NO. 1025939

SUPREME COURT
OF THE STATE OF WASHINGTON

JASON and AMANDA GATES,

Appellants,

v.

HOMESITE INSURANCE COMPANY,

Respondent.

ANSWER TO PETITION FOR REVIEW

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II. INTRODUCTION

Contrary to Homesite's assertion, the Court of Appeals' decision in this case does not "grant[] the judiciary broad discretion to ignore the 20-day pre-suit written notice required under the IFCA[.]" Homesite Pet., 15. In fact, the Court of Appeals' decision did not reach the issue of the IFCA notice, because the 20-day pre-filing notice requirement was viewed as a procedural requirement which was waived by Homesite. Accordingly, the Court of Appeals' decision does not undermine the requirement to give a 20-day pre-filing notice, because it does not apply broadly, rather only to the very narrow circumstances of this case, i.e., a case involving a default judgment.

The Court of Appeals correctly ruled that the 20-day pre-filing notice is procedural—not jurisdictional. Thus, the failure to give the pre-filing notice is an affirmative defense to be asserted as any other affirmative defense. Here, Homesite waived that defense by failing to assert it.

Nevertheless, Homesite attempts to equate the failure to provide a 20-day IFCA pre-suit notice as a defect that strips the court of its subject matter jurisdiction to decide the case. But a defense based on the Gates' failure to comply with statutory prerequisites does not establish a lack of subject matter jurisdiction; instead, such a defense speaks to failure to comply with statutory requirements and must be raised in the answer, just like any other affirmative defense, e.g., the statute of limitations.

In other words, the 20-day pre-filing notice preceding an IFCA claim is at most an *element* of an IFCA claim and not a jurisdictional requirement.

III. FACTS

The Gates suffered a loss when they purchased a home whose walls were contaminated with methamphetamine residue. They asked their insurance company, Homesite, to cover the cost of the remediation under the terms of the policy—over $88,000.

After Homesite denied coverage, the Gates filed a lawsuit against Homesite on theories of breach of contract and violation of the IFCA.

Homesite was properly served by the Insurance Commissioner, as required by RCW 48.05.200. Homesite failed to answer or appear within the required time, so the Gates subsequently obtained an order of default and two default judgments against Homesite, one for damages and one for attorney fees. Homesite admitted it did not respond due to "an inadvertent mistake by a temporary employee at the corporate office, who failed to notify others at Homesite about this lawsuit, [so] Homesite did not retain counsel to appear or answer the complaint." CP 70.

Ultimately, the trial court vacated the two default judgments—and even granted summary judgment of dismissal on the Gates' two claims—but the Court of Appeals reversed the vacation of the default judgments and remanded the case for re-

entry of the default judgments, considering the summary judgment orders as moot.

In its assumption that the 20-day IFCA notice requirement is jurisdictional, Homesite ignores the fact such requirement would have no effect on the Gates' breach-of-contract claim and the resulting default judgment on that claim.

IV. ARGUMENT

Homesite sets forth no compelling grounds for review under RAP 13.4(b)(1) or (4). Furthermore, the Court of Appeals' decision is correct that the default judgments entered in this case are neither void nor is there a basis to invalidate them.

A. The Decision of the Court of Appeals Is Not in Conflict with Any Decision of the Supreme Court; Rather It Is Supported by Supreme Court Authority.

Homesite contends that the Court of Appeals' decision upon which it seeks review is inconsistent with Supreme Court precedent in *Dike v. Dike*, 75 Wn.2d 1, 7, 448 P.2d 490 (1968). Homesite Pet. at 17-18. Homesite's contention is misplaced.

Dike involved the question of whether an attorney could be held in contempt for failing to reveal his client's address where the client had taken her child to an unknown place during a dissolution action and where the court had ordered the attorney to disclose the client's address. The attorney honestly believed that his client's address was protected by the attorney-client privilege, while the Supreme Court held that the client's address was not covered by the attorney-client privilege and the attorney's disobedience was not justified. *Dike*, 75 Wn.2d at 13.

Nevertheless, the Supreme Court set aside the adjudication of contempt because the application of the privilege was rather obscure, the attorney was faced with the dilemma of apparently conflicting obligations to his client and to the court, the attorney acted in good faith, and the attorney should have been given the opportunity for review by an appellate court before being sent to jail. *Dike*, 75 Wn.2d at 16.

While the issues in *Dike* have nothing to do with the issues in the instant case, Homesite focuses upon the following statement in *Dike*:

> Where a court has jurisdiction of the parties and of the subject matter, and has the power to make the order or rulings complained of, but the latter is based upon a mistaken view of the law or upon the erroneous application of legal principles, it is erroneous.

Dike v. Dike, 75 Wn. 2d 1, 7 (quoting *Robertson v. Commonwealth*, 181 Va. 520, 536, 25 S.E.2d 352, 146 A.L.R. 966 (1943). Homesite Pet. at 17.

This statement announces no new legal principle. It has been taken by the Supreme Court in discussing *Dike* to mean, "[W]here the court 'has jurisdiction of the parties and of the subject matter, and has the power to make the order or rulings complained of, '" but its order "'is based upon a mistaken view of the law or upon the erroneous application of legal principles, it is erroneous,' as opposed to void for lack of jurisdiction." *Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.,*196

Wn.2d 353, 372-73, 474 P.3d 547 (2020) (internal quotation marks omitted) (quoting *Dike v. Dike,*75 Wn.2d 1, 7, 448 P.2d 490 (1968)).

The principle is merely that where a court has jurisdiction and the power to make a ruling, but the ruling is based upon a mistaken view of the law or upon the erroneous application of legal principles, the ruling "is erroneous." Where such a ruling is erroneous, the remedy is through a timely appeal. *In re Marriage of Kaufman*, 17 Wn. App.2d 497, 517, 485 P.3d 991, 999-1000 (2021) (citing *Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.*, 196 Wn.2d 353, 371-72, 474 P.3d 547 (2020)).

The problem for Homesite in this case is that if the trial court erred in entering a judgment against Homesite despite the Gates' failure to send Homesite the 20-day IFCA pre-filing notice, Homesite's remedy was to file a motion under CR 60(b)(1) to vacate the default judgment for "mistakes, inadvertence, surprise, excusable neglect or irregularity in

obtaining a judgment or order." CR 60(b)(1). But such a motion must be filed within one year, and a year had already passed before Homesite made the motion. CR 60(b). "CR 60 defines the limited circumstances under which a party may obtain relief from a final unappealed judgment." *In re Marriage of Kaufman*, 17 Wn. App.2d 497, 485 P.3d 991, 997. Homesite was unable to meet the requirements of CR 60, so was unable to avoid the two default judgments.

Accordingly, the opinion of the Court of Appeals is not inconsistent with *Dike* or any other recent opinion of the Supreme Court. In fact, recent decisions of the Supreme Court support the reasoning of the Court of Appeals in this case. *Ronald*, 196 Wn.2d 353, 372 (jurisdictional deficiencies occur when a court acts outside of its adjudicative authority); and *Freedom Found. v. Teamsters Local 117 Segregated Fund,* 197 Wn.2d 116, 141, 480 P.3d 1119 (2021) (failure to comply with statutory prerequisites does not strip the superior court of its subject matter jurisdiction).

Homesite thus fails to satisfy the requirement for review under RAP 13.4(b)(1), which requires an inconsistency between the opinion of the Court of Appeals and a decision of the Supreme Court.

B. Homesite's Petition Does Not Involve an Issue of Substantial Public Interest that Should be Determined by the Supreme Court.

Homesite's claimed issue of substantial public interest under RAP 13.4(b)(4) is that the 20-day IFCA pre-filing notice is designed to protect insureds, and that if a court may disregard the failure to give the 20-day pre-filing notice, insureds lose protection which the referendum process was designed to establish. Homesite Pet. at 14-15.

This argument is a red herring, as it is surely a relatively rare instance where an insurance company will fail to respond to – or lose – a properly served summons and complaint. After all, insurance companies are in the business of settling claims and have processes and procedures in place for doing so.

While the IFCA may have been designed to benefit insureds, the 20-day pre-filing notice provision actually gives little protection to insureds. One can even make a good argument that the pre-filing notice requirement harms insureds, as the 20-day pre-filing notice allows a recalcitrant insurance company to deny legitimate claims on a widespread basis, unless and until its insured files the 20-day notice. Then the insurance company can take the claim seriously and act reasonably. Many insureds won't bother to retain an attorney to file the 20-day notice, so in those cases the insurance company will get away with the wrongful denial of the claim.

Rather than protect the insured, the 20-day pre-filing notice does little more than tip the insurer off that a claim it has denied may be litigated. The 20-day pre-filing IFCA notice is triggered by an insurer's "unreasonable" denial of a claim for coverage or payment of a benefit. RCW 48.30.015(1); RCW 48.30.015(8). If the insurer has unreasonably denied a claim for coverage or payment of benefits, the court may increase the total

amount of damages to an amount not to exceed three times the actual damages. RCW 48.30.015(3).

Furthermore, the 20-day pre-filing notice may be regarded as a mere trap for the unwary which does little to promote honest insurance company conduct. If the insured inadvertently does not file the 20-day pre-filing notice, then the insurance company can argue that any IFCA claim should be dismissed on summary judgment. The 20-day pre-filing notice then can be viewed as a technical hurdle which will eliminate some otherwise legitimate IFCA claims, but which will have limited beneficial effect on the insurance company's practices and conduct, which clearly does not benefit the insured.

Homesite attempts to hang its hat on such argument, citing certain federal cases for the proposition that the 20-day pre-filing notice is a "condition precedent" for filing an IFCA lawsuit against an insurance company. Homesite Pet., 3-4. Homesite fails to mention, though, that those cases involved the 20-day IFCA notice requirement as an affirmative defense in the

summary judgment context. Homesite provided no authority for the proposition that this affirmative defense can be used as a ground to vacate a default judgment after more than a year has passed. The Court of Appeals rejected such argument here.

Clearly, the 20-day IFCA pre-filing notice in this case provided no protection to the insured. Accordingly, Homesite has failed to show an issue of substantial public interest for review under RAP 13.4(b)(4).

C. The Default Judgment as to the IFCA Claim Was Not Void.

Homesite argued essentially – and the Court of Appeals rejected – that not giving the procedural 20-day pre-filing notice deprives the superior court of the authority to enter the default judgment, and therefore it is void. RB 25. See AB 17-22.[1] Homesite argued that a court's jurisdiction is "irrelevant" to whether the court has "actual authority or power to enter a

[1] "RB" refers to respondents' brief in the Court of Appeals. "AB" refers to appellants' brief in the Court of Appeals.

judgment." RB 25. But Homesite's failure to consider subject matter jurisdiction is fatal to its analysis.

The proper inquiry is to first determine whether the trial court has subject matter jurisdiction and then, as a second step, determine whether there is a limitation on relief. This inquiry leads to a result opposite from Homesite's, namely, that the default judgment is not void. The entry of the default judgment as to the IFCA claim was at most legal error, for which Homesite's remedy was time barred.

1. The Trial Court has Subject Matter Jurisdiction with respect to the IFCA Claim.

There has been longstanding confusion in Washington regarding subject matter jurisdiction, which has been clarified by recent cases. *Buecking v. Buecking*, 179 Wn.2d 438, ¶ 21, 316 P.3d 999 (2013) ("Washington courts have been inconsistent in their understanding and application of jurisdiction"), *cert denied*, 574 U.S. 869, 135 S.Ct. 181, 190 L.Ed.2d 129 (2014). These conflicts and inconsistencies have been seen in all three divisions

of the court of appeals, *viz.*, *Rabbage v. Lorella*, 5 Wn. App.2d 289, 299, 426 P.3d 768 (2018) [Div. I]; *Boudreaux v. Weyerhaeuser Co.*, 10 Wn. App.2d 289, 294, 448 P.3d 121 (2019) [Div. I]; *In re Marriage of Tupper*, 15 Wn. App.2d 796, 806, 478 P.3d 1132 (2020) [Div. II) (holding that although trial court had subject matter jurisdiction, the court lacked the inherent authority to enter an order where the trial court made a legal error and entered an order preempted by federal law, thus making the order void *ab initio*]; *In re Marriage of Weiser*, 14 Wn. App.2d 884, 888, 475 P.3d 237 (2020) [Div. II] (holding to the contrary that legal error alone did not defeat the trial court's inherent authority to enter the dissolution decree at issue); *In re Marriage of Kaufman*, 17 Wn. App.2d 497, 514, 517, 485 P.3d 991, 999-1000 (2021) [Div. II] (rejecting reasoning of *Tupper* and adopting reasoning of *Weiser*); *In re Marriage of Orate*, 11 Wn. App.2d 807, 813, 455 P.3d 1158 (2020) [Div. III].

The *Buecking* court noted that recent cases "have narrowed the types of errors that implicate a court's subject

matter jurisdiction. Under these cases, if a court can hear a particular class of case, then it has subject matter jurisdiction." *Buecking*, 179 Wn.2d 43, ¶ 24.

In *Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.*, 196 Wn.2d 353, 372, the Supreme Court clarified that "subject matter jurisdiction has two necessary components: (1) the authority to adjudicate the particular claim and (2) the authority to issue a particular form of relief. These two components are intertwined." *Ronald*, 196 Wn.2d 353, 372; *Glenrose Ass'n v. Spokane County*, 22 Wn. App.2d 293, 296-97, ¶ 9, 511 P.3d 110, 112 (2022).

"When determining subject matter jurisdiction, the controlling question is whether the court possessed the authority to adjudicate the *type of controversy* involved in the action." *Ronald*, 196 Wn.2d 353, 372, ¶ 39. The "type of controversy" is the "nature of a case and the kind of relief sought." *Id.* (quoting *Dougherty*, 150 Wn.2d 310, 317 (2003)).

The dispositive inquiry to determine subject matter jurisdiction is whether the court had overall authority to adjudicate the particular claim, and the authority to issue a particular form of relief follows. *Ronald*, 196 Wn.2d 353, 372, ¶ 39*; In re Marriage of Kaufman*, 17 Wn. App.2d 497, 514, 517, 485 P.3d 991, 999-1000 (2021).

In the instant case, the trial court's subject matter jurisdiction to deal with an IFCA claim was based on constitutional and statutory authority. CONST. art. IV, § 6 (superior courts "have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."); RCW 48.30.015(1); *Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.,*176 Wn. App. 185, 199, ¶ 33, 312 P.3d 976 (2013) (The "IFCA . . . allow[s] claimants to bring suit in superior court"), *review denied*, 179 Wn.2d 1010 (2014).

Statutory procedural requirements that "limit the exercise of the court's jurisdiction . . . do not eliminate that jurisdiction."

Freedom Found. v. Teamsters Local 117 Segregated Fund, 197 Wn.2d 116, 141, 480 P.3d 1119 (2021). Furthermore, "a person's failure to comply with [statutory] prerequisites does not strip the superior court of its subject matter jurisdiction." *Id.* It follows that a defense based on the plaintiff's failure to comply with statutory prerequisites does not establish a lack of subject matter jurisdiction; instead, such a defense "speaks to statutory prerequisites and should be raised in the answer, just like any other affirmative defense. CR 8(c)." *Freedom Foundation*, 197 Wn.2d at 142.[2]

Accordingly, the 20-day pre-filing notice for an IFCA claim is an *element* of an IFCA claim and not a jurisdictional requirement. See *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 208, 258 P.3d 70 (2011) (citing *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 504, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006))

[2] See also, *Boyle v. Clark*, 47 Wn.2d 418, 424, 287 P.2d 1006 (1955) (statute of limitations is affirmative defense which is waived when defendant defaults); *Davis v. Nielson*, 9 Wn. App. 864, 876-77, 515 P.2d 995 (1973) (same).

(holding that numerosity is an *element* of a Title VII claim, not a *jurisdictional* requirement).

2. Homesite's Cited Cases Do Not Support the Conclusion that the Default Judgments on the IFCA Claim Were Void.

Both the trial court and Homesite relied upon *Lindgren v. Lindgren*, 58 Wn. App. 588, 794 P.2d 526 (1990) to support the propriety of the trial court's vacation of the default judgments. CP 213; RB 21-22. The trial court's and Homesite's reliance on *Lindgren* is misplaced because in *Lindgren* the summons was defective, which deprived the court of personal jurisdiction. Here there was no such defect, as the summons was proper and properly served. CP 514; AB 21-22.

As noted earlier, "a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith. . . .. Such a judgment is, under proper circumstances, voidable, but until avoided is regarded as valid." *In re Marriage of Ortiz,* 108 Wn.2d 643, 649-50, 740 P.2d 843 (1987) (internal quotation

marks omitted) (quoting *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968); *In re Marriage of Orate*, 11 Wn. App.2d 807, 812-13, 455 P.3d 1158 (2020)); *Cole v. Harveyland, LLC*, *supra*, 163 Wn. App. 199, 205.

Appellate courts review de novo whether a trial court erred in granting or denying a motion to vacate a judgment as void. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). If a court enters an order with both jurisdiction and the inherent power to enter the order, a procedural irregularity makes the judgment only voidable. *Rabbage v. Lorella,* 5 Wn. App.2d 289, 297, 298-99. Stated another way, "[s]o long as a superior court had the authority to adjudicate the type of controversy involved in its order, an incorrect decision regarding pre-emption is a legal error that does not implicate the court's subject matter jurisdiction." *Marriage of Kaufman*, 17 Wn. App.2d 497, 371-72.

Homesite fails to discuss or apply key Washington Supreme Court cases which mandate the result reached by the

Court of Appeals here. These cases are *Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.*, 196 Wn.2d 353, 372, 474 P.3d 547 (2020) (jurisdictional deficiencies occur when a court acts outside of its adjudicative authority); and *Freedom Found. v. Teamsters Local 117 Segregated Fund,* 197 Wn.2d 116, 141, 480 P.3d 1119 (2021) (failure to comply with statutory prerequisites does not strip the superior court of its subject matter jurisdiction).

V. CONCLUSION

This Court should deny Homesite's petition for review. The requirements for review under RAP 13.4(b)(1) and 13.4(b)(4) have not been satisfied. The default judgments against Homesite were not void, but voidable, and Homesite waived its ability to raise its IFCA affirmative defense.

RESPECTFULLY SUBMITTED December 28, 2023.

I certify that this document contains 3,272 words in compliance with RAP 18.17(b).

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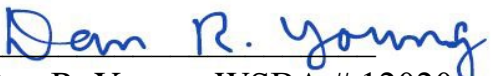
By 
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