101142-3

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

COURT OF APPEALS No. 38208-7-III

THEODORE DENISON, MARTHA DENISON and

GWENEVER (KIRA) LOREN SAPIER,

PLAINTIFFS/APPELLANTS

V.

SPENCER GORMAN, DEFENDANT/RESPONDENT

APPELLANTS'PETITION FOR REVIEW TO THE SUPREME COURT

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I. IDENTITY OF PETITIONERS

Theodore Denison, Martha Denison and Gwenever (Kira) Loren Sapier, plaintiffs in the trial court and appellants in the Court of Appeals, ask this Court to accept review of the Court of Appeals decision, designated in Part B of this Petition.

II. COURT OF APPEALS DECISION

Review is sought of *Denison v. Gorman*, Division III, No. 38208-7-III, unpublished, July 12, 2022 ("Decision"). See Appendix A.

III. ISSUES PRESENTED FOR REVIEW

No. 1: Does CR 60 govern vacation of default judgments?

No. 2: Did the Court of Appeals apply the wrong standard of review?

No. 3: Was service presumptively accomplished?

No. 4: Did Respondent prove insufficient service by clear and convincing evidence?

No. 5: Did the Court of Appeals err in applying the standards of CR 60(b)(1) and *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968) under CR 60(b)(5), where Defendant's motion to vacate was not brought within the one-year time limitations of CR 60(b)?

No. 6: Did the Court of Appeals err in upholding the trial court's order vacating Plaintiff's orders of default and default judgment for equitable principles under CR 60(b)(11)?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

This dispute originates from a motor vehicle collision on November 26, 2018. CP 1-5, 478-480. On November 26, 2018, Plaintiff Theodore Denison was driving his vehicle north on Washington Street in Spokane, Washington. CP 1-5, 223, 229. Plaintiffs, Martha Denison and Kira Sapier, were passengers in Mr. Denison's vehicle. CP 1-5, 223, 229. At the intersection of 1st Avenue and Washington Street, Plaintiffs came to a stop for a red light. CP 1-5, 223, 229.

While Plaintiffs were stopped, Defendant, Spencer Gorman, who was also traveling north on Washington, failed to stop and collided with the rear of Plaintiffs' vehicle. CP 1-5, 223, 229, 478-480. Defendant admitted liability. CP 1-5, 223, 229, 478-480, RP.

Plaintiffs were injured in the collision. CP 17-212, 223-234. After completing care, settlement demands were mailed to Defendant's insurance company, State Farm, on June 18, 2019. CP 422, 437-440. Plaintiffs' counsel informed the State Farm adjuster that the settlement offers made to Plaintiffs were not acceptable. CP 422, 437-440, RP.

B. Statement of Procedure.

On October 5, 2019, Defendant was served via substitute service at his home. CP 12-13, 442-445. Plaintiffs filed suit on October 23, 2019. CP 1-5. After no answer or notice of appearance, Plaintiffs made a motion for default and default judgment. CP 6-212.

An evidentiary hearing was held in Spokane Superior Court on December 13, 2019. CP 422-23, 438-440. The three default judgments were entered in favor of Plaintiffs on January 3, 2020. CP 245-250.

On January 8, 2021, Plaintiffs' requested payments on the judgments from State Farm. CP 422-23, 438-440. On January 27, 2021, Plaintiffs' counsel received a call from Defendant's counsel, Gary Luloff. CP 422-23, 438-440. Mr. Luloff asked Plaintiffs to set aside the judgments. CP 422-23, 438-440. Mr. Luloff indicated he had not yet spoken to Defendant, but that State Farm was going to try and void coverage should Defendant admit to having not cooperated by ignoring service. CP 422-23, 438-440. Defendant and his mother later signed declarations drafted by Mr. Luloff's office stating they had never been served. CP 293-298, 351-356.

Thereafter, Defendant filed a motion to set aside the January 3, 2020 orders of default and default judgments. CP 251-252. The motion to set aside was made approximately

fifteen months after the default order was entered, over fourteen months after the default judgments were entered and approximately two months after Defendant was notified of the default judgments. CP 213-14, 245-250, 251-252, 422-23, 438-440.

Defendant's motion requested relief for approximately eleven reasons, including CR 60(b)(1), (2), (4), (5) and CR (11), as well as the Servicemembers Civil Relief Act (SCRA) 50 USC § 3931(b)(1)(A). CP 253-284.

In his motion to vacate, Defendant argued service was improper because the process server's registration had expired, and because the process server did not endorse the summons. CP 253-284, RP. Defendant argued he was not served, because he and his mother did not remember receiving service, and because, according to their assertions, they would have notified State Farm had they been served. CP 253-284, 293-298, 351-356. Defendant argued numerous other reasons and requested that the order of default and default judgments

be vacated under CR 60(b)(1) and CR 60(b)(11). CP 253-284, 471-476, RP.

Plaintiffs' response brief to Defendant's Motion to Vacate included a new declaration from the process server, Melvin Miller. CP 442-443. Mr. Miller's supplemental declaration stated he, "personally served a true copy of the SUMMONS, and COMPLAINT FOR DAMAGES in this matter upon a person of suitable age and discretion who identified themselves as being a resident at the usual place of Defendant's abode. . . " CP 442-443. Mr. Miller declared the person he served, identified herself as "Jennie" and as Defendant's mother. CP 442-443. Mr. Miller's declaration continued that he recognized Defendant's mother from her Facebook page, and that she was the person he served by personally handing her an envelope containing the summons and complaint. CP 442-443, lines 4, 13 and 15 of Declaration of Melvin Miller.

Plaintiffs requested an evidentiary hearing should the Court determine further development to be necessary. CP 436. This request was denied. CP 481-483, RP.

A hearing was held on March 26, 2021. CP 477, 481-483, RP. The court noted it did not read Defendant's memorandum after page fifteen as a penalty for exceeding the page limit. RP at 4:1-3. Defendant's argument of insufficient service began on page fifteen. CP 253-284. No argument regarding insufficient service, except process servers being required to register, was in the first fifteen pages of Defendant's memorandum. CP 253-284.

During the March 26, 2021 hearing, the trial court commented it was not convinced Defendant was *not* served, but found there to be irregularities in the proof of service documents. RP pages 26-27. The trial court held under CR 60(b)(2) that a guardian or guardian ad litem should have been appointed to Defendant. CP 481-483, RP at 24:21–27:16. The trial court also held that the requirements of the SCRA

were not met under 50 USC § 3931(b)(1)(A). CP 481-483, RP at 24:5-20, 27:3-16.

In summary, the trial court abused its discretion by granting Defendant's motion to vacate. The one-year time restrictions were ignored. The requirements for vacating under the SCRA were ignored, and CR 60(b)(11) was used as an end run around of these requirements to grant vacation, when no individual issue justified vacating the order of default or default judgments.

C. Superior Court Verbatim Report of Proceedings.

The verbatim report of proceedings (RP) provides the Court with the trial court's explanation for granting Defendant's motion to vacate. The trial court was concerned that the process server's license had lapsed. RP at 23:12. The trial court stated that Defendant and his mother denied receiving service, so how was the Court supposed to know what happened. RP at 23:17-21. The trial court applied the incorrect standard. To prevail under this theory, Defendant

was required to prove improper service by clear and convincing evidence. The trial court made no such finding; instead stating, "I'm not 100 percent certain that I can find there was proper service." RP at 27:9-10.

Despite being outside the one-year timeframe, the trial court addressed the four *White v. Holm* factors under CR 60(b)(1). RP at 26:16-20. The trial court then went onto conclude,

> [b]ut I think based upon all of the irregularities here and the issues with service -- and I'm not 100 percent certain that I can find there was proper service -- but there are also some credibility issues with regard to the process server; there's certainly an issue with regard to the Soldiers and Sailors Act; and there's certainly an issue with Mr. Gorman being a minor and not having the benefit of the guardian ad litem. So for all of those reasons, I am going to vacate the default order as well as the default judgment.
>
> RP at 27:8-16

D. Court of Appeals.

On July 12, 2012, the Washington Court of Appeals, Division III affirmed the trial court's ruling. The Court of

Appeals ruled that CR 60(b)(5) and equitable principles were proper bases on which to vacate the default judgments, not addressing Gorman's other arguments. *See Denison v. Gorman*, 2022 WL 2677513, at *2 (Div. III, July 12, 2022). The Court of Appeals ruled that default judgments are not governed by CR 60, but rather by equitable principles, and that the provisions of CR 60(b)(1) may be used to vacate judgments even after one year based upon overarching equitable principles at the discretion of a trial court judge. *Id.* at 10.

IV. REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following considerations for review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by

the Supreme Court.

Appellants seek review under subsections (1), (2) and (4).

A. The decision below conflicts with this Court's decisional law and other decisions by the Court of Appeals.

1. CR 60 Applies to Default Judgments

This Court has already decided that setting aside defaults is governed by CR 60(b). The Court of Appeals erroneously held that where a judgment is a default judgment, relief is governed not by CR 60, but by equitable principles. *Id.* The Court of Appeals cited to *Griggs v. Averbeck Realty*, Inc., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) for this proposition. Not only does *Griggs* not stand for this proposition, but the Court of Appeals' ruling conflicts with well-established law.

CR 55(c) states that "for good cause shown and on terms the court deems just, the court may set aside default in accordance with CR 60(b)." *See Reynolds & Assocs v.*

Harmon, 193 Wn.2d 143, 160, 437 P.3d 677 (2019). Relief from judgments and orders in both civil and criminal cases is governed by CR 60(b). *Burlingame v. Consol. Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986). Furthermore, "[a]ny motion to vacate is governed by CR 60." *N. Commercial Co. v. E.J. Hermann Co.*, 22 Wn.App. 963, 972, 593 P.2d 1332, (Div. 2, 1979).

The Court of Appeals cited *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P. 3d 956 (2007). While *Morin* does state that courts do not favor default judgments, *Morin* goes onto state that "if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)." *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P. 3d 956 (2007). CR 60 sets out specific grounds upon which a party may apply to set aside a default judgment. *Id.* The Court of Appeals erroneously ruled that the vacation of default judgments is not governed by CR 60, but by equitable principles.

2. Standard of Review

The Court of Appeals also applied the incorrect standard of review. Generally, a trial court's order on a motion to vacate is reviewed for abuse of discretion. *Larson v. State*, 9 Wn.App.2d 730, 744, 447 P.3d 168 (Div. 3, 2019), *review denied*, 194 Wn.2d 1019 (2020). Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. *Id* at 703; *see also Housing Autho. v. Newbigging*, 105 Wn.App. 178, 185, 19 P.3d 1081 (Div. 3 1999).

Courts, however, have "a nondiscretionary duty to vacate void judgments." *Leen v. Demopolis*, 62 Wn.App. 473, 478, 815 P.2d 269 (Div. 1, 1991). CR 60(b)(5) permits a court to vacate a judgment if the judgment is void. Therefore, a decision whether to vacate a judgment for voidness is reviewed de novo. *Ahten v. Barnes*, 158 Wn.App. 343, 350, 242 P.3d 35 (Div. 1, 2010) (*quoting Dobbins v. Mendoza*, 88 Wn.App. 862, 871, 947 P.2d 1229 (Div. 3, 1997)). The

sufficiency of service of process and therefore, the arguments made under CR 60(b)(5) in this case, are reviewed de novo. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014), *Northwick v. Long,* 192 Wn.App. 256, 260, 364 P.3d 1067 (Div. 1, 2015). The Court of Appeals erred when it applied an abuse of discretion standard of review instead of de novo to CR 60(b)(5) determinations.

Furthermore, a trial court's denial of a request for an evidentiary hearing is reviewed for abuse of discretion. *Northwick* at 260. A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility. *Woodruff v. Spence*, 76 Wn.App. 207, 210, 883 P.2d 936 (Div. 3, 1994).

3. Service Was Accomplished

As mentioned above, whether service was accomplished is reviewed de novo. *Scanlan,* at 847; *Dobbins*, at 871; *Northwick,* at 260. The trial court never ruled service was

invalid in this case. The trial court found the process server's statement in his second declaration, that he served the summons and complaint in an envelope to be "problematic." RP. at 22:12-19. The trial court also found it "problematic" that the process server's registration had lapsed, even though he met the qualifications for service. RP at p. 23:12-14. The trial court used insufficient service as an afterthought to vacate Plaintiffs' order of default and default judgments under CR 60(b)(11), stating only "I'm not 100 percent certain that I can find there was proper service." RP at 27:9-12.

The Court of Appeals, however, ruled that an inference could be made that the trial court found clear and convincing evidence that service did not take place. The Court of Appeals stated that such a determination by the trial court was not an abuse of discretion. The Court of Appeals erred by not making a de novo determination of whether Defendant proved insufficient service by clear and convincing evidence.

The Court of Appeals erroneously held that Defendant

did not need to show lack of service by clear and convincing evidence. This is also contrary to well established precedent.

In *Castellon v. Rodriguez*, 4 Wn.App.2d 8, 16-17, 418, P.3d 804 (Div. 3, 2018), Division III held that "[t]he party attacking the sufficiency of the service carries the burden to show by clear and convincing proof that it was improper." In *Castellon*, Division III cited *Northwick, v. Long,* 192 Wn.App. 256, 261, 364 P.3d 1067 (Div. 1, 2015) and the Supreme Court case of *Allen v. Starr*, 104 Wn. 246, 247, 176 P. 2 (1918), which states, "[a]fter judgment the burden is upon the person attacking the service to show, by clear and convincing proof, that the service was irregular." (emphasis added). Division III, in the case of *Woodruff v. Spence, supra,* also held that "[a]n affidavit of service is presumptively correct, and the challenging party bears the burden of showing improper service by clear and convincing evidence." *Woodruff*, at 210. It is clear that the burden of proving insufficient service had shifted to Defendant in this case.

Division III improperly relied on *Lee v. W. Processing Co.*, 35 Wn.App. 466, 469, 667 P.2d 638 (Div. 3, 1983) for the proposition that Plaintiffs did not meet their initial burden because the affidavit of service was not endorsed or attached to the summons as required by CR 4(g)(2).

The Supreme Court, however, has made it clear that a lack of an endorsement does not invalidate service.

> "But, failure to make proof of service does not affect the validity of the service." CR 4(g)(7). A "lack of return of service [neither] deprive[s] a court of jurisdiction, nor does it affect the validity of the service." *Jones v. Stebbins*, 122 Wn.2d 471, 482, 860 P.2d 1009 (1993).

Scanlan v. Townsend, 181 Wn.2d 838, 848, 336 P.3d 1155 (2014).

The proper remedy though "is to amend the return rather than to declare the judgment void." *Lee* at 470 (quoting *Williams v. Steamship Mut. Underwriting Ass'n*, 45 Wn.2d 209, 273 P.2d 803 (1954)). *Lee* is a very narrow decision where the proper remedy was only ignored on appeal, because the plaintiff did not raise this issue to the trial court. *Id.* In the

case at hand, Plaintiffs did argue before the trial court that lack of return of service did not affect the validity of service.

Furthermore, *Lee* has been distinguished on this issue. In *Leda v. Whisnand*, 150 Wn.App. 69, 207 P.3d 468 (Div. 1, 2009) the Court of Appeals also dealt with service documents containing discrepancies in the dates. Regarding the application of *Lee*, Division 1 stated, "in *Lee* we found proof of service to be insufficient in that case because there existed a raft of evidence beyond the inconsistent dates demonstrating that service had not actually been made." *Leda* at 86.

Here, the Court of Appeals extended its reasoning far beyond the express holding of *Lee* requiring Plaintiffs to speculate why Defendant never informed his insurer that he had been served. CR 4(c) specifies service may be accomplished by anyone who is competent, over 18 years of age, and not a party. *Scanlan v. Townsend*, 181 Wn.2d 838, 850, 336 P.3d 1155 (2014); CR (4)(c). Under RCW 4.28.080(16), service on an individual, requires service be

made upon: "the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein." Here, Defendant's mother met that criteria and she was at Defendant's abode, where she resided. All elements of service were met. Whether the process server's registration was up to date is irrelevant.

It is impossible to determine whether the trial court's factual findings were supported by substantial evidence, because the record was left so incomplete. The Court Appeals inferred that "discrepancies" in the service documents created doubt. The law is clear, however, that Defendant was required to show insufficient service by clear and convincing evidence. The Court of Appeals never made such a finding, instead holding that equitable determinations by the trial court judge were sufficient to vacate the default judgments.

4. Defendant did not overcome the presumption of service through clear and convincing evidence.

Defendant bears the burden of showing improper service by clear and convincing evidence. *See Woodruff supra* at 210. Defendant's arguments fail to meet that standard. The extent of Defendant's evidence consists of two self-serving affidavits stating Defendant and his mother had not been served or did not recall being served approximately fourteen months after service took place. The remainder of Defendant's evidence was that Plaintiffs' counsel listed the incorrect date of service on a declaration and that the process server testified to serving the summons and complaint in an envelope.

Defendant's mother may not remember being served. Defendant and his mother may have been scared into signing declarations by State Farm's threat of voiding coverage if they acknowledged service. Moreover, Defendant's statement that he is responsible, or does not remember being served, does not overcome service.

After completing service, the process server, Mr. Miller, recorded the address and name "Jennie" given to him

by a woman at Defendant's address, who identified herself as Defendant's mother. CP 442-445. Later, Mr. Miller also identified Defendant's mother, Ms. Duncan, from her Facebook page as being the person he served. CP 442-448. At the time of service, Mr. Miller asked Ms. Duncan to give the paperwork to her son. CP 442-443 at lines 4 and 15.

Defendant claimed during oral argument that the process server filed, "conflicting affidavits in this matter." RP at 7:17. Mr. Miller's initial declaration of service stated he "personally served a true copy of the SUMMONS, and COMPLAINT FOR DAMAGES in this matter upon a person of suitable age and discretion who identified themselves as being a resident at the usual place of Defendant's abode. . . " CP 12-13. Mr. Miller's second declaration stated he "personally served a true copy of the SUMMONS, and COMPLAINT FOR DAMAGES in this matter upon a person of suitable age and discretion who identified themselves as being a resident at the usual place of Defendant's abode. . .,"

and that he was confident she was the person he served by personally handing her an envelope. CP 442-443, lines 4 and 15. These were not conflicting statements. Both of his sworn statements stated he served Defendant's mother with the summons and complaint. Mr. Miller only had one dealing with Defendant's mother. Of course the envelope he mentioned is how he handed her the summons and complaint.

If defendants are able to overcome service simply by providing self-serving declarations, stating they were not served or don't remember being served, then no contested service or default would ever be upheld. In *Leen v. Demopolis,* 62 Wn.App. 473, 815 P.2d 269 (Div. 1, 1991), the court considered the clear and convincing evidence test in the case of conflicting affidavits. *Id.* at 478. There, the process server stated that he personally served the defendant. *Id.* at 479. In response, the defendant submitted his own declaration that he was not personally served, but later found the complaint in his mailbox. *Id.* at 479-80. He also provided declarations from

two other people stating defendant was at a restaurant with them at the time of alleged service. *Id.* at 480. The court found that the conflicting affidavits did not constitute clear and convincing evidence. *Id.*

Conflicting affidavits were again considered in *Woodruff v. Spence,* 76 Wn.App. 207, 883 P.2d 936 (Div. 3, 1994). There, the defendant filed a declaration that he was out of town when the process server's affidavit stated service occurred. *Id.* at 210. He also provided declarations from his son and a neighbor, both of whom testified they were around defendant's residence that day, and did not observe anyone else on the property. *Id.* Like *Leen*, the court found the defendant's evidence did not meet the clear and convincing standard. *See id.*

In *Leda v. Whisnand*, 150 Wn.App. 69, 207 P.3d 468 (Div. 1, 2009), the court ruled inconsistent dates in the proof of service documents did not meet the substantial evidence standard in that case. *Id.* at 86. This case also deals with

inconsistency of a service date in a declaration and a trial court record, which was incomplete and never found insufficient service.

Defendant failed to prove by clear and convincing evidence that he was not served. Accordingly, any inference that the trial court vacated Plaintiffs' order of default and default judgments, for insufficient service, should be overturned.

5. The Court of Appeals erred in applying the *White v. Holm* factors and equitable considerations to CR 60(b)(5)

In *White v. Holm*, the Washington Supreme Court held that application of CR 60(b)(1) turns on the following four factors: (1) that there is substantial evidence to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) **that the moving party's failure to timely appear in the action and answer the opponent's claim was occasioned by mistake, inadvertence, surprise, or excusable neglect;** (3) that the moving party acted with due

diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (emphasis added); *see also Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 832, 14 P.3d 837 (Div. 2, 2000), *review denied*, 143 Wn.2d 1021, 25 P.3d 1019 (2001).

Defendant conceded that a motion to vacate a default judgment under CR 60(b)(1) must be made within one year of entry of judgment. (CP 278, lines 2-3). Defendant also conceded that part two of *White's* four factors was not met (his failure to appear was not due to excusable neglect, etc.). Defendant's Response Brief p. 15. Defendant, however, still argued that not meeting all of the required elements permits vacation over one year after judgment under CR 60(b)(11), which **"cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1)."** *Friebe v. Supancheck*, 98 Wn.App. 260, 267, 992 P.2d 1014 (Div. 1, 1999) (emphasis added).

The Court of Appeals made no findings of any extraordinary circumstances which would justify the application of CR 60(b)(11). In fact, the Court of Appeals ruled "[w]e can affirm on the basis that vacating the default judgments was authorized by CR 60(b)(5) and equitable principles. We need not reach the CR 60(b)(4) and (11) alternatives and the subissues they present." *Denison* at 15.

The Court of Appeals ruled that equitable considerations and the *White* factors have been considered and are permitted to be applied to CR 60(b)(5) when it is contended that a judgment is void. The Court of Appeals again incorrectly relied upon the decision in *Lee v. Western Processing Co*. 35 Wn. App. 466, 468, 667 P.2d 638 (1983). While *Lee* does hold that a proceeding to vacate a default judgment is equitable in character, that statement was made prior to the court performing its analysis under CR 60(b)(1). *Lee* at 468. The *Lee* court then states that, "[a] motion to vacate a default judgment under CR 60(b)1) must be brought

within 1 year after the judgment was entered." *Id.*

Like in this case, the plaintiff in *Lee* waited for the one year period to elapse before attempting to collect, "thus denying Western the opportunity to base its motion on CR 60(b)(1)." *Id.* at 469. *Lee* only then analyzed CR 60(b)(5) where the "primary issue is whether the record supports the trial judge's finding that Western (defendant) was not properly served with the summons and complaint." *Id.*

No *White* analysis or equitable analysis was done in *Lee* under CR 60(b)(5). The Supreme Court has been clear that CR 60 governs the vacation of default of judgments. *See Reynolds, Supra* at 160; *Burlingame Supra* at 336; *Morin Supra* at 754. *White's* four factors, which Defendant admitted were not met, must be performed under CR 60(b)(1) within one year. The plain language of CR60(b)(5) is clear that it only applies if the judgment is void; not if a trial court judge finds equitable reasons to vacate. The Court of Appeals erred in applying the four factors from *White v. Holm* in this case

under CR 60(b)(5) as a basis to vacate for voidness.

6. A CR 60(b)(11) analysis was not available and not followed by the Court of Appeals.

CR 60(b)(11) permits vacation for "[a]ny other reason justifying relief from operation of the judgment." Defendant's primary argument has been that the totality of issues justifies relief when no single issue justifies relief.

Precedent holds, however, "[t]he use of CR 60(b)(11) **'should be confined to situations involving extraordinary circumstances not covered by the other sections of CR 60(b).'"** *Friebe v. Supancheck*, 98 Wn.App. 260, 266, 992 P.2d 1014 (Div. 1, 1999) (emphasis added). "Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." *Id.* **"CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1)."** *Id.* at 267 (emphasis added). Therefore, when a motion to vacate is brought more than one year after entry of

the default judgment, such that CR 60(b)(1) is no longer available to the moving party, an argument for vacation of the judgment due to mistake, inadvertence, or excusable neglect cannot be made under CR 60(b)(11). *Id.*

The Court of Appeals failed to make the requisite findings of extraordinary circumstances to vacate under CR 60(b)(11). In fact, the Court of Appeals explicitly stated that it was not vacating under CR 60(b)(11), instead ruling that it is not bound by the limitations of CR 60 and may simply vacate based on an equitable determination, regardless of whether the requirements of CR 60(b) have been met.

B. This Case Involves an Issue of Substantial Public Interest.

Review should also be granted because this case involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4). To determine whether a case presents a substantial public interest, a nonexclusive list of criteria is considered: "'[(1)] the public or

private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future recurrence of the question.'" *Reynolds & Assocs v. Harmon,* 193 Wn.2d 143, 437 P.3d 677 (2019).

This decision from Division III will undoubtedly be quoted to and followed by many trial courts. This change to precedent stating that CR 60 does not govern vacations of default judgments, but rather vacation is governed solely by equity is substantial and has created a substantial public interest.

The Court of Appeals ruling that parties are no longer required under CR 60(b)(5) to prove insufficient service by clear and convincing evidence is another stark change that will permit trial court judges to leave records incomplete and simply vacate judgments based upon equitable principles.

The Court of Appeals decision also has potential precedential effects far beyond vacating default judgments.

Creative counsel can cite this decision as authority for ignoring other civil rules and instead only applying an equitable analysis. Guidance is needed on this issue. The pervasive interest in this opinion and the substantial number of people that will be affected combine to make this a case of substantial public interest that should be decided by this Court.

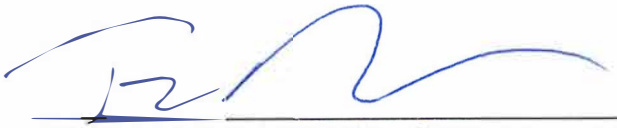
CONCLUSION

For the above stated reasons, Plaintiffs respectfully request this Court should accept review.

I certify this Reply Brief contains 4,955 words.

Dated: August 2, 2022.

Respectfully submitted,



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APPENDIX A

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JULY 12, 2022
In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THEODORE DENISON, MARTHA DENISON, AND G.S.,[†]	)	No. 38208-7-III
Appellants,	)	
v.	)	UNPUBLISHED OPINION
SPENCER GORMAN,	)	
Respondent.	)	

SIDDOWAY, C.J. — Theodore Denison, Martha Denison, and Martha's granddaughter G.S. (collectively "the Denisons") appeal an order vacating their default judgments against Spencer Gorman for damages resulting from an automobile accident. A little over a year after obtaining the judgments, the Denisons' lawyer notified Mr. Gorman's insurer that the judgments existed. The lawyer retained to represent Mr. Gorman moved to vacate the judgments for failure to effect service of process and other claimed irregularities. The trial court granted the motion, identifying multiple grounds.

[†] To protect the privacy interests of minor children, this court identifies them by initials or pseudonyms. General Orders of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses*, (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

CR 60(b)(5) and equitable principles were proper bases on which to vacate the default judgments. We need not reach Mr. Gorman's alternative arguments. We affirm.

FACTS AND PROCEDURAL BACKGROUND

In late November 2018, Spencer Gorman, who turned 17 earlier that month, was contacted by his maternal grandfather, Scott Duncan, who needed a ride. Young Mr. Gorman used his grandfather's car and was driving through downtown Spokane when he glanced backward, intending to change lanes, and realized too late that a light had changed and the car ahead of him had come to a stop. He rear-ended a car being driven by Theodore Denison in which Martha Denison and Martha's 7-year-old granddaughter G.S. were passengers.

Police were not summoned. Insurance and personal information was exchanged and Mr. Gorman took photographs of the damage to the cars. Mr. Gorman spoke on the phone with his mother, Jennifer Duncan, who also spoke with Mr. Denison. Ms. Duncan notified her father, Mr. Duncan, of the mishap and Mr. Duncan reported it to his insurer, State Farm, the next day.

Within two days of the accident, State Farm contacted the Denisons. State Farm was thereafter notified by a lawyer that he would be representing the Denisons in connection with their personal injury claims. State Farm dealt directly with Mr. Denison to resolve the property damage claim.

In June 2019, the Denisons' lawyer sent separate settlement demands to State Farm on behalf of Mr. and Ms. Denison. He sought $37,000 and $25,000, respectively. State Farm notified Mr. Duncan and Mr. Gorman of the demands in a letter. State Farm's letter said the insurer would continue trying to resolve the claims, and, "[i]n the event this case is not settled and litigation should ensue, we will select and compensate attorneys to defend you." Clerk's Papers (CP) at 343. The letter asked that State Farm be notified immediately if Mr. Duncan or Mr. Gorman was served with lawsuit papers, "as there is a limited time allowed for a response." *Id.*

The Denisons' medical expenses presented to State Farm supported only a small part of their demands, and on July 17, 2019, State Farm conveyed offers to pay Mr. and Ms. Denison $5,850 and $5,500, respectively. According to State Farm, the Denisons' lawyer never responded to the offers. His last correspondence to State Farm was a letter dated July 24, 2019, stating that his firm was now representing G.S.

Legal proceedings

In five declarations filed in the action below, the Denisons' lawyer testified that service of a summons and complaint on Spencer Gorman was accomplished on August 18, 2019. The summons and complaint were filed with the clerk of court on October 23, 2019. Both are dated September 13, 2019.

On November 19, no notice of appearance or answer having been filed, the Denisons moved ex parte for entry of an order of default and default judgments. In

moving for the default judgments, their lawyer represented to the court that Mr. Gorman was not an infant. Counsel had a basis for saying that, as he had obtained a copy of Mr. Gorman's driver's license at some point and was aware Mr. Gorman had turned 18 two weeks earlier.

The motion for default stated that Mr. Gorman was served with the summons and complaint on August 18, 2019. Yet the process server's declaration filed in support of the motion stated that service was effected on October 5, 2019. It stated that the process server had effected substitute service at Mr. Gorman's usual place of abode on a woman who answered the door and said she was Mr. Gorman's mother. But it identified the woman as "Ms. Gorman," and Mr. Gorman's mother is Jennifer Duncan. CP at 12.

At an ex parte hearing on December 13, 2019, the trial court entered the proposed order of default. The order stated Mr. Gorman had been served on August 18, 2019. The Denisons' lawyer presented proposed judgment summaries awarding Mr. Denison, Ms. Denison, and G.S. principal judgment amounts of $35,000, $25,000, and $10,000, respectively, amounts that were well in excess of their special damages. The trial court declined to enter judgment in the amounts requested without further declarations justifying the general damage amounts. Based on declarations filed by the Denisons' counsel thereafter, the trial court entered judgments in the requested amounts on January 3, 2020.

Collection undertaken

A little over a year later, on January 8, 2021, the Denisons' lawyer wrote State Farm, informing the insurer that he had obtained default judgments on January 3, 2020, and "[t]he one year timeframe for which to ask the judge to vacate the default ha[d] passed." CP at 306. He informed State Farm that over $8,000 in interest had accrued at the 12 percent interest rate provided in the judgments, but the Denisons would forego the interest if they received payment within 30 days.

Instead, on March 5, 2021, Mr. Gorman, represented by counsel, moved to set aside the order of default and default judgments under CR 55 and CR 60(b). Although he did not dispute liability, he identified defenses to causation and damages.[1] In an overlength brief, he identified what he contended were the following irregularities or other bases for setting aside the judgments:

- Failure to appoint a guardian or guardian ad litem for minor plaintiff G.S. and minor defendant Gorman,
- Failure to comply with the Servicemembers Civil Relief Act, 50 U.S.C. § 3912,
- Failure to make findings of fact and conclusions of law supporting the default judgments,
- Failure to present expert testimony establishing injury causation and whether medical expenses were reasonable and necessary,

[1] State Farm's review of the medical bills submitted on behalf of Mr. and Ms. Denison in the summer of 2019 caused it to question whether all of the medical care was traceable to the automobile accident. After adjustments, it had offered to pay Mr. Denison $5,850.00, $4,984.97 of which was special damages; and to pay Ms. Denison $5,500.00, $4,515.97 of which was special damages. It had never received a settlement demand package for G.S.

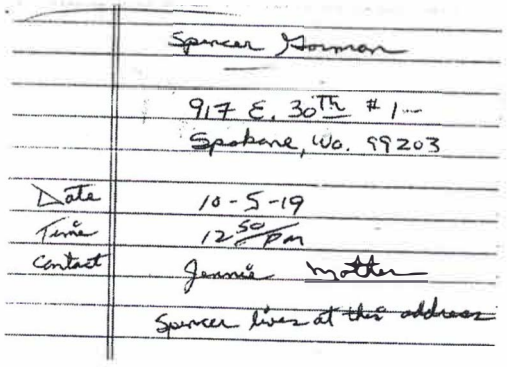
- A judgment interest rate of 12 percent, exceeding the statutory maximum for tort-based judgments,
- Judgments improperly implying that Mr. Duncan's auto insurance policy was subject to the Washington "Financial Responsibility Act," chapter 46.29 RCW, and
- Improper service of process, and in this connection,
    - Use of an unregistered professional process server,
    - Failure by the process server to endorse the summons or attach an affidavit to the summons as required by CR 4(g)(2), and
    - Failure to effect service of process on Mr. Gorman.

Mr. Gorman argued that he had presented a prima facie defense to causation and damages, he had acted with due diligence upon learning of the default judgments, and the Denisons would not suffer substantial hardship if the judgments were set aside.

Mr. Gorman's motion was supported by the declaration of a State Farm employee who recounted the history of State Farm's dealings with the Denisons and their lawyer. It was supported by a declaration from Ms. Duncan, testifying that she has a bachelor of arts degree in criminal justice and sociology, had been served with process in the past, and was fully aware that when served you must respond to it. She testified she was "never served with the Summons and Complaint in this action or received any notice or paperwork indicating any type of claim against [her] son." CP at 353. It was supported by a declaration of Mr. Gorman, who testified, "I was never served with the Summons and Complaint in this matter" and "had no knowledge that a lawsuit against me was filed or that a default judgment was entered against me." CP at 295. He testified that if he had

received notice, he "would have discussed it with [his] parents about how to respond to it." CP at 296.

The Denisons' response not only contested Mr. Gorman's briefing on the merits, but also included a motion to strike his overlength brief. The Denisons also filed a second declaration from their process server, who testified he had not realized his registration as a process server had lapsed. This second declaration repeated that the process server had personally served a woman "at approximately 12:50 p.m. on October 5, 2019," and the woman had identified herself as "Jennie and told [him] that she was Spencer's mother." CP at 442-43. He testified that he had reviewed photos on "Jennie" Duncan's Facebook page (which was Mr. Gorman's mother's Facebook page) and was "confident that she is the person I served." *Id.* at 443. He also testified that he writes down "in a pad of paper the name, date, time and address of everyone I serve," CP at 443, and attached a copy of the following information from his notepad:



CP at 445. The Denisons' lawyer filed his own further declaration in which he once again stated, as he had consistently, that he "had Defendant properly served on August 18, 2019." CP at 438.

In reply, Mr. Gorman argued that the Denisons' response only raised additional questions about effective service. He directed the court's attention to the process server's statement in the second declaration, "When I served her with the Summons and Complaint, Ms. Duncan *took an envelope from me that I told her was for her son*," arguing that effective service requires handing the recipient the summons and complaint, not an envelope. CP at 443 (emphasis added). He pointed out the continuing discrepancy in the date of service.

The motion to set aside the default was heard by the same judge who had granted the motion for default and had entered the default judgments. Addressing the Denisons' motion to strike, the court said its practice on receiving an overlength brief was to stop reading after the 15 permitted pages, which is what it had done in this case. The court did not limit oral argument, however, and in orally arguing the motion, Mr. Gorman's lawyer argued his multiple grounds. He stated that the defense's "first and primary claim is that Spencer Gorman was not properly served in this matter. So that falls into CR 60 (b) (5), that the judgment is void." Report of Proceedings (RP) at 7, *and see* RP at 21. The Denisons' counsel responded to the multiple grounds.

After hearing argument, the trial court ruled orally, touching on most but not all of Mr. Gorman's arguments, and concluded, "for all of those reasons, I am going to vacate the default order as well as the default judgment." RP at 27. The court then spoke with the lawyers about the process going forward. Before the hearing was adjourned, the Denisons' lawyer asked "if we could specifically note under which of the elements that the default is being vacated for," and the court answered, "I'm going to let [Mr. Gorman's lawyer] put that order together." RP at 29. It told the Denisons' lawyer that he could propose his own order if he wished.

The order later presented by Mr. Gorman was entered by the court after it added some handwritten language. Relevant to the appeal, the order states (with the court's handwritten addition indicated by a disimilar font):

> Based on the argument of counsel, the pleadings and evidence presented, the Court finds that good cause exists to set aside the Order of Default dated December 13, 2019 and the Default Judgments dated January 3, 2020 are set aside and vacated for the following reasons
>
> 1. Defendant Spencer Gorman's failure to appear and answer was due to improper and inadequate service on defendant and lack of actual notice to defendant & Irregularity in proof of service documents, failure to meet reqs. of § 3931(b)(1), lack of guardian. MCM
>
> 2. Defendant Spencer Gorman has a meritorious defense to plaintiffs' claims.
>
> 3. Defendant Spencer Gorman acted with due diligence after notice of entry of the Default Judgments against him.
>
> 5. Plaintiffs will not suffer substantial hardship if the Default Judgments are set aside and Defendant is permitted to enter a defense in this action.

CP at 482.

The Denisons appeal.

ANALYSIS

I. BASIS FOR RELIEF FROM DEFAULT JUDGMENTS AND STANDARD OF REVIEW

The grounds and procedures for obtaining relief from a judgment are set forth in CR 60. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). But where a judgment is a *default* judgment, relief is governed by equitable principles, which our Supreme Court summarized in *Griggs*. *See id.*

"Default judgments are not favored in the law." *Id.* at 581 (citing *Ramada Inns, Inc. v. Lane & Bird Advert., Inc.*, 102 Ariz. 127, 129, 426 P.2d 395 (1967). "'[I]t is the policy of the law that controversies be determined on the merits rather than by default.'" *Id.* (alteration in original) (quoting *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). "Balanced against that principle is the necessity of having a responsive and responsible system which mandates compliance with judicial summons, that is, a structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint." *Id.* A proceeding to vacate a default judgment is "equitable in character and relief is to be afforded in accordance with equitable principles." *Id.* at 581 (citing *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968)). "The trial court should exercise its authority 'liberally, as well as equitably, to the end that substantial rights be preserved and justice

between the parties be fairly and judiciously done.'" *Id.* at 582 (quoting *White*, 73 Wn.2d at 351).

"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) (citing *White*, 73 Wn.2d at 352). This is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity. *Id.* When the party seeking relief shows a strong defense to the underlying claim, "scant time will be spent inquiring into the reasons which occasioned entry of the default." *White*, 73 Wn.2d at 352.

The motion to vacate is addressed to the sound discretion of the trial court and on appellate review, we will not disturb the trial court's disposition unless it clearly appears that that discretion has been abused. *Griggs*, 92 Wn.2d at 582. Abuse of discretion is less likely to be found if the default judgment is set aside. *Id.* (citing *White*, 73 Wn.2d at 351-52; *Agric. & Livestock Credit Corp. v. McKenzie*, 157 Wash. 597, 289 P. 527 (1930)).

The Denisons argue in error that the four factors identified in *White* as those considered in deciding whether to vacate a default judgment apply only to motions

brought under CR 60(b)(1). Relief under CR 60(b)(1) is only available to defendants who move for relief within one year of entry of the judgment, and Mr. Gorman concededly missed that one-year time limit.

The basis for relief in *White* was that provided by former RCW 4.32.240 (1891),[2] which was substantially similar to the basis for relief provided by CR 60(b)(1). *See* 73 Wn.2d at 350 & n.1. But contrary to the position taken by the Denisons, when a *default* judgment is at issue, equitable principles in general and the *White* factors in particular are considerations for the court in deciding a motion to vacate a judgment under other subsections of CR 60(b), not just CR 60(b)(1).

In *Morin v. Buris*, a case presenting arguable fraud—a basis for vacating a judgment under CR 60(b)(4)—our Supreme Court observed that it had "long favored resolution of cases on their merits over default judgments" and "will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice." 160 Wn.2d 745, 749, 161 P.3d 956 (2007). One of the cases in that consolidated appeal supported an inference of active concealment and the court "remand[ed] to the trial court for further consideration of whether [defendant] has met the standards of *White* and/or CR 60(b)(1), (4)." *Id.* at 758. If so, "then the [defendants]' failure to appear was excusable under equity and CR 60." *Id.* (citing, inter

[2] RCW 4.32.240 was repealed by LAWS OF 1984, ch. 76, § 11(16).

alia, CR 60(b)(4)). *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 370-71, 777 P.2d 1056 (1989), also recognized that equitable principles, including the guidance in *White*, apply where a motion to vacate is brought under CR 60(b)(4). *See also Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 307-08, 863 P.2d 1377 (1993) (citing equitable principles in affirming order vacating default judgment under CR 60(b)(4) and 60(b)(11)).

Equitable considerations and the *White* factors have been considered when it is contended that a judgment is void under CR 60(b)(5). The decision in *Lee v. Western Processing Co.* affirmed the vacating of a judgment because the record supported the trial court's finding that the defendant was not properly served with the summons and complaint, yet this court still discussed the relevant equitable principles. 35 Wn. App. 466, 468, 667 P.2d 638 (1983) (stating that "[t]he law favors determination of controversies on their merits," "default judgments are disfavored," "[a] proceeding to vacate a default judgment is equitable in character," and "[t]he court should exercise its authority to the end that substantial rights be preserved and justice done between the parties"). *See also Morris v. Palouse River & Coulee City R.R. Inc.*, 149 Wn. App. 366, 370, 203 P.3d 1069 (2009) (applying equitable principles in reviewing order vacating default judgment under CR 60(b)(5)).

Equitable principles and the *White* factors were analyzed by this court in determining to set aside a judgment under CR 60(b)(11), the "catchall" provision of the

rule. *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922 (2005)). The Topliffs had properly served a foreign insurer by serving process on the state insurance commissioner, but the commissioner neglected to notify the foreign insurer by forwarding the process. *Id.* at 305. This court held that the commissioner's failure to forward process provided a basis for relief under CR 60(b)(11), since it was an extraordinary circumstance not covered by any other section of CR 60(b). *Id.* Yet this court held that equitable principles, including the four *White* factors, also applied in determining whether to grant relief. *Id.* at 304-05, 308.

If CR 60(b)(1) is often the basis for motions to set aside default judgments, it is probably the broad circumstances under which it applies—"[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order"—the sort of circumstances that can result in a failure to answer. But the trial court's decision whether to grant relief to Mr. Gorman under CR 60(b)(4), (5), or (11) was governed by the same equitable principles.

II. WE CAN AFFIRM THE TRIAL COURT'S ORDER AS A PROPER EXERCISE OF DISCRETION UNDER CR 60(b)(5) AND NEED NOT ADDRESS MR. GORMAN'S ALTERNATIVE ARGUMENTS

The trial court's order setting aside the order of default and default judgments found that Mr. Gorman has a meritorious defense to the Denisons' claims, that he acted with due diligence after notice of entry of the default judgments, and that the Denisons

will not suffer substantial hardship if the default judgments are set aside. Those findings are not challenged on appeal.

The focus of the Denisons' appeal is the trial court's CR 60(b) bases for providing relief. No subsection of the rule is identified by the trial court's order. We can infer from the order's language that one basis for relief was CR 60(b)(5). *See* CP at 482 ("Defendant Spencer Gorman's failure to appear and answer was due to improper and inadequate service on defendant and lack of actual notice to defendant & Irregularity in proof of service documents."). We can infer that other bases were CR 60(b)(4) and (11), which Mr. Gorman argued applied based on the Denisons' alleged failure to comply with state and federal law protecting defendants under the age of 18 and servicemembers. *See* CP at 482 ("Defendant Spencer Gorman's failure to appear and answer was due to . . . failure to meet reqs. of § 3931(b)(1), lack of guardian.").

We can affirm on the basis that vacating the default judgments was authorized by CR 60(b)(5) and equitable principles. We need not reach the CR 60(b)(4) and (11) alternatives and the subissues they present.

The Denisons contend we cannot affirm by relying on Mr. Gorman's "first and primary" basis for relief, CR 60(b)(5),[3] because, they argue, the trial court "did not find Plaintiffs failed to serve Defendant" and "never ruled that Defendant's mother was not

[3] *See* RP at 7.

served with process at Defendant's usual place of abode." Br. of Appellant at 1; Appellant's Reply Br. at 1. But the order's language that relief is granted due to "improper and inadequate service on defendant and lack of actual notice to defendant" can reasonably be read as relying on only CR 60(b)(5). CP at 482. To say that the Denisons improperly served, inadequately served, and failed to give actual notice to Mr. Gorman *is* to say that they failed to serve him, and did not serve process on Ms. Duncan at Mr. Gorman's usual place of abode.[4]

Under CR 60(b)(5), a court may relieve a party from a final judgment if the judgment is void. *See Sutey v. T26 Corp.*, 13 Wn. App. 2d 737, 748, 466 P.3d 1096, *review denied*, 196 Wn.2d 1026, 476 P.3d 568 (2020). A default judgment against a party is void if the court did not have personal jurisdiction over that party. *Delex Inc. v. Sukhoi Civ. Aircraft Co.*, 193 Wn. App. 464, 468, 372 P.3d 797 (2016) (citing *Ahten v.*

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[4] The Denisons support their contention that the trial court's order did not rely in part on CR 60(b)(5) by pointing to statements made by the trial court during the hearing on the motion to vacate the default order and judgments.

A trial judge's oral conclusions are "no more than a verbal expression" of her informal opinion at the time. *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). A trial court's oral decision may be "altered, modified, or completely abandoned," and is not binding unless it is later formally incorporated into the findings, conclusions, and judgment. *Id.* at 567. The trial court clearly stated during the hearing that it was going to await Mr. Gorman's presentment of a proposed order to specify the basis for its ruling.

"[I]f the court's oral decision is *consistent* with the findings and judgment, it may be used to interpret them." *Id.* (emphasis added). But the Denisons are pointing to statements during the hearing as *inconsistent* with the plain meaning of the court's order. Assuming without agreeing that the statements are inconsistent, we will not consider them.

Barnes, 158 Wn. App. 343, 349, 242 P.3d 35 (2010)). A court does not have personal jurisdiction over a party if service of the summons and complaint was improper. *Id.* (citing *Ahten*, 158 Wn. App. at 349).

Under Washington law, the plaintiff bears the initial burden of proving a prima facie case of sufficient service. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). An affidavit of service that is regular in form and substance is presumptively correct. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) (citing *Lee*, 35 Wn. App. at 469). The return, however, is subject to attack and may be discredited by competent evidence. *Lee*, 35 Wn. App. at 469 (citing *Dubois v. W. States Inv. Corp.*, 180 Wash. 259, 39 P.2d 372 (1934)). When the plaintiff meets it burden of proving a prima facie case of sufficient service (by the presumption or otherwise), the burden is on the person attacking the service to show by clear and convincing proof that the service was improper. *See id.* (citing *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); *McHugh v. Conner*, 68 Wash. 229, 231, 122 P. 1018 (1912)).

Among defects in the return of service that will prevent the presumption of service from arising are discrepancies in dates on documents that create doubt about proper service, and where the affidavit of service is not endorsed upon or attached to the summons, as required by CR 4(g)(2). *Id.* at 469-70.

When the affidavit of service contains defects or irregularities, they are permitted to be corrected by an amendment of the return, since it is the fact of service that confers

jurisdiction, not the return. *In re Est. of Palucci*, 61 Wn. App. 412, 416, 810 P.2d 970 (1991) (citing *Williams v. Steamship Mut. Underwriting Ass'n*, 45 Wn.2d 209, 227, 273 P.2d 803 (1954)).

Applying this case law to the facts at hand, the Denisons bore the initial burden of proving a prima facie case of sufficient service. They failed to do so. Just as in *Lee*, there was a failure to endorse the affidavit of service upon or attach it to the summons, as required by CR 4(g)(2). As in *Lee*, the discrepancies in the Denisons' lawyer's and process server's declarations and the order of default as to when service was effected (August 18, 2019, October 5, 2019, and August 18, 2019, respectively) creates doubt about proper service. The return of service stated the woman served was Ms. Gorman, whereas Mr. Gorman's mother is Jennifer Duncan. Finally, the Denisons' process server, who was engaged in serving process for a fee, was not registered as required and did not affix his registration number or county of residence on the proof of service, in violation of RCW 18.180.010 and .030.

Mr. Gorman responded to the Denisons' failure to present a prima facie showing of sufficient service with his own declaration that he had never been served, and if he had been served or otherwise received notice of the lawsuit, he would have discussed with his parents how to respond. He filed his mother's declaration that she was never served on October 5, 2019, as asserted by the Denisons' process server. She testified in her

declaration to the educational experience and prior receipt of process that made her fully aware of the need to respond.

Finally, Mr. Gorman responded with the declaration of a State Farm claim specialist, which established that Duncan/Gorman family members promptly notified the insurer of the accident and the insurer had acknowledged coverage and promptly addressed the loss claim. The claim specialist attached and authenticated a copy of the letter State Farm directed to Mr. Gorman and his grandfather on June 20, 2019, notifying them that if the claim was not settled and litigation ensued, "we will select and compensate attorneys to defend you," and which advised Mr. Gorman and his grandfather to notify State Farm immediately if they were served with lawsuit papers. CP at 343.

In an effort to correct the defects and irregularities in their proof of service, the Denisons submitted a second declaration of their process server. As Mr. Gorman emphasizes, in the second declaration the process server states that service was effected when Ms. Duncan "took an envelope from me that I told her was for her son," without swearing under oath that the envelope contained the summons and complaint in this case. CP at 443. The second declaration again did not identify a Washington registration number or county of residence for the process server. And most strange was that the discrepancy between the October 5, 2019 and August 18, 2019 dates of service was not only *not clarified*; it was repeated. *See* CP at 422 (Plaintiffs' Resp.), 438 (Decl. of counsel).

This case can be analyzed as one in which the Denisons never met their initial burden of presenting prima facie proof of sufficient service. Their original affidavit of service was not regular in form and substance, and its irregularities and defects were never fully cured. As a result, the burden of responding never shifted to Mr. Gorman.

Even if the burden was viewed as shifting, the trial court could reasonably find Mr. Gorman's evidence to be clear and convincing. If Ms. Duncan was not served, then the earliest she would have learned that she was allegedly served on October 5, 2019, was on or after January 8, 2021, when the Denisons' lawyer informed State Farm of the judgments. That was 15 months after the early Saturday afternoon in October 2019 when she was allegedly served. It would be unreasonable to expect her to be able to recreate where she was at 12:50 p.m. that day, or who might have been at the residence at that time and able to speak to whether a process server came by. That cannot be the evidence required.

Under the circumstances, evidence that can reasonably be viewed as clear and convincing includes the evidence that Ms. Duncan—the person allegedly served—has a background that supports her testimony that she knew service of process must be responded to. It includes evidence that the Duncan/Gorman family had promptly reported the accident to the insurer and had received assurances that the claim was covered and the insurer would retain counsel and provide a defense. This is similar to the evidence in *Lee*, of a defendant whose prior actions "demonstrated concern about [the

plaintiff]'s claim," from which "[i]t could be inferred that any receipt of service of the summons and complaint would have produced a similar reaction." *Lee*, 35 Wn. App. at 469. The Denisons offer no reason why the family would *not* have notified the insurer.

For these reasons, and because the Denisons do not dispute that Mr. Gorman demonstrated the first, third, and fourth *White* factors, we find no abuse of discretion by the trial court in vacating the order of default and default judgments.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, C.J.

WE CONCUR:

Lawrence-Berrey, J.

Pennell, J.

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

THEODORE DENISON, MARTHA DENISON AND GWENEVER (KIRA) LOREN SAPIER, Appellants, vs. SPENCER GORMAN, Respondent.	Court of Appeals No.: 38208-7-III Spokane Superior Court Cause No.: 19-2-04483-32 **DECLARATION OF THOMAS J. FARRELL**

I, Thomas J. Farrell, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am the attorney of record for the Appellants in the above captioned action.
2. On August 3, 2022, I personally mailed Appellants' Petition for Review to the Supreme Court in this matter to Defendant located at:

WAGNER, LULOFF & ADAMS, PLLC,

GARY LULOFF,

2010 W. Nob Hill Blvd., Ste. 2,

Yakima, WA 98902

FARRELL LAW OFFICE, PS
921 W. Broadway, Ste. 301
Spokane, Washington 99201
(509)326-8387
Fax (509)325-4994

3. The above mentioned documents were sent via the United States Postal service. The aforementioned documents were sent first class with postage prepaid

Signed by my hand this 3rd day of August, 2022 at Spokane, WA.

THOMAS J. FARRELL, WSBA #40713
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