Court of Appeals No. 55920-0-II

101086-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JON MORRONE,

Petitioner,

v.

NORTHWEST MOTORSPORT, INC., a Washington corporation; NORTHWEST MOTORSPORT, LLC, a Washington limited liability company,

Respondents,

PETITION FOR REVIEW

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I. INTRODUCTION

It has been 54 years since this Court decided *White v. Holm*,[1] which carefully laid out the standards for reviewing defaults. Since then, these standards have grown unworkable, unclear, and inconsistent within the lower courts.

There is no clearer demonstration of the dysfunction foisted upon trial courts than to read this opinion and an opinion issued by the *same* court on the *same* day regarding the *same* issue: *Adam Laneer Construction v. Foster Brothers, Inc.*, 2022 WL 1467658 at *1-2 (May 10, 2022).[2] These cases are incompatible, demonstrating there is no real standard of review in default proceedings any longer – and that is just the beginning of the problems created by Division II with the underlying opinion. The time has come for this Court to clarify the scope and limitations of re-opening a default judgment.

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[1] 73 Wn.2d 348, 351, 438 P.2d 581 (1968).

[2] Copy at Appendix A-22-29.

The need for clarity could not be more consequential. Scores of cases acknowledge the discretion afforded to trial courts to consider and weigh evidence. Here, the trial court weighed a tardy party's vague justification against the weakness of its claimed defenses and appropriately found the judgment should stand. There was ample support for this outcome in the record, which included not a single affidavit from the Defendants to explain why they failed to timely appear.[3] The trial court straightforwardly applied the *White* factors and the Civil Rules allowing the judgment to stand.

But Division II preferred a different result, and thus rebalanced and changed the *White* factors. In so doing, it made three errors that either render future default proceedings meaningless, or hasten the total unraveling of *White*:

1. It charted new territory by accepting an unexplained "miscommunication" from counsel as an excuse, and ignored the affidavit requirement of CR 60(e)(1) by accepting unsworn oral assertions

[3] Counsel simply cited a "miscommunication at [her] office." Op. at 9 (CP 199).

during a subsequent hearing to supplement her insufficient declaration.

2. It utilized a new "strong prima facie defense" standard when considering NWMS' purported defenses, in derogation of this Court's established "prima facie" or "strong or virtually conclusive" standards.

3. It gutted the longstanding principle that trial courts may weigh credibility, and then created a *new* standard that trial courts should presume that the defaulted party intended to appear since "nothing in the record shows that NWMS willfully failed to appear." Op. at 19.

On these flawed bases, the trial court's decision was reversed, and the judgments vacated.

This body of law needs to be settled by this Court. Does a trial court abuse its discretion by simply complying with CR 60's affidavit requirements—rather than crediting verbal assertions at argument? What categories of defenses should apply: "prima facie" and "strong or virtually conclusive" as decided by this Court, or the undefined "strong prima facie" standard now being invoked within the lower courts? Is a defaulted defendant allowed a free pass by saying *nothing* as to what it did and when?

Even if an appellate panel would have reached a different conclusion, at what point can it fairly find that "no reasonable judge would have reached the same conclusion"[4] as the trial court and an abuse of discretion?

In addition, and of perhaps greater importance, central to Division II's ruling was NWMS's "strong prima facie defense" to Morrone's Family Leave Act ("FLA") claim, predicated on Division II's belief that there was no savings provision permitting Morrone to assert a FLA claim in the first place. But this ignores RCW 50A.05.125 which does precisely that. Division II committed legal error when it disregarded the express direction of the Legislature and reversed the trial court which had *correctly* applied the law.

This error impacts not only Morrone. As the only opinion to touch upon this issue, Division II created a total bar for any employee seeking to properly assert a FLA claim. At a minimum,

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[4] *Sofie v. Fibreboard Corp.*, 112 Wn.2d 667, 771 P.2d 711 (1989).

this Court should reaffirm the plain language of the statute and vacate Division II's unwarranted changes and misinterpretation of the *White* framework.

II. IDENTITY OF THE PETITIONER

Petitioner Jon Morrone ("Morrone"), Plaintiff and Respondent in the underlying Appeal, seeks review of the decision terminating review described below.

III. COURT OF APPEALS DECISION

The Court of Appeals, Division II, filed its Unpublished Opinion on May 10, 2022 ("the Opinion"). The Opinion is provided at Appendix A-1 to A-21. Morrone's motion to publish was denied on June 15, 2022.

IV. ISSUES PRESENTED

1. Where a statue expressly allows employees to assert claims under Washington's former FLA, did the Court of Appeals err in concluding plaintiffs like Morrone lack standing?

2. In light of the minimal and only prima facie defenses to some of Morrone's claims and NWMS's "weak

reasons" for failing to appear, did the Court of Appeals improperly disregard the trial court's discretion and misapply the *White* factors?

3. Did the Court of Appeals inappropriately substitute its own judgment in a manner inconsistent with published precedent of this Court and the Courts of Appeals—including another opinion by Division II *that same day*—to usurp the discretion afforded to the trial court, who declined to vacate the default?

V. STATEMENT OF THE CASE

The Opinion sets forth the facts and procedural history. Morrone, a WSBA member, was constructively discharged from his employment as general counsel for NWMS after seeking medical leave to deal with the traumatic loss of his stillborn daughter. Op. at 4-5. He returned to work early, without taking the leave recommended by his healthcare provider, because of the actions of NWMS' president, Don Fleming. *Id.* After continued hostility, retaliation and interference with Morrone's

ability to staff the legal department, Morrone was unable to continue working in this environment. Op. at 5.

Following his constructive discharge, Morrone sought a bonus owed under his NWMS contract based on a successful trial result that was later affirmed on appeal. Op. at 6-7. NWMS refused to pay. *Id.*

Morrone ultimately filed this lawsuit asserting six claims: (1) disability discrimination under RCW 49.60.030; (2) retaliation under RCW 49.60.210; (3) wrongful termination (constructive discharge) in violation of public policy; (4) breach of employment contract; (5) wage withholding under RCW 49.52.050 and RCW 49.48.030; and (6) actions for violations of RCW 49.78.330, Washington's FLA then in effect. Op. at 7.

Morrone properly served NWMS, who did not timely respond. Op. at 7-8. The trial court then entered a default Order on March 4, 2021. *Id.*

The trial court held a hearing on March 8, 2021, and entered judgment for the contract and wage claims. Op at 8. Because the remaining claims involved general damages, the court scheduled a second hearing for March 9, 2021, where it took testimony and then entered a supplemental judgment. *Id.*

After the judgments were entered, counsel for NWMS appeared and moved to vacate a few days later. Op. at 9. The *only* evidence to explain NWMS's failure to appear was one sentence in a declaration by its attorney obliquely stating that it was "due to a miscommunication" in her office. *Id.*

NWMS submitted only a declaration from Fleming, who generally denied that he had discriminated or retaliated against Morrone, but offered no testimony to dispute the meaning of Morrone's employment contract terms or his statements to Morrone explaining its bonus provision. Worse, Fleming said

nothing to explain what NWMS had done following proper service.[5]

At oral argument, NWMS's counsel made verbal, unsworn and unsubstantiated statements about waiting to see if an insurer would appoint counsel in an effort to bolster the excusable neglect element; nothing was offered by NWMS to explain its actions. Op. at 10 (VRP 56). Morrone objected to the unpled oral assertions, and Judge Schwartz rightfully agreed given CR 60(e)(1)'s clear requirement—as well as Civil Rules requiring evidence to be contained in affidavits. VRP 68, 74 ("those facts do not appear in any of the pleadings…The only thing that's set forth is that there was a miscommunication in my office.")

[5] NWMS claims Morrone obtained a "hurried" default. One can hardly claim a default is "hurried" when well-known, longstanding timelines set forth in the Civil Rules and stated in the Summons were followed. If those timelines are problematic, the "fix" is to re-write the Rules, not to ignore *White's* framework and trial court discretion.

After properly weighing credibility and evaluating the evidence and equities, the trial court denied the motion to vacate, reasoning that:

> 1. Defendants did not provide substantial evidence supporting any defense;
>
> 2. The evidence submitted does not support excusable neglect, inadvertence or mistake following the proper service of the Summons and Complaint on Defendants on February 11, 2021;
>
> 3. The materials submitted by Defendants do not provide any facts to suggest anything more than a breakdown in office procedures;
>
> 4. On balance the equities do not support vacating the default judgment.

Op. at 11 (CP 272).

NWMS appealed, and Division II performed what amounted to a *de novo* review. It found minimal "prima facie" defenses to "some" of Morrone's claims; made no finding whatsoever as to any defense to Morrone's constructive discharge in violation of public policy claim; *but* it found a "strong prima facie defense" only to Morrone's FLA claim and reversed. Op. at 11-12. The sole premise of this "strong prima

facie" defense was purportedly that Morrone "lacked standing" to bring the FLA claim after the statute was repealed and replaced with new legislation. Op. at 16-17.

This "strong prima facie" standard was neither a "prima facie" nor a "strong or virtually conclusive" defense standard as contemplated by *White*. Instead, and for the first time, Division II imported an entirely new standard used occasionally in Divisions I and III; this standard is not found in any opinion from this Court. Though this term of art reverberated throughout the opinion, and the court afforded NWMS the benefits normally confined to defendants who establish a "strong or virtually conclusive defense,"[6] the panel did not elaborate on how it was different from *White's* "strong or virtually conclusive" defense standard, nor the impact on its overall *White* analysis.[7]

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[6] *See* Op. at 12, 13, 18, 19, 20.

[7] As noted *infra*, a handful of opinions from the Courts of Appeal use this "strong prima facie defense" verbiage—and do so inconsistently.

Setting aside this new addition to the *White* balancing test—which future courts will have to struggle with—it was clear error, too. As a matter of law, there was *no* defense at all because the Legislature expressly preserved Morrone's ability to bring a claim under the repealed FLA statute. RCW 50A.05.125.

Morrone timely moved for publication, noting the broad import and implications of such a holding. Division II declined to publish and Morrone now seeks discretionary review.

VI. ARGUMENT WHY THE COURT SHOULD ACCEPT REVIEW

Under RAP 13.4(b), a petition for review should be accepted where the Court of Appeals' decision is in conflict with a decision of this Court, a published decision of the Court of appeals, a significant constitutional issue is implicated, or the case involves an issue of substantial public interest. Morrone's Petition for Review should be granted under RAP 13.4(b)(1) (conflicts with a decision of this Court), RAP 13.4(b)(2) (conflicts with published decisions of the Courts of Appeals) and RAP 13.4(b)(4) (issues of substantial public importance).

A. Division II's Conclusion that Morrone Cannot Bring a Family Leave Act Claim Is Obvious Error and Ignores RCW 50A.05.125.

The first ground for review is likely the easiest, and was obvious error. Division II emphasized that, in December 2017, the Legislature repealed the FLA (Former Chapter RCW 49.78) effective December 31, 2019. RCW 49.78.300 made it unlawful to interfere with an employee's attempt to take family leave or to retaliate against anyone who opposed such interference.[8]

Division II found that Morrone lacked standing to bring a FLA claim in 2021 on account of the 2019 repeal. It reached this finding by (erroneously) concluding there was no savings clause following the repeal. Op. at 18. Thus, Division II found that Morrone lacked standing—which it found was a "strong prima facie defense" to Morrone's FLA claims under RCW 49.78.330.

[8] The underlying interference and retaliation occurred in 2019 before the repeal date.

In doing so, Division II overlooked the applicable statutory provision which *expressly* preserves this cause of action:

> The provisions of chapter 49.78 RCW as they existed prior to January 1, 2020, apply to employee and employer conduct, acts, or omissions occurring on or before December 31, 2019, including but not limited to the enforcement provisions set forth in RCW 49.78.330 as they existed prior to January 1, 2020. ***Accordingly, a cause of action for conduct, acts, or omissions occurring on or before December 31, 2019, under chapter 49.78 RCW remains available within its applicable statute of limitations***. As an exercise of the state's police powers and for remedial purposes, this subsection applies retroactively to claims based on conduct, acts, or omissions that occurred on or before December 31, 2019.

RCW 50A.05.125 (emphasis added). *See* Appendix A-30. The holding that Morrone lacked standing—giving rise to NWMS' claimed "strong prima facie defense"—was wrong.

Worse, there are real consequences for this error. "Washington has a long and proud history of being a pioneer in the protection of employee rights." *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 760, 426 P.3d 703 (2018) (internal

quotations omitted). But, in its haste to re-balance the trial court's *White* analysis, Division II ignored this policy and eliminated a cause of action for an *entire* class of people in need of protection—and did so despite direct Legislative decree. This was the basis for reversal and is not dicta. [9]

Here, the erroneous FLA holding both related to the issue and drove the analysis. Regardless of publication, it can and will be cited by current and future litigants[10]—particularly by employers who violate their employees' medical leave rights in this uniquely precarious time. This, alone, constitutes more than sufficient ground to accept review.

B. Division II's Use of a "Strong Prima Facie Defense" Factor Directly Contradicts *White*.

Through *White* and its progeny, courts are instructed to

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[9] Op. at 11-12 ("we hold that NWMS presented a strong prima facie defense to Morrone's Family Leave Act claim. Accordingly, we hold that the trial court abused its discretion"); Op. at 13 ("when a defendant demonstrates strong or "virtually conclusive" defenses, we generally set aside default judgment regardless of why the defendant failed to timely appear").

[10] GR 14.1(a).

recognize two standards when considering a defaulted party's defenses to the plaintiff's claims: (1) "prima facie defenses," or (2) "strong or virtually conclusive" defenses. *See, e.g., White*, 73 Wn.2d at 352-53; *see also VanderStoep v. Guthrie*, 200 Wn. App. 507, 517-18, 402 P.3d 883 (2017); *Akhavuz v. Moody*, 178 Wn. App. 526, 533, 315 P.3d 572 (2013) . The distinction between the two standards is significant. If only prima facie defenses exist, then the reasons for the defendant's failure to appear are "scrutinized with greater care." *White*, 73 Wn.2d at 352-53. This is exactly what the trial court did here.

But Division II ignored *White's* two standards for evaluating defenses and, instead, imported a new and different standard used occasionally—and inconsistently—in Divisions I and II: a "strong prima facie" standard.[11] This new amalgamation

[11] This terminology has been used sporadically in published and unpublished decisions within Divisions I and III *See, e.g., Johnson v Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003) ("it failed to present a ***strong prima facie defense*** to Ms. Johnson's claims); *State v. ANW Seed*, 44 Wn. App. 604, 609-10, 722 P.2d 815 (Div. 3 1986) ("These affidavits . . .

conflates the "strong or virtually conclusive defense" with the "prima facie defense" factor, and is problematic for three obvious reasons.

First, none of the cases which use this new hybrid standard ever explain the difference between their use of "strong prima facie defense" and the long-recognized *White* standard of a "prima facie" or a "strong or virtually conclusive" defense. Does a trial court use one standard? Two? All three?

Second, Division II failed to apply this new standard evenly. Indeed, it relied on *White's* basic "prima facie" defense standard for all claims *except* the FLA claim. Op. at 15-16. Worse, Division II did not address when to use one standard over

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demonstrate the presence of a ***strong prima facie defense***"); *MacIntosh v. Lupastean*, 122 Wn. App. 1045 (Div. 1 Mar. 1, 2004) ("Lupastean has not shown a ***strong prima facie defense***, nor excusable neglect"); *Kreibich v Wallace*, 115 Wn. App. 1018 (Div. 1 Jan. 27, 2003) ("Upon his showing of a ***strong prima facie defense*** and excusable neglect").

the other. [12] Are trial courts to decide on a whim? How will an appellate court know if the trial court used the wrong standard without any guidance?

Third, this "strong prima facie defense" standard has *never* been recognized by this Court. Not only are the lower courts creating new law in contravention of *White*, but they are doing so without any guidance from this Court. This likely explains why virtually all of the default opinions adhere strictly to the two approved *White* standards, while outliers are experimenting with this hybrid standard. Trial courts and lawyers must have some clarity of which test to use and when to use it.

C. Division II Ignored CR 60's Affidavit Requirement and Set an Untenable Precedent.

Compounding its initial errors, Division II *then* ignored CR 60's affidavit requirement in finding excusable neglect when NWMS provided *no* evidence whatsoever on why it failed to

[12] NWMS did not advocate for this erroneous standard when it sought to vacate at the trial court or on appeal. Instead, Division II imported this standard on its own accord.

timely appear; there was no evidence explaining what NWMS did upon service of the lawsuit, when it hired a lawyer, or anything else on which the trial court could base a finding that its neglect was *excusable*. This creates two catastrophic problems for trial courts and practitioners going forward.

First, CR 60 clearly outlines the evidentiary standard for setting aside relief: the evidence must be contained in an affidavit. *See* CR 60(e)(1). This comports with longstanding precedent which requires evidence to be competently presented to the trial court for consideration; argument and opinion of counsel is not evidence.

While the trial court properly rejected counsel's unpled, oral assertions during argument, Division II embraced them and quoted them verbatim. Op. at 10. Is a trial court now to ignore CR 60's affidavit requirement and allow a lawyer to swoop in with all sorts of verbal "testimony" when the proceeding appears to be slipping away from them?

Second, the Opinion recognized that counsel's statement of a "miscommunication" in her office was a "weak reason," at best. Op. at 20. According to *White*, the analysis should have ended there; when the defenses do not rise to the level of "strong" or "virtually conclusive" under *White*, "the plausibility and excusability of the defaulted defendants' reason for failing to initially and timely appear in the action deserve grave, if not dispositive, consideration." *White*, 73 Wn.2d at 353-54.

White and the underlying Opinion stand in stark contrast. Unlike the defendant in *White*, who provided affidavits explaining how he promptly notified his insurance agent, was assured counsel was being appointed, relied in good faith upon those assurances, and diligently complied with requests for information from insurance representatives (*id.* at 354), there is *no* evidence in the record from NWMS, who said *nothing*.

Division II, in substituting its own decision for the trial court's discretion, created a new standard by which a defendant will never need to go on the record to describe *its* actions giving

rise to the default. This contravenes numerous other published decisions. *See, e.g. Akhavuz*, 178 Wn. App. at 535-539 (imputing negligence of outside counsel to defendant); *Titus v. Larsen*, 18 Wash. 145, 51 P. 351 (1897) (defendant erroneously advised his attorney as to the date of service); *O'Toole v. Phoenix Ins. Co. of Hartford, Conn.*, 39 Wash. 688, 82 P. 175 (1905) (defendant appeared and defended but due to miscommunication failed to appear at jury trial); *Kain v. Sylvester*, 62 Wash. 151, 152, 113 P. 573 (1911) (affidavit of defendant explained he consulted with counsel soon after service and believed he had employed attorney); *Leavitt v. DeYoung*, 43 Wn.2d 701, 704-05, 263 P.2d 592 (1953) (affidavit of personal attorney who provided suit papers to insurance company four days after service).

No case has let a defendant off the hook simply because defense counsel asserted only an amorphous "miscommunication." Such a result turns default proceedings into sham proceedings by allowing the defendant to hide its conduct and avoid consequences since this absence of evidence

inures to the defendant's benefit. *See Larson v. Zabroski*, 21 Wn.2d 572, 576, 155 P.2d 284 (1945) (recognizing the defaulting party's "burden of presenting facts to the court which would justify discretion to vacate the judgment.").

In light of the Opinion, how many agents who mislay a summons and complaint or drag their feet will *never* be forced to admit what happened if they can say nothing and receive *better* treatment than if they provided the true facts behind the delay? This Court should accept review and ensure that CR 60's standard is honored and defendants cannot avoid valid defaults by simply standing mute.

D. Division II Substituted Its Judgment and Ignored the Trial Court's Broad Discretion in Default Proceedings.

The fundamental principle is that consideration of a motion to vacate is committed to the sound discretion of the trial court. *White*, 73 Wn.2d at 351. The importance of the trial court's discretion to evaluate the facts and evidence offered to show excusable neglect, including fact and credibility determinations, is well-established. *Rosander v Nightrunners Transport Ltd.,*

147 Wn. App. 392, 406, 196 P.3d 711 (2008) ("trial court has broad discretion over the issue of excusable neglect and may make credibility determinations and weigh facts in order to resolve it.")

Underscoring this point, on the same day Division II decided this case, it issued another unpublished opinion affirming the trial court's broad discretion in the default context. In *Adam Laneer Construction v. Foster Brothers, Inc.*, 2022 WL 1467658 at *1-2 (May 10, 2022),[13] the defendant failed to appear, and a default judgment was entered. In considering the motion to vacate the default, the trial court considered contested facts about the hardships COVID-19 imposed. *Id.* at 3-4. In *that* case, Division II emphasized a point it ignored in Morrone's case: "the superior court may make credibility determinations or weigh evidence to determine whether there has been excusable neglect," and was "within its discretion to weigh the opposing

[13] Copy at Appendix A-22-29.

declarations and give more weight to Foster Brothers' . . .."[14] *Id.* Moreover, in Morrone's case, Division II directed trial courts to instead infer an intent to defend or appear by reasoning: "[t]here is nothing in the record that shows NWMS willfully failed to appear." Op. at 19. This was directed *despite* the trial court reviewing that same record and reasonably concluding otherwise.[15]

Although courts may more "readily" find an abuse of discretion where a trial is denied, *White* at 352, *White* clearly stated that the standard remains "abuse of discretion," and provided clear guidance to trial courts through primary and secondary factors to guide the exercise of that discretion. *White*, 73 Wn.2d at 353-54. Division II, in supplanting the trial court's reasoned analysis and correct application of *White* and the Civil

[14] Confusingly, Division II did *not* use "strong prima facie" in this case despite using it in Morrone's case, which is yet another discrepancy in these irreconcilable opinions.

[15] This encourages future defendants to say nothing since this inference will be made in the absence of actual testimony.

Rules, has created two standards: (1) abuse of discretion (as used in *Laneer*); and (2) some lesser discretion (as used here), which is really *de novo* review. This clearly contradicts *White.*

Can it objectively be said that the trial court here, given this record, reached a decision so untenable that it warranted a finding of abused discretion? That "*no* reasonable judge would have reached the same conclusion[?]" *Sofie,* 112 Wn.2d at 667 (emphasis added). This case presents a perfect vehicle to clarify the law. Notwithstanding the broad discretion afforded to the trial court, the well-settled law that breakdowns in office procedures do not constitute excusable neglect,[16] the wholesale lack of evidence in the record establishing any diligence by NWMS,[17]

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[16] *See Beckman v. State*, 102 Wn. App. 687, 695, 11 P.3d 313 (2000).

[17] This is not a scenario where NWMS submitted any declaration stating that within a few days of service it had retained a lawyer whom it understood would be appearing to protect its interests. There is no evidence that NWMS did anything to retain counsel *before* the default was taken. Neither counsel, nor any NWMS representative, provided any facts to establish ***NWMS's*** diligence.

and CR 60(e)(1)'s affidavit requirement, this "less deferential abuse of discretion" standard served as a proxy for Division II to simply supplant the trial court's judgment.

"Abuse of discretion" is a term of art relied upon by judges and practitioners. Review should be accepted to give meaningful guidance as to when a trial court may enforce the Civil Rules.

E. The Decision Addresses Issues of Substantial Public Interest Under RAP 13.4(b)(4).

We were recently reminded that courts of appeal should decide cases in a manner which "promotes the evenhanded, predictable, and consistent development of legal principles." *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 2022 WL 2276808, 597 U.S. ___ (June 24, 2022),[18] Dissenting slip op. at 30 (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). By ignoring the clear standards in *White* and CR 60(e)(1), it can hardly be said that Division II's decision

[18] Slip op. at https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

"maintain[s] stability that allows people to order their lives under a clear legal framework." *Id.* Court Rules exist and trial courts are vested with authority to enforce them consistent with applicable legal standards. When discretion is exercised tenably, it should not be undone by a reviewing court who simply desires a different outcome.

This principle carries over to the abuse of discretion issue as well. In upholding the application of an abuse of discretion standard and describing its parameters, the Supreme Court noted it is employed "where the trial judge's decision is given an unusual amount of insulation from appellate revision for functional reasons." *McLane Co. v EEOC*, 581 U.S. ___, 137 S. Ct. 1159, 1169 (2017) (internal quotation omitted).

There is a substantial public interest in predictability, finality, and consistency in the interpretation of Civil Rules, and in defining and recognizing what "abuse of discretion" really means. While the Opinion is unpublished, in light of GR 14.1(a), it can and will be cited in the lower courts as "persuasive"

authority. The Opinion was entirely premised on an erroneous finding of a "strong prima facie defense" to one claim, and then compounded by a disregard of the lower court's lawful authority.

Stripping a class of employees of their rights under the FLA—the dispositive factor for Division II—is problematic. But stripping the trial court of its discretion is worse. Division II has created a strong disincentive for other trial courts (who are in a much better position to make credibility and factual findings) to insist upon "an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their case and comply with court rules." *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007).

Even when the rules and standards allow for a properly obtained judgment to be enforced, it is unclear why a trial court would do so in light of the unpredictable way review can now occur. Nor can attorneys cogently counsel when compliance with the standard is now wholly unpredictable. The one party here who followed the Civil Rules has now lost strategic time and fees

when, apparently, the trial court had no discretion to begin with. Guidance from this Court is necessary to prevent trial court discretion from becoming illusory.

VII. CONCLUSION

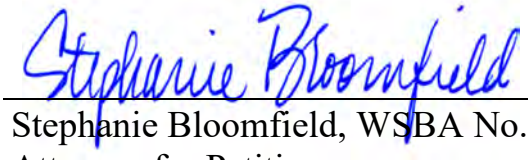
Defaults are routinely litigated, and both practitioners and trial courts deserve a clear framework. For the reasons stated above, Morrone asks this Court to grant Review.

Dated this 15th day of July, 2022.

Counsel certifies that this motion contains 4,720 words in compliance with RAP 18.7 (b) and RAP 18.17(c)(10) [5,000 words].

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 

Stephanie Bloomfield, WSBA No. 24251
Attorney for Petitioner

CERTIFICATE OF SERVICE

I declare that on the dated stated below, I caused the foregoing pleading to be served on Counsel for Respondents as follows:

Aaron Ornheim Philip Talmadge	[X] Email to: aaron@tal-fitzlaw.com phil@tal-fitzlaw.com

Dated this 15th of July, 2022 at Tacoma, Washington.

/s/ Christine L. Scheall
Christine Scheall, Paralegal
GORDON THOMAS HONEYWELL LLP

APPENDIX

Pages:	***Description:***
A-1 - A-21	*Morrone v. NWMS*, (May 10, 2022 Unpublished Opinion)
A-23 – A-29	*Adam Laneer Construction, Inc. v. Foster Brothers, Inc.*, (May 10, 2022 Unpublished Opinion)
A-30 – A-31	RCW 50A.05.125

Filed
Washington State
Court of Appeals
Division Two

May 10, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JON MORRONE, Respondent, v. NORTHWEST MOTORSPORT, INC., a Washington corporation; NORTHWEST MOTORSPORT, LLC, a Washington limited liability company, Appellants.	No. 55920-0-II UNPUBLISHED OPINION

WORSWICK, J. — Northwest Motorsport, Inc., and Northwest Motorsport, LLC, (collectively NWMS) appeal the trial court's entry of an order of default, default judgment, supplemental default judgment, and denial of NWMS's motion to vacate default judgment on a complaint filed by Jon Morrone. Morrone, NWMS's former in-house counsel, sued NWMS for disability discrimination, retaliation, wrongful termination, breach of employment contract, willful wage withholding, and violation of the Family Leave Act. NWMS was properly served but did not appear or respond to Morrone's complaint. The trial court granted Morrone's motion for default and subsequent motion for default judgment on shortened time. NWMS moved to vacate, and the trial court denied its request.

NWMS argues that the trial court abused its discretion when it denied NWMS's motion to vacate the judgment. We hold that the trial court abused its discretion when it denied NWMS's motion to vacate the default judgment. Accordingly, we reverse.

FACTS

I. BACKGROUND

A. *Employment Contract*

Jon Morrone was an experienced attorney working as a partner at Williams Kastner & Gibbs. Morrone represented NWMS in several actions. The CEO of NWMS, Don Fleming, asked Morrone to leave his role and join NWMS. In January 2017, Morrone left the firm and entered into an employment contract with NWMS. He agreed to act as NWMS's in-house general counsel.

The contract provided, in pertinent part:

> 1.3 *Employee shall be entitled to salary and benefits during the three-year Contract Term regardless of whether Employee's employment is terminated, for any reason, before the three-year anniversary unless Employee resigns his position before the end of the Contract Term. Stated differently, Employer guarantees Employee the salary and benefits described herein for a period of three years after the Start Date.* In the event Employee's employment becomes terminated, nothing in this Agreement prevents Employee from seeking and obtaining employment from a different employer before the expiration of the Contract Term, and any such employment shall not end Employer's promise to pay Employee his salary and benefits for the Contract Term.
>
> . . . .
>
> 2.3 As Chief Legal Officer, Employee shall plan, organize, manage, budget for, direct, staff and control the legal work of Employer. *This may include, at Employee's discretion as Chief Legal Officer and Director of Legal Affairs, hiring of personnel, including outside counsel as needed*.
>
> . . . .

> 3.1 Employer agrees *Employee shall have final authority over the selection of personnel*, including outside counsel as needed, *as well as allocation of resources within Employee's department*, provided that authority is exercised in accordance with all laws, statutes, and regulations.
>
> . . . .
>
> 4.3 Employee shall be entitled to 10% of each and every settlement or award (by way of jury, judge, or arbitrator) as bonus monies during the Contract Term. *The settlement or award amount will not include attorney's fees as part of this bonus. Stated differently, the settlement or award amount shall only consist of damages collected as part of a settlement or award*. . . .
>
> . . . .
>
> 5.2.1 Annual Bonuses: Employee shall be paid $20,000.00 on each anniversary of his Start Date. Said monies are in addition to all other methods and forms of payment described herein, and shall be classified as a separate anniversary bonus.
>
> 5.2.2 Structured Long Term Incentive Plan:
>
> . . . .
>
> [ ] Employee shall be eligible for any stock, ownership, or other benefits offered to other employees of Employer as they come available.
>
> . . . .
>
> 5.3 In the event that there is a change in majority ownership of Northwest Motorsport, Inc., during the Contract Term, the Contract Term shall automatically extend to ten years, with termination at will solely by Employee. All rights and guarantees owed to Employee within the three-year contract term shall thus be guaranteed to Employee during this extended ten-year period.

Clerk's Papers (CP) at 135-37 (emphasis added).

Morrone's base salary in this role was $300,000 per year. Morrone and Fleming signed the contract.

B. *Morrone's Family Tragedy,* Sunset Chevrolet*, and Pasco Trial*

Morrone began work at NWMS in March 2017. Throughout his time at NWMS, Morrone litigated *Northwest Motorsport, Inc. v. Sunset Chevrolet, Inc.,* Pierce County Super. Ct. No. 16-2-12141-7.[1] The *Sunset Chevrolet* litigation culminated in December 2018 with the trial court awarding NWMS fees, costs, and interest totaling more than $1.8 million. Sunset Chevrolet filed a supersedeas bond to secure judgment, and appealed the decision. NWMS did not pay Morrone a bonus because the judgment awarded was pending appeal.

Around the same time, Morrone's wife suffered complications with her pregnancy. Morrone informed NWMS staff of the complications, but based on his experience with Fleming, and witnessing Fleming's treatment of two other employees, Morrone was concerned that sharing any information about his emotional trauma would damage his relationship with NWMS and negatively impact his reputation as a lawyer. Morrone's wife gave birth to a stillborn daughter on January 4, 2019.

A doctor then provided a note for Morrone for six weeks of leave, which Morrone submitted to NWMS as a Family Medical Leave Act (FMLA) request. However, NWMS had another trial coming up in February, 2019, in Pasco. When Morrone informed Fleming of his daughter's death, Fleming expressed his condolences but in the same sentence pivoted to how

[1] *Northwest Motorsport, Inc. v. Sunset Chevrolet, Inc.,* No. 52799-5-II (Wash. Ct. App. Oct. 13, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2052799-5-II%20Unpublished%20Opinion.pdf. This case is cited for its factual background, not for its precedential value.

Morrone's trial preparation was proceeding. After hearing about Morrone's daughter's death, NWMS's chief financial officer commented to Morrone that he did not believe Morrone's wife looked pregnant—intimating that Morrone was lying about his daughter's death. Morrone provided the HR director with photographs of his late daughter to show he was not lying.

Convinced he had to return to work to please Fleming and maintain his professional reputation, Morrone took one week of leave and then went to Pasco for the trial. The Pasco trial lasted six weeks, and Morrone lived there for the duration.[2] While in Pasco, Morrone was on the other side of a wall from an office Fleming and others were using. Morrone could hear Fleming and other employees discussing a stock plan Fleming was establishing. No one at NWMS included Morrone in the conversation.

After returning from Pasco, Morrone was cut out of management conversations and decisions. In April, Fleming barred Morrone from backfilling a legal assistant position that had become vacant.[3] In May, Fleming, in a very hostile meeting, accused Morrone of swindling him, telling Morrone that his $20,000 anniversary bonus from the employment contract was meant only to be a one-time payment, despite NWMS honoring the commitment the year prior. After that encounter, Morrone determined he was on Fleming's bad side, found his workplace intolerable, and began seeking work elsewhere.

[2] Morrone and his family reside on Mercer Island.

[3] The previous person in the position was Fleming's girlfriend. Fleming stated he was informed by NWMS's human resources department that he could not backfill the vacant position because the legal assistant was on protected leave.

C. *Morrone's Departure and Northwest Motorsport's Sale*

Morrone sent NWMS a letter on October 1, 2019, stating that he was "resigning" his position effective October 24. CP at 264. The letter read:

> I will be resigning from my position as Chief Legal Officer with Northwest Motorsport. I have worked my tail off to protect Northwest Motorsport from all sorts of risk since I first met Kenny and Don many years ago. But, it is clear that my journey with Northwest Motorsport has reached its end. My last day of employment will be October 24, 2019, with several pre-planned days off intermixed beforehand.
>
> I am rooting for your success. You and Joe have a good vision for this company. I hope that I have helped you implement your vision along the way – I've sure tried to help as much as possible. I intend to continue helping you implement your vision during my remaining days with Northwest Motorsport, and to work closely with you to tie up loose ends and transition my workload.

CP at 264.

Morrone found employment with a different company where his base salary was approximately $100,000 less per year than he was making at NWMS.

Fleming sold Northwest Motorsport, Inc., in February 2020. The new owner converted the entity into Northwest Motorsport, LLC.

We affirmed the trial court's award to NWMS in the *Sunset Chevrolet* case and entered the mandate on December 4, 2020. On December 11, Morrone contacted NWMS, requesting that it remit payment to him for his earnings under his contract for his work on *Sunset Chevrolet*.[4] A NWMS employee responded, "The contract is with Northwest Motorsport, Inc. . . . I am with Northwest Motorsport, LLC, which is not the company on your contract."

[4] Morrone requested 10% of the amount awarded to NWMS under his employment contract, approximately $180,000.

CP at 145. Morrone responded that Northwest Motorsport, Inc., was converted into Northwest Motorsport, LLC, and that he would communicate with Northwest Motorsport, LLC, to obtain his back pay because Northwest Motorsport was the named party in the *Sunset Chevrolet* case. Neither Northwest Motorsport, Inc. nor Northwest Motorsport, LLC remitted payment to Morrone.

II. PROCEDURAL HISTORY

A. *Complaint*

On February 11, 2021, Morrone filed a complaint against both Northwest Motorsport, Inc., and Northwest Motorsport, LLC. He alleged he was constructively discharged from NWMS because the working conditions were intolerable, and this forced him to take a different job for less money. Morrone alleged six causes of action: (1) disability discrimination under Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW; (2) retaliation for requesting disability-related leave under RCW 49.60.210; (3) wrongful termination because of his exercise of a legal right or privilege, alleging that NWMS interfered with his ability to obtain FMLA leave and discriminated against him once he had; (4) breach of the employment contract; (5) willful wage withholding under RCW 49.52.050 and 49.48.030, for not paying his bonus as required by the contract; and (6) violation of the Family Leave Act, former RCW 49.78.330 (2019). Morrone served the summons and complaint on NWMS that same day.

B. *Default*

NWMS did not answer or file any response, and on March 4, 21 days after filing his complaint, Morrone moved for default. A superior court commissioner entered an order of

default against NWMS that same day. Later that day, Morrone moved to shorten time for the trial court to hear his motion to enter default judgment for amount certain. That afternoon, the trial court entered an order, allowing Morrone to enter a default judgment on shortened time.

Morrone then filed a motion to enter default judgment on amount certain and to set an evidentiary hearing for the remaining issues. The trial court held a hearing on March 8. The trial court entered a judgment for amount certain of $407,272.34. This amount was based on the trial court's ruling that the withholding of wages for the unpaid bonus was willful, and included liquidated double damages and reasonable fees and costs. The trial court scheduled an evidentiary hearing on the remaining damages for the following day, March 9.

The court conducted an evidentiary hearing on March 9. NWMS did not appear. Morrone testified as above. The court entered a supplemental default judgment, entered extensive findings of fact consistent with Morrone's testimony, and deemed the facts in the complaint admitted.

The court found that Morrone returned from FMLA early for fear of his career, that NWMS announced a new employee stock plan without telling Morrone during the Pasco trial, and that NWMS ostracized and retaliated against Morrone for his request to take leave and his statements about his mental health. The court found that Morrone was constructively discharged and that the salary at his new employment was $103,700 less per year than at NWMS. The court entered this amount as past economic damages. The court further found that Morrone suffered future economic losses in the amount of $742,200 and noneconomic losses for discrimination

and retaliation totaling $500,000. The court entered the supplemental default judgment in open court and the hearing concluded at 2:33 PM.

C. *NWMS's Appearance and Motion to Vacate*

NWMS entered a notice of appearance on the afternoon of March 9, approximately one hour after the court entered the supplemental default judgment.

Two days later, on March 11, NWMS filed a motion to vacate the order of default and default judgment. In its motion, NWMS stated its defenses to Morrone's causes of action and called its failure to appear a "good faith mistake by counsel." CP at 187-91. NWMS's counsel, Sheryl Willert, filed a declaration in support of the motion. She submitted the following regarding the failure to appear: "Unfortunately, the notice of appearance was not filed earlier due to a miscommunication at my office. Subsequently, our office discovered that Plaintiff had obtained an order for default and default judgment." CP at 199. Her declaration included further statements on NWMS's defenses to Morrone's claim, based entirely on allegations in Morrone's complaint, rather than on Morrone's testimony. No NWMS employee filed any declaration at that time.

Morrone filed a response to NWMS's motion to vacate, pointing out that NWMS had failed to submit any evidence of defenses. NWMS then filed a reply that included a declaration from Fleming. Fleming stated Morrone's testimony to the court was "largely untrue" and that he never engaged in retaliatory or discriminatory behavior. CP at 243. Fleming stated that he never perceived that Morrone had any disability, and never took action in furtherance of such belief. He claimed that his lack of communication with Morrone on business decisions was due to his

heart condition and a move to Montana. He also stated that he had sold NWMS and was not the owner when Morrone commenced his lawsuit. He denied the existence of any stock plan. He also stated that NWMS could not hire a replacement for Morrone's legal assistant because she had not resigned, but was on protected family leave to care for her ailing mother.

The trial court held a hearing on NWMS's motion to vacate on March 26. The court heard argument, but no testimony was taken. During argument, Willert stated:

> This is not a case where the defendant consciously decided that it would not participate in this litigation, Your Honor. To the contrary, this is a matter that was fully intended to be defended. This is a mistake, not of the client, but this is a mistake that resulted as a result of miscommunications in my office.
>
> When this matter was filed and served on Defendant, they tendered it through me and requested that I tender it to the insurer, and I am not panel counsel for the insurer. So my assistant believed that we would not be defending this case but that other counsel would, in fact, be defending this case.
>
> Unfortunately, the insurer then notified us, on March 9th, the day that I filed a notice of appearance, that they would not be appointing counsel at that time, and that was when I – when I, in fact, filed a notice of appearance and believed that this miscommunication and misunderstanding in my office is exactly what caused the failure to calendar dates.

VRP (Mar. 26, 2021) at 56.

Willert did not say when NWMS tendered the summons and complaint to her, or when she first notified NWMS's insurer of the lawsuit.

The trial court denied NWMS's motion to vacate. The court order stated that the court considered NWMS's motion to vacate, Willert's declaration, Morrone's opposition, NWMS's reply, and Fleming's declaration. The court explained that the facts Willert relayed to the court in the hearing were not in any of the pleadings, which stated only that there had been a

miscommunication in her office. The court found that the evidence before it did not meet the standard for excusable neglect required to vacate the default. Likewise, the court noted that NWMS did not present evidence of defenses, but instead stated that it was a contract dispute and that the court should look to the contract. The court found that the defenses were inadequate to vacate the default judgment. The court concluded:

> 1. Defendants did not provide substantial evidence supporting any defense;
>
> 2. The evidence submitted does not support excusable neglect, inadvertence or mistake following the proper service of the Summons and Complaint on Defendants on February 11, 2021;
>
> 3. The materials submitted by Defendants do not provide any facts to suggest anything more than a breakdown in office procedures;
>
> 4. On balance the equities do not support vacating the default judgment.

CP at 272.

NWMS appeals the order of default, the default judgments, and the order denying the motion to vacate.

ANALYSIS

NWMS argues that we should vacate the order of default and default judgment because it presented substantial defenses to Morrone's causes of action. NWMS further argues that its failure to appear was due to mistake and excusable neglect that was solely due to a miscommunication by outside counsel, and that the trial court erred by imputing the "sins of the lawyer" on a blameless client. Br. of Appellant at 1, 12. Morrone argues that NWMS provided no evidence supporting any prima facie defense and that NWMS cannot show excusable neglect. We agree with NWMS that it presented prima facie defenses to some of Morrone's claims, and

we hold that NWMS presented a strong prima facie defense to Morrone's Family Leave Act claim. Accordingly, we hold that the trial court abused its discretion when it denied NWMS's motion to vacate the default judgment.

I. STANDARDS FOR SETTING ASIDE DEFAULT JUDGMENT

Under CR 55(c), a trial court may set aside an entry of default or default judgment under CR 60(b). CR 60(b)(1) provides that a party may obtain relief from default judgment based on "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order."

A. White *Test*

We review whether a trial court should set aside default judgment under CR 60(b)(1) by applying the four-part test our Supreme Court first laid out in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

> A party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Little v. King, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007). Factors (1) and (2) are "primary" and (3) and (4) are "secondary." *VanderStoep v. Guthrie*, 200 Wn. App. 507, 517, 402 P.3d 883 (2017). Morrone does not contest that NWMS acted with due diligence. Thus, we need only consider factors (1), (2), and (4).

We determine whether default should be set aside as a matter of equity. *VanderStoep*, 200 Wn. App. at 517. Accordingly, when reviewing the trial court's decision to vacate default

judgment, we assess whether that decision is just and equitable. *Rush v. Blackburn*, 190 Wn. App. 945, 956-57, 361 P.3d 217 (2015). "Our primary concern is whether justice is being done." *VanderStoep*, 200 Wn. App. at 517. What is equitable is determined from the specific facts of each case, and is not a fixed rule. *Little*, 160 Wn.2d at 703.

B. *Relationship Between Primary Factors*

"The strength of the defendant's defense determines the significance of the defendant's reasons for failing to timely appear and defend." *VanderStoep*, 200 Wn. App. at 518. When a defendant establishes only prima facie defenses, the defendant's reasons for failing to timely appear are a critical consideration. *Akhavuz v. Moody*, 178 Wn. App. 526, 533, 315 P.3d 572 (2013). However, when the defendant demonstrates strong or "virtually conclusive" defenses, we generally set aside default judgment regardless of why the defendant failed to timely appear, unless the failure was willful or the secondary *White* factors are not satisfied. *VanderStoep*, 200 Wn. App. at 518; *Akhavuz*, 178 Wn. App. at 533.

Here, NWMS argues it presented a prima facie defense to Morrone's breach of contract and willful withholding claims, and it raised observations that "were enough to defeat or *at least* create questions of fact about Morrone's non-contractual claims." Br. of Appellant at 24. Because NWMS raises stronger arguments on some defenses than others, but generally argues it has raised prima facie defenses, we address both primary factors. *See VanderStoep*, 200 Wn. App. at 518.

C. *Standard of Review*

We review the trial court's ruling on a motion to vacate default judgment for an abuse of discretion. *Rush*, 190 Wn. App. at 956. "A trial court abuses its discretion by making a decision that is manifestly unreasonable or by basing its decision on untenable grounds or untenable reasons." *VanderStoep*, 200 Wn. App. at 518.

II. PRIMA FACIE DEFENSES

NWMS argues that it satisfied the first *White* factor because it presented prima facie defenses to Morrone's claims. We agree.

A. *General Principles*

"To set aside a default judgment, a defendant generally must submit affidavits identifying specific facts that support a prima facie defense." *VanderStoep*, 200 Wn. App. at 519. Allegations or conclusory statements are insufficient. *VanderStoep*, 200 Wn. App. at 519. A defendant must present "concrete facts" to support a defense. *VanderStoep*, 200 Wn. App. at 519 (quoting *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 449, 332 P.3d 991 (2014)) (internal quotation marks omitted).

In determining whether a defendant presented a prima facie case, the trial court does not weigh evidence as a trier of fact. *VanderStoep*, 200 Wn. App. at 519. Rather, the trial court views the evidence and draws reasonable inferences in the light most favorable to the defendant. *VanderStoep*, 200 Wn. App. at 519-20. "The trial court need only determine whether the defendant is able to demonstrate any set of circumstances that would, if believed, entitle the defendant to relief." *Ha*, 182 Wn. App. at 449.

B. *Prima Facie Defense Analysis*

NWMS argues that the trial court erred when it concluded that NWMS did not provide substantial evidence supporting any defense. Morrone argues that NWMS provided *no evidence* supporting any prima facie defense. Here, the strength of NWMS's purported defenses to each of Morrone's claims vary, and NWMS provided evidence to support defenses to some claims.

1. *Amount Certain Judgment*

We first address the initial default judgment for amount certain and NWMS's defenses to the claims resolved there.

a. *Willful Wage Withholding*

NWMS argues that it presented a prima facie defense to Morrone's willful wage withholding claim because it provided evidence of a *bona fide* wage dispute. We agree.

In its motion to vacate, NWMS pointed to a clause in Morrone's employment contract which stated, "Employee shall be entitled to salary and benefits during the three-year Contract Term regardless of whether Employee's employment is terminated, for any reason, before the three-year anniversary *unless Employee resigns his position before the end of the Contract Term.*" CP at 187 (quoting CP at 135) (emphasis added). NWMS argued that Morrone was not entitled to any bonuses or other benefits of the contract because he resigned before the end of the three-year term. NWMS further argued that, even assuming that it was required to pay Morrone a bonus from the *Sunset Chevrolet* case, the court miscalculated the 10% value by including attorney fees, counter to the contract.

NWMS argues that it raised a *bona fide* dispute over whether Morrone is owed any wages based on the employment contract language and Morrone's resignation. We agree.

A willful withholding of wages under RCW 49.52.050(2) is a basis for double damages and reasonable attorney fees. RCW 49.52.070. However, a willful withholding is "the result of knowing and intentional action and not the result of a bona fide dispute as to the obligation of payment." *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002) (quoting *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 300, 745 P.2d 1 (1987)) (internal quotation marks omitted). Where a *bona fide* dispute exists as to the amount of wages owed, a court may not find a willful failure to pay. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 833, 214 P.3d 189 (2009).

NWMS raised a *bona fide* dispute both as to whether it owed Morrone wages because of his resignation, and whether the amount the trial court awarded was appropriate given the contract's language excepting attorney fees. Thus, evidence of a *bona fide* dispute creates a prima facie defense to a willful wage withholding claim.

Accordingly, we hold that NWMS raised at least a prima facie defense to Morrone's willful wage withholding claim.

b. *Violation of Washington Family Leave Act*

NWMS argues that it raised a prima facie defense to Morrone's claim that it violated the Family Leave Act. We agree and hold that NWMS raised at least a prima facie defense. Although the parties did not provide sufficient evidence to consider this a virtually conclusive defense, it is a strong one.

The legislature repealed the Family Leave Act in December 2017, effective December 2019.[5] That law, in effect at the time Morrone's wife suffered complications and gave birth, provided, among other things:

> [A]n employee is entitled to a total of twelve workweeks of leave during any twelve-month period for one or more of the following:
>
> (a) Because of the birth of a child of the employee and in order to care for the child;
>
> . . . .
>
> (c) In order to care for a family member of the employee, if the family member has a serious health condition.

Former RCW 49.78.220(1). Furthermore:

> (1) It is unlawful for any employer to:
>
> (a) Interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this chapter; or
>
> (b) Discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this chapter.

Former RCW 49.78.300.

Morrone claimed that NWMS interfered with his rights under the Family Leave Act, former RCW 49.78.330. Former RCW 49.78.330 provided for civil action by an employee against "[a]ny employer who violates RCW 49.78.300."

In its motion to vacate, NWMS argued that Morrone did not have standing under the Family Leave Act because it expired in December 2019 and he filed his claim in 2021. NWMS

[5] *See* former chapter 49.78 RCW (LAWS OF 2006, ch. 59, § 1), *repealed by* LAWS OF 2017, 3d Spec. Sess., ch. 5, § 98.

further argued that because Morrone took one week of leave he cannot show that NWMS interfered with his ability to take leave. Although NWMS cites no authority for its contention that the change in law divested Morrone of his ability to sue under the Family leave Act, it is axiomatic that the legislature can divest a plaintiff of a cause of action when it repeals a statute, absent a savings clause. *Hansen v. W. Coast Wholesale Drug Co.*, 47 Wn.2d 825, 827, 289 P.2d 718 (1955). It appears no savings clause exists here.[6] Accordingly, we hold that NWMS raised a strong prima facie defense regarding Morrone's Family Leave Act claim.

2. *Supplemental Judgment*

Turning to the claims the court ruled on in its supplemental judgment, NWMS argues it presented evidence of prima facie defenses to Morrone's other claims sufficient to satisfy the first of the *White* factors. We agree. For example, NWMS presented a prima facie defense to Morrone's disability discrimination claim.

Morrone claimed disability discrimination under WLAD, chapter 49.60 RCW. He claimed that his emotional distress and anxiety relating to his wife's pregnancy complications and the loss of their daughter was a disability that: "(i) [was] medically cognizable or diagnosable; or (ii) exists as a record or history; or (iii) was perceived to exist whether or not it existed in fact."[7] CP at 12.

[6] *See* LAWS OF 2017, 3d Spec. Sess., ch. 5.

[7] The definition Morrone cites is from RCW 49.60.040(7) (defining "disability") and aligns with WAC 162-22-020(1)-(2) (Human Rights Commission Employment Regulations).

Fleming's declaration states that he neither perceived Morrone to have any disability nor took any negative action against Morrone "in furtherance of any such belief." CP at 243. The evidence in Fleming's declaration demonstrates a set of circumstances that, if Fleming were to be believed, would entitle NWMS to relief. *See Ha*, 182 Wn. App. at 449. Taking all evidence in the light most favorable to NWMS, Fleming's declaration presented a prima facie defense to Morrone's disability discrimination claim.

III. Reason for Failure to Timely Appear

NWMS argues it also satisfied the second *White* factor because NWMS's failure to appear was due to the mistake or excusable neglect of outside counsel and NWMS should not bear the "sins of the lawyer." Br. of Appellant at 12.

Where a defendant demonstrates strong defenses, there is no willful failure to appear, and the secondary *White* factors are satisfied, we may set aside the default judgment regardless of why the defendant failed to timely appear. *VanderStoep*, 200 Wn. App. at 518; *Akhavuz*, 178 Wn. App. at 533. "The strength of the defendant's defense determines the significance of the defendant's reasons for failing to timely appear and defend." *VanderStoep*, 200 Wn. App. at 518.

Here, NWMS presented several strong defenses, especially to Morrone's Family Leave Act claim. Accordingly, NWMS's reasons for failing to appear are not a critical consideration. *See Akhavuz*, 178 Wn. App. at 533. There is nothing in the record that shows NWMS willfully failed to appear. NWMS presented a reason for failing to appear: a miscommunication at

counsel's office. Although this was a weak reason, it was a reason that Willert declared to be a mistake.

IV. HARDSHIP

NWMS argues that it satisfied the fourth *White* factor because there would be no substantial hardship visited on Morrone if the court were to grant the motion to vacate. Morrone argues that he would suffer hardship by continuing to have his wages withheld and having to relive the trauma associated with his loss. We agree with NWMS.

"[V]acation of a default judgment inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits." *Ha*, 182 Wn. App. at 455 (quoting *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003)) (internal quotation marks omitted). "The prospect of having to go to trial is not, by itself, enough to constitute substantial hardship." *Akhavuz*, 178 Wn. App. at 539. Hardship occurs, for example, when evidence has gone stale as a result of a delay. *Akhavuz*, 178 Wn. App. at 539.

Morrone cannot show more than a delay of judgment and the prospect of trial, which are not substantial hardships. We hold that NWMS has satisfied the fourth *White* factor.

CONCLUSION

NWMS has met all the *White* factors. Although NWMS presents defenses of varying strengths to Morrone's multiple claims, it presents several strong defenses, especially to his Family Leave Act claim. NWMS also showed that its failure to appear was due to mistake. Morrone cannot show that proceeding to trial would result in hardship. Considering all the

factors and determining whether default should be set aside as a matter of equity, we hold that the trial court abused its discretion when it denied NWMS's motion to vacate. We set aside the default judgment for amount certain and the supplemental default judgment. We deny Morrone's request for reasonable attorney fees because he does not prevail on appeal. We reverse.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Glasgow, C.J.

Price, J.

Filed
Washington State
Court of Appeals
Division Two

May 10, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ADAM LANEER CONSTRUCTION, INC., Appellant, v. FOSTER BROTHERS, INC., Respondent.	No. 55324-4-II UNPUBLISHED OPINION

LEE, J. — Adam Laneer Construction, Inc. appeals the superior court's orders granting Foster Brothers, Inc.'s motion to set aside a default judgment and denying Laneer Construction's motion for reconsideration. Laneer Construction argues the superior court abused its discretion in granting the motion because Foster Brothers failed to present evidence establishing a prima facie defense and to show that the failure to appear resulted from excusable neglect. Further, Laneer Construction argues that the superior court abused its discretion by failing to impose sanctions as a condition of granting the motion to set aside the judgment. We affirm the superior court's orders.

FACTS

On May 12, 2020, Laneer Construction filed a complaint against Foster Brothers seeking $13,085.43 in damages for breach of contract. Laneer Construction alleged that it entered into a subcontracting agreement with Foster Brothers for work on a construction project. The complaint also alleged that the work Foster Brothers completed on the project was defective and did not comply with industry standards.

A summons was filed on the same day. The summons was served on Foster Brothers' registered agent on May 16.

On June 12, Laneer Construction filed a motion for default and for entry of default judgment. On June 22, the superior court entered judgment against Foster Brothers for $13,085.43 in damages plus statutory costs and attorney fees.

On June 25, three days after entry of the default judgment, the attorney for Foster Brothers filed a notice of appearance. On July 28, Foster Brothers filed a motion to set aside the default judgment under CR 60(b). The motion alleged that Foster Brothers attempted to retain an attorney from May 16 through June 22, but was unable to do so because of complications related to the COVID-19 pandemic. Foster Brothers was able to retain counsel on June 25. Foster Brothers also denied that any of its work was done improperly.

Foster Brothers argued that its failure to retain counsel was excusable neglect under CR 60(b)(1). Foster Brothers also argued that it had a valid defense because the work was done as contemplated under the terms of the contract. Foster Brothers' motion was supported by the declaration of Josh Foster, part owner of Foster Brothers. Foster declared that Foster Brothers completed the work under the contract and was paid for its work. Later, Laneer Construction claimed the work was done improperly and had to be redone. Foster also declared that Foster Brothers was unable to speak to potential counsel until June 22 because of the COVID-19 pandemic.

Laneer Construction opposed the motion to set aside the default judgment. Laneer Construction argued that Foster Brothers failed to support its motion with any specific factual references supporting its contentions, so the superior court should deny Foster Brothers' motion. Laneer Construction also argued, alternatively, that the superior court should impose sanctions

against Foster Brothers and leave the judgment in effect for seven days to give Foster Brothers the choice to either "(a) pay the sanctions and prepare to litigate; or (b) decide to just pay the judgment and move on." Clerk's Papers at 75.

Laneer Construction supported its opposition to Foster Brothers' response based on the conditions caused by the COVID-19 pandemic with a declaration from its own attorney. The attorney declared that he had continued to practice during the pandemic, as well as interacting with various other lawyers during the pandemic, and was not aware of any situation that would prevent a person from being able to consult with or retain an attorney. Further, the attorney stated that Foster Brothers did not make any attempt to contact him and explain their difficulty in retaining an attorney.

The superior court granted Foster Brothers' motion to set aside the default judgment. Laneer Construction moved for reconsideration, which the superior court denied.

Laneer Construction appeals.

ANALYSIS

A. LEGAL PRINCIPLES

We review a superior court's decision on a motion for reconsideration for an abuse of discretion. *Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015), *review denied*, 185 Wn.2d 1035 (2016). We also review decisions to set aside default judgments for an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). "A [superior] court abuses its discretion by making a decision that is manifestly unreasonable or by basing its decision on untenable grounds or untenable reasons." *VanderStoep v. Guthrie*, 200 Wn. App. 507, 518, 402 P.3d 883 (2017), *review denied*, 189 Wn.2d 1041 (2018). "[W]e are more likely to find an abuse of discretion when the [superior] court denies a motion to set aside a default judgment than when

the [superior] court grants such a motion." *Id*. "[D]efault judgments generally are disfavored because courts prefer to resolve cases on their merits." *Id*. at 517.

CR 60(b)(1) provides for relief from a judgment for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Courts apply a four-prong test to determine if a default judgment should be vacated under CR 60(b)(1):

> (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Little, 160 Wn.2d at 703-04. The first two factors are the primary considerations in whether to set aside a default judgment. *Id.* at 704.

However, whether to set aside a default judgment is ultimately a matter of equity. *Id*. "Our primary concern is whether justice is being done." *VanderStoep*, 200 Wn. App. at 517. We must decide whether the superior court's decision on a motion to set aside a default judgment is just and equitable. *Id*. "What is just and equitable must be determined based on the specific facts of each case, not based on a fixed rule." *Id.* at 517-18.

B. MOTION TO SET ASIDE DEFAULT JUDGMENT

Laneer Construction argues that the superior court erred by granting the motion to set aside the default judgment because Foster Brothers failed to present prima facie evidence of a defense. Laneer Construction also argues that the superior court erred by granting the motion to set aside the default judgment because Foster Brothers failed to establish the failure to timely appear was due to excusable neglect.[1]

[1] Laneer Construction's briefing provides substantial argument regarding the first two factors of the test but only passing treatment of the remaining two factors. Laneer Construction concedes that Foster Brothers acted with due diligence after the default judgment was entered. With regard

1. Prima Facie Defense

Laneer Construction argues that there was not substantial evidence supporting a prima facie defense to the complaint because Foster Brothers offered only a conclusory denial of the allegations that the work was done improperly. We disagree.

When moving to set aside a default judgment, "a defendant generally must submit affidavits identifying specific facts that support a prima facie defense." *Id*. at 519. Conclusory allegations and statements are insufficient to establish a prima facie defense; "[t]he defendant must present 'concrete facts' that support a defense." *Id.* (quoting *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 449, 332 P.3d 991 (2014), *review denied*, 182 Wn.2d 1006 (2015)).

However, the superior court must view all facts and inferences in the light most favorable to the defendant. *Id*. at 519-20. Any set of circumstances that, if believed, would entitle the defendant to relief may support setting aside a default judgment. *Id*. at 520. "[E]ven a 'tenuous' defense may be sufficient." *Id.* (internal quotation marks omitted) (quoting *Little*, 160 Wn.2d at 711).

"In a breach of contract action, the plaintiff must prove that a valid agreement existed between the parties, the agreement was breached, and the plaintiff was damaged." *Univ. of Wash. v. Gov't Emp. Ins. Co.*, 200 Wn. App. 455, 467, 404 P.3d 559 (2017). Here, Foster Brothers' defense is simply general denial, which Foster Brothers did support by Foster's declaration that

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to the hardship factor, Laneer Construction argues that it incurred legal expenses resulting from the motion to set aside the default judgment and, therefore, it suffered financial hardship resulting from the order setting aside the default judgment. However, Laneer Construction would have incurred these legal expenses regardless of whether the motion to set aside was granted. This is not a "substantial hardship" as required by the *Little* factors. 160 Wn.2d at 704. Accordingly, Laneer Construction has not shown that either of the secondary factors warrants reversing the superior court's orders granting the motion to set aside the default judgment and denying the motion for reconsideration.

the work had been done properly. Further, Foster Brothers stated that Laneer Construction paid for the work but later determined that the work was substandard. A reasonable inference from Foster's declaration is that Laneer Construction also considered Foster Brothers' work satisfactory because Laneer Construction paid Foster Brothers for their work, providing Foster Brothers with a viable defense to Laneer Construction's breach of contract claim. Thus, given the facts presented, the superior court did not abuse its discretion by granting Foster Brothers' motion to set aside the default judgment.

2. Excusable Neglect

Laneer Construction argues that Foster Brothers failed to show that the failure to appear was excusable neglect resulting from the COVID-19 pandemic.[2] We disagree.

The superior court has broad discretion in determining whether the failure to appear resulted from excusable neglect. *VanderStoep*, 200 Wn. App. at 526. The superior court may make credibility determinations or weigh evidence to determine whether there has been excusable neglect. *Id*.

Here, Foster Brothers declared that it had difficulty retaining an attorney because of the COVID-19 pandemic. Although Laneer Construction provided evidence that its attorney had been able to contact clients during the pandemic, the superior court was within its discretion to weigh the opposing declarations and give more weight to Foster Brothers' declaration.

Furthermore, granting Foster Brothers' motion facilitates a decision on the merits. *Id*. at 517 ("[D]efault judgments generally are disfavored because courts prefer to resolve cases on their

[2] Laneer Construction also argues that Foster Brothers has failed to provide any explanation for its failure to timely take action in response to Laneer Construction's communications prior to filing the lawsuit. But Laneer Construction cites to no law establishing that we consider response or lack of response to pre-filing attempts to resolve a dispute when deciding whether to grant or deny a motion to set aside a default judgment.

merits."). Because the superior court granted, rather than denied, Foster Brothers' motion and it is in the interest of justice to have this case decided on the merits, the superior court did not abuse its discretion by granting Foster Brothers' motion to set aside the judgment.

C. SANCTIONS

Laneer Construction also argues that the superior court abused its discretion by refusing to impose sanctions as a condition of granting the motion to set aside the default judgment. Laneer Construction does not cite to any specific court rule or statute that justifies the imposition of sanctions as a condition of granting a motion to set aside a default judgment. Instead, Laneer Construction argues that the superior court should have exercised its inherent authority to impose sanctions. We disagree.

Any decision on sanctions is reviewed for an abuse of discretion. *State v. Gassman*, 175 Wn.2d 208, 210, 283 P.3d 1113 (2012) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)). Although various court rules allow for the imposition of sanctions, the superior court also has "inherent equitable powers to manage its own proceedings" which justify imposition of sanctions. *Id*. at 211. The inherent power to impose sanctions comes from the superior court's "inherent authority to control and manage their calendars, proceedings, and parties." *See Id*.

Here, the superior court exercised its inherent authority by choosing to not impose sanctions as a condition of granting the motion to set aside the default judgment. Because the decision of whether or not to do so was based on the superior court's inherent authority to control its own calendar, proceedings, and parties, we cannot say that the superior court abused its discretion by declining to impose sanctions as condition of setting aside the default judgment against Foster Brothers.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, J.

Cruser, A.C.J.

West's Revised Code of Washington Annotated
Title 50a. Family and Medical Leave
Chapter 50A.05. General Provisions

West's RCWA 50A.05.125

50A.05.125. Continuity with prior law

Effective: April 16, 2021
Currentness

(1) The provisions of chapter 49.78 RCW as they existed prior to January 1, 2020, apply to employee and employer conduct, acts, or omissions occurring on or before December 31, 2019, including but not limited to the enforcement provisions set forth in RCW 49.78.330 as they existed prior to January 1, 2020. Accordingly, a cause of action for conduct, acts, or omissions occurring on or before December 31, 2019, under chapter 49.78 RCW remains available within its applicable statute of limitations. As an exercise of the state's police powers and for remedial purposes, this subsection applies retroactively to claims based on conduct, acts, or omissions that occurred on or before December 31, 2019.

(2) The provisions of this title apply to employee and employer conduct, acts, or omissions occurring on or after January 1, 2020, including but not limited to the enforcement provisions set forth in RCW 50A.40.040.

Credits
[2021 c 59 § 2, eff. April 16, 2021.]

OFFICIAL NOTES

Intent--2021 c 59: "(1) Since enacted in 1989, chapter 49.78 RCW afforded employees the right to unpaid family and medical leave, to return to their jobs afterwards, and to enforce those rights. In 2017, the legislature passed Substitute Senate Bill No. 5975, creating the paid family and medical leave act to replace and enhance the existing unpaid family and medical leave laws.

(2) The passage of the paid family and medical leave act repealed chapter 49.78 RCW and replaced its provisions as a new title in Title 50A RCW. However, the passage of the paid family and medical leave act did not, and was not intended to, undermine any right, liability, or obligation existing under chapter 49.78 RCW prior to its repeal, or under any rule or order adopted under those statutes. Likewise, the passage of the paid family and medical leave act was not intended to affect any proceeding that had been, or could be, brought under the existing chapter 49.78 RCW relating to conduct, acts, or omissions occurring on or before December 31, 2019. To the contrary, the legislature incorporated the employment protections provisions of chapter 49.78 RCW wholesale into the new Title 50A RCW. Moreover, the legislature specifically delayed the effective date of the repeal of chapter 49.78 RCW by over two years after the effective date of the rest of the act, in part, in order to ensure that there would be continuity in the protections provided and rights available under chapter 49.78 RCW and its successor provisions in Title 50A RCW.

(3) The legislature intends to clarify that the passage of the paid family and medical leave act did not sever, impair, extinguish, or in any way affect the rights, liabilities, or obligations under chapter 49.78 RCW as it existed prior to January 1, 2020. A cause of action for conduct, acts, or omissions occurring on or before December 31, 2019, under chapter 49.78 RCW remains available within its applicable statute of limitations." [2021 c 59 § 1.]

Effective date--2021 c 59: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 16, 2021]." [2021 c 59 § 3.]

West's RCWA 50A.05.125, WA ST 50A.05.125
Current with all effective legislation from the 2022 Regular Session of the Washington Legislature. Some statute sections may be more current, see credits for details.

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