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DIVISION III
STATE OF WASHINGTON
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Court of Appeals File No. 34201-8-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

Frank DeCaro, as personal represesentative for the ESTATE OF JESSICA ALVARADO,

*Petitioner/Plaintiff,*

vs.

SPOKANE COUNTY, DOE,

*Respondents/Defendants.*

# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Petitioner Frank DeCaro, as personal representative of the Estate of Jessica Alvarado, asks this court to accept review of the Court of Appeals decision affirming the ruling of the trial court that the default judgment entered against the County should be set aside.

## II. INTRODUCTION

In *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), this Court established the governing principles for review of a motion to set aside a default judgment. In particular, as they pertain to this case, the Court held that, if the defendant has "a strong or virtually conclusive" defense to the plaintiff's claim, then the default judgment should be set aside, even if the defendant's failure to answer the complaint was not excusable. *White,* 73 Wn.2d at 353-54, 438 P.2d at 585. If, on the other hand, the defendant presents only a "prima facie" defense to the plaintiff's claim, then the default judgment should not be set aside unless the defendant can also establish that the failure to answer the complaint was the result of excusable neglect. *Id.* The rationale underlying this approach is that respect for court rules, and ultimately the court's legitimacy, require a party who fails to comply with the rules to justify its noncompliance before being relieved from the

consequences of noncompliance.[1] If the defendant cannot show that the plaintiff's complaint is meritless, then the reasons for the defendant's failure to appear deserve "grave, if not dispositive, consideration." *White*, 73 Wn.2d at 354, 438 P.2d at 585.

In this case, the County was served with the summons and complaint on September 18, 2015. In response, the County did—nothing.[2] Not until

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[1] *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345, 349 (2007) (citations omitted):

> As a general matter, default judgments are not favored because "'[i]t is the policy of the law that controversies be determined on the merits rather than by default.'" But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.

[2] The complete absence of action or excuse is confirmed, rather than disputed, by the Bartel Affidavit, reproduced in its entirety as pages A-13 to A-15 in the Appendix to this Petition. (CP 268-69). The key paragraphs of the Bartel Affidavit, which appear to be the entirety of any explanation ever offered by the County for its neglect, follow:

> ¶8. On September 18, 2015, the current Lawsuit was served on the Spokane County Auditor's Office. It was then forwarded to my office. Unfortunately, a copy of the lawsuit was not forwarded on to legal counsel. This was an inadvertent, and most unfortunate mistake, which has not occurred since I have been the Risk Manager;
>
> ¶9. This was not a case of wilful or deliberate failure. Clearly, as the Risk Manager, one of my roles is to ensure that Spokane County defends itself against torts and lawsuits. I am responsible for resolving those claims that I can resolve and assigning those that cannot be resolved in the tort phase and lawsuits are filed.

December 3, 2015, more than 75 days after the initial service, did the County respond in any way. In its motion to set aside the default, the County offered no explanation for the failure. (See Bartel Affidavit). Nor did it offer a "strong or virtually conclusive" defense, even by the County's own description. (CP 211, Spokane County's Memo in Supp. Of Mtn. to Set Aside Default). Nonetheless, the trial court granted the motion to set aside the default, and the Court of Appeals affirmed, contrary to the principles set forth in *White*. What is more, in divining "[a]t its heart ... what the *White* standard is about," the appellate court represented the *White* standard as permitting a default judgment to be set aside so long as a party does not "intentionally ignore its obligation to respond."[3] This ruling essentially replaces the requirement to show excusable neglect (unless the plaintiff's case is meritless) with a mere showing that the failure to timely respond to a lawsuit was not intentional. If the procedure under CR 60 for setting aside default judgments is to be altered in such a dramatic way, the authority to do so can be found only in this Court.

## III. STATEMENT OF RELIEF SOUGHT

A copy of the published Court of Appeals decision, *Estate of Alvarado v. Spokane County,* 198 Wn. App. 638, 394 P.3d 1042 (Div. 3

[3] 198 Wn. App. at 645, 394 P.3d at 1046.

2017) is reproduced in the Appendix to this Petition at pages A-1 to A-10. Petitioner seeks review of the Court of Appeals decision, and reversal of the same.

## IV. ISSUE PRESENTED FOR REVIEW

The Court of Appeals held that a prima facie defense is sufficient to justify vacating a default judgment even without a showing of excusable neglect. In the absence of a "meritless" claim, does the *White v. Holm* test allow vacating default judgments when the neglect leading to the default judgment is not excusable?

## V. STATEMENT OF THE CASE

On September 18, 2015, Denise Toutloff in the County Auditor's Office accepted service of a summons and complaint on behalf of the Estate of Jessica Alvarado, alleging that while in the County's custody as a jail inmate, Jessica was subjected to negligent care, resulting in her death. Because the Estate's counsel was unsure whether the service on Toutloff satisfied the statute, the Estate served another copy of the summons and complaint (constituting the third notice[4] to the county of the Estate's claims) on Todd Taylor in the Auditor's office, who verified his authority to accept service on behalf of the County and signed a formal written acceptance.

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[4] Because suits against political subdivisions of the state must be preceded by a notice of claim, the County was first made aware of the claim when a Notice of Claim was filed with Stephen Bartel on July 17, 2015. CP 268.

The summons and complaint were forwarded to Stephen Bartel, the County Risk Manager, who was responsible for obtaining defense counsel to appear on behalf of the County. Inexplicably, Bartel did nothing. After more than 40 days had passed following the service of the Summons and Complaint, the Estate filed a motion for default on November 6, 2015. The motion was granted and the County was held in default. CP 18-19.

The Estate then waited another month, anticipating that the County would eventually respond, but then asked the trial court to enter a default judgment on December 1, 2015. CP 20. The next day, in open court, Judge Annette Plese entered Findings of Fact and Conclusions of Law. She found that when Jessica Alvarado was being held in the Spokane County Jail she informed a jail officer that she was sick because of her withdrawal from medication. CP 182. Jail personnel knew that Alvarado had been continually vomiting and suffering from diarrhea, unable to retain food or water. *Id.* Alvarado told jail personnel that something was seriously wrong and that she needed to be hospitalized. *Id.* Alvarado's distress was so intense that her cell mate asked jail personnel to transfer her to a different cell, and to provide medical care to Alvarado. *Id.* The cell mate was removed, but no additional medical care was provided to Alvarado. *Id.* Alone in her cell, Alvarado aspirated vomit, suffocated, and died in the early morning hours of August 13, 2012.

Judge Plese further found because of the lack of medical care, Alvarado suffered needless pain, fear, and death. Moreover, her only surviving child, Angelo DeCaro (age 9 at the time of his mother's death), was deprived of the consortium of his mother. Based on the affidavits supporting the damages suffered by the Estate, she entered a judgment against the County for $8 million.

On December 21, 2015 the County filed a Motion and Supporting Memorandum to Set Aside the Default and the Default Judgment. CP 203; 205. The County's brief stated, "Spokane County has a Prima Facie Defense." CP 211:24; it further claimed, "Spokane County Has a Prima Defense as to Liability." CP 212:5. The County further claimed that its failure to enter a notice of appearance "Constitutes Inadvertent Mistake and Excusable Neglect." However, despite the initial claim that its failure to appear was the result of excusable neglect, the County failed to provide any evidence that would support a finding of excusable neglect, and thereafter abandoned the defense of excusable neglect. RP 11.

The County's primary argument in support of its motion to set aside the default was that it had a prima facie defense (CP 223-297) and that it deserved an opportunity to have the case decided on the merits rather than by default. Consequently, the County submitted numerous declarations setting forth the County's defense. CP 218:13. Apparently recognizing that

it could not establish a case of excusable neglect, the County characterized its failure to appear as a "mistake" (CP 205:20; 218:13).

In its opposition to the Motion to Set Aside Default, the Estate agreed that the County had presented a prima facie defense—but no more than that. As a result, The Estate argued that the County's failure to answer or appear would have to be found to be "excusable." Although CR 60 lists mistake as a basis for setting aside a judgment, the Estate pointed out that the County had not pointed to any evidence of mistake; instead, by the County's own admission, it had simply failed to respond—which was a form of neglect, and thus the dispositive question under the relevant case law was whether the County's neglect was excusable or inexcusable.[5] If the County was unable to establish that its failure to appear was the result of excusable neglect, then it would have to present a "strong or virtually conclusive defense" in order to justify vacating the default. The more stringent standard for defendants who are unable to prove "excusability" was established in *White v. Holm,* 73 Wn.2d 348, 438 P.2d 581 (1968),[6] but

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[5] Plaintiff further argued that if a failure to appear or answer could simply be labeled a "mistake" rather than neglect, and thereby avoid the inquiry into whether the neglect was excusable or inexcusable, then the caselaw distinguishing excusable from inexcusable neglect would be meaningless.

[6] *White* begins with the quality of the defense, and then looks to the reason for the failure to appear or answer. If a strong or virtually conclusive defense is presented, then any reason for failing to appear, short of willful refusal,

it was further refined in *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (Div. 1 2007). *TMT Bear Creek* dealt with a case of inexcusable neglect, and therefore focused on whether the defendant had met the higher standard of a "strong or virtually conclusive" defense. *TMT Bear Creek* recognized that *White* placed the burden on the defendant to prove that the Estate's claim was meritless.[7]

Because the County had essentially conceded that it could not show excusable neglect, the Estate focused on the standard for what the County would need to show in order to establish a strong or virtually conclusive defense. A key question in *TMT Bear Creek* was whether the trial court should weigh the evidence. In cases where the defendant's burden is only to establish a prima facie defense, the trial court should consider only the

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will be enough. On the other hand, if a "reasonably debatable prima facie defense is promptly submitted, then 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." 73 Wn.2d 353-54, 438 P.2d at 585 (emphasis added). In other words, the defendant must either offer an excusable reason for the failure to appear, plus a prima facie defense, or else a strong or virtually conclusive defense.

[7] Just as a default judgment will not be set aside, even though the defendant's failure to appear was the result of excusable neglect, if the defendant cannot demonstrate a prima facie defense (why proceed with a trial on the merits if it would be useless?), the Plaintiff whose case is meritless should not be allowed a default judgment even if the defendant presents no good reason for failing to answer or appear. *TMT Bear Creek*, 140 Wn. App. at 204-05, 165 P.3d at 1279-80.

defendant's evidence, and view it in the light most favorable to the Defendant. By contrast, if the burden is shifted to the Defendant to prove a "strong or virtually conclusive" defense, the trial court must weigh both the Defendant's evidence as well as the Estate's evidence to determine whether the Plaintiff's claim is "meritless." *TMT Bear Creek,* 140 Wn. App. at 204-05, 165 P.3d at 1279-80. The Estate therefore responded to the County's motion by offering evidence that contradicted the County's claims and offered additional support for the findings of fact and conclusions of law upon which the default had been based. In its Reply Brief the County did not address the additional evidence offered by the Estate, but insisted that it was not required to, because the trial court should consider only the County's evidence in determining whether to set aside the default.

At the hearing on the motion to set aside the default the County admitted it was not a case of excusable neglect (RP 8:10-11), but argued that the County had presented a "strong defense," and that the equities of the case favored setting aside the default. At the conclusion of the hearing the trial court granted the County's motion. Judge Plese acknowledged that the County was not relying on excusable neglect,[8] but ruled that there was

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[8] As is discussed more fully in the Argument section, the transcript of the hearing is unreliable. It reads "I would agree the County has already said this is an excusable neglect on the part of the County." RP 38 (emphasis added). In context it is plain, given the concession on the part of the County,

a clear preference for a trial on the merits.[9] The trial court stated that it was not required to weigh the evidence;[10] because the County had presented a prima facie defense, it felt compelled to set the default judgment aside.

The Estate timely appealed the trial court's ruling. The Estate repeated its argument that the trial court could only vacate the default judgment if it found either excusable neglect or a strong or virtually conclusive defense, and the trial court had done neither; hence it was an abuse of discretion to set aside the default. In response, the County argued that it was within the trial court's discretion to set aside the default and that there had been no abuse of that discretion. The County's brief admitted that

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that the trial judge was referring to the admission by the County that this is *inexcusable* neglect on the part of the County. This is confirmed by a later comment by the trial court: "Then I have to look at was there neglect, and they've already stipulated to that." RP 39:24-25. The only "they" that the trial court could have referred to is the County.

[9] "I would have to agree with the defendants that a lot of these cases, in fact, most of these cases talk about defaults being generally disfavored in Washington, and it's very clear from reading all of the cases that the courts like cases to be tried and heard on the merits and not on a default. So that's pretty much in most of the cases that I read." RP 38:3-9. "The courts, in fact, all three divisions and the Supreme Court, want cases to be heard on their merits, and so in that, the Court has no choice but to vacate the default at this point . . .." RP 40:3-6.

[10] "The Court can't go in and actually weigh [the evidence] and say well, do I really think that's a great defense based on your countering what they said because I agree there's not been any discovery in this case, but have they shown it." RP 39:16-20.

it was unable to establish excusable neglect; in fact, it chided the Estate for continuing to focus on whether the neglect was excusable or not: "[I]t is understandable that Plaintiff would like to pigeonhole this into 'excusable neglect' which requires a 'higher standard,' but that is not what Spokane County ever argued." Respondent's Brief on Appeal, at 17.

In its opinion affirming the trial court, the Court of Appeals inexplicably cited what it claimed was a finding by the trial court: that the County's failure to answer or appear constituted excusable neglect: "[Judge Plese] characterized the matter as a case of 'an excusable neglect.'" Only by leaving out the first part of the sentence in the transcript[11] and ignoring the balance of the trial judge's comments (and the County's admissions and arguments) could the Court of Appeals conclude that the trial court had found excusable neglect.[12] But in the balance of its opinion the Court of

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[11] "I would agree *the County has already said* this is an excusable neglect on the part of the County." RP 38:15-16. Even assuming the transcript is correct, the omission of the first part of the sentence makes clear it is a claim (or admission) on the part of the County, not a finding of the trial court.

[12] Although the Court of Appeals briefly claimed that the trial judge found excusable neglect, it did not base its decision on such a finding—nor could it, in light of the Rules of Appellate procedure, which limit the scope of appellate argument to those issues actually contested by the parties. RAP 12.1(a) ("Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.") To the extent that the County explicitly waived reliance on excusable neglect, it could not form the basis of the Court of Appeals decision, unless the Court invoked RAP 12.1(b), which allows the appellate court to

Appeals claimed for *White* and its progeny a rule in stark contrast to the procedure described in *White*: "The County did not intentionally ignore its obligation to respond. At its heart, that is what the *White* standard is about." 198 Wn.App. at 645, 394 P.3d at 1046. This characterization of *White* ignores its careful balance between the preference for a trial on the merits and the need to preserve respect for court rules.

Believing that the Court of Appeals had erred in both its characterization of the record and the applicable law, the Estate timely filed a motion for reconsideration. The motion was denied on May 30, 2017.[13]

## VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

**Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals' description of the standard for setting aside a default judgment conflicts with *White v. Holm* and its progeny.**

### A. "[W]hat the *White* Standard is about."

The Court of Appeals described the *White* standard as being satisfied so long as the County did not "intentionally ignore its obligation to respond." 198 Wn.App. at 645, 394 P.3d at 1046. For nearly 50 years the courts of this state have been guided by the procedure prescribed in *White* for exercising a trial court's discretion to set aside a default judgment—and

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introduce issues not argued by the parties, but only upon notice to the parties giving them an opportunity to respond.

[13] Because the parties were not notified until July 12 of the entry of this order, the Court of Appeals subsequently recalled the mandate and the time to file this Petition for Review was extended.

it is decidedly different from simply determining whether the defendant intentionally ignored its obligation to respond.

In considering a motion to set aside a default judgment, a trial judge is called upon to balance two competing considerations:

> As a general matter, default judgments are not favored because "'[i]t is the policy of the law that controversies be determined on the merits rather than by default.'" But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.

*Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345, 349 (2007) (citations omitted). The trial judge evaluates the motion under CR 60, which has been described as "the mechanism to guide the balancing between finality and fairness." *Suburban Janitorial Services v. Clarke American*, 72 Wn.App. 302, 313, 863 P.2d 1377, 1383 (Div. 1 1993). A careful examination of the record is required to determine which way the balance tilts.

*White v. Holm* established a four-part test for the consideration of motions to set aside a default:

> The discretion which the trial court is called upon to exercise in passing upon an appropriate application to set aside a default judgment concerns itself with and revolves about two primary and two secondary factors which must be shown by the moving party. These factors are: (1) That there is substantial evidence extant 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, 584 (1968). The Estate has conceded that the County presented a prima facie defense (factor #1), that it acted promptly to set aside the default judgment after notice of entry (factor #3), and that the Estate would not suffer a substantial hardship from setting aside the default judgment (factor #4). However, the County failed to argue—much less to establish—that its failure to timely appear in the action was a result of mistake, inadvertence, surprise or excusable neglect.[14]

*White* further explained the process to be followed:

> [W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his

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[14] As is more fully discussed below, the County claimed that it had established "mistake"—but it failed to establish that it was an *excusable* mistake. Mistake occurs when, for example, the defendant sends the wrong case file to an attorney, and the mistake is not discovered until after a default is entered. *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 748 P.2d 241 (Div. 3 1987). Similarly, in *Pfaff v. State Farm Mutual Auto Ins. Co.,* 103 Wn. App. 629, 14 P.3d 837 (Div. 2 2000), the defendant timely faxed the summons and complaint but mistakenly sent it to the wrong number. And in *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 332 P.3d 981 (Div. 1 2014), an independent attorney retained for a Chapter 11 bankruptcy proceeding sent the summons and complaint to the wrong insurance company. Unlike neglect, which is the failure to do something, mistake is an effort to do the right thing, but for "understandable" or "bona fide" reasons, fails to achieve the correct result. Thus, a finding of "mistake" under CR 60 requires something more than regret that the default was taken, which is all that the Declaration of Stephen Bartel establishes.

> application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party.

73 Wn.2d at 353, 438 P.2d at 584. *White* clearly contemplates two different scenarios presented to the trial judge: the first is one where the defendant has shown a "strong or virtually conclusive defense"—in other words, that the plaintiff's claim is meritless. Under the second scenario, the defendant offers a prima facie defense; in that case the "reasons for [the defendant's] failure to timely appear in the action before the default **will be scrutinized with greater care** . . .." *Id.* (emphasis added). More specifically, *White* stated that if a "reasonably debatable prima facie defense is promptly submitted, then 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." 73 Wn.2d 353-54, 438 P.2d at 585 (emphasis added).

The successful proffer of a strong or virtually conclusive defense has been rare. In only one case did the trial court find a strong or virtually

conclusive defense;[15] in every other case the result turned on the "excusability" of the defendant's reason for failing to appear. Consequently, an abundance of cases distinguish those excusable failures from those that are not excusable.

In particular, there is well established precedent that if the defendant fails to appear because of a breakdown of the defendant's internal procedures, the neglect is not excusable.[16] In recognition of its inability to qualify for excusable neglect based on prior cases, the County chose to rely instead upon "mistake" as the basis for setting aside the default.

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[15] *Fowler v. Johnson*, 167 Wn. App. 596, 273 P.3d 1042; the trial court found that as to one cause of action there was a strong or virtually conclusive defense, but felt he had to decide the motion for default on an "all-or-nothing" basis; the Court of Appeals reversed to permit the entry of default on those claims supported by only a prima facie defense, but to set aside the default judgment with respect to the claim that was meritless.

[16] *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 332 P3d 991 (Div. 1 2014) (failure to appear resulting from lack of notice was not breakdown of internal procedure); *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 312 P.3d 967 (2013) (breakdown of internal procedure could not be the basis of excusable neglect); *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (2007) (legal assistant's failure to enter due date on office calendar was inexcusable neglect); *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (Div. 3 2003) (mistaken belief that summons and complaint were part of bankruptcy proceeding was inexcusable neglect); inexcusable); *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 900 P.2d 595 (Div. 2 1995) ("mislaid" file and absence of general counsel were not excusable neglect).

## B. A mistake that is not excusable does not satisfy the second prong of *White.*

The Estate argued on appeal that if the County was unable to establish excusable neglect, it would only be entitled to have the default set aside if it could satisfy the "strong or virtually conclusive defense" standard explained by such cases as *TMT Bear Creek.* In affirming the trial court's decision to set aside the default, the Court of Appeals rejected the claim that if the County had presented only a prima facie defense, it was required to establish excusability:

> Such a reading of the *White* second prong also would be contrary to the language of CR 60(b)(1). That rule permits relief from judgment due to:
>
> > Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.
>
> Nothing in the rule heightens the standard for proving the reason for the error is dependent upon how strong its perceived defense on the merits might be. The burden imposed by the rule is to demonstrate mistake or one of the other factors. It does not require a "really good excuse" if there is only a prima facie defense.

Elsewhere the Court of Appeals seemed satisfied that the County had committed a "mistake" and was therefore within CR60(b)(1).[17] While the

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[17] "The County did not intentionally ignore its obligation to respond. At its heart, that is what the *White* standard is about. Was there a mistake or excusable neglect and is there a chance of a successful defense at trial? If so, *White* is satisfied and a trial judge does not abuse her discretion in setting aside a default judgment." 198 Wn. App. at 645, 394 P.3d at 1046. "Here the County made a mistake about answering the suit, had a potential defense

Court of Appeals earlier had tried to extract a finding of "excusable neglect" from the trial judge's ruling, in the latter portion of the opinion it approves the trial court's vacating of the default judgment upon a showing of "mistake" as long as the defendant offers a prima facie defense.

The Court of Appeals opinion stands in glaring contrast to *White* and the cases that follow it. Under *White*, if the defendant offers merely a prima facie defense, then the "the defaulted defendants' reason for failing to initially and timely appear in the action deserve **grave, if not dispositive,** consideration." 73 Wn.2d 353-54, 438 P.2d at 585 (emphasis added).

In other words, contrary to the claim of the Court of Appeals, a heightened standard is precisely what *White* does require: if the defendant cannot offer a strong or virtually conclusive defense, then it must show that the reason for its failure to appear is *excusable*.[18] Here the County offered no excuse. The County admitted that it simply failed to respond.

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at trial, and rapidly acted to set aside the default." 198 Wn. App. at 645-46, 394 P.3d at 1046.

[18] The cases employ a variety of descriptions of what will satisfy the *White* inquiry into "excusability"; some cases, including *White v. Holm*, ask whether there was a "bona fide mistake." Others refer to whether the cause of the error is "understandable" *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 974 P.2d 1275 (Div. 1 1999).

The County could only call its failure to appear a "mistake" because, in hindsight, it was regrettable.[19] Previous cases have permitted a default judgment to be set aside based upon mistake, but only where it was an actual mistake—that is, an attempt to comply with the rules that went awry—and the mistake could be characterized as "bona fide,"[20] or "understandable."[21] If the County's failure to appear in this case can be characterized as a "mistake" that justifies setting aside a default, then any defendant who cannot meet the standard of "excusable neglect" could simply relabel the failure to appear as a "mistake" and thereby avoid the consequences of default. Such a result would throw into confusion the proper procedure for trial courts addressing motions to set aside a default judgment. Instead, the Court of Appeals judgment should be reversed and the long line of cases applying *White v. Holm* should be reaffirmed.

## VII. CONCLUSION

The decision of the Court of Appeals conflicts with existing standards for applying CR 60 to motions to set aside default judgments. The

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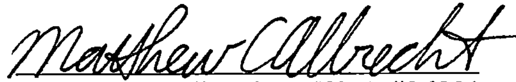
[19] Stephen Bartel said as much: His failure to forward the summons and complaint to legal counsel was "an inadvertent, and most unfortunate mistake . . .." CP 268.

[20] *White v. Holm*, 73 Wn.2d at 355, 438 P.2d at 586.

[21] *Shepard Ambulance,* 95 Wn. App. at 243.

Estate requests that the Supreme Court accept review of the decision of the Court of Appeals.

Respectfully submitted this 11th day of August, 2017



Matthew C. Albrecht, WSBA #36801
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## CERTIFICATE OF SERVICE

I certify under oath and penalty of perjury of the laws of the State of Washington that I caused a copy of the foregoing brief to be served on the date set forth below by email as per the stipulation for electronic service to:

Evans, Craven & Lackie, P.S
Heather C. Yakely - Hyakely@ecl-law.com
J. Winkler - jwinkler@ecl-law.com
Adrien Plummer - aplummer@ecl-law.com

Signed at Spokane, Washington, this 11th day of August, 2017.

Matthew C. Albrecht

**FILED**
**APRIL 11, 2017**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|---|
| Frank DeCaro, as personal representative for the ESTATE OF JESSICA ALVARADO,<br><br>Appellant,<br><br>v.<br><br>SPOKANE COUNTY,<br><br>Respondent. | ) | No. 34201-8-III<br><br>PUBLISHED OPINION |

KORSMO, J. — Frank DeCaro, as representative of the estate of his daughter, Jessica Alvarado, appeals a Spokane County Superior Court ruling vacating a default judgment obtained against Spokane County (County). Concluding that the Estate failed to establish any error by the trial court, we affirm.

FACTS

This case arises from the tragic death of Ms. Alvarado in the Spokane County Jail on August 13, 2012. The Estate filed a tort claim with the county on July 17, 2015, requesting $8,000,000. The County did not respond. The Estate then filed suit on September 18, 2015, alleging wrongful death, a survival action, and negligence in failing to address Ms. Alvarado's medical needs. The complaint was served on the Spokane

County Auditor's Office on September 22, 2015. The matter was forwarded to the county's risk manager.

The risk manager apparently failed to forward the notice to defense counsel. No appearance was filed on behalf of the County. On November 6, 2015, the Estate obtained an order finding the County in default. On December 2, 2015, the trial court entered a default judgment for $8,000,546.25. That figure represented $4,000,000 for Ms. Alvarado's damages, $4,000,000 for her son's loss of consortium, and the remainder for costs and statutory attorney fees. The following day, counsel for the County filed a notice of appearance. Six days later, December 9, 2015, the County filed an answer to the complaint that raised three defenses: contributory negligence, reasonable use of force, and reasonable action in accordance with the County's duty to the incarcerated.

The County on December 21, 2015, moved to set aside the order of default and the judgment pursuant to CR 60(b)(1). The County contended that it had made an inadvertent mistake, had substantial evidence in support of a prima facie defense to the claim, acted with due diligence after receiving notice of the default judgment, and also alleged that the Estate would not suffer substantial hardship. The County explained its prima facie case, argued that the damages were excessive, and offered to pay the plaintiff's attorney fees for obtaining the default judgment and responding to the motion to vacate.

The Estate countered with an argument that the County failed to provide a strong or virtually conclusive defense and that its prima facie defense was contradicted by the Estate's witnesses, the damages were supported by the evidence, and that the County's failure to follow its own policies amounted to inexcusable neglect as a matter of law. The matter was argued to the Honorable Annette Plese on January 8, 2016.

Judge Plese granted the motion to vacate, reasoning that the case law required her to ask "is the default just and equitable in this case?" Report of Proceedings (RP) at 38. She characterized the matter as a case of "an excusable neglect." *Id.*[1] Considering the four factors required by *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), the trial court determined that all had been met. RP at 40. The court concluded:

> When the Court looks at what's just and proper, what's just and proper is this case needs to be heard on the merits and not on a default, and so based on that, the Court is going to grant the Motion to Set Aside the Default at this time and let the case be heard on the merits.

RP at 40.

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[1] The Estate contends that the court actually said "inexcusable neglect" and that it was prepared to seek clarification if necessary. Brief of Appellant at 19 n.8. However, RAP 9.5(c) gives parties ten days from the filing of the transcript to serve objections. If the Estate considered the alleged error significant, it needed to bring the matter promptly to our attention. Its failure to do so precludes our giving the language a different interpretation. Treating the County's error as "inexcusable" also would be inconsistent with the trial court's subsequent analysis of the *White* factors. *White v. Holm*, 73 Wn.2d 348, 438 P.3d 581 (1968).

An order granting the motion thereafter was entered. The Estate promptly appealed to this court. A panel heard oral argument at the request of the Estate.

## ANALYSIS

The Estate argues that the trial court applied the wrong standard to its analysis of the case and thereby abused its discretion. It also claims an entitlement to attorney fees on appeal. After first discussing the governing standards for our review, we turn to the Estate's arguments.

The decision to vacate a default judgment is reviewed for abuse of discretion. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Refusal to vacate a default judgment is more likely to amount to an abuse of discretion because default judgments are generally disfavored. *White*, 73 Wn.2d at 351-52. Stated another way, Washington has a strong preference for giving parties their day in court. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007); *Griggs*, 92 Wn.2d at 581-82. While not a proceeding in equity, the decision to vacate a judgment should be made in accordance with equitable principles. *White*, 73 Wn.2d at 351.

There are four factors to consider when hearing a motion to vacate a default judgment:

> (1) That there is substantial evidence extant 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.

*Id.* at 352. The first two factors are of primary importance. *Id.* When the defense is strong or virtually conclusive, "scant time will be spent inquiring into the reasons which occasioned entry of the default" if it was not willful and the request to vacate is timely made. *Id.* Conversely, where the defendant promptly moves to vacate and has a strong case for excusable neglect, the actual strength of the defense is less important to the reviewing court. *Id.* at 353.[2] The overriding concern is to ensure that justice is done. *Griggs*, 92 Wn.2d at 582.

The Estate's argument, reduced to its essentials, is that the County had neither a good excuse nor a strong defense, and therefore the trial court erred in determining that the *White* factors favored setting aside the default. The Estate also claims that the trial

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[2] However, there must be at least some defense because there is no good reason to vacate a default judgment only to face a useless trial. *Griggs*, 92 Wn.2d at 583.

court placed a primacy on the policy of deciding cases on the merits rather than properly applying the *White* standards.

Contrary to the Estate's argument, there is no requirement that one of the two primary *White* factors must be compelling. It is sufficient if both favor vacation of the default judgment. In the context of this portion of its analysis, *White* merely stands for the proposition that when one of the two primary factors is very strong, then the other factor need not be carefully considered. 73 Wn.2d at 352-53.

A previous decision from this court exemplifies this approach. *Johnson v. Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003). There a default was entered when the defendant had not appeared because its store manager, believing the document to be inapplicable because the plaintiff had repaid her loan, had returned the summons to plaintiff's counsel rather than forward it to the home office. *Id.* at 847-48. The trial court refused to vacate a default after determining that the defendant had no defense and no valid excuse for the default. *Id.* at 840. Finding that the trial court had erred by not recognizing that the store's compliance with statutory requirements presented a prima facie defense, this court then turned to the second prong of the *White* test. We characterized the manager's actions as "inexcusable neglect, if not willful noncompliance." *Id.* at 849. We therefore concluded that there was no abuse of discretion by the trial court because the defendant had failed to meet its burden of demonstrating "mistake, inadvertence, surprise, or excusable neglect." *Id.* In other

words, the second prong of the *White* standard was not satisfied, dooming the defendant's argument despite the presence of a prima facie defense. The court did not attempt to test that second prong by a higher standard merely because only a prima facie defense had been proffered. Instead, we looked to the merits of each prong since there was not a sufficiently strong showing on one to limit our review of the other.

Of a similar vein is *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007). There the defendant had appeared in a lawsuit, but did not answer and did not contest the default order despite being given an opportunity to answer. *Id.* at 705-06. The court concluded there was no defense and no excuse for failing to contest the action. *Id.* For both reasons, the defendant failed the *White* test. The court concluded its analysis:

> Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment.

*Id.* at 706. As in *Johnson*, the quality of the evidence on the first *White* prong did not establish a requirement for showing higher quality evidence on the second prong.

Such a reading of the *White* second prong also would be contrary to the language of CR 60(b)(1). That rule permits relief from judgment due to:

> Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.

*Id.*[3] Nothing in the rule heightens the standard for proving the reason for the error is dependent upon how strong its perceived defense on the merits might be. The burden imposed by the rule is to demonstrate mistake or one of the other factors. It does not require a "really good excuse" if there is only a prima facie defense.

As *Griggs* noted, *White* still requires inquiry into the nature of the defense even if there is a really good excuse since no purpose would be served in vacating a judgment if there is no meritorious defense to the claim. 92 Wn.2d at 583. That obligation is satisfied when, as here, there is at least a prima facie defense to the claim. The County provided evidence that Ms. Alvarado declined medical attention and did not appear to be in distress when observed by the jailers. Accordingly, vacating the judgment would not necessarily be a waste of time. A genuine trial question was presented by the defense.

The County did not intentionally ignore its obligation to respond. At its heart, that is what the *White* standard is about. Was there a mistake or excusable neglect and is there a chance of a successful defense at trial? If so, *White* is satisfied and a trial judge

[3] This provision is derived from the former civil procedure statutes. *See* former RCW 4.32.240. Laws of 1891, ch. 62, § 3 provided in part that a court "may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." That provision, in turn, is virtually identical in all except the repayment language, with Laws of 1854, § 69, at 144 ("may relieve a party from such judgment, order, proceeding, taken against him, through his mistake, inadvertence, surprise, or excusable neglect").

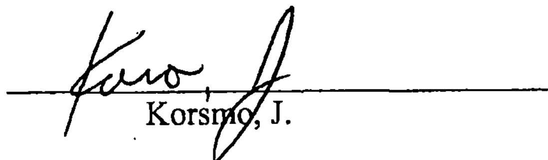
does not abuse her discretion in setting aside a default judgment. We agree with the trial court that was the situation here. The *White* test prevents those who purposely do not contest a default or do not timely do so from benefiting from their actions. It, however, authorizes second chances for those who promptly assert their interest and show that they have the ability to perhaps successfully contest the case. Here the County made a mistake about answering the suit, had a potential defense at trial, and rapidly acted to set aside the default. The trial court had a tenable reason for granting the motion.

The Estate also argues that the trial court abused its discretion by not applying *White* and, instead, unduly relying on the policy of determining a case on the merits instead of by default. This argument mischaracterizes the record and is simply another way of saying that the trial court wrongly applied *White*. The factors identified in *White* reflect Washington's policy preference for decisions on the merits. The trial court noted that policy at the beginning of its decision and affirmed that policy at the end of its analysis. In between, it considered the *White* factors and applied them to the facts of this case. It did not defer to the state policy rather than make considered use of the *White* factors. It applied those factors and recognized that they led to the result promoted by our state courts—it was appropriate to set aside the default and resolve the case on its merits.

We also decline to award the Estate its costs and fees on appeal. With respect to the costs reflected in RAP 14.2, the Estate is not a prevailing party. Moreover, the County's offer to pay the Estate's costs, including attorney fees, was only to reimburse the costs of obtaining the default and responding to the motion to set it aside. Clerk's Papers at 220. The stipulation did not extend to attorney fees for efforts to maintain the default judgment on appeal. Therefore, no fees are available to it per RAP 18.1(a).

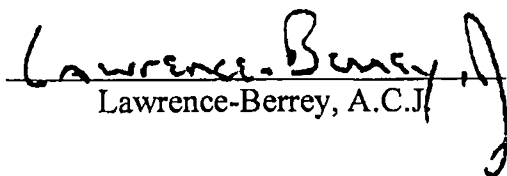
The trial court properly considered the *White* factors. Having found excusable neglect and at least a prima facie defense, the court did not abuse its discretion in setting aside the default judgment.

Affirmed.

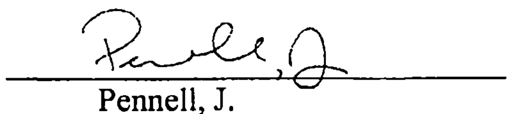


Korsmo, J.

WE CONCUR:



Lawrence-Berrey, A.C.J.



Pennell, J.

**FILED**
**MAY 30, 2017**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
## DIVISION THREE

| | | |
|---|---|---|
| Frank DeCaro, as personal representative for the ESTATE OF JESSICA ALVARADO, | ) | No. 34201-8-III |
| Appellant, | ) | |
| v. | ) | ORDER DENYING MOTION FOR RECONSIDERATION |
| SPOKANE COUNTY, | ) | |
| Respondent. | ) | |

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of April 11, 2017 is hereby denied.

PANEL: Judges Korsmo, Lawrence-Berrey, Pennell

FOR THE COURT:

Lawrence-Berrey, A.C.J.

**ROBERT E. LAWRENCE-BERREY**
**ACTING CHIEF JUDGE**

CR 60
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

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

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

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

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

[Amended effective September 26, 1972; January 1, 1977; April 28, 2015.]

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DEC 21 2015
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ADMINISTRATORS OFFICE

RECEIVED
DEC 21 2015
ALBRECHT LAW

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

FRANK DECARO, as personal representatives for the ESTATE OF JESSICA ALVARADO;

Plaintiffs,

vs.

SPOKANE COUNTY, DOES.

Defendants.

No. 15-2-03881-2

AFFIDAVIT OF STEPHEN R. BARTEL IN SUPPORT OF SPOKANE COUNTY'S MOTION TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT

STATE OF WASHINGTON )
) ss
County of Spokane )

STEPHEN R. BARTEL, being first duly sworn upon oath deposes and says:

1. I have been the risk manager for 9 years;
2. As the risk manager I am responsible for numerous functions for Spokane County. One of those functions is to assign claims and lawsuits to the appropriate legal representation. In addition, my office is responsible for forwarding claims and/or lawsuits to the Washington Counties Risk Pool;



Evans, Craven & Lackie, P.S.
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

3. I received a copy of the Default Judgment in the above referenced matter via email on Thursday, December 3rd, 2015;
4. Spokane County has a procedure for assigning litigation to either internal or external counsel. It has been the same procedure for the past approximate seven to eight years when I implemented the current procedure for forwarding lawsuits to counsel. In that same time frame, Spokane County has been sued on average fourteen to twenty times per year. This is the only time this mistake has been made;
5. The procedure starts with the auditor being served, the County Auditor, Assistant to the Auditor, Records/Licensing Manager/Recording Supervisor and Auto Licensing Supervisor are authorized to accept service. The Summons and Complaint is then scanned into the Receipt of Service Electronic Program. Once entered, an email is sent to the Administrative Assistant in the Risk Manager's Office. The Administrative Assistant prints a copy of the Summons and Complaint, date stamps it and places the document in the Risk Manager's mail box. After review, it is given to the Liability Claims Adjuster for scanning and preparation to be forwarded to the Risk Pool. I personally forward the complaint on to the assigned defense attorney once it has been scanned;
6. This procedure obviously, and necessarily, relies on human action because it requires review and analysis of the correct lawyers to assign, and whether the issues can be resolved in the Tort claim;
7. In this particular case, Risk Management received the Notice of Tort Claim, which was received on approximately July 17, 2015. Given the enormity of the demand, it is not a claim that was resolvable in the claims stage and it was assumed that a lawsuit would be filed;
8. On September 18, 2015, the current Lawsuit was served on the Spokane County Auditor's Office. It was then forwarded to my office. Unfortunately, a copy of the lawsuit was not forwarded on to legal counsel. This was an inadvertent, and most unfortunate mistake, which has not occurred since I have been the Risk Manager;



Evans, Craven & Lackie, P.S.
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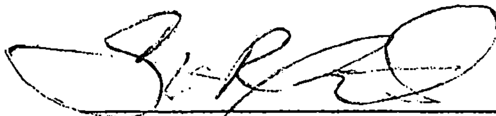
Spokane, WA 99201-0910
(509) 455-5200; fax (509) 455-3632

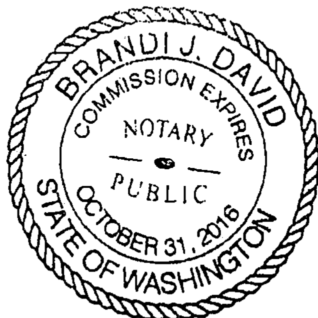
9. This was not a case of wilful or deliberate failure. Clearly, as the Risk Manager, one of my roles is to ensure that Spokane County defends itself against torts and lawsuits. I am responsible for resolving those claims that I can resolve and assigning those that cannot be resolved in the tort phase and lawsuits are filed.



STEPHEN R. BARTEL

SUBSCRIBED AND SWORN TO before me this 7 day of December, 2015.

Brandi David
NOTARY PUBLIC in and for the
State of Washington
Residing at: Spokane County
My Commission Expires: 10/31/2016




CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 21st day of December, 2015, the foregoing was delivered to the following persons in manner indicated:

| | | |
|---|---|---|
| Matthew C. Albrecht<br>Albrecht Law, PLLC<br>421 W. Riverside, Suite 614<br>Spokane, WA 99201 | Via Regular Mail<br>Via Certified Mail<br>Via Facsimile<br>Hand Delivered | ☐<br>☐<br>☐<br>☒ |

Adrien Plummer, Legal Assistant to
HEATHER C. YAKELY



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