent by providing the summons and complaint and “rel[ying] upon it to make the necessary defense according to its contract with them.”<sup>101</sup>

As shown above, however, under Washington law, the insurer has no legal obligation to defend until the policyholder properly “tenders” defense of the lawsuit. Where, as here, the policyholder did no more than send a copy of the documents with no affirmative request for a defense, the insurer cannot be considered the policyholder’s agent, and the insurer’s actions should not be imputed to the policyholder. Moreover, in this case because the insurer never received Crow’s fax, no agency would have arisen.<sup>102</sup>

Moreover, in the trial court, Crow itself argued that because CNA is not a named party in this matter, CNA’s actions should not be imputed to Crow.<sup>103</sup>

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<sup>101</sup> Leslie, 170 Okla. at 646.

<sup>102</sup> *See Nordstrom Credit, Inc. v. Department of Revenue*, 120 Wn.2d 935, 941, 845 P.2d 1331 (1993) (“Agency requires that both parties consent to the relationship and that the principal exercise control over the agent.”); Matsumura v. Eilert, 74 Wn.2d 362, 368, 444 P.2d 806 (1968) (“[Agency] does not exist unless the facts, either expressly or by inference, establish that one person is acting at the instance of and in some material degree under the direction and control of the other.”).

<sup>103</sup> CP 319 (“As CNA is not a named party in this matter, any breakdown of CNA’s internal office procedure should not be imputed to Crow.”).

2. **Even if CNA's Actions are Imputed to Crow, CNA's Neglect was Similarly Inexcusable**

Even if the Court finds it appropriate to consider whether CNA's actions satisfy CR 60(b)(1), the judgment should still not have been vacated because CNA, too, acted with inexcusable neglect for two reasons. First, CNA knew not only that Westlund had drafted a complaint, but that the complaint had been filed.<sup>104</sup> Yet CNA then sat back and did nothing. Despite knowledge that its policyholder had been sued, CNA did not appoint defense counsel, did not answer or appear, and remarkably, did not make any contact whatsoever with its policyholder.<sup>105</sup> Such inaction amounts at least to inattention or neglect if not willful disregard of process, and a defendant will not be relieved from a judgment "due to his inattention or neglect . . . where there has been no more than a prima facie showing of a defense on the merits."<sup>106</sup>

Second, an insurer's failure to get a complaint to the person responsible for answering it is inexcusable neglect. Although Crow provided no evidence that the faxed documents ever arrived at CNA, Crow

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<sup>104</sup> CP 118 ("A courtesy copy of the lawsuit *filed last Friday and the case scheduling order* is attached.") (emphasis added).

<sup>105</sup> See *Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345 (2007) ("Similarly, St. Paul knew about the accident, knew that it was Little's underinsured motorist carrier, and knew that King was uninsured. . . . *St. Paul had ample opportunity to intervene in the case and elected not to.* Similarly, *its decision not to participate fails to satisfy White.*").

<sup>106</sup> *Commercial Courier*, 13 Wn. App. at 106.

and CNA maintain that the documents were faxed to Mr. Howell, the previous claims adjuster, and failed to make their way to Ms. Rapolas.<sup>107</sup> Washington courts have repeatedly held that this sort of “office mix-up” is inexcusable neglect and will not support vacation of a default judgment.<sup>108</sup>

Crow’s attempts to distinguish the “office mix-up” cases fail because Crow provided no explanation as to why Mr. Howell failed to forward the documents to Ms. Rapolas and no evidence whatsoever of procedures in place at CNA to prevent that kind of “mix-up.” Absent an explanation of why the documents were not forwarded, the trial court cannot conclude the failure was “excusable.”<sup>109</sup> Further, when a defendant

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<sup>107</sup> CP 154 ¶ 12; CP 165 ¶ 8.

<sup>108</sup> See, e.g., TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 212, 165 P.3d 1271 (2007) (“Judicial decisions have repeatedly held that if a company’s failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable.”); Cash Store, 116 Wn. App. at 848 (“If a company fails to respond to a complaint because someone other than general counsel accepted service of process and then neglected to forward the complaint, the company’s failure to respond is deemed due to inexcusable neglect.”); Prest, 79 Wn. App. at 101 (Insurer claimed excusable neglect because file was “mislaidd” and not “forward[ed] to the proper personnel in time.” “While certainly Bankers’s failure to answer was neglect, it is not excusable. It is an important part of the business of an insurance company to respond to legal process that is served upon it.”).

<sup>109</sup> Park Corp. v. Lexington Ins. Co., 812 F.2d 894 (4th Cir. 1987) (“The unexplained disappearance of the summons and complaint from Lexington’s mail room does not constitute grounds for relief from the default judgment under *Rule 60(b)(1)*. ***Because Lexington could give no reason for the loss of the complaint, the district court could not determine whether it had an acceptable excuse for lapsing into default.*** In the absence of any acceptable excuse for Lexington’s default, the district court did not abuse its discretion in determining that Lexington had failed to demonstrate any mistake, inadvertence, surprise or excusable neglect that would justify relief from the default judgment under *Rule 60(b)(1)*. ***Indeed, to hold otherwise would be to allow defaulting defendants to escape the consequences of***

in default fails to demonstrate systems or procedures designed to prevent process from falling through the cracks, courts will not characterize a lost summons as “excusable.”<sup>110</sup>

**3. CNA was Not Lulled Into Inaction By “Negotiations”**

Crow attempted to justify CNA’s failure to defend Crow as a product of CNA’s belief that the parties were “continu[ing] settlement negotiations.”<sup>111</sup> However, on March 4, 2009, CNA informed Westlund that it was “denying the claim.”<sup>112</sup> Having denied the claim based on its belief that Crow had “no liability,” CNA cannot have subjectively believed that “negotiations” were “continuing.”

**4. A Plaintiff Has No Duty to Inform a Non-Party Insurer of its Intent to Seek Default**

Crow additionally attempted to justify CNA’s failure to take action to prevent the default arguing that Westlund did not tell CNA that it had

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*their inaction simply by asserting that the legal process to which they failed to respond was lost.”*) (emphasis added).

<sup>110</sup> TMT Bear Creek, 140 Wn. App. at 213 (“PETCO failed to ensure that the legal assistant responsible for entering the deadline into the calendaring system did so before she left on an extended vacation, subsequently failed to ensure that employees hired to replace that assistant were trained on the calendaring system and competent in operating it, and *failed to institute any other procedures necessary to ensure that PETCO’s general counsel received notice of the dispute.*”) (emphasis added); Park Corp., 812 F.2d at 898 (Haynsworth, SCJ, Concurring) (“[S]loppy handling of papers by which legal actions are commenced is inexcusable. In this case, *Rule 60(b)* relief was properly denied . . . because Lexington made no showing that it had in place reasonable internal controls designed to prevent or discover such losses.”).

<sup>111</sup> CP 153 ¶ 9 (“Mr. Harper expressed a willingness to continue settlement negotiations.”).

<sup>112</sup> CP 153 ¶ 8.

served Crow or intended to obtain a default judgment.<sup>113</sup> Both arguments fail as a matter of law because a plaintiff has no duty to inform a defendant's liability insurer of the lawsuit or the plaintiff's intent to seek a default judgment:

We do not believe that a plaintiff's failure to notify a nonparty insurer of her intention to obtain a default judgment against an insured is a basis for vacation of a default order and judgment. Martinez has cited no authority, and our research has revealed none, that stands for the proposition that it is inequitable to enter a default judgment against a defaulting party without first notifying that party's insurer.<sup>114</sup>

Furthermore, even where a plaintiff *does* owe the insurer notice of a lawsuit (such as in the underinsured motorist (UIM) context, where the plaintiff must notify its own UIM insurer of a lawsuit against an uninsured or underinsured defendant), notice that the lawsuit has been *filed* is all that is necessary.<sup>115</sup> Even the UIM notice requirement does not mandate separate notice that the summons and complaint have been *served*.<sup>116</sup>

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<sup>113</sup> CP 154 ¶ 11 (“Even though I had numerous conversations and communications with him, Mr. Harper never provided notice that he intended to obtain a default order or a default judgment”); *id.* ¶ 13 (“If I had known about the service of the complaint and summons upon Crow or of the plaintiff's intent to seek default, I would have retained counsel to appear and defend this action.”).

<sup>114</sup> Caouette v. Martinez, 71 Wn. App. 69, 78, 856 P.2d 725 (1993).

<sup>115</sup> Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 275-76, 996 P.2d 603 (2000) (rejecting insurer's argument that notice was insufficient because it was never told that defendant had been served).

<sup>116</sup> Lenzi, 140 Wn.2d at 277 (rejecting argument that plaintiff “‘set a trap’ for [the insurer] by withholding information about service of process on [defendant] and obtaining a default judgment, while ostensibly continuing in a negotiation posture”).

Here, Westlund’s counsel notified CNA of the filed lawsuit *as a courtesy*. Crow’s contention that Westlund should then have provided additional notice that the summons had been served – or that Westlund intended to pursue a default judgment – has no basis in law. CNA was on notice that its policyholder had been sued<sup>117</sup> and still failed to take any steps to protect Crow’s interests.

**E. CROW FAILED TO ESTABLISH MORE THAN A TENUOUS, PRIMA FACIE DEFENSE**

Under CR 60, a party seeking to vacate a judgment must provide affidavits setting forth “facts constituting a defense to the action or proceeding.”<sup>118</sup> It is insufficient to “merely state allegations and conclusions.”<sup>119</sup> “[P]roving to the court that there exists, at least prima facie, a defense to the claim . . . avoids a useless subsequent trial if the defaulted defendant cannot bring forth facts to make such a showing when seeking to vacate the default.”<sup>120</sup>

Where the defendant establishes a “strong or virtually conclusive defense” to the plaintiff’s claim, the reasons for entry of default are of less

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<sup>117</sup> See Lenzi, 140 Wn.2d at 276 (“Receipt of a summons and complaint alerts a potential party there is a lawsuit afoot.”).

<sup>118</sup> CR 60(e) Procedure on Vacation of Judgment.

<sup>119</sup> Shepard Ambulance, Inc. v. Helsell, 95 Wn. App. 231, 239, 974 P.2d 1275 (1999).

<sup>120</sup> Griggs, 92 Wn.2d at 583.

import.<sup>121</sup> On the other hand, where the defendant is able to show no more than a prima facie defense, “the reasons for the failure to timely appear will be scrutinized with greater care.”<sup>122</sup> Where no more than a prima facie showing has been made, a defendant *will not be relieved* from a default judgment taken due to inattention or neglect.<sup>123</sup>

Crow offers two defenses: (1) that the contract and warranty disclaim liability for leaks; and (2) that the damage to the roof was probably caused by seismic activity and/or excessive shifting rather than Crow’s defective workmanship.<sup>124</sup> Neither amounts to more than a prima facie defense.

1. **Crow’s Disclaimers, Even If Valid, Do Not Apply to Roof Replacement**

The contract and warranty’s disclaimers for consequential damages caused by leaks do not apply to the bulk of Westlund’s claim. Westlund has demonstrated that the roof installed by Crow is defective and needs to

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<sup>121</sup> Cash Store, 116 Wn. App. at 842 (“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.”).

<sup>122</sup> Cash Store, 116 Wn. App. at 842.

<sup>123</sup> Commercial Courier, 13 Wn. App. at 106 (“This court will not relieve a defendant from a judgment taken against him due to his willful disregard of process, *or due to his inattention or neglect* in a case such as this where there has been no more than a prima facie showing of a defense on the merits. *It should also be noted that relief is likewise denied by the federal courts under Fed. R. Civ. P. 60(b)(1), the analogous federal rule, where a judgment results from mere carelessness.*) (emphasis added).

<sup>124</sup> CP 200, 316.

be removed and replaced.<sup>125</sup> Westlund has further demonstrated that replacement will cost \$158,599.<sup>126</sup> To the extent that Crow could convince a fact-finder that its disclaimers are valid and enforceable and apply to the remaining \$14,012.75 of Westlund's judgment, this creates a prima facie defense *only to that portion of the damages* and not to liability or the remaining \$158,599 of damages.<sup>127</sup>

**2. Crow's Seismic Event Theory is Speculative and Fails to Rebut Evidence of Crow's Breach of Contract**

Crow's expert's opinion that the damage to Westlund's roof was caused by seismic activity fails for two reasons. First, it is essentially a conclusion unsupported by facts. Mr. Kunze states that "[t]he pattern and location of the cracking [in the concrete structure of the building itself] suggests damage caused by a seismic event or earthquake."<sup>128</sup> However, his conjecture is unsupported by any evidence of any seismic events in the relevant time period – since the roof was installed in late 2004.<sup>129</sup> Even if he is correct that cracks in the building were caused by seismic activity, no

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<sup>125</sup> CP 47, 49.

<sup>126</sup> This includes the contractors bid of \$153,599 plus \$5,000 in construction management fees. CP 47.

<sup>127</sup> See *Shepard Ambulance*, 95 Wn. App. at 241 (judgment with respect to liability may stand even if defendant has defense to damage award).

<sup>128</sup> CP 139-40 ¶6.

<sup>129</sup> See CP 184 (date of completion 9/7/2004).

evidence in the record establishes that this occurred after the roof was installed.

Second, even if Crow had submitted evidence to show that seismic activity occurred subsequent to roof installation, this does not rebut, explain, or contradict the evidence turned up during destructive investigation by Westlund's expert, Robb Smith. Mr. Smith's investigation showed that Crow failed to properly clean the control joints when it installed the roof, leading to failure of the adhesive bond in the joints and ultimately to roof failure. Because Crow's earthquake theory does not explain away or even address its failure to perform the control joint cleaning required by the contract – or the damages caused therefrom – it falls far short of being a conclusive or even strong defense.<sup>130</sup> Thus, Crow has clearly provided at best a prima facie defense – as opposed to a strong or virtually conclusive defense – and thus, its reasons for defaulting should be closely scrutinized.<sup>131</sup>

## VI. CONCLUSION

This is a simple case. Westlund properly served Crow with a summons and complaint, and Crow failed to appear or answer. Crow had

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<sup>130</sup> See Waxman, 132 Wn. App. at 147 (finding defendant's prima facie case fails because it did not explain plaintiff's theory of liability: "The materials submitted by Waxman do not explain how Waxman could avoid a finding of liability simply by proving that some other entity actually manufactured the supply line.").

<sup>131</sup> See Cash Store, 116 Wn. App. at 842.

no legitimate reason to assume its insurer was defending it. Despite knowledge of the lawsuit, the insurer similarly did nothing. Such inaction in response to process is inexcusable and cannot justify the vacation of a judgment under CR 60(b)(1). Therefore, Westlund respectfully requests that this Court reverse the trial court's order vacating appellant's judgment.

DATED this 19 day of October, 2009.

HARPER | HAYES PLLC

By: 

Gregory L. Harper, WSBA No. 27311  
Charles K. Davis, WSBA No. 38231  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on *Monday, October 19, 2009*, I caused and true and correct copy of this document to be delivered in the manner indicated to the following parties:

**BY MESSENGER**  
Steven G. Wraith  
Lee Smart PS, Inc.  
701 Pike Street, Suite 1800  
Seattle, WA 98101-3929

DATED this 19<sup>th</sup> day of October, 2009.

  
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Jessica Gardner