

69234-8

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No. 69234-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DANA AND HASAN AKHAVUZ,

Appellants,

v.

TRACY ARNOLD MOODY, SEVEN ENTERTAINMENT, INC.,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Mary Yu)

RESPONDENTS' ANSWERING BRIEF

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I. INTRODUCTION

Under *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), default judgments are set aside when a defendant shows: (1) evidence to support, at least prima facie, a defense to the claim asserted by plaintiff; and (2) that the default resulted from mistake, inadvertence, surprise or excusable neglect. While the trial court may also consider the secondary factors of due diligence and substantial hardship, the first factor, a meritorious defense, is the most compelling. *Id.* at 352; *Borg-Warner Acceptance Corp. v. McKinsey*, 71 Wn.2d 650, 652, 430 P.2d 584 (1967). This is consistent with Washington's unwavering policy of favoring disposition of controversies on the merits rather than by default. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

Respondents Tracy Arnold Moody and Seven Entertainment, Inc. (collectively, "Studio Seven") ask this Court to affirm the Order Granting the Motion to Vacate Order of Default and Default Judgment. The trial court properly applied the *White* factors and found that Studio Seven had (i) potentially meritorious defenses to Akhavuz's claims; (ii) established excusable neglect and mistake; and (iii) acted with diligence by moving to vacate promptly after learning of the default. In particular, the court correctly invoked the "innocent insured doctrine," which recognizes that a

“genuine misunderstanding between the insured and his insurer as to who is responsible for answering summons and complaint will constitute a mistake for purposes of vacating a default judgment.” *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987).

Studio Seven was an “innocent insured.” The record confirms that Studio Seven did not answer the complaint or immediately oppose the motion for default because it reasonably believed that its insurer was handling the investigation, defense and settlement of Akhavuz’s claims. Indeed, Studio Seven did not know about the default judgment until a mere three weeks before seeking to vacate it. That Studio Seven’s insurer and its attorney knew about the default for months is simply irrelevant; as the trial court properly concluded, “the negligence of an insurer cannot be imputed to innocent insureds.” CP 545. Based on the evidence and the policy disfavoring default judgments, the trial court did not abuse its discretion by vacating the default judgment against Studio Seven.

II. COUNTERSTATEMENT OF THE ISSUES

1. Should the Order Granting the Motion to Vacate be affirmed when the trial court properly applied the *White* factors and ruled that: (i) Studio Seven presented defenses to Appellants’ claims; (ii) Studio Seven was an innocent insured; (iii) Studio Seven did not learn of the default judgment until June 2012; and (iv) Studio Seven acted in a timely

fashion by moving to vacate the default judgment approximately three weeks after learning of the judgment? **Yes.**

2. Should the Order Granting the Motion to Vacate be affirmed because the trial court properly determined that the “excusable neglect” prong under the *White v. Holm* test was satisfied when Studio Seven presented evidence that they (i) forwarded a copy of the complaint to their insurer; (ii) believed their insurer would defend the litigation; (iii) did not have notice of the default judgment until June 2012; and (iv) had no knowledge of an attorney-client relationship with Mr. Mesher? **Yes.**

3. Should the Order Granting the Motion to Vacate be affirmed because the trial court properly determined that the “diligence” prong under the *White v. Holm* test was satisfied when Studio Seven presented evidence that they filed the Motion to Vacate less than one month after discovering the default judgment? **Yes.**

III. COUNTERSTATEMENT OF THE FACTS

A. The Alleged Slip and Fall.

Respondents own a live music and entertainment venue known as Studio Seven, which is located in the SODO neighborhood of Seattle, Washington. CP 387. Appellant Dana Akhavuz alleges that she attended a Halloween party at Studio Seven on October 30-31, 2010, which

included musical performances by the Genitorturers, a costume contest, a “bloody t-shirt contest,” and a burlesque show. CP 2, 25, 34, 37. While at Studio Seven, Akhavuz contends that she slipped and fell on a substance, which she claims was fake blood. *Id.* She further claims that she suffered a broken leg and other injuries as a result of her slip and fall. CP 26.

B. Appellants’ Counsel Wanted to Deal Directly With Studio Seven’s Insurer.

On January 20, 2011, Akhavuz’s counsel contacted Studio Seven to notify it of this potential claim. CP 388-89. Akhavuz’s counsel requested the name of Studio Seven’s insurance carrier and indicated that counsel would “**deal directly with [Studio Seven’s] insurer regarding this claim.**” CP 388-89, 392-93 (emphasis added). Studio Seven forwarded a copy of this correspondence to its insurer, Founders Insurance Company (“Founders”), to tender the claim. CP 387-403, 460. Studio Seven subsequently provided information to Founders regarding the event held on October 30 and 31, 2010 to assist Founders with its investigation. CP 389, 460. At all times, Studio Seven believed that Founders was responsible for investigating, managing and settling this claim. *Id.*

C. The Complaint and the Default Judgment.

On May 6, 2011, Akhavuz filed a Complaint for Negligence (the “Complaint”) in King County Superior Court. CP 1-3. The Complaint alleges that “Defendants failed to exercise reasonable care to protect its

business invitees against the dangerous condition which caused Plaintiff to fall.” CP 2. The Summons and Complaint were served on Tracy Moody on May 24, 2012, and on Seven Entertainment, Inc. on May 26, 2011. CP 389, 460. Studio Seven immediately provided copies of the Complaint and Summons to Founders. CP 387-403, 460. Studio Seven did not receive any further communications from Founders or Akhavuz’s counsel in May or June 2011. CP 389, 460. Indeed, Studio Seven did not hear anything more about the lawsuit until June 2012. CP 460. Studio Seven believed that Founders was responsible for defending the litigation. *Id.*

On June 13, 2011, Akhavuz’s counsel prepared and sent a settlement demand letter to Founders. CP 466, 469-74. There is no evidence that this demand letter was provided to Studio Seven. CP 469-474. Akhavuz’s counsel noted that the demand would remain “open for acceptance for thirty (30) days from the date of this letter.” CP 467, 474. Thus, the demand would remain open until July 13, 2011. Founders received this settlement demand on June 17, 2011. CP 466.

On June 16, 2011, twenty one days after the Complaint was served and three days after Akhavuz’s counsel forwarded the 30-day settlement demand to Founders, Akhavuz filed a Motion for Default. CP 10-12. The Motion for Default was not served on Studio Seven or Founders. CP 390, 460, 467. The Order of Default was entered on June 17, 2011. CP 23-24.

Akhavuz then filed a Motion for Default Judgment on June 22, 2011. CP 25-33. The Court entered default judgment in the amount of \$433,046.58 on June 28, 2011. CP 248-49. Critically, the default judgment was entered 15 days before the expiration of the settlement demand. *Compare* CP 248-49, *with* CP 474. Neither Studio Seven nor Founders received notice of the default judgment or a copy of the order. CP 390, 460, 467.

D. Founders' Retention of Attorney Barry Mesher.

In November 2011, a Founders employee reviewed King County's online docket for Akhavuz's lawsuit and discovered that a default judgment had been entered against Studio Seven. CP 467. Founders then retained Lane Powell attorney Barry Mesher to act as defense counsel for Studio Seven. CP 358-61, 407-08. It is undisputed that Studio Seven was not aware that Founders had retained Mr. Mesher to represent them. CP 460. In fact, Studio Seven never had any conversations with Mr. Mesher about the litigation or any other matter. *Id.*

In June 2012, Mr. Mesher terminated his partnership with Lane Powell. CP 359. On June 8, 2012, the file was transferred to Lane Powell attorneys Gabriel Baker and Jennifer Sheffield (née Davis). *Id.* Baker and Sheffield reviewed the pleadings, obtained witness declarations, and spoke with their client, Studio Seven. *Id.* It was only then, during these

conversations with counsel in June 2012, that Studio Seven first learned of the default judgment entered against it a year earlier. CP 460.

E. Respondents' Investigation of the Incident.

Upon learning of the default judgment from its new counsel, Studio Seven conducted its own investigation of Akhavuz's claims for purposes of evaluating whether to move to vacate the judgment. This investigation revealed a number of discrepancies in Akhavuz's account of the purported events of October 30 and 31, 2010:

- The band (Genitorturers) and poster identified in Plaintiffs' Motion for Default Judgment was not the band that performed on Halloween night in 2010. *Compare* CP 34 & 37, *with* CP 387. The band that performed that night was Spiderface. CP 387.
- Studio Seven knew that Spiderface uses fake blood on themselves during their performances, but it was Studio Seven's understanding that the band did not spray the fake blood into the general public area. *Compare* CP 26, *with* CP 387-88.
- Prior to opening each night, the floors are inspected, cleaned, and free of debris, and it is the policy of Studio Seven to always have a supervisor on the floor to remove any debris, spills, or other hazards. CP 388.
- For the event on Halloween night in 2010, Studio Seven had eight staff members on duty—one supervisor, four staff downstairs, and three staff upstairs. *Id.* There was also a security person near the area where Ms. Akhavuz alleges she fell. *Id.*
- The "After Event Incident Report" prepared by Studio Seven on October 31, 2010 did not reference the incident described in the Complaint or the Motion for Default Judgment. *Id.*

CP 387-403. Nicole Russell, manager of Studio Seven, submitted a declaration to the trial court summarizing this investigation. *Id.* This declaration was submitted in support of Studio Seven’s argument that it possessed meritorious defenses to Akhavuz’s claims.

F. The Trial Court Granted Studio Seven’s Motion to Vacate After Fully Considering the *White* Factors.

After completing its investigation, Studio Seven filed a motion to vacate the default judgment on June 27, 2012—approximately three weeks after it first learned of the default judgment. CP 545.¹ The trial court considered the *White* factors and ruled that: (1) Studio Seven has a defense to the claims; (2) Studio Seven was an “innocent insured”; (3) it did not matter that Studio Seven’s insurer knew about the default judgment because its negligence could not be imputed to Studio Seven; and (4) Studio Seven acted diligently in moving to vacate the default judgment only three weeks after learning of the judgment. *See* CP 539, ¶ 16 & CP 545, ¶ 29. Based on these findings, the trial court vacated the

¹ Studio Seven supported its motion with declarations from Nicole Russell, Carlos Ortiz of Founders, Jonathan Silva (an employee of Studio Seven), and Tracy Moody. CP 387-403; 459-74. Akhavuz subsequently moved to strike the declarations of Ortiz, Silva and Moody. CP 483-88. The trial court did not consider the motion to strike. CP 531. Akhavuz does not assign error to this decision and, thus, she cannot challenge the trial court’s consideration of these declarations. *See* RAP 10.3(a).

default judgment against Studio Seven and re-set the matter for trial.
CP 530-31.

IV. ARGUMENT

A. **Default Judgments Are Not Favored and, Thus, The Vacation of a Default Judgment Is Rarely An Abuse of Discretion.**

This Court reviews the trial court's order on a motion to vacate a default judgment for abuse of discretion. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* "Default judgments are not favored in the law." *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). As a result, this Court "is less likely to reverse a trial court decision that sets aside a default judgment than a decision which does not." *Showalter*, 124 Wn App. at 511; *Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 391, 254 P.3d 208 (2011) ("[r]efusal to vacate a default judgment is more likely to amount to an abuse of discretion because default judgments are generally disfavored."). If the trial court's decision to set aside the default judgment "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Showalter*, 124 Wn App. at 510. The trial court's decision below easily satisfies that standard.

B. The Trial Court Did Not Abuse Its Discretion in Ruling That Studio Seven Satisfied the *White v. Holm* Factors.

1. The Trial Court Properly Applied the *White* Factors.

As an initial matter, this Court can easily reject Akhavuz's suggestion that the trial court applied the wrong standard. *See* Opening Br. at 18-20. Under Washington law, a default judgment may be set aside when a defendant shows: (1) evidence to support, at least prima facie, a defense to the claim asserted by plaintiff; and (2) that the default resulted from mistake, inadvertence, surprise or excusable neglect. *White*, 73 Wn.2d at 352. Although secondary factors include consideration of whether the defendant acted with due diligence after notice of the default and whether substantial hardship will result to the plaintiff, it is well-settled that the first factor, a meritorious defense, is the most compelling. *Id.* at 352-53. Indeed, when there is a conclusive defense to the underlying claims, only willful disobedience should preclude vacating the default judgment. *White*, 73 Wn.2d at 352; *Borg-Warner*, 71 Wn.2d at 652. This is consistent with Washington's strong policy of favoring resolution of controversies on the merits. *Griggs*, 92 Wn.2d at 581, 583.

As Appellants concede, the *White* factors "are not applied either rigidly or in a void . . . [t]heir relative importance varies depending on the facts of the case." Opening Br. at 19; *White*, 73 Wn.2d at 352. The Agreed Report of Proceedings confirms that the trial court applied the

White factors. CP 534-45. The court found: (1) Studio Seven has at least a prima facie defense; (2) Studio Seven was an “innocent insured” (and, thus, showed mistake, excusable neglect, etc.); (3) the negligence of an insurer cannot be imputed to an innocent insured (and, thus, it did not matter that Founders knew about the default); and (4) Studio Seven acted in a timely fashion by moving to vacate the default judgment three weeks after first learning of it. *Id.* Accordingly, Akhavuz cannot reasonably maintain that the trial court did not apply the *White* factors properly.

2. Studio Seven Has Meritorious Defenses.

Studio Seven easily satisfied the first *White* factor—the existence of a prima facie meritorious defense. *White*, 70 Wn.2d at 352. Akhavuz does not challenge the trial court’s finding in this regard. *See* Opening Br. at 2. But Studio Seven has more than just a prima facie defense; it has a compelling one. “The more conclusive this showing is, the more readily will the court vacate the default judgment.” *Borg-Warner*, 71 Wn.2d at 652. “A conclusive defense requires little excuse on a prompt motion to vacate an order of default.” *Id.* Although the Agreed Report of Proceedings does not indicate whether the trial court found Studio Seven’s defenses conclusive (CP 539), the record shows that they are.

Studio Seven demonstrated that it owed no duty of care to Akhavuz. “[O]wners of property are not insurers against all happenings

that occur on the premises.” *Fernandez v. State*, 49 Wn. App. 28, 36, 741 P.2d 1010 (1987). For there to be premises liability, a plaintiff cannot prove negligence by the mere fact that he or she slipped and fell. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 448, 433 P.2d 863 (1967). Rather, a plaintiff must prove that: (1) the unsafe condition was caused by the owner or its employees; or (2) the owner had actual or constructive notice of the dangerous condition. *Pimentel v. Roundup*, 100 Wn.2d 39, 49, 666 P.2d 888 (1983). Constructive notice arises “where the condition has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger.” *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 652, 869 P.2d 1014 (1994).

Akhavuz cannot satisfy her burden in proving Studio Seven had actual or constructive notice of a hazardous condition. There is no allegation or evidence that Studio Seven or its employees had actual notice of fake blood on the floor prior to the alleged incident. *Compare* CP 1-3 and CP 25-33, *with* CP 387-91. In fact, Studio Seven presented evidence that it had no such notice. *See* Section III.E; CP 387-88. Similarly, there is no evidence that Studio Seven had constructive notice. Although Studio Seven was aware that fake blood may be used by the band on the stage (CP 387-88), it had no way of knowing it might reach the public areas. To

be sure, there is no evidence that any fake blood was on the floor for a sufficient time for Studio Seven to make a proper inspection and remove it. In fact, the record confirms that Studio Seven satisfied its duty of care by having a supervisor on the floor to remove any debris, spills, or other hazards, as well as a security person near the stage. CP 388.²

Based on this record, Studio Seven presented conclusive defenses to Akhavuz's claims and unquestionably satisfied the first *White* factor.

3. Studio Seven Showed Excusable Neglect and Mistake.

a. The Trial Court Properly Concluded That Studio Seven Was an "Innocent Insured."

The trial court did not abuse its discretion in concluding that Studio Seven satisfied the second *White* factor. A defendant satisfies the second *White* factor when he shows that his failure to timely appear in the action, and answer the plaintiff's complaint, was caused by mistake, inadvertence, surprise or excusable neglect. *White*, 73 Wn.2d at 352. In certain circumstances, defendants can satisfy the second *White* factor by invoking the so-called "innocent insured doctrine." *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987). Under this

² Studio Seven also argued that it possesses meritorious defenses to Akhavuz's claims because: (1) Studio Seven was not the proximate cause of Akhavuz's injuries; and (2) Akhavuz had an obligation to exercise reasonable care for her own safety. CP 349-351.

doctrine, a “genuine misunderstanding between the insured and his insurer as to who is responsible for answering summons and complaint will constitute a mistake for purposes of vacating a default judgment.” *Id.*

This principle was first applied in *White* itself. In *White*, the insured forwarded the complaint to his insurance adjuster, who in turn sent the complaint to the insurance carrier. 73 Wn.2d at 350. Although the insured believed that the carrier would hire counsel to defend the action, no one entered an appearance on behalf of the insured, leading to a default judgment. *Id.* The insured filed a motion to vacate within one month of learning of the default. *Id.* Although affidavits submitted to the trial court established that the defendant did not appear because he believed his carrier would defend him (*id.* at 350, 354), the trial court denied the motion to vacate based on the inexcusable fault of the insurer. *Id.* at 351.

The Washington Supreme Court reversed, and remanded for entry of an order vacating the default judgment. The Court explained that even though the insurer may have mislaid the file or was otherwise negligent, “[w]e need not now decide whether or not there was in fact any culpable neglect on the part of the insurer or its agents.” *Id.* at 354. The Court was “satisfied that . . . the instant circumstances do not warrant an imputation of any such fault to defendants, who were otherwise found to be blameless.” *Id.* “Under these circumstances [the court] would be most

reluctant to hold that Mr. Holm tendered the defense of the action to the insurer at his peril.” *Id.* (citing Annot., 87 A.L.R.2d 870 (1963)).

The Washington Court of Appeals followed this doctrine more recently in *Berger v. Dishman Dodge, Inc., supra*. There, the defendant-insured immediately forwarded the summons and complaint to its insurance carrier, and believed that the carrier would defend the action. 50 Wn. App. at 310. Upon learning of the default judgment, the defendant filed a motion to vacate, which was granted by the trial court. The Court of Appeals affirmed, explaining that the insured “had no reason to believe that his interests were not being protected after promptly forwarding the [Summons and Complaint] to the insurer.” 50 Wn. App. at 312. Like *White*, the *Berger* court concluded that a “genuine misunderstanding” between an insured and an insurer regarding who was responsible for defending an action constitutes a “mistake” sufficient to vacate a default judgment. *Id.* at 312-13.

This case is no different than *White* and *Berger*. The evidence showed that Studio Seven immediately forwarded the Complaint and Summons to Founders; that Studio Seven believed Founders would handle the litigation; that Studio Seven relied on the representations of Akhavuz’s counsel that he would deal directly with Founders, which he did; and finally, that Studio Seven did not learn of the default judgment until June

2012. CP 387-403, 460, 545. In short, Studio Seven did not appear, hire counsel or otherwise defend itself because it had no reason to believe it needed to do so.³ Although Founders learned of the default judgment in November 2011, it did not communicate this information to Studio Seven. CP 460. Even if Founders should have done more, the trial court properly found that Founders' neglect cannot be imputed to Studio Seven. CP 545.

b. Mr. Mesher's Knowledge of the Default Judgment Cannot Be Imputed to Studio Seven.

Nor was it an abuse of discretion for the trial court to refuse to impute the knowledge of Mr. Mesher to Studio Seven, as Akhavuz repeatedly claims. *See* Opening Br. at 33-37. Founders hired Mr. Mesher in November 2011 after it learned of the default judgment. But, critically, the record reflects that Studio Seven did not know that Founders had hired Mr. Mesher, much less that he was purportedly acting as their attorney. Indeed, Studio Seven never had any communications with Mr. Mesher at all. CP 460. Here too, although Mr. Mesher may have known about the

³ Even if Akhavuz argues that Studio Seven should have followed-up with Founders regarding the defense of the action, the fact that it did not does not militate in favor of reinstating the default judgment. *See White*, 73 Wn.2d at 355 (explaining that even "if such failure be a significant factor in other circumstances, it is mitigated . . . by the alacrity with which the default was claimed and the judgment was entered"). Here, the default was sought 21 days after the Complaint was served on Studio Seven. *See* CP 343-44, 362-64, 374-76.

default judgment in November 2011, Studio Seven did not learn of it until June 2012, just weeks before it moved to vacate. *Id.*

Akhavuz argues that none of that matters, because the “sins of the lawyer”—or, in this case, the knowledge of the lawyer—must be visited upon the client. Opening Brief at 33-37. While that may be true where the client agrees to be represented by a lawyer (for better or worse), it is not true where, as here, no attorney-client relationship was ever created. In each of the cases cited by Akhavuz, the existence of an attorney-client relationship was established. *See Taylor v. Illinois*, 484 U.S. 400 (1988) (no dispute regarding the existence of an attorney-client relationship between defendant and criminal defense attorney, who represented him at trial); *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 679-80 & n.20, 41 P.3d 1175 (2002) (counsel and client communicated about discovery responses, plaintiff’s move to Ohio, and plaintiff’s availability to assist with the prosecution of her case); *Haller v. Wallis*, 89 Wn.2d 539, 540, 573 P.2d 1302 (1978) (noting that appellant “engaged the firm of Tonkoff, Holst, Hanson and Dauer to pursue her claim”).

Akhavuz’s reliance on *Haller* is particularly unavailing, as it was undisputed that the client had retained the law firm to represent the interests of her minor child. 89 Wn.2d at 540. In explaining the legal principle that “the attorney’s knowledge is deemed to be the client’s

knowledge,” the *Haller* court noted that this principle becomes applicable “once a party has designated an attorney to represent him in regard to a particular matter[.]” 89 Wn.2d at 547. Only in that scenario—*where the client has designated the attorney to represent him*—may “the court and the other parties to an action ... rely upon that authority[.]” *Id.* In short, where there is no dispute that the client has agreed to be represented by the attorney, it is equitable to attribute the attorney’s knowledge to the client. That is not the case here; there is no evidence that Studio Seven agreed to have Mr. Mesher represent it against Akhavuz’s claims. CP 460.

4. Studio Seven Acted With Diligence After Notice of the Default Judgment.

Akhavuz’s claim that Studio Seven failed to act with diligence is based on its flawed argument that Founders’ or Mr. Mesher’s knowledge of the default judgment may be imputed to Studio Seven. The proper inquiry, as the trial court found, is whether Studio Seven acted with diligence once it—not its insurer or putative attorney—first was made aware of the default. It did. The record shows that Studio Seven did not learn of the default judgment until June 2012 and filed its motion to vacate approximately 3 weeks later. *See* CP 352, 455-56, 460, 541, 544-45. There was no abuse of discretion in the trial court’s conclusion that Studio Seven “acted in a timely fashion” given its actual knowledge. CP 545.

Akhavuz contends that the “facts in *Little* [*v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007)] demonstrate even a motion to vacate within two weeks of entry can be too late where, as here, the facts show a decision not to participate by not appearing, not answering, and not moving promptly to vacate the default.” Opening Br. at 24. This case is nothing like *Little*. There, the Supreme Court held that the defendant did not act diligently in filing a motion to vacate two weeks after entry of a default of judgment because she not only had notice of the motion for default judgment, but actually attended the hearing. *Id.* at 706. Here, Studio Seven did not have notice of the motion for default judgment, did not attend the hearing, and had no knowledge about the status of the case. When it did learn about the default judgment, it investigated the facts and filed its motion within three weeks—which was as prompt as possible under the circumstances.

5. Akhavuz Did Not Demonstrate Substantial Hardship.

Akhavuz effectively concedes that the fourth *White* factor does not favor reinstating the default judgment; she devotes two sentences to the issue in passing. Opening Br. at 28. Further, she has the burden of proof backwards. Akhavuz argues that the Studio Seven “failed the fourth *White v. Holm* criterion of assuring no substantial hardship to the opposing party, here Plaintiffs.” *Id.* But it is Akhavuz’s burden, not Studio Seven’s, to show substantial hardship. *Berger*, 50 Wn. App. at 313 (“Nothing in

White suggests that [defendant] has this burden.”). She claims that delay has exposed her to a “threat of garnishment,” but the record contains no actual evidence to show how vacating the judgment will subject her to hardship—other than the fact that she now has to prove her claim on the merits. In any event, Akhavuz fails to cite any Washington cases that have refused to vacate a default judgment based on the fourth *White* factor alone where, as here, the first three factors are satisfied. There are none.

C. **Akhavuz’s Reliance on *Little* and *Morin* Do Not Require Reinstatement of the Default Judgment.**

1. **The Supreme Court’s Ruling in *Little v. King* Does Not Establish Abuse of Discretion by the Trial Court.**

Akhavuz maintains that the default judgment must be reinstated because the trial court’s failed to follow the Washington Supreme Court’s decision in *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007). Opening Brief at 2, 20-26. At the outset, Studio Seven notes that Akhavuz did not rely on *Little v. King* in her briefing or arguments to the trial court. Nevertheless, Akhavuz’s last-minute reliance on *Little* is misplaced, as that case did not involve the innocent insured doctrine.

In *Little*, defendant Annie King rear-ended plaintiff Lisa Little’s automobile. Plaintiff ultimately filed suit against King who was uninsured at the time of the incident. 160 Wn.2d at 701. In addition to filing suit against King, plaintiff was in communication with her employer’s UIM

carrier, St. Paul Insurance Company. *Id.* at 700. St. Paul was notified of the lawsuit and provided with a copy of the summons and complaint. *Id.* at 701. Although St. Paul could have intervened in the lawsuit because it was at risk of liability by virtue of its UIM obligations, it elected not to do so. *Id.* at 699.

Plaintiff subsequently moved for an order of default and default judgment against King. *Id.* King was provided with notice of the motion, and attended the default judgment hearing. *Id.* During the hearing, the trial court gave King an opportunity to file an answer and explained that default judgment would be denied if an answer was filed. *Id.* at 702. King declined the court's invitation and default judgment was entered. *Id.* Approximately two weeks later, both St. Paul and King moved to vacate the default judgment. *Id.* The trial court granted King and St. Paul's motions.

In analyzing whether the trial court abused its discretion, the Supreme Court concluded that neither King nor St. Paul met their respective burden under the second *White* factor. *Id.* at 705. The Court refused to find excusable neglect because King appeared in the action and participated in the default judgment hearing. *Id.* at 705-06. The Court held that "King made the deliberate choice, after being told of the consequence by the trial judge, not to prevent default judgment by filing

an answer.” *Id.* at 706. With respect to St. Paul, the Court concluded that “St. Paul had ample opportunity to intervene in the case and elected not to.” *Id.* The Court ultimately concluded that there was an abuse of discretion because “[w]here a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment.” *Id.*

Akhavuz’s reliance on *Little* is based on a fundamental misunderstanding of St. Paul’s role in that lawsuit. In *Little*, St. Paul was the UIM carrier of plaintiff’s employer. St. Paul was not Defendant King’s insurer. Because St. Paul did not provide insurance coverage to King, the *Little* Court had no opportunity to evaluate the innocent insured doctrine. Critically, King did not argue that her failure to appear was based on a belief that her insurer would defend the action. Rather, King participated in the default judgment hearing and “made the deliberate choice, after being told of the consequence by the trial judge, not to prevent default judgment by filing an answer.” Given these factual differences, the *Little* decision has absolutely no bearing on whether Studio Seven was an innocent insured and established excusable neglect.

2. The Supreme Court's Ruling in *Morin v. Burris* Does Not Establish Abuse of Discretion by the Trial Court.

Akhavuz likewise maintains that the default judgment must be reinstated because the trial court failed to apply the Washington Supreme Court's holding in *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). Opening Brief at 2, 20-26. Akhavuz did not rely on *Morin v. Burris* in her briefing or arguments to the trial court. Nevertheless, Akhavuz's last-minute reliance on *Morin* is unavailing, as that case involved the informal appearance doctrine, which is not at issue here.

In *Morin*, the Supreme Court accepted review of three consolidated cases, where defendants had argued that their default judgments should be vacated because they had substantially complied with the appearance requirements under CR 4 through their pre-litigation contacts. 160 Wn.2d at 749-50. In the first case (*Morin*), the named defendants argued that they had "informally appeared" in the action and thus were entitled to notice of the plaintiffs' intention to seek an order of default based on the pre-litigation contact between defendants' insurer and plaintiff. *Id.* at 750-51. The *Morin* defendants did not seek to vacate the default judgment under the *White* factors. *Id.* at 750-51, 758.

In the second case (*Gutz*), the named defendants informed their insurer of the complaint and assumed that the insurer would handle the suit. 160 Wn.2d at 751. After litigation had commenced, the insurer

contacted plaintiff's counsel with an offer to settle the claim. *Id.* Shortly after this communication, counsel moved for a default order without notice to defendants or defendants' insurer. *Id.* Upon learning of the default order (and subsequent default judgment), defendants filed a motion to vacate based on the informal appearance doctrine and good cause under CR 60(b) and the *White* factors. *Id.* at 752.

In the final case (*Matia*), the named defendant argued that it had "informally appeared" in the action and thus were entitled to notice of the plaintiffs' intention to seek an order of default based on the fact that the plaintiff had filed a pre-litigation damages claim. *Id.* at 752-53. The *Matia* defendant did not seek to vacate the default judgment under the *White* factors. *Id.* at 752-53, 758.

In evaluating these cases, the Supreme Court began by noting that a defendant can seek to set aside a default judgment by establishing that they: (1) actually appeared or substantially complied with the appearance requirements and were thus entitled to notice; *or alternately*, (2) satisfied the four part test set forth in *White*. *Id.* at 755. With respect to *Morin* and *Matia*, the Court rejected the informal appearance doctrine and defendants' argument that their pre-litigation contacts constituted substantial compliance with the appearance requirements. *Id.* at 757-58. Accordingly, the Court reversed the vacation of the default judgments. *Id.*

at 760 (holding that the defendants have not shown other cause—i.e., cause under the *White* test—to set aside default judgment).

With respect to *Gutz*, however, the Court held that the facts may indeed justify vacation of the default judgment. *Id.* The Court explained that plaintiff’s counsel’s failure to disclose the fact that “a default judgment was pending when the . . . claim representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation.” *Id.* at 759. The Court remanded the case for further consideration because the trial court did not appear to have reached this specific issue. *Id.*

Unlike the defendants in *Morin* and *Matia*, Studio Seven’s motion to vacate was not based upon the informal appearance doctrine. CP 342-53. Studio Seven’s motion was based solely on the four *White* factors. *Id.* Moreover, the trial court did not consider the application of the informal appearance doctrine in vacating the default judgment against Studio Seven. CP 532-45. Thus, the Supreme Court’s decision in the *Morin* and *Matia* cases are inapplicable and do not require reinstatement of the default judgment here.

At most, the factual circumstances present in the *Gutz* case are fairly analogous to the record here and support vacation of the default

judgment. Like *Gutz*, Akhavuz's counsel contacted Founders regarding a 30-day settlement demand, filed the motion for default within days of the settlement demand, and ultimately obtained a default judgment while the settlement demand was pending, without providing any notice to Founders. Compare CP 248-49, 474, with 160 Wn.2d at 759. Based on these facts, as well as the evidence supporting the innocent insured doctrine (*see supra* Sec. IV.B.3), the Supreme Court's holding in *Morin v. Burris* does not require reinstatement of the default judgment.

D. The Existence of Insurance Coverage Does Not Require Reversal of the Trial Court's Order.

Akhavuz asserts that the default judgment should be reinstated because "Defendants themselves have no need of a vacated judgment and are not prejudiced by any vacation since their insurer is indemnifying them from that judgment." Opening Brief at 28. Tellingly, Akhavuz does not identify a single case or court rule in support of this position. *See id.* The reason is simple. Akhavuz's suggestion is contrary to an individual's right to have access to the courts, and the long-standing policy disfavoring default judgments. Insurance coverage is not a reason to deprive a person of their day in court. Moreover, any adverse judgment will likely appear on Studio Seven's credit history and is a matter of public record, regardless of whether it is ultimately covered by insurance. Thus, Studio Seven would be prejudiced if the default judgment was reinstated.

V. CONCLUSION

For the reasons set forth above, the trial court's Order Granting the Motion to Vacate the Default Order and Default Judgment should be affirmed.

RESPECTFULLY SUBMITTED on May 1, 2013.

LANE POWELL PC

By 
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on May 1, 2013, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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Heidi Carchano

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