

65811-1

63877-7

NO. 63877-7

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

WARREN WESTLUND BUICK-GMC TRUCK, INC.,

Appellant-Plaintiff,

v.

CROW ROOFING & SHEET
METAL, INC.,

Respondent.

BRIEF OF RESPONDENT

Steven G. Wraith, WSBA No. 17364
Gauri Shrotriya Locker, WSBA No. 39022
Of Attorneys for Respondent

LEE SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

2009 FEB -9 4:11 PM
FILED
COURT OF APPEALS
DIVISION I
SEATTLE, WA

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE	3
A. Procedural background.	3
B. Factual background.....	4
1. Crow entered into a contract with Westlund subject to specific exclusions and exceptions.	4
2. Investigations by manufacturer of roof membrane..	5
3. Crow’s tender of Westlund’s claim to its liability insurer.	6
4. Communication between CNA and Westlund’s counsel.	7
5. Westlund filed suit without notice to Crow or CNA.....	7
6. Westlund obtained a default judgment without further notice to Crow or CNA.....	9
IV. ARGUMENT.....	10
A. Standard of review.....	10
1. The trial court’s decision is reviewed for abuse of discretion.	10
B. The default judgment was properly vacated under CR 60(b)	11
1. Crow demonstrated a strong <i>prima facie</i> defense against the underlying claims.	13
2. The superior court did not abuse its discretion where Crow established that its failure to answer was due to mistake and excusable neglect.....	18
a. A genuine misunderstanding existed between Crow and its insurer which justified setting aside the default judgment in light of decisional law.	18

TABLE OF AUTHORITIES
Table of Cases

	Page(s)
Cases	
<i>America Nursery v. Indian Wells</i> , 115 Wn.2d 217, 222, 797 P.2d 477 (1990)	17
<i>Berger v. Dishman Dodge, Inc.</i> , 50 Wn. App. 309, 312, 748 P.2d 241 (1987)	19, 24, 29
<i>Calhoun v. Merritt</i> , 46 Wn. App. 616, 731 P.2d 1094 (1986).....	24, 29
<i>Golson v. Carscallen</i> , 155 Wash. 176, 177, 283 P. 681 (1930)	19, 20
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 681-82, 599 P.2d 1289 (1979)	11, 22, 32
<i>Heidebrink v. Moriwacki</i> , 104 Wn.2d 392, 400, 706 P.2d 212 (1985)	30
<i>Leavitt v. De Young</i> , 43 Wn.2d 701, 706, 263 P.2d 592 (1953).....	10, 27
<i>Lee v. Western Processing Co.</i> , 35 Wn. App. 466, 468, 667 P.2d 638 (1983)	11
<i>Norton v. Brown</i> , 99 Wn. App. 118, 124, P.2d 1019 (1999).....	19, 29
<i>Peoples State Bank v. Hickey</i> , 55 Wn. App. 367, 371, 777 P.2d 1056, <i>rev. den.</i> , 113 Wn.2d 1029 (1989).....	11
<i>Pfaff v. State Farm Mut'l Automobile Ins. Co.</i> , 103 Wn. App. 829, 935, 14 P.3d 837 (2000)	13, 14
<i>Rogers Walla Walla, Inc. v. Ballard</i> , 16 Wn. App. 92, 553 P.2d 1379 (1976), <i>rev. denied</i> , 88 Wn.2d 1004 (1977)	33
<i>Sacotte Constr., Inc. v. Nat'l Fire & Marine Ins. Co.</i> , 143 Wn. App. 410, 414, 177 P.3d 1147 (2008)	11, 13, 22, 32
<i>Showalter v. Wild Oats</i> , 124 Wn. App. 506, 512, 101 P.3d 867 (2004)....	17
<i>Sofie v. Fiberboard Corp.</i> , 12 Wn.2d 636, 667, 771 P.2d 711 (1989).....	11
<i>State ex rel. Trickel v. Superior Court</i> , 52 Wn. 13, 100 P. 155 (1909)	22, 32
<i>State v. Johnston</i> , 143 Wn.App. 1,14-15, 177 P.3d 1127 (2007).....	29
<i>State v. Worl</i> , 129 Wn.2d 416, 425, 918 P.2d 905 (1996).....	33
<i>Suburban Jan. Serv. v. Clarke American</i> , 72 Wn. App. 302, 313, 863 P.2d 1377 (1993)	11

Page(s)

TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.,
140 Wn. App. 191, 202, 165 P.3d 1271 (2007)..... 14

White v. Holm, 73 Wn.2d 348, 351-52, 438 P.2d 581
(1968) 10, 11, 12, 13, 14, 19, 25, 26, 30

Wilma v. Harsin, 77 Wn. App. 746, 747, 893 P.2d 686 (1995) 11, 19, 20

Rules and Regulations

CR 55..... 10, 12

CR 55(c)(1)..... 12, 22, 32

CR 60..... 10

CR 60(b) 1, 2, 11, 12

CR 60(b)(1)..... 1, 2, 12, 18

CR 60(b)(4)..... 22, 32

RAP 10.3(a)(5) 34

I. INTRODUCTION

Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits. Appellant Westlund Buick GMC Truck, Inc. (“Westlund”) requests this court overturn the trial court's decision granting respondent Crow Roofing & Sheet Metal, Inc.'s (“Crow”) motion to set aside the default judgment despite significant evidence and law that the trial court did not abuse its discretion. The trial court's ruling setting aside the default judgment against Crow should be affirmed.

Crow demonstrated that, under the four factors which guide the trial court's exercise of discretion under CR 60(b), the default judgment should be set aside. Westlund concedes that three of the four factors were established below – that Crow presented evidence of a prima facie defense to all of Westlund's claims, that Crow acted with due diligence after receiving notice that the default judgment was entered, and that no substantial hardship would result to Westlund if the judgment were set aside.

Crow established that, under CR 60(b)(1), its failure to appear was occasioned by mistake or excusable neglect under well-established decisional law. Default judgments are set aside upon a minimal showing of mistake or inadvertence in failing to answer, and courts have

consistently found that in a situation where a defendant reasonably assumes his insurer would hire defense counsel, a failure to respond to a plaintiff's complaint constitutes inadvertence, mistake or excusable neglect. Here, Crow promptly notified its liability insurance carrier of the suit and reasonably assumed that it would retain defense counsel.

A motion to vacate a default judgment is essentially an equitable proceeding in which the trial court balances the interests in favor of finality against the interests in favor of allowing the defendant his or her day in court. Here, Crow established and submitted sufficient evidence to support setting aside the default judgment. In exercising its sound discretion, the trial court correctly applied the standards governing motions to set aside default judgments under CR 60(b) and, as such, its decision should be affirmed.

II. ASSIGNMENTS OF ERROR

Assignments of Error

Crow assigns no error to the action of the King County Superior Court. Crow asks that the decision be affirmed.

Issues Pertaining to Assignments of Error

Crow disagrees with and objects to Westlund's characterization of the issues presented for review. The issues are more properly stated as follows:

In vacating the default judgment against Crow, under CR 60(b), whether the trial court exercised its discretion on untenable grounds or for untenable reasons, when:

1. The declarations, photographs and other evidence set forth facts establishing Crow's strong *prima facie* defense;

2. Crow promptly notified Continental Casualty Company ("CNA") its liability insurance carrier, upon service and reasonably assumed that the insurer would retain counsel;

3. On the same day Crow was served, Westlund's counsel failed to disclose to the insurance claims representative that service on Crow had been effectuated;

4. Crow moved to set the default aside approximately three weeks after it was entered and less than a week after receiving notice of the default; and

5. There is no showing of substantial hardship to Westlund by vacation of the default.

III. STATEMENT OF THE CASE

A. Procedural background.

Westlund filed this lawsuit on February 27, 2009. CP 3. Crow was served with the summons and complaint via personal service on March 4, 2009. CP 75; CP 165 ¶ 7. Westlund obtained an order of default

on April 7, 2009. CP 77. A default judgment of \$172,611.75 was obtained on April 27, 2009. CP 78-79. Westlund notified Crow and CNA of the default judgment on May 27, 2009. CP 162-63; CP 177-78.

On June 3, 2009, counsel for Crow filed a notice of appearance. CP 134. The same day, Crow moved to set aside the default. CP 132-33; CP 193. The trial court granted Crow's motion to set aside the default judgment on June 26, 2009. CP 327-28.

Crow filed a notice of appeal on July 21, 2009. CP 335.

B. Factual background.

1. Crow entered into a contract with Westlund subject to specific exclusions and exceptions.

In August 2004, Westlund and Crow entered into a contract whereby Crow agreed to install a roofing system for Westlund, a car dealership, on the deck of Westlund's roof-top parking lot. *See* CP 165 ¶ 11; CP 180-82. The contract states in relevant part:

Crow Roofing shall have no responsibility at any time after completion of the work for damages of any kind to persons or property located below the installed roof membrane, whether or not such damages result from (a) **leaks** or other weather-oriented sources or (b) mold growth.

CP 182 (emphasis added). Crow issued a five-year warranty subject to the following limitations:

a. This guarantee does not cover damages caused by lightning, windstorm, hailstorm, or other unusual phenomena of the elements; **foundation settlement**;

failure or cracking of roof deck; faulty building design or construction; inferior ventilation, defects or failure of material used as a roof deck; defects or failure of material as a roof base over which the roof, chimneys, skylights, vents or other parts of the building are supported; or fire. **If the roof is damaged by any of the foregoing, this guarantee shall thereupon become null and void** for the balance of the guarantee period unless such damages be repaired by the contractor at the expense of the party requesting such repairs. This guarantee does not cover required roof maintenance (i.e. leaks originating from plugged roof drains, inadequate pitch pocket filler, or inadequacies of roofing equipment.)[sic]

...

e. Limitation of Liability: **The guarantee is issued in lieu of all other statements or warranties, expressed or implied,** including the warranty of Merchantability[sic] and all other obligations and liabilities on the part of Crow Roofing. **In no event shall Crow Roofing be liable for any consequential damages to the building or its contents.**

CP 184 (emphasis added).

2. Investigations by manufacturer of roof membrane.

After Westlund complained to Crow in July 2006 about leaks, Crow contacted the 3M Company, which manufactured the roof deck membrane installed by Crow. CP 166 ¶ 13. Crow provided 3M with photographs of the roof deck and structure which were taken on August 29, 2006. CP 166 ¶ 14; CP 189-92.

As a result, on September 5, 2006, 3M concluded that the alleged problems were not related to Crow's work or product failure; rather, that

excessive movement in the structure was the root cause of the water leaks below the roof membrane. CP 166 ¶ 13, CP 186-87.

3. Crow's tender of Westlund's claim to its liability insurer.

On November 5, 2008, Gregory Harper, counsel for Westlund, sent a formal demand to Crow regarding the roofing claim. CP 164 ¶ 3; CP 170-71. The next day, Crow forwarded the demand to Crow's insurance broker. CP 165 ¶ 4; CP 173.

On November 10, 2008, CNA claims representative Thomas Howell sent Crow a letter acknowledging receipt of the claim. CP 165 ¶ 5; CP 175. The letter from Mr. Howell instructed Crow to fax all correspondence relating to the matter to his fax number. CP 175. As a result, on November 18, 2008, Crow faxed a number of documents and correspondence relating to the transaction to the number provided by Mr. Howell. CP 165 ¶ 6.

On November 19, 2008, CNA claims representative Sarah Rapolas mailed Crow a notice that the claim had been received in CNA's Construction Defect Unit and that she would be the adjuster handling Crow's claim. CP 152 ¶ 3; CP 158. The notice did not provide Crow with instructions to fax all correspondence relating to the matter to a different fax number. *See* CP 158.

4. Communication between CNA and Westlund's counsel.

After November 19, 2008, Ms. Rapolas exchanged multiple telephone calls and correspondence with Mr. Harper.¹ On November 25, 2008, Ms. Rapolas requested further information regarding the claim from Mr. Harper. CP 58 ¶ 6. On December 1, 2008, Mr. Harper and Ms. Rapolis discussed Westlund's claim for damages. CP 67. Later that day, in an effort to resolve the matter without litigation, Mr. Harper forwarded additional information to Ms. Rapolas. CP 58; CP 67. On December 15, 2008, Mr. Harper again contacted Ms. Rapolas in an attempt to resolve the claim. CP 58 ¶ 8, CP 69.

In January 2009, Ms. Rapolas retained consultant Pete Fowler Construction Services to investigate causation and assess the alleged damage. CP 153 ¶ 6. Richard Kunze of Fowler Construction conducted an on-site inspection and advised Ms. Rapolas and Crow that the probable cause of the water leaks and other problems was excessive movement of the structure and not Crow's work or material. CP 153 ¶ 6. Ms. Rapolas subsequently advised Mr. Harper of Mr. Kunze's opinions. CP 153 ¶ 6.

5. Westlund filed suit without notice to Crow or CNA.

On March 3, 2009, Mr. Harper forwarded a courtesy copy of the

¹ CP 152 ¶ 4.

complaint to Ms. Rapolas with a notation that suit had been filed. CP 153 ¶ 7; CP 160. Mr. Harper did not advise that the summons and complaint were out for service on Crow. *See* CP 160. Rather, Mr. Harper stated “my client remains ready and willing to sit down with CNA at any time to attempt to negotiate a settlement of all claims.” CP 160.

Meanwhile, on March 4, 2009, Crow was served with the summons and complaint via personal service. CP 75; CP 165 ¶ 7. Within a day of receiving the summons and complaint, Crow faxed the summons and complaint to CNA, to the attention of Ms. Rapolas at the fax number listed on Mr. Howell’s correspondence. CP 165 ¶ 8. As Ms. Rapolas and Mr. Howell work in different offices as well as different divisions of CNA, Ms. Rapolas never received the notice that Crow had been served with the summons and complaint. CP 153 ¶ 9.

That same day, March 4, 2009, Ms. Rapolas called Mr. Harper to acknowledge receipt of the copy of the summons and complaint from Mr. Harper. CP 153 ¶ 8. Ms. Rapolas notified Mr. Harper that CNA was denying Westlund’s claim for damages due to a lack of liability on the part of Crow. CP 153 ¶ 8. Ms. Rapolas did not indicate that CNA denied coverage for defense of the claims; rather, in response to Mr. Harper’s questions regarding retention of defense counsel for Crow, she indicated that CNA “may be” paying for a defense for Crow. CP 153 ¶ 8. At no

time during this conversation did Mr. Harper state that he had served Crow that day, or had planned to serve Crow that day. CP 153 ¶ 9.

Later that day, Mr. Harper emailed Ms. Rapolas a copy of the report from Westlund's expert witness with the notation "[w]e think it would make more sense to try and resolve this without the litigation." CP 254. Again, Mr. Harper did not advise that he had served Crow. *See* CP 254.

6. Westlund obtained a default judgment without further notice to Crow or CNA.

Without any further notice to Crow or CNA, Westland obtained an ex parte order of default on April 7, 2009. CP 197. Within weeks, again without any notice or knowledge of the defendant or CNA, a default judgment of \$172,611.75 was obtained, ex parte, on April 27, 2009. CP 197; CP 165 ¶ 10; CP 177-78. Neither Crow nor CNA had any notice of the default judgment until May 27, 2009. CP 153-54 ¶ 10; CP 162-63; CP 165 ¶ 10; CP 177-78.

On May 27, 2009, Westlund wrote to Crow and Ms. Rapolas demanding payment of the judgment. CP 162-63; CP 177-78. In its letter, Westlund noted that if the judgment amount was not paid in full by June 2, 2009, it would begin supplemental proceedings to collect the judgment. CP 162; CP 177. Westlund also noted that it would agree to delay enforcing its judgment only if both Crow and CNA agreed to attend a

mediation of the matter, with the mediation to occur no later than June 12, 2009. CP 163; CP 178.

On June 3, 2009, Crow moved to set aside the default under CR 55, 60. CP 193. On June 26, 2009, the trial court heard oral argument from both sides regarding Crow's motion to set aside the default. After hearing argument from both sides, the judge granted defendant's order to set aside the default judgment. CP 327-28.

IV. ARGUMENT

A. Standard of review.

1. The trial court's decision is reviewed for abuse of discretion.

This court's review of the trial court's decision is for abuse of discretion. *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968).

In *White*, the Supreme Court noted that a motion to set aside a default is

[A]ddressed to the sound judicial discretion of the court, and that this court, sitting in appellate review, will not disturb the trial court's disposition of the motion unless it is made to plainly appear that sound discretion has been abused. In this rein, however, it is pertinent to observe that where the determination of the trial court results in denial of a trial on the merits on 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 at 351, (internal citations omitted). *See also Leavitt v. De Young*, 43 Wn.2d 701, 706, 263 P.2d 592 (1953) (citations omitted).

There is an abuse of discretion only when the discretion exercised is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Sacotte Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wn. App. 410, 414, 177 P.3d 1147 (2008). This court should find an abuse of discretion “when no reasonable judge would reach the same conclusion.” *Sofie v. Fiberboard Corp.*, 12 Wn.2d 636, 667, 771 P.2d 711 (1989).

Thus, the issue on appeal is whether the trial court’s decision vacating the default, thereby permitting a resolution on the merits of the case, is manifestly unreasonable or was based on untenable grounds or for untenable reasons.

B. The default judgment was properly vacated under CR 60(b).

Because the law prefers the determination of controversies on their merits, default judgments are disfavored. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 681-82, 599 P.2d 1289 (1979).² Thus, while the finality of judgments is an important value of the legal system, “circumstances arises 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

² See also *White*, 73 Wn.2d at 351; *Wilma v. Harsin*, 77 Wn. App. 746, 749, 893 P.2d 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).

Wn. App. 302, 313, 863 P.2d 1377 (1993).

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 55(c)(1).

CR 60(b) sets forth the relevant criteria for the vacation of a default judgment:

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; or

...

(11) Any other reason justifying relief from the operation of the judgment.

Four factors guide the exercise of the trial court's discretion under

CR 60(b)(1):

(1) that there is substantial evidence to support at least a prima facie defense to the claim asserted; (2) that its failure to appear was occasioned by mistake, inadvertence, surprise, excusable neglect, or that there was irregularity in obtaining the judgment; (3) that the party acted with due diligence after receiving notice that the default judgment was entered; and (4) whether substantial hardship would result to the plaintiff if the judgment were set aside.

White, 73 Wn.2d at 352.

In addition, “because a proceeding to vacate a default judgment is equitable in character, ‘a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable.’” *Sacotte*, 143 Wn. App. at 416-17.

As set forth more fully below, the trial court did not abuse its sound discretion in setting the default judgment aside. This court should not disturb the decision as it plainly appears that the trial court did not abuse its sound discretion in vacating the default.

1. Crow demonstrated a strong *prima facie* defense against the underlying claims.

The standard for establishing a colorable defense 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 351-52; *Pfaff v. State Farm Mut’l Automobile Ins. Co.*, 103 Wn. App. 829, 935, 14 P.3d 837 (2000).

The law requires that trial courts review *prima facie* defenses in the light most favorable to the defendant:

[I]n determining whether there exists evidence to support a *prima facie* defense, ‘the trial court must take the evidence, and the reasonable inferences therefrom, in the light most favorable to the movant.’

TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 202, 165 P.3d 1271 (2007) (citations omitted).

Moreover, courts do not act as a trier of fact in determining whether there exists evidence to support a *prima facie* defense and may not conclusively determine which party's facts control. *TMT Bear Creek Shopping Ctr.*, 140 Wn. App. at 202-03. A *prima facie* defense is demonstrated if the defendant produces evidence that, if later believed by the trier of fact, would constitute a defense to the claims presented. *Pfaff*, 103 Wn. App. at 835.

A showing of a strong *prima facie* defense will limit the court's inquiry into the reasons for the default:

[W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, *prima facie* at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party.

White, 73 Wn.2d at 352-53.

Here, there is **no dispute** that a *prima facie* defense was presented to the trial court.³ As set forth above, this Court's review is limited to whether the trial court's decision to set aside the default was manifestly unreasonable or based on untenable grounds. The trial court did not make findings of fact or conclusions of law; consequently, this Court should not weigh the strength of the evidence when reviewing for an abuse of discretion. The trial court did not serve as a trier of fact, nor should this Court. Thus the strength of the testimony provided by the parties' respective experts is not properly before this Court on review.

Crow presented a strong *prima facie* defense that Crow breached no contractual duty in its installation of the roofing system; consequently, no breach caused Westlund's alleged damages. The limitations and exclusions on the face of the contract disclaimed Crow's liability for all of Westlund's claims.

In addition, the supporting evidence presented with Crow's motion to set aside the default judgment provided the Court with facts and opinions based on personal observations of the witnesses. Witness Richard Kunze's opinions, based on his personal observation, set forth in detail the basis for his assertions. CP 139 ¶ 3. Listing the specific locations of cracks in the building, he noted that "the pattern and location

³ Opening brief at 36 ("Neither amounts to more than a *prima facie* defense.").

of the cracking suggests damage caused by a seismic event or earthquake.” CP 140 ¶ 6. He further opined that the cause of the water intrusion was “probably due to a weakened concrete structure (likely due to seismic activity) that allows the building to shift and move and continue to crack as seen by recurring cracks in the roof repairs.” CP 140 ¶ 8.

Crow has clearly demonstrated a meritorious defense to Westlund’s claims in the underlying action, and therefore support with sufficient evidence the trial court’s decision to overturn the default judgment against Crow. The declaration of Mr. Kunze provides affirmative and specific facts and evidence to support Crow’s defenses to the underlying claim by Westlund. Crow is not relying upon mere speculation and argument of counsel, but has submitted the specific declaration of a qualified witness to support its defenses, and which provide the basis for the overturning of the default judgment by the trial court.

Specifically, Mr. Kunze in his declaration of June 3, 2009 sets forth his qualifications, his first hand knowledge and inspection of the site, and the specific facts that support his conclusion that the water leakage Westlund asserts is due solely to the actions and work of Crow is incorrect.

Crow has satisfied its burden of presenting a meritorious defense if it produces evidence that, if later believed by the trier of fact, constitutes a prima facie defense to the claim asserted. The trial court is not to act as an actual trier of fact and make an ultimate determination as to the validity of that defense at the time the default judgment is vacated. *Showalter v. Wild Oats*, 124 Wn. App. 506, 512, 101 P.3d 867 (2004). The Kunze declaration establishes the meritorious defense, and is more than conclusory or mere assertion. Westlund's argument that the declaration is not persuasive, in their opinion, is irrelevant to the sufficiency for overturning the default judgment.

Finally, any fair reading of Crow's contractual defenses based either on the warranty or exclusions in the underlying contract would constitute a valid defense to Westlund's claims. Such contractual provisions and clauses between two commercial entities limiting or negating damages is enforceable, unless deemed unconscionable. *America Nursery v. Indian Wells*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990).

Moreover, Westlund has conceded that a *prima facie* defense was established before the trial court. Where a substantial *prima facie* defense to all of Westlund's claims was established before the trial court, the trial court did not abuse its discretion in setting the default judgment aside to allow the case to proceed on its merits.

2. The superior court did not abuse its discretion where Crow established that its failure to answer was due to mistake and excusable neglect.

Default judgments are set aside upon a minimal showing of mistake or inadvertence in failing to answer. Courts have consistently found that in a situation where a defendant reasonably assumes his insurer would hire defense counsel, a failure to respond to a plaintiff's complaint constitutes inadvertence, mistake or excusable neglect.

Crow met the criteria of CR 60(b)(1) in that it was through inadvertence, mistake, and excusable neglect that Crow failed to answer the complaint. Crow's officer, Carrie Vares, forwarded suit papers in this instance and then reasonably understood that Crow's insurance carrier was handling the representation of Crow in the instant action. CP 165 ¶¶ 6-9. This misunderstanding clearly falls within the meaning of "mistake, inadvertence, surprise or excusable neglect" as contemplated in CR 60(b)(1), and the trial court did not abuse its discretion in setting aside the default.

a. A genuine misunderstanding existed between Crow and its insurer which justified setting aside the default judgment in light of decisional law.

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.” *Norton v. Brown*, 99 Wn. App. 118, 124, P.2d 1019 (1999); *see also Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987). The Supreme Court has also found excusable mistake where a defendant reasonably assumed his insurer would hire defense counsel after the defendant was personally served with the summons and complaint and promptly notified his insurance company about the plaintiff’s claim. *White*, 73 Wn.2d at 349-50, 354-55.

The record in this case clearly shows that there was a genuine misunderstanding sufficient to justify vacating the default judgment. Washington courts have excused reliance on ambiguous or misleading statements included with the summons and complaint which state:

The service of the Summons and Complaint upon you is **only as a last resort**. It is not yet filed with the Court Clerk. Mr. Wilma is **still more than willing to discuss a settlement of this account**.

Wilma v. Harsin, 77 Wn. App. 746, 747, 893 P.2d 686 (1995) (emphasis added); or a note which states:

Hoping that we may yet be able to settle the matter **without court action**, we have not filed the complaint and will not do so until we give you an opportunity to adjust the matter outside of court if you desire to do so. We have advised our client to let us adjust the matter **outside of court if possible**, and hope you will call and see us at once.

Golson v. Carscallen, 155 Wash. 176, 177, 283 P. 681 (1930) (emphasis added).

In the instant case, one day before he served Crow with the summons and complaint, Mr. Harper forwarded Ms. Rapolas a copy of the filed lawsuit. Included with the copy was the notation:

Notwithstanding, my client remains ready and willing to sit down with CNA at any time to attempt to negotiate a **settlement of all claims.**

CP 71 (emphasis added).

Later that day, Mr. Harper emailed Ms. Rapolas a copy of the report from Westlund's expert witness with the notation:

I encourage you to take another look at this. If you would do so, and if you need additional information, please let me know. We think it would make more sense to try and resolve this **without the litigation**⁴.

CP 73 (emphasis added).

Mr. Harper's statements were virtually no different than the statements deemed misleading or ambiguous in *Wilma* and *Golson*. The trial court's decision to set aside the default was clearly not manifestly unreasonable or untenable in light of decisional law.

Westlund contends that the evidence does not establish that Crow's faxing of the summons and complaint to the wrong number "caused"

⁴ The record shows numerous attempts by counsel for Westlund "to resolve the matter without litigation." *See, e.g.*, CP 58 at ¶ 7 ("On December 1, 2008, in an effort to resolve Westlund's claim against Crow **without litigation** I forwarded information about the roofing-related damage and cost of repair **directly to Ms. Rapolas at CNA.**") (emphasis added) CP 58 at ¶ 8; CP 69 ("[W]e certainly want to make every effort to try and resolve this matter **directly and expeditiously with CNA** before the matter gets to the point of filing suit with Crow. Please call me when you can.") (emphasis added).

Crow's default, and that:

[T]his 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.**

Opening Brief at 24 (emphasis added).

The record shows that Ms. Rapolas, "the correct person at CNA" was provided with a copy of the suit the day before it was served. CP 71. Moreover, as set forth above, the record also shows that the "correct person" never received notice that Crow was served with the suit, although Mr. Harper had contacted Ms. Rapolis the day before he served the complaint, and had been in contact with her twice the day he actually served the complaint in his continued attempts to resolve the claims "without the litigation." *See* CP 153-54 ¶¶ 9-11.

Westlund contends that "something other than faxing error" must have caused the default- if this is true, the evidence in the record leads to the conclusion that Mr. Harper's misleading statements and omissions caused the default.

The record supports the conclusion that the trial court exercised its discretion equitably. The trial court voided an inequitable default so that the matter can be determined on its merits. Ambiguous and misleading

statements included with the summons and complaint warranted the decision to set aside the default.

Washington courts “will liberally set aside default judgments...for equitable reasons in the interests of fairness and justice.” *Sacotte*, at 143 Wn. App. at 414; *see also Griggs*, 92 Wn.2d 576 at 582.

As such, courts have the discretion to set aside default judgments if the plaintiff has done something that would render enforcing the judgment inequitable. *Sacotte*, 143 Wn.App. at 416-17; *State ex rel. Trickel v. Superior Court*, 52 Wn. 13, 100 P. 155 (1909); cf. CR 60(b)(4) (allowing default to be set aside based on fraud, misrepresentation, or misconduct by adverse party). CR 55(c)(1) states that for good cause shown, and upon such terms as the court deems just, the court can set aside a default. *See* CR 55(c)(1).

In the instant case, one day before he served Crow with the summons and complaint, Mr. Harper forwarded Ms. Rapolas a copy of the filed lawsuit. Included with the copy was the notation:

Notwithstanding, my client remains ready and willing to sit down with CNA at any time to attempt to negotiate a **settlement of all claims**.

CP 71 (emphasis added).

Later that day, Mr. Harper emailed Ms. Rapolas a copy of the report from Westlund’s expert witness with the notation:

I encourage you to take another look at this. If you would do so, and if you need additional information, please let me know. We think it would make more sense to try and resolve this **without the litigation**⁵.

CP 73 (emphasis added).

Mr. Harper's statements were virtually no different than the statements deemed misleading or ambiguous in *Wilma* and *Golson*. The trial court's decision to set aside the default was clearly not manifestly unreasonable or untenable in light of decisional law.

In addition, Westlund contends that the evidence does not establish that Crow's faxing of the summons and complaint to the wrong number "caused" Crow's default, and that:

[T]his 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.**

Opening Brief at 24 (emphasis added).

The record shows that Ms. Rapolas, "the correct person at CNA" was provided with a copy of the suit the day before it was served. CP 71.

⁵ The record shows numerous attempts by counsel for Westlund "to resolve the matter without litigation." *See, e.g.*, CP 58 at ¶ 7 ("On December 1, 2008, in an effort to resolve Westlund's claim against Crow **without litigation** I forwarded information about the roofing-related damage and cost of repair **directly to Ms. Rapolas** at CNA.") (emphasis added) CP 58 at ¶ 8; CP 69 ("[W]e certainly want to make every effort to try and resolve this matter **directly and expeditiously with CNA** before the matter gets to the point of filing suit with Crow. Please call me when you can.") (emphasis added).

Moreover, as set forth above, the record also shows that the “correct person” never received notice that Crow was served with the suit, although Mr. Harper had contacted Ms. Rapolis at CNA the day before he served the complaint, and had been in contact with her twice the day he actually served the complaint in his continued attempts to resolve the claims “without the litigation.” *See* CP 153-54 ¶¶ 9-11.

Westlund contends that “something other than faxing error” must have caused the default- if this is true, the evidence in the record leads to the conclusion that Mr. Harper’s misleading statements and omissions caused the default.

The record supports the conclusion that Judge Shaffer exercised her discretion equitably. She voided an inequitable default so that the matter can be determined on its merits.

- b. The superior court did not abuse its discretion where the record shows that excusable neglect justified setting aside the default judgment.**

Miscommunications between attorneys, clients and insurance companies have been deemed excusable neglect justifying setting aside default in Washington. *Berger*, 50 Wn.App. 309; *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986).

Westlund’s assertion that “the facts and circumstances in this case can support no finding other than Crow failed to take any reasonable

action to protect its interests”⁶ is without merit. The record shows that the trial court’s decision to set aside the default was supported by evidence to the contrary. Crow took reasonable measures to effectuate an appearance by promptly faxing the summons and complaint to CNA. In equity, this Court should not hold this reasonable misunderstanding against Crow as any willful failure to respond to the lawsuit.

i. **Crow reasonably relied on its insurer to defend.**

White v. Holm is the only Washington case specifically cited in support of Westlund’s assertion that Crow should have demonstrated that Crow received some sort of assurance from its insurer that CNA would defend its claim when Crow moved to set aside the default judgment. *White*, 73 Wn.2d 348; Opening brief at 27.

Although Westlund has apparently focused on a single factor (that “the court was clear that Holm’s reliance on these assurances justified his bona fide belief that the insurer would provide counsel,” (Opening brief at 21), the Court actually listed a number of factors which aided in their analysis of the underlying facts:

[W]e are satisfied that in any event the instant circumstances do not warrant an imputation of any such fault to defendants, who were otherwise found to be blameless. Clearly this should be so where it appears, as it does here, that Mr. Holm **promptly notified the insurance**

⁶ Opening Brief at 14.

agent of plaintiff's outstanding claim, expeditiously consulted with an attorney and with the appropriate insurance adjuster, relied in good faith upon the assurances of the insurance agent and the attorney as to the insurer's responsibility in furnishing counsel, **diligently complied with all requests of the insurance adjuster relative to furnishing information** concerning the accident and the plaintiff's claim, executed the "nonwaiver" agreement with the advice of the attorney he had consulted, **and** justifiably entertained a bona fide belief that the insurer would provide counsel to defend the action at least until such time as the extent of coverage was determined.

White, 73 Wn.2d at 354-55 (emphasis added). Here, Crow promptly notified its insurer of the outstanding claim, CP 165 ¶¶ 7-8; diligently complied with all requests from the insurer relative to furnishing information, CP 165 ¶¶ 6-8; and justifiably entertained a bona fide belief that Crow's insurer would defend the action. CP 165 ¶ 9.

Moreover, the Court further emphasized the importance of due diligence in noting that the defendant's failure to "persistently pursue the adjuster" was mitigated by, *inter alia*, his diligence in moving to set aside the default:

The fact that Mr. Holm did not persistently pursue the adjuster with inquiries relative to the progress of the matter, **if such failure be a significant factor in other circumstances, is mitigated** somewhat in the instant case by the alacrity with which the default was claimed and the judgment entered, as well as **by the promptness with which the motion to set aside the default was submitted.**

White, 73 Wn.2d at 355 (emphasis added). Here, the record reflects that the motion to set aside the default was prepared and filed within 5 days of

Crow learning of the default. CP 165 ¶ 10, CP 193. As such, not only was there much less than one year's time period involved, there was an immediate and proper response by the defense upon notice of the mistake and inadvertent failure to answer the lawsuit.

The *White* court also noted that their conclusion was “well within the spirit of several prior decisions of this court under somewhat analogous circumstances.” *White*, 73 Wn.2d at 355. In *Leavitt v. DeYoung*, 43 Wn.2d 701, 263 P.2d 592 (1953), plaintiff's attorney “conversed and corresponded” with the defendant's insurance adjuster with regard to the collision, but no settlement resulted as a result of these contacts. *Id.* at 704. Although the defendant and insurance company both received the summons and complaint, *id.* at 704-05, the attorney for the insurance company was in the process of moving offices, and “in some manner the file relating to [the] case had been mislaid and was not recovered until after the default judgment had been taken.” *Id.* at 705. Nevertheless, the *Leavitt* court affirmed the trial court's decision to set aside the default judgment. *Id.* at 709.

Here, the trial court was well within its discretion where the record supports the conclusion that Crow reasonably assumed its insurer would hire defense counsel. The insurer had hired an expert to investigate the plaintiff's claim, and a claims representative had been corresponding with

the plaintiff over the course of the year prior to the filing of the complaint. CP 152-53 ¶¶ 3 – 7. Crow had no reason to believe its interests were not being protected after promptly forwarding legal documents to its insurer. Crow should not be punished with a default judgment by relying on procedures that should have avoided failing to respond to legal process.

ii. Whether or not Crow's insurer accepted tender of the claim is irrelevant.

Westlund's argument regarding a purported lack of evidence regarding Crow's tender of the claim to CNA, and whether Crow's belief that CNA would defend the claim were reasonable in light of Washington insurance coverage law were never raised before the trial court by Westlund; therefore, the trial court did not abuse its discretion in not taking insurance coverage law into account. Moreover, as the arguments were not made in opposition to Crow's motion to set aside the default, Crow was under no obligation to furnish the trial court with additional correspondence between Crow and its insurer *made in anticipation of litigation*, given that their motion to set aside the default was already supported by established Washington law.

Westlund's reliance on Washington cases *outside* the insured-insurer context is telling. Moreover, Westlund's exhaustive analysis of cases from other states *within* the insured-insurer context is entirely

irrelevant and unnecessary. The out of state authority cited by Westlund is not persuasive nor is it binding on this court. *See, e.g. State v. Johnston*, 143 Wn.App. 1,14-15, 177 P.3d 1127 (2007). The trial court's decision to set aside the default judgment is well-grounded in existing Washington law and is supported by the record.

The appellate cases cited by Crow in support of their motion to set aside the default judgment are not factually distinguishable. In attempting to distinguish *Berger*, 50 Wn.App. 309, Westlund argues:

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." **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.**

Opening brief at 25 (citations omitted)(emphasis added).

The silence in the *Berger* case merely underscores Crow's argument that the information before the trial court set forth in Crow's motion to set aside the default was more than adequate for the trial court to exercise its discretion and set aside the default.

Similarly, in *Norton*, 99 Wn. App. 118, and *Calhoun*, 46 Wn. App. 616, the fact that their insurers were already involved in the respective defendants' cases caused the defendants/policyholders to believe that their

insurers would respond to the complaints. The record before the trial court reflects a substantial amount of contact between Ms. Rapolis and Mr. Harper which occurred prior to and after filing suit.

The instant matter is not an insurance coverage matter; CNA is not a party to the suit, nor is there any dispute that CNA retained counsel to defend Crow. Given that Westlund's argument regarding insurance coverage law was never before the trial court (see discussion below at Section D, I), Westlund's arguments regarding the purported lack of evidence in the record regarding communications between Crow and its insurer made regarding the incident are wholly without merit. This is especially true with regard to the propriety of submitting correspondence between Crow and its insurer made in anticipation of litigation. *See Heidebrink v. Moriwacki*, 104 Wn.2d 392, 400, 706 P.2d 212 (1985).

- iii. **Crow established that its actions did not warrant that any fault of its insurance carrier be attributed to Crow.**

The Supreme Court opinion in *White* supports Crow's argument before the trial court that any breakdown in CNA's internal office procedure should not be attributed to Crow. CP 319; *White*, 73 Wn.2d at 354. In *White*, the Court noted that "the instant circumstances do not warrant an imputation of any such **fault** to defendants, who were otherwise found to be blameless." *White*, 73 Wn.2d at 354 (emphasis

added).

Thus, any *fault* of CNA should not be attributed to Crow, where Crow promptly forwarded the summons and complaint to their insurance carrier with the expectation that their carrier would provide a defense to the claim.

3. Crow acted with due diligence in appearing and moving to vacate the default.

Once Crow learned of the default, the present motion to set aside the default was prepared and filed. Since this default was taken on April 27, 2009, the motion to vacate filed on June 3, 2009, was well within the one-year cutoff which allows for such a motion. CP 78-79, 132.

As such, not only was there much less than one year's time period involved, there was an immediate and proper response by Crow upon notice of the mistake and inadvertent failure to answer the lawsuit. Crow took immediate action to contact its insurer and have the matter set aside.

4. Westlund can show no substantial hardship by vacation of the default.

Finally, there is clearly no substantial hardship or prejudice to Westlund. No formal discovery has taken place. Weighed against the prejudice to Crow if the default is not set aside, the delay has been short and the prejudice to Westlund negligible.

Crow's arguments regarding due diligence and the lack of prejudice to Westlund were not opposed by Westlund before the trial court and were therefore tacitly conceded. CP 319.

C. Westlund's failure to notify Crow and CNA prior to obtaining the default judgment rendered enforcement of that judgment inequitable.

Washington courts "will liberally set aside default judgments . . . for equitable reasons in the interests of fairness and justice." *Sacotte*, at 414; *see also Griggs v. Averbeck Realty*, 92 Wn.2d at 582.. As such, courts have the discretion to set aside default judgments if the plaintiff has done something that would render enforcing the judgment inequitable. *Sacotte*, 143 Wn.App. at 416-17; *State ex rel. Trickel v. Superior Court*, 52 Wn. 13; *cf.* CR 60(b)(4) (allowing default to be set aside based on fraud, misrepresentation, or misconduct by adverse party). CR 55(c)(1) states that for good cause shown, and upon such terms as the court deems just, the court can set aside a default. *See* CR 55(c)(1).

Here, the record shows that Mr. Harper had been in contact with Ms. Rapolas on a number of occasions, both before and after the complaint was served on Crow in repeated attempts to resolve Westlund's claims "without the litigation." *See* CP 153-54 ¶¶ 9-11; CP 162-53. While he apparently had the foresight to ask Ms. Rapolas whether CNA would be paying for a defense for Crow, it is undisputed that he failed to

mention that he had served Crow with the summons and complaint.

Combined with his misleading statements regarding resolving the claim “without the litigation,” enforcement of the default would have been inequitable in the instant case. The trial court exercised its discretion equitably in setting aside the default.

D. Crow’s motion to strike portions of Westlund’s brief.

1. Westlund raises issues for the first time on appeal.

Much of the argument and evidence contained in Westlund’s motion is raised for the first time before this court and is not part of the record below, including: (1) Westlund’s argument that CNA’s duty to defend was not triggered by Crow because Crow did not “tender” a claim to CNA; (2) Westlund’s argument that even if CNA’s actions are imputed to Crow, CNA’s neglect was similarly inexcusable; (3) Westlund’s argument that CNA was not lulled into inaction by negotiations; and (4) Westlund’s argument that a plaintiff has no duty to inform a non-party insurer of its intent to seek default. *See* Opening Brief at 28-35.

The Court of Appeals may refuse to consider argument or evidence not raised before the superior court. *See State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996); *see also Rogers Walla Walla, Inc. v. Ballard*, 16 Wn. App. 92, 553 P.2d 1379 (1976), *rev. denied*, 88 Wn.2d 1004 (1977).

Because the standard of review of the superior court's decision is abuse of discretion, it would be improper for this court to consider any argument or evidence not part of the record below. Nevertheless, and without waiving any objection, respondent will respond to the new arguments raised by Westlund for the first time in his motion.

2. Westlund's statement of the case is not a fair statement of the facts, and the court should disregard it.

RAP 10.3(a)(5) requires that the statement of the case should be “[a] fair statement of the facts and proceedings relevant to the issues presented for review, **without argument**. References to the record should be included for each statement.” (emphasis added). Accordingly, for the reasons set forth more fully below, this court should disregard Westlund's statement of the case.

Westlund's statement of the case is rife with argument, conjecture, and gross inaccuracies, including: (1) the argument and assertion that “[n]either Crow nor CNA gave any explanation why the documents never made it from Mr. Howell – if he got them – to Ms. Rapolas,”⁷ (2) the false assertion, conjecture and argument that “it is undisputed that Crow never affirmatively requested that CNA provide it with a defense to Westlund's

⁷ Opening Brief at 8.

lawsuit,”⁸ (3) the false assertion that it is “undisputed that Crow had no contact with Ms. Rapolas or anyone else at CNA”⁹; (4) the conjecture and argument that the record “demonstrates that Crow never even attempted to contact anyone at CNA between the time it faxed the documents on March 6, 2009 and the time it learned of the judgment against it on May 27, 2009;”¹⁰ (5) the argument that Crow “offered no actual evidence of negotiations” to the trial court, and that “the only evidence in the record shows that CNA never offered any money to settle the claim at any time”¹¹; (6) the argument that “CNA's sole, substantive discussions” with Westlund’s counsel were limited to requesting information and telling Westlund that CNA was denying the claim in its entirety¹²; (7) the argument that “at no time did any person or entity appear (formally or informally) on behalf of Crow in the action,”¹³ and (8) the false assertion and argument that “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.”¹⁴ This court should strike all of those assertions.

⁸ Opening Brief at 8.

⁹ Opening Brief at 8.

¹⁰ Opening Brief at 8-9.

¹¹ Opening Brief at 9.

¹² Opening Brief at 10.

¹³ Opening Brief at 10.

¹⁴ Opening Brief at 10.

V. CONCLUSION

Based on all the factors noted above, the vacation of the present default was proper and the trial court did not abuse its discretion. Accordingly, the trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of December, 2009.

LEE SMART, P.S., INC.

By: 

Steven G. Wraith, WSBA No. 17364
Gauri Shrotriya Locker, WSBA No. 39022
Of Attorneys for Respondent
Crow Roofing & Sheet Metal, Inc.

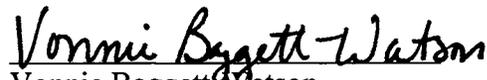
CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on December 9, 2009, I caused service of the foregoing on each and every attorney of record herein:

VIA HAND DELIVERY

Mr. Gregory L. Harper
Harper Hayes, PLLC
600 University Street, Suite 2420
Seattle, WA 98101

DATED this 9th day of December at Seattle, Washington.



Vonnice Baggett-Watson,
Legal Assistant

FILED
STATE OF WASHINGTON
2009 DEC -9 PM 4:33