No. 99858-2
Court of Appeals No. 82052-4

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

MILWAUKIE LUMBER CO., a Washington corporation,

Respondent,

v.

VERISTONE FUND I, LLC, et. al.;

Appellant/Petitioner

PETITION FOR REVIEW

Thomas S. Linde, WSBA #14426
John A. McIntosh, WSBA #43113
Schweet Linde & Coulson, PLLC
575 South Michigan Street
Seattle, WA 98108
(206) 381-0131
Attorneys for Veristone Fund I, LLC

Table of Contents

Cases

Statutes

Rules

I. INTRODUCTION

If a default judgment on a meritless claim is allowed to stand, justice has not been done. *TMT Bear Creek Shopping Center, Inc., v. Petco* ("*Petco*"), 140 Wn. App. 191, 205, 165 P.3d 1271 (2007). The Supreme Court should accept review of this case because the Court of Appeals' opinion overlooks the above fundamental principle presented in this case and rewards a party who, with the assistance of counsel, seeks and obtains relief it is not entitled to.

Milwaukie Lumber Co. ("Milwaukie") misrepresented the facts related to the priority of its liens in obtaining judgments against Veristone Fund I, LLC ("Veristone"). Milwaukie did not (and cannot) prove it was entitled to the relief it obtained against Veristone. The court of appeals ignored this dispositive issue and, instead, focused only on Veristone's reasons for failing to appear in the context of its motions to vacate. But regardless of whether Veristone's motions to vacate were granted, the law in Washington is clear that proof is still required to support a default declaratory judgment even if the opposing party is found to be in default.[1] *Taylor v. State*, 29 Wn. 2d 638, 642, 188 P.2d 671 (1948)[2]. The

[1] Milwaukie's sole claims against Veristone was for declaratory relief that its liens were superior to all other claimed interests in the Property. CP 746 at ¶ 4.8.

[2] "Respondents have asked the court to put its stamp of approval on their purported compliance with a special statute. Even had there been no appearance by the appellants

interlocutory Default Judgments were initially defective for lack of proof, and the subsequent Final Judgments are defective because they contradict the sole evidence on the record.

Review should also be accepted because the court of appeals' conclusion that Veristone willfully ignored the summonses and complaints conflicts with existing law. First, the incorrect standard was applied. When a movant establishes a conclusive defense on a motion to vacate a default judgment under CR 60(b)(1), the movant's reason for not responding is scrutinized less, not more. Here, the court of appeals scrutinized Veristone's declarations as if it had merely presented a prima facie defense, pointing to a lack of "corroborating evidence" and holding that 5 inches and 20 lbs. is "not compelling" enough of a difference in a description to warrant an evidentiary hearing. But Veristone's affidavits were just as "valid" as Milwaukie's; they were made under the penalty of perjury and were based on personal knowledge. In the context of a motion to vacate where a conclusive defense has been established, Veristone's declarations were sufficient to demonstrate, at minimum, that it did not willfully ignore the summonses and complaints.

---

in the court below, a default declaratory judgment could not have been secured without offering sufficient evidence to support it." *Taylor v. State, supra*. at 642 (emphasis added).

Second, the court of appeals' opinion finding Veristone had a "strategic theory" to take a default judgment on claims it had conclusive defenses to misconstrues a statute that is not before it and did so to the detriment of materialmen lien claimants. By forcing Milwaukie's "strategic theory" to the facts of this case, this Court misconstrues an unambiguous statute that is not at issue, and its holding is detrimental to materialmen lien claimants. Further, there is no evidence on the record that Veristone "strategically" took a default judgment on claims it had conclusive defenses to. Milwaukie plainly created its "strategic" theory out of thin air to avoid having the merits of its claims heard.

In determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are preserved and justice is done. If a default judgment on a meritless claim is allowed to stand, justice has not been done. Justice has not been done in this case and the orders of the trial court and the court of appeals should be reversed.

II. IDENTITY OF PETITIONER

Petitioner Veristone Fund I, LLC ("Veristone") seeks review of the decision designated in Section III. Veristone was the Appellant before Division One of the Court of Appeals and a Defendant before the trial court.

III. COURT OF APPEALS DECISION

On March 29, 2021, Division One of the Court of Appeals affirmed Judge Clark's decisions denying Veristone's motions to vacate default judgments and related orders. This Court should grant review of the Court of Appeals' decision, *Milwaukie Lumber Company v. Veristone Fund I, LLC*, No. 82052-4-I, 2021 WL 1176138 (2021). The court of appeals entered an order denying Veristone's motion for reconsideration on May 5, 2021.

IV. ISSUES PRESENTED FOR REVIEW

Veristone requests that the Supreme Court review whether the Court of Appeals erred by:

1. Holding that Milwaukie Lumber Co. can obtain relief it is not entitled to, did not and cannot prove, and that was obtained by misrepresenting known facts;

2. Holding that Veristone willfully ignored the summonses and complaints;

3. Holding that Veristone was not entitled to an evidentiary hearing before a factual determination was made on the issue of willfulness.

V. STATEMENT OF THE CASE

Veristone is a lender that financed the construction of residential homes on five lots in Camas, Washington. The parcels at issue here are Lot 2, Lot 3, and Lot 4. Veristone's original Deeds of Trust on each lot were recorded in October of 2016. The original Deeds of Trust were refinanced with Veristone and new Deeds of Trust were recorded on each lot in July of 2017.

Milwaukie began to perform labor on Lot 3 and Lot 4 on September 21, 2017, *after* Veristone's Deeds of Trust were recorded on July 26, 2017.[3] Milwaukie began to perform labor on Lot 2 on December 21, 2016 before the July 2017 Deed of Trust was recorded, but after the original Deed of Trust on Lot 2 was recorded on October 20, 2016.[4]

Milwaukie recorded a materialmen's lien on Lot 2 on September 29, 2017[5], and recorded liens on Lot 3 and Lot 4 on February 22, 2018.[6] Before Milwaukie filed these foreclosure complaints, it obtained title reports on Lot 2, Lot 3, and Lot 4.[7] Those title reports disclosed to Milwaukie and its attorneys Veristone's Deeds of Trust that were recorded on July 26, 2017 and also disclosed the existence of Veristone's prior

[3] CP 12 (Lot 3) and CP 1471 (Lot 4); Under RCW 60.04.061, a materialmen's lien attaches to the property when the work is commenced.
[4] CP 753, 781.
[5] CP 753.
[6] CP 12 (Lot 3) and CP 1458 (Lot 4).
[7] CP 115 (Lot 3); CP 880 (Lot 2); and CP 1552 (Lot 4).

Deed of Trust on Lot 2 that was recorded on October 20, 2016 and reconveyed on September 7, 2017.[8]

Despite the fact that Milwaukie knew Veristone's Deeds of Trust were prior to its materialmen's liens, it still named Veristone as a defendant in its foreclosure complaints and falsely alleged the sole following language in each of its complaints with regard to Veristone:

> Defendant Veristone Fund I, LLC ("Veristone") is a Washington limited liability company that may claim an interest in the Property defined below by way of deed of trust recorded against the Property. The deeds of trust are inferior in priority to [Milwaukie's] claim of construction lien."[9]

(emphasis added).

Milwaukie sole explanation for its false allegations on this record was explained by its counsel as follows:

> MS. SPRATT: I'm a construction lawyer. We always allege that we have priority over all other deeds of trust – or all other lien claimants or encumbrances in a deed of trust.[10]

This admission has never been disputed or even addressed by Milwaukie or the lower courts in their rulings.

---

[8] CP 939 (Reconveyance of original Deed of Trust on Lot 2 with reference to its recording date, auditor's File No, date of the Deed of Trust, and the date of reconveyance.)
[9] CP 16 (Lot 3); CP 757 (Lot 2); and, CP 1462 (Lot 4).
[10] RP at 16, lines 9-14 (emphasis added)

On July 2, 2018, Milwaukie obtained *ex parte* default judgments against only Veristone in all three cases (the "Veristone Default Judgments").[11] Milwaukie's motions were supported only by declarations from its counsel Paige Spratt and a Declarations of Service from Tim Hedgpeth.[12] Neither declaration asserted that Miluwakie's liens had priority and none of Veristone's Deeds of Trust (and the dates on which they were recorded) were part of the record before the Court when the Veristone Default Judgments were entered.

On August 7, 2018, Veristone discovered the Veristone Default Judgments and, on August 23, 2018, promptly moved to vacate the judgments under CR 60(b)(1) and (b)(11). Veristone submitted a "valid" affidavit disputing that she was served and testified that Veristone's internal record keeping system did not show that she or anyone else at Veristone received the Summons and Complaint. Good also testified that the description of her in Milwaukie's process server's declaration was inaccurate by over 5 inches and 20 lbs., several other people in the office better fit the description given, and there were no business records of her receipt of the Summons and Complaint.

Veristone also presented conclusive defenses that its Deeds of Trust on Lot 3 and Lot 4 were recorded before Milwaukie began work.

[11] CP 29-35 (Lot 3); CP 770-776 (Lot 2); and, CP 1475-1481 (Lot 4).
[12] *Id*.

With regard to Lot 2, Veristone pointed out, as part of the refinance of Lot 2, that it paid off the obligation secured by the original Deed of Trust and was therefore equitably subrogated to the priority of said original Deed of Trust. With respect to Lot 3 and Lot 4, Veristone further pointed out that the title reports (or "Litigation Guarantees") obtained by Milwaukie revealed these facts yet these facts had not been disclosed to the Court by counsel for Milwaukie when the Veristone Judgments were presented.[13]

On September 12, 2018, the trial court denied Veristone's Motions to Vacate. Veristone attempted to appeal the orders immediately, but Milwuakie opposed those efforts conceding that the Default Judgments were not final and interlocutory. Milwaukie subsequently moved and obtained (again without evidence) final judgments granting it the same relief as the Default Judgments. Veristone timely appealed the final judgments, the orders denying its motions to vacate, and the Default Judgments.

VI. ARGUMENT

1. Milwaukie's misrepresentations and undisputed failure and inability to prove the relief it obtained requires vacation of the Default Judgments and the Final Judgments

Proof is required to support a default declaratory judgment. *Taylor v. State*, 29 Wn. 2d 638, 642, 188 P.2d 671 (1948). There is no dispute

[13] CP 194 (Lot 3); and CP 1638 (Lot 4)

that there is not a single declaration (or any other admissible evidence of any kind) on this record stating that Milwaukie's liens are prior to Veristone's Deeds of Trust. Instead, the evidence on the record establishes the opposite, that the Veristone Deeds of Trust are prior to Milwaukie's liens.

The court of appeals' opinion improperly concluded: "MLC's allegations about lien priority presented legal questions because lien priority is a question of law." In support of this statement, the court of appeals misstates a line in *Kim v. Lee*, 145 Wn.2d 79, 85-86, 31 P.3d 665 (2001), which states, in full, that **"[s]ince the pertinent facts of this case are not in dispute**, the lien priority of PHH over a prior perfected lien creditor is a question of law, which is subject to de novo review." (emphasis added). Factual allegations are always necessary to allege a claim of lien priority, and proof of those facts is needed to obtain a default judgment of said priority. Lien priority allegations are not excepted from the requirements of CR 11. *See*, *Hickey*, *infra*.

There are clear irregularities in this case, yet the court of appeals found there were none. Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unreasonable time or in an improper

manner. *Mosbrucker v. Greenfield Implement, Inc*., 54 Wn. App. 647, 652, 774 P.2d 1267, 1270 (1989). There can be no greater claim of irregularity than the violation of CR 11. Further, a claim of irregularity is not controlled by the test set out in *White v. Holm*, which applies to cases involving excusable neglect or inadvertence. *Id*. at 652. Willfulness has no bearing on a motion to vacate for procedural irregularities.

Veristone should not have been named or served by Milwaukie in the first place. At least two of the complaints filed by Milwaukie violated CR 11. There can be no greater procedural irregularity. In *Peoples State Bank v. Hickey ("Hickey")*, 55 Wn. App. 367, 777 P.2d 1056 (1989), Justice Pekelis's dissent is instructive:

> Peoples' counsel knowingly presented erroneous findings of fact which stated that Carol Hickey's lien was inferior or subordinate. These findings provided the legal basis for entry of the default judgment. Had the trial court known that Carol Hickey's lien was superior to Peoples' lien, it would have, no doubt, refused to enter judgment against Carol Hickey without conducting a hearing to determine whether the lien had been satisfied. CR 55(b)(2). Thus, the misrepresentation by Peoples' counsel subverted the integrity of the court itself . . .
> The conduct of Peoples' counsel, unlike that of the plaintiff in Plattner, also violated CR 11.

Hickey, supra., at 374. The dissent in Hickey also noted that Plaintiff's conduct arguably violated RPC 3.3 which prohibits a lawyer from "knowingly making a false statement of material fact or law to a tribunal",

and RPC 8.4 which prohibits attorneys from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" and "in conduct that is prejudicial to the administration of justice" *Id*. at n. 2, citing RPC 8.4(c) and (d).

Indeed, under RPC 3.3(f), in an ex parte proceeding, an attorney is required to inform the tribunal of all relevant facts known to the attorney that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse. This Court addressed RPC 3.3(f) as follows:

> While we consider all alleged violations of the RPC with great seriousness, we view misrepresentations to the court in ex parte proceedings with particular disfavor. The duty of candor in an ex parte proceeding directly influences the administration of justice. We cannot, and will not, tolerate any deviation from the strictest adherence to this duty.

In re Disciplinary Proceeding Against Carmick, 146 Wash.2d 582, 595, 48 P.3d 311, 317 (2002) (emphasis added). This Court further explained that:

> These rules are designed to protect the integrity of the legal system and the ability of court to function as courts. An attorney's duty of candor is at its highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. Such a high level of candor is necessary to prevent judges from making decisions that differ from those they would reach in an adversarial proceeding.

Id., *citing* Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: Handbook on the Model Rules of Professional Conduct § 29.2, at 29-3, 29-4 (3d ed.2001).

Furthermore, the role of judges and commissioners on a motion for default judgment has been explained by this Court as follows: "[j]udges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court when the amount of a default judgment is uncertain." *Lenzi v. Redlands, Inc. Co*, 140 Wn. 2d 267 281, 996 P.2d 603 (2000).

Here, the trial court was initially not presented with all of the evidence to make an informed decision at the time of the entry of the Default Judgments on Lot 3 and Lot 4. The irregularities in obtaining the Default Judgments identified above are not merely sufficient to support a vacation of the Default Judgments regarding Lot 3 and Lot 4, they are sufficient to establish that they are void and should have never been entered in the first place. Thereafter, the trial court abused its discretion in failing to address the issues presented by disregarding the material facts, and refusing to vacate the Default Judgments regarding Lot 3 and Lot 4; and then by entering Final Judgments based on the void Default Judgments.

Milwaukie's Motions for Default Judgments on Lot 2, Lot 3, and Lot 4 violated CR 11 and CR 55(b). And Milwaukie's Motions for Final Judgments on Lot 2, Lot 3 and Lot 4 violated CR 11 and CR 55(b). It is undisputed that Milwaukie couldn't and didn't prove the relief it requested against Veristone with respect to Lot 2, Lot 3, and Lot 4, and the trial court knew that when it entered the Final Judgments.

The court of appeals also overlooked the fact that the Default Judgments and Final Judgments are directly on review. The Default Judgments are interlocutory, non-final, and subject to the trial court's jurisdiction at all times until the Final Judgments were entered. *Rush v. Blackburn*, 190 Wn. App. 945, 958, 361 P.3d 217 (2015). There is no question that the Default Judgments are interlocutory- when Veristone filed motions for discretionary review of the orders denying the motions to vacate the default judgments, Milwaukie opposed those requests on the basis that they were not final judgments.

This means the Default Judgments and the Final Judgments are all directly on appeal because an appeal from the Final Judgments brings up for review all prior partial judgments, including the defective Default Judgments . RAP 2.2(d), 2.4. Errors of law in the Default Judgments or the Final Judgments are properly on appeal. And the issue that neither the Default Judgments nor the Final Judgments were supported with a

declaration from Milwaukie as required by CR 55(b) was sufficiently raised in Veristone's Opening Brief at p. 28 ("In order to obtain a default judgment, the moving party must present evidence to the court or commissioner which establishes its entitlement to the precise relief its seeks. CR 55(b).").

2. Veristone did not willfully ignore the summonses and complaints

Where a 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 . . ." *White v. Holm*, 73 Wn.2d 348, 353, 438 P.2d 581 (1968). This means the reasons for not responding are scrutinized less, not more. Conclusive defenses were established in this case.

In no event can Veristone's actions be deemed a willful failure to respond. Washington cases that find a willful failure to respond involve defendants that admit to being served a clear mandate to come to court (*e.g.*, a summons, order to show cause, or writ of garnishment), and there is evidence on the record that the defendant intentionally disregarded that mandate without further explanation. For example, in *Bishop v. Illman*, 14 Wn.2d 13, 126 P.2d 582 (1942), the garnishee defendant was served a Writ of Garnishment ordering it to Answer the Garnishment. Instead of filing an answer, the garnishee defendant told the plaintiff: "We never

make a practice of answering garnishments, besides we refused this garnishment." *Id*. at 16. The court found the garnishee defendants' actions to be a willful disregard of the command of a summons. *Id*. at 17.

Similarly, in *Commercial Courier Service, Inc., v. Miller*, 13 Wn.App. 98, 533 P.2d 852 (1975), the plaintiff was admittedly served with the summons and complaint and a temporary restraining order and order to show cause, both of which commanded the defendant to appear within 20 days. *Id*. at 857. The defendant stated that he thought the action was "merely a bluff" and offered no other explanation as to why he did not appear and defend despite receiving both the summons and order to show cause commanding him to appear. *Id*.

On the other hand, Washington cases have found no evidence of a willful failure to respond where the reason for failing to appear is based on confusion, mistakes of law, and other reasons that would otherwise be found to be inexecusable neglect but for the existence of a conclusive defense. In *Borg-Warner Acceptance Corp v. McKinsey*,[14] the Supreme Court affirmed vacation of a default judgment where the garnishee defendant explained that it failed to respond to the Writ of Garnishment because it confused the subject writ with another that they had received against the same debtors. *Id*. at 652. The Supreme Court noted that "a

[14] 71 Wn.2d 650, 430 P.2d 584 (1967).

conclusive defense requires little excuse on a prompt motion to vacate an order of default" and affirmed the writ finding no evidence of a willful disobedience of the writ. *Id*. at 652-53.

Similarly, in *Gage v. Boeing*,[15] Boeing failed to file an answer after receiving a notice of appeal pursuant to RCW 51.52.110 (which required Boeing to file a notice of appearance twenty days after receipt of a notice of appeal of an industrial injury claim before the Board of Industrial Insurance Appeals). *Id*. at 158. Counsel for Boeing acknowledged she was unaware of the notice of appearance requirement. *Id*. at n. 1. The Court affirmed vacation of the default judgment specifically finding that "nothing in the record suggests that counsel's failure to file a notice of appearance was willful." *Id*. at 164.

Here, unlike *Miller* and *Illman*, Veristone submitted affidavits that it did not receive the summons and complaint, much less intentionally disregarded a court mandate to appear. Veristone's registered agent, Meghann Good, testified that that she did not receive the pleadings, the description of her in Hedgpeth's declaration is inaccurate and several other people in the office better fit the description given, and there were no business records of her receipt of the Summons and Complaint.[16] There is

[15] 55 Wn.App. 157, 776 P.2d 991 (1989).
[16] *Id*.

no evidence on the record support a finding that Veristone willfully disregarded a command to appear in court under Washington law.

3. The "strategic theory" adopted by the court of appeals is pure conjecture and misconstrues an unambiguous statute to the detriment of lien claimants

The court of appeals forced Milwaukie's "strategic theory" to the facts of this case and, in doing so, misconstrued an unambiguous statute that is not at issue. Under RCW 60.04.100, a lien binds the subject property for eight calendar months after the claim of lien has been recorded, unless an action to enforce the lien is filed by the lien claimant within the eight-month period and service is made upon the owner of the subject property within ninety days of the date of filing the action. Therefore, as long as a lienholder is within the eight-month window, it can take steps to correct any deficiencies in service.

If a lienholder elects to file an action early in the 8-month window, as Milwaukie did here, there is nothing in the statute preventing that lienholder from dismissing the action and refiling a new action to cure any service defects with the 90-day service requirements. The *statute* merely requires that as long as an action is filed in the 8-month period and the owner of the subject property is served within 90 days from the filing of the action, the lienholder strictly complies with the statute. The court of

appeals' ruling misconstrues RCW 60.04.100 by cutting off the eight-month window the minute a lienholder files an action to enforce its lien.

Milwaukie recorded its liens on Lot 3 and Lot 4 on February 22, 2018 and had eight months, until October 22, 2018, to file an action to enforce its liens. Veristone filed its motions to vacate on August 24, 2018, two months before the 8-month period expired. Nothing prevented Milwaukie from curing any service defect by dismissing and commencing a new action against Veristone. Materialmen's liens under chapter 60.04 RCW are strictly construed to determine whether a lien attaches, but if a court determines that a party's materialmen's lien attaches and is covered by chapter 60.04 RCW, then the court liberally construes the statute to provide security for all parties intended to be protected by its provisions. *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 344-345, 308 P.3d 791 (2013).

Holding that the filing of an action cuts off the eight month period under RCW 60.04.100 is also improper because it adds language to an unambiguous statute. When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Just as we "cannot add words or clauses to an unambiguous statute when the legislature has

chosen not to include that language," we may not delete language from an unambiguous statute. *Id*.

It is also improper to construe RCW 60.04.100 at all because it has no bearing on this case - Veristone is not the owner of the properties. The sole link identified by the court of appeals in connecting Veristone to the strategy is that a reasonable inference could be made that Veristone and its attorneys knew of the 90-day limit because it was statutory. But the 90-day limit as to Veristone is not statutory. No provision of RCW 60.04 *et seq*. required Milwaukie to serve Veristone, a lienholder, within a specific period of time. *Bob Pearson Const. v. First Community Bank* ("*Bob Pearson*"), 111 Wn. App. 174, 179, P.3d 1261 (2002) ("But the 1991 amendments do not say when other lienholders must be sued."). *Bob Pearson* is the only authority that requires a lien claimant to serve another lienholder within 90 days of the filing of the action and *Bob Pearson* was not before the trial court.[17]

4. Refusing to Hold an Evidentiary Hearing Was Reversible Error

When a motion to set aside a default judgment is supported by affidavits asserting lack of personal service, and the plaintiff files controverting affidavits, a triable issue of fact is presented. *Woodruff v. Spence*, 76 Wn.App. 207, 210 (1994). The factual issues in this case did

[17] *Bob Pearson* is not being used as legal authority in this case; it is being offered as evidence to prove a strategic theory.

not simply turn on whether Veristone was served, but whether Veristone willfully ignored the summonses and complaints and engaged a "strategic" basis to do so.

The court, in its discretion, may direct that an issue raised by motion be heard on oral testimony if that is necessary for a just determination. *Id. citing Swan v. Landgren*, 6 Wn.App. 713, 495 P.2d 1044 (1972). 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. *Id*., *citing Autera v. Robinson*, 419 F.2d 1197, 1202 (D.C.Cir.1969). There was insufficient evidence to make a finding of willfulness and, as such, an evidentiary hearing, at minimum, was required. Whether the determination of willfulness required an evidentiary hearing is not even addressed by the court of appeals, despite being clearly stated as an error of law in Veristone's appeal.

VII. CONCLUSION

If a default judgment on a meritless claim is allowed to stand, justice has not been done. *TMT Bear Creek Shopping Center, Inc., v. Petco ("Petco")*, 140 Wn.App. 191, 165 P.3d 1271 (2007). That has occurred here after the court of appeals' Opinion. Accordingly, Veristone requests the Supreme Court accept review.

Dated: June 4, 2021.

Respectfully submitted,

/s/ Thomas S. Linde
Thomas S. Linde, WSBA #14426
/s/John A. McIntosh
John A. McIntosh, WSBA #43113
Attorneys for Veristone Fund I, LLC

APPENDIX

Appendix A:	Unpublished Opinion, No.82052-4-I 3/29/2021
Appendix B:	Order Denying Motion for Reconsideration 5/5/2021
Appendix C:	RCW 60.04.100

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

MILWAUKIE LUMBER COMPANY, Respondent, v. VERISTONE FUND I, LLC, Appellant.	)	No. 82052-4-I UNPUBLISHED OPINION

VERELLEN, J. — A party who willfully ignores a summons and complaint cannot later take advantage of the court's authority to vacate a default judgment entered in the action. Because the trial court found Veristone Fund I, LLC willfully ignored a properly served summons and complaint and substantial evidence supports its findings, the court did not abuse its discretion by denying Veristone's motions to vacate.

An award of compound postjudgment interest is strongly disfavored. Because the judgments entered by the trial court award compound postjudgment interest without explicit contractual authorization, the court erred.

The trial court awarded the Milwaukie Lumber Company (MLC) attorney fees without entering findings of fact, and it entered sanctions against Veristone without identifying a clear legal basis or entering findings of fact. Because findings of fact are required to allow review of both, remand is required.

Therefore, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

Veristone financed the development of five lots in Camas, Washington. The parcels at issue here are Lot 2, Lot 3, and Lot 4. Veristone received and recorded multiple deeds of trust on each lot.

MLC entered into a supply contract with Emerald Valley Development for sale and delivery of building materials to the lots. MLC made its last delivery to Lot 2 on July 19, 2017. On September 29, it filed a lien on Lot 2 for $38,027.95. MLC made its last deliveries to Lots 3 and 4 in December. On February 22, 2018, MLC filed liens on Lots 3 and 4 for $28,022.77 and $15,143.63, respectively.

On May 11, 2018, MLC filed summonses and complaints—one for each lot—to foreclose its three liens and have it declared the first-position lienholder. MLC alleged Veristone's deeds of trust were inferior to its liens. On May 30, a process server delivered the summonses and complaints to Veristone. About two weeks later, MLC filed amended complaints that were nearly identical to the original complaints and mailed them to Veristone.

Veristone never appeared. On July 2, MLC moved for entry of default judgments. The court granted its motions the same day, entering default judgments declaring MLC's interests superior to Veristone's.

On August 24, Veristone moved to vacate the default judgments. The court denied its motions, finding that Veristone had been properly served. The court

explained Veristone "chose not to respond" and had "a strategic reason why they waited to bring this motion to set aside."[1]

MLC sought entry of judgments against Emerald Valley and requested attorney fees. Veristone opposed those efforts. In its reply to Veristone's opposition filings, MLC requested "its fees for having to respond to this improper objection as sanctions under CR 11."[2] The court entered judgments identifying MLC as the creditor and Emerald Valley as the debtor. It awarded postjudgment interest of two percent per month based on MLC's contract with Emerald Valley. The court entered judgments for $87,128.41, including $29,577 in attorney fees, on Lot 2; $66,275.14 on Lot 3; and $49,926.03 on Lot 4. The court also entered orders requiring that Veristone pay MLC $29,577 for the Lot 2 litigation, $66,275 for Lot 3, and $49,926 for Lot 4.

Veristone appeals.

ANALYSIS

I. Vacating Default Judgment

We review a trial court's decision on a motion to vacate a default judgment under CR 60(b)(1) for abuse of discretion.[3] A court abuses its discretion where its decision rests on untenable grounds or was made for untenable reasons.[4]

---

[1] Report of Proceedings (RP) (Sept. 12, 2018) at 32-34.

[2] Clerk's Papers (CP) at 1264.

[3] Little v. King, 160 Wn.2d 696, 702, 161 P.3d 345 (2007) (citing Yeck v. Dep't of Labor & Indus., 27 Wn.2d 92, 95, 176 P.2d 359 (1947)).

[4] TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 199, 165 P.3d 1271 (2007) (citing Showalter v. Wild Oats, 124 Wn. App. 506, 510, 101 P.3d 867 (2004)).

A. Vacation For Mistakes, Inadvertance, Surprise, or Excusable Neglect

A motion to vacate default judgment under CR 60(b)(1) presents a question of equity requiring the trial court to balance Washington's preference for resolving disputes on their merits with the value placed upon an organized, responsive, and responsible judiciary.[5] The court weighs four factors when deciding this question:

> (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.[6]

But when a defendant caused the default by willfully failing to appear, the second factor outweighs the others because equity demands the judgment stand to avoid rewarding misconduct.[7] "[E]quity will not allow for vacation of [a default] judgment if the actions leading to default were willful. Willful defiance of the court's authority can never be rewarded in an equitable proceeding."[8] The movant has the burden of demonstrating that equity favors vacating the judgment.[9]

MLC argues the court correctly denied Veristone's motions to vacate because it found Veristone was properly served and willfully failed to appear.

---

[5] Id. (citing Little, 160 Wn.2d at 703; Showalter, 124 Wn. App. at 510).

[6] White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

[7] TMT Bear Creek, 140 Wn. App. at 206.

[8] Id.

[9] White, 73 Wn.2d at 352.

Veristone contends it was not properly served with summonses, so it could not have intentionally failed to appear. If Veristone was properly served and chose to ignore the summonses, then, regardless of the strength of its defenses, the court did not abuse its discretion by denying the motions to vacate for all three lots.[10]

We review a ruling about proper service of process de novo.[11] But Veristone did not challenge the validity of the professional process server's affidavit of service, making it presumptively correct.[12] Veristone also did not challenge the court's finding of fact that it was properly served, making the finding a verity on appeal.[13] Instead, Veristone argues the court erred by relying upon written testimony and evidence, rather than live testimony, to determine service was proper. Because the decision to decide a motion on affidavits is "purely discretionary,"[14] we review the court's ruling for abuse of discretion.

CR 43(e) governs taking evidence on motions. CR 43(e)(1) provides that a trial court considering a motion "may hear the matter on affidavits" or "may direct that the matter be heard wholly or partly on oral testimony or depositions." But

[10] See TMT Bear Creek, 140 Wn. App. at 206 ("[E]quity will not allow for vacation of the judgment if the actions leading to default were willful.").

[11] Streeter-Dybdahl v. Nguyet Huynh, 157 Wn. App. 408, 412, 236 P.3d 986 (2010) (citing Pascua v. Heil, 126 Wn. App. 520, 527, 108 P.3d 1253 (2005)).

[12] Id. (citing Woodruff v. Spence, 75 Wn. App. 207, 210, 883 P.2d 936 (1994)).

[13] Rosander v. Nightrunners Transp., Ltd., 147 Wn. App. 392, 397 n.1, 196 P.3d 711 (2008) (citing In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g)).

[14] Rivard v. Rivard, 75 Wn.2d 415, 419, 451 P.2d 677 (1969).

when a determination requires evaluating witness credibility to resolve an issue of fact, the trial court can abuse its discretion by not holding an evidentiary hearing.[15]

In Rivard v. Rivard, divorced parents petitioned the court to clarify the father's visitation schedule.[16] The parties filed "sharply conflicting" affidavits, and the trial court heard argument on the matter before adopting the father's proposed visitation schedule.[17] The mother appealed and argued the trial court's decision was an abuse of discretion because it decided the motion without holding an evidentiary hearing.[18] The Supreme Court upheld the decision to resolve the matter solely on the affidavits because they "contained ample evidence upon which a ruling could be made as to visitation rights," and the mother did not otherwise show an abuse of discretion.[19]

By contrast, the court in Woodruff v. Spence remanded for the taking of live testimony when a buyer moved to vacate a seller's default judgment due to ineffective service of process.[20] The seller submitted an affidavit of service stating the buyer had been personally served on January 20, 1992, at his house in Renton.[21] The buyer submitted an affidavit stating he was not served, a

---

[15] Harvey v. Obermeit, 163 Wn. App. 311, 327, 261 P.3d 671 (2011) (citing Woodruff, 76 Wn. App. at 210).

[16] 75 Wn.2d 415, 451 P.2d 677 (1969).

[17] Id. at 416.

[18] Id. at 419.

[19] Id. at 420.

[20] 76 Wn. App. 207, 209-10, 883 P.2d 936 (1994).

[21] Id. at 209.

declaration stating he was in Bellingham on January 20, and declarations from two people who were at his house on January 20 denying that a process server visited that day.[22] The court concluded the affidavits and declarations presented an issue of fact that could be resolved only by assessing credibility.[23]

Here, MLC presented a valid affidavit of service and a declaration from the professional process server detailing how he served Veristone. He swore to personally serving Veristone's registered agent, Meghann Good, at Veristone's office with summonses and complaints, several exhibits, and notices of assignment to a judicial department. His declaration explained he asked the receptionist for Good, and the receptionist said she would get her. A woman identifying herself as Good appeared, looked at the documents, and acknowledged service. The server's contemporaneous handwritten notes, which were attached to his declaration, described Good's appearance.[24] A different affidavit of service from a different process server's recent personal service on Good largely corroborated this description.

Veristone submitted two declarations from Good contesting service. She declared, "I do not recall ever being personally served" and explained Veristone's internal record-keeping system did not show "that I, or anyone else at Veristone,

[22] Id. at 210.

[23] Id.

[24] See CP at 1633 (describing Good as a 40 year-old White woman with brown hair, standing 5'5'', and weighing 140 pounds); CP at 1757 (describing Good as a 40 year-old White woman with black hair, standing 5'3'', and weighing 140 pounds).

received the Summons and Complaint on May 30, 2018."[25] She contested the process server's description of her.[26] Veristone did not provide any evidence to corroborate Good's statements about service or its record-keeping system.

Veristone fails to show the court abused its discretion by declining to hold an evidentiary hearing. Good's general denial of having been served and bare assertion about Veristone's record-keeping system do not compel an evidentiary hearing. The process server's valid affidavit is presumptively correct,[27] and MLC corroborated it with the process server's detailed declaration and supporting notes. The minimal variations between the process server's description of Good and her description of herself are not compelling. As in Rivard, the evidence submitted was sufficient to decide the matter, even though the parties asserted different facts. Unlike Woodruff, Veristone did not corroborate its assertion that it was not served, despite having access to the documents and potential declarants needed to rebut MLC's affidavit of service. Veristone fails to show the court abused its discretion under CR 43(e)(1) by finding service of process was proper without

[25] CP at 58.

[26] Good described herself as standing 5'0'' tall and weighing 120 pounds. Unlike Streeter-Dybdahl, where service was ineffective when the process server claimed to personally serve a defendant identified as a 5'8'' tall, 140 pound man and the defendant was actually a 5'1'' tall, 110 pound woman, 157 Wn. App. at 411, the differences between Good's description and the process servers' are minor.

[27] Streeter-Dybdahl, 157 Wn. App. at 412 (citing Woodruff, 75 Wn. App. at 210).

holding an evidentiary hearing.[28] Because Veristone was properly served, the question is whether Veristone's failure to appear was willful.

Veristone asserts a failure to appear is willful only if done knowingly. Assuming without deciding that this standard is correct, the record supports the trial court's conclusion that Veristone willfully failed to appear.

The trial court found Veristone was properly served, meaning it knew of its obligation to appear. In its oral ruling on the motions to vacate, the court found Veristone "chose not to respond" and had "a strategic reason why they waited to bring this motion to set aside: so that [MLC] could not cure [allegedly deficient service]."[29]

Veristone challenges the court's finding of willfulness, contending the court lacked a basis in law or fact to conclude it had a strategic reason to not appear. Although Veristone did not assign error to any findings of fact, this argument is best understood as a substantial evidence challenge. A finding of fact is supported by substantial evidence when there is sufficient evidence to convince a

[28] See Northwick v. Long, 192 Wn. App. 256, 266-68, 364 P.3d 1067 (2015) (affirming denial of a motion for an evidentiary hearing to resolve credibility determination on service of process where the defendant had opportunity to discover process server's assertions).

[29] RP (Sept. 18, 2018) at 32-34. The trial court offered this explanation when asked whether the court was making a finding of willfulness. It is reasonably viewed as a finding of willfulness in support of the court's denial of Veristone's motions to vacate. See Grieco v. Wilson, 144 Wn. App. 865, 872, 184 P.3d 668 (2008) ("And if findings of fact are incomplete, the appellate court may look to the superior court's oral decision to understand the court's reasoning.") (citing Lakewood v. Pierce County, 144 Wn.2d 118, 127, 30 P.3d 446 (2001)).

reasonable person of its truth.[30] As the party challenging the finding, Veristone has the burden of proving it was unsupported.[31]

Veristone was properly served with summonses, complaints, and scheduling notices. It was reminded of the action a few weeks later when it received three amended complaints in the mail, each with a cause number, naming it as a defendant and alleging its deeds of trust were inferior to MLC's liens. When addressing service of process, Good's declarations did not explain what happened to the summonses and complaints properly served on Veristone and did not identify any mistakes to explain Veristone's failure to appear. Substantial evidence supports the trial court's conclusion that Veristone chose not to respond.

MLC also noted to the trial court that Veristone had a strategic reason to avoid responding before the 90-day limitation period of RCW 60.04.141 ran, and the court accepted this explanation. By delaying its motion to vacate, Veristone could avoid alerting MLC in time to cure any defect in service.

Veristone challenges this reasoning on several grounds, none of which are compelling. In its opening brief, Veristone contends the time limit on service applies only to service upon the owner and not a secured lender. But, as pointed out by MLC in its brief, Bob Pearson Construction Inc. v. First Community Bank of

[30] Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 497, 254 P.3d 835 (2011) (citing Brin v. Stutzman, 89 Wn. App. 809, 824, 951 P.2d 291 (1998)).

[31] Id. (citing Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990)).

Washington expressly holds the 90-day time limit on service extends to any party asserting an interest in the property, so service past 90 days prevents enforcement of the lien against the unserved party.[32] Veristone contends that Bob Pearson should not be considered on appeal because it was not cited to the trial court. But the issue was squarely before the trial court, and citing authority addressing that issue is proper on appeal. Veristone also contends no evidence shows it was actually aware of the 90-day time limit on service, but it cites no authority requiring explicit evidence of actual awareness.

For the first time during oral argument in this court, Veristone argued that the trial court's reasoning was incorrect because RCW 60.04.141 actually provides "eight months and 90 days" from the date a lien was filed to serve all parties. Veristone is incorrect. The specific statutory rules for filing and service of process in RCW 60.04.141 "must be followed in order to prevent expiration of a lien."[33] The plain language of the statute expressly provides service must be made "within ninety days of the date of filing the action."[34] And Washington courts confirm the time limit for service is 90 days from the date of filing the action. "To prevent expiration of a valid lien, the lien claimant must (1) file a lawsuit within 8 months of

[32] 111 Wn. App. 174, 179, 43 P.3d 1261 (2002) (citing Davis v. Bartz, 65 Wash. 395, 397, 118 P. 334 (1911)).

[33] Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 886, 251 P.3d 293 (2011) (citing Pac. Erectors, Inc. v. Gail Landau Young Constr. Co., 62 Wn. App. 158, 165, 813 P.2d 1243 (1991)).

[34] RCW 60.04.141 (emphasis added).

recording the lien and (2) make service . . . within 90 days of filing suit."[35] A lien claimant does not have eight months and ninety days from the filing of a lien to serve an action for foreclosure of the lien. And because the 90 day limit is a statutory requirement, there is a reasonable inference that Veristone and its attorneys were aware of the time limit for service.

MLC recorded its lien on Lot 2 on September 29, 2017. MLC recorded liens on Lots 3 and 4 on February 22, 2018. It had to file suit to enforce the lien on Lot 2 by May 29, 2018. MLC chose to enforce all three liens at the same time and filed complaints to enforce them on May 11, 2018. It then had 90 days from May 11, 2018, to serve the lots' owners and any other parties against whom MLC wanted to enforce its rights as a lienholder.[36] If MLC failed to properly serve Veristone by August 9, 2018, then its foreclosure as to all three lots could not impact Veristone. Veristone received amended complaints by mail in mid-June and spoke with MLC on August 7 about the default judgments. If it had genuine questions about proper service, it did not raise them until August 24, when it filed the motions to vacate. From this, a reasonable factfinder could conclude Veristone purposefully waited until after expiration of the 90-day limitations period to allege insufficient service of process. Substantial evidence supports the court's finding that Veristone had a strategic reason it chose not to appear. Because

[35] Diversified Wood, 161 Wn. App. at 887; see Bob Pearson, 111 Wn. App. at 179 (RCW 60.04.141 "requires a lien claimant to sue within eight months and serve within 90 days any party against whom the claimant seeks to enforce its lien.").

[36] Diversified Wood, 161 Wn. App. at 887; Bob Pearson, 111 Wn. App. at 179.

Veristone chose not to appear for a strategic reason, its failure to appear was willful.[37]

The strength of a party's defenses are immaterial if it declines to raise them in court by willfully failing to appear.[38] Because Veristone willfully failed to appear, the court did not abuse its discretion by denying Veristone's motions to vacate the default judgments.

B. Vacation Due To Irregularity

Veristone argues the court abused its discretion because MLC obtained its default judgment through irregularities in its complaints. Both MLC's original and amended complaints stated Veristone's "deeds of trust are inferior in priority to MLC's claim of construction lien."[39] Veristone alleges these were misrepresentations and warranted vacation.

An error of law is not an irregularity requiring vacation of a judgment under CR 60(b).[40] Vacation may be warranted under CR 60(b)(1) from irregularities "relating to want of adherence to some prescribed rule or mode of proceeding," such as "procedural defects unrelated to the merits."[41]

---

[37] We note a finding of willfulness is not limited to when a party has a strategic reason for not appearing.

[38] See TMT Bear Creek, 140 Wn. App. at 206 ("[E]quity will not allow for vacation of judgment if the actions leading to default were willful.").

[39] CP at 4, 16.

[40] In re Marriage of Tang, 57 Wn. App. 648, 654, 789 P.2d 118 (1990) (citing Burlingame v. Consol. Mines & Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986)).

[41] Id. (citing In re Adamec, 100 Wn.2d 166, 174, 667 P.2d 1085 (1983); 4 L. ORLAND, WASHINGTON PRACTICE: RULES PRACTICE § 5713, at 543 (3rd ed. 1983)).

Veristone compares this case to Mosbrucker v. Greenfield Implement, Inc..[42] Mosbrucker is not apt. The Mosbrucker defendant did not willfully fail to appear, and the plaintiff's inaccurate factual allegations caused a procedural irregularity affecting "the integrity of the proceedings."[43] Thus, the court concluded the equities favored vacation.[44]

Here, however, MLC's allegations about lien priority presented legal questions because lien priority is a question of law.[45] MLC brought suit to have this legal question answered. Because Veristone's alleged error is actually an alleged error of law, and Veristone fails to allege a procedural irregularity unrelated to the cases' merits, the court did not abuse its discretion by refusing to vacate.[46]

II. Judgment Interest Rate & Attorney Fees From Trial

Veristone argues the court erred by entering a judgment interest rate of two percent per month and by awarding MLC attorney fees without entering findings of fact. MLC contends both issues are beyond the scope of this appeal.

It is well-established that "[a] CR 60(b) motion is not a substitute for appeal and does not allow a litigant to challenge the underlying judgment."[47] Exceptions

[42] 54 Wn. App. 647, 774 P.2d 1267 (1989).

[43] Id. at 652, 654.

[44] Id. at 653-54.

[45] Kim v. Lee, 145 Wn.2d 79, 85-86, 31 P.3d 665 (2001).

[46] Tang, 54 Wn. App. at 654.

[47] Winter v. Dep't of Soc. & Health Servs. on behalf of Winter, 12 Wn. App. 2d 815, 830, 460 P.3d 667 (citing Bjurstrom v. Campbell, 27 Wn. App. 449, 451, 618 P.2d 533 (1980)), review denied, 196 Wn.2d 1025, 476 P.3d 565 (2020); see, e.g., Pamelin Indus., Inc. v. Sheen-U. S. A., Inc., 95 Wn.2d 398, 403, 622 P.2d

to this rule exist for issues affecting fundamental constitutional rights, for challenges to the trial court's jurisdiction, and—within our discretion under RAP 12.2—as justice may require.[48] Veristone does not argue its challenges are constitutional or to the court's jurisdiction, and it does not mention RAP 12.2. However, because these issues could affect the recovery of other junior lienholders, despite Veristone's waiver of its right to contest the judgments' merits by willfully refusing to appear, we will consider them.

A. Postjudgment Interest Rate

The court awarded postjudgment interest to accrue at a rate of "2% per month."[49] The court also awarded prejudgment interest. Veristone challenges only the postjudgment interest rate, arguing it violates the 12 percent cap on postjudgment interest required by RCW 4.56.110(4) and RCW 19.52.020(1).

Awards of postjudgment interest are reviewed de novo as a question of law.[50] A compound postjudgment interest rate is disfavored, so the parties' agreement must expressly provide for it.[51]

1270 (1981) ("We are mindful of the rule that an error of law may not be corrected by a motion pursuant to CR 60(b), but must be brought up on appeal.").

[48] State v. Santos, 104 Wn.2d 142, 145-46, 702 P.2d 1179 (1985).

[49] CP at 686, 1415, 2129.

[50] TJ Landco, LLC v. Harley C. Douglass, Inc., 186 Wn. App. 249, 256, 346 P.3d 777 (2015) (citing Sintra, Inc. v. Seattle, 96 Wn. App. 757, 761, 980 P.2d 796 (1999)).

[51] Xebek, Inc. v. Nickum & Spaulding Assocs., Inc., 43 Wn. App. 740, 743, 718 P.2d 851 (1986) (citing Goodwin v. Nw. Mut. Life Ins. Co., 196 Wash. 391, 402-03, 406, 83 P.2d 231 (1938)).

MLC argues its contract with Emerald Valley authorizes this compound interest rate, analogizing to Xebek, Inc. v. Nickum & Spaulding Associates, Inc.[52] In Xebec, the court considered whether two contracts authorized an award of compound interest.[53] One contract provided "[l]ate charges of 1½% per month shall be applied to all billings which have not been paid within thirty (30) days after receipt."[54] The other contract required that the "[c]ontractor will submit invoices twice monthly for services rendered under this Agreement. The terms of payment are net thirty (30) days, or a 1½ percent per month late charge will become effective."[55] The court concluded these terms were "not explicit enough" to authorize an award of compound postjudgment interest.[56] However, the court affirmed because the trial court relied upon the 1.5 percent interest rate to award a flat postjudgment simple interest of 18 percent per annum.[57]

MLC's contract with Emerald Valley contained a provision allowing for interest to accrue:

> Applicant's signature attests financial responsibility, ability to pay [MLC] invoices in accordance with the following terms: 1% 10th, net 11th. Invoices are considered to be past due on the 12th of the month. A late payment charge of 2% per month will be assessed after the 26th ($2 minimum). Applicant agrees to pay reasonable

[52] 43 Wn. App. 740, 718 P.2d 851 (1986).

[53] Id. at 742.

[54] Id. at 743.

[55] Id.

[56] Id.

[57] Id.

> attorney fees, cost of collection and court costs that may arise in the enforcement of these terms.[58]

Because the facts surrounding the contract are undisputed, we interpret the contract de novo as a matter of law.[59]

The first three sentences set payment requirements for the ordinary course of business. The fourth sentence authorizes additional payments "that may arise in the enforcement of these terms."[60] Thus, a "late payment charge of 2% per month" refers to prejudgment charges on sums already owed. Like Xebec, the contract does not expressly provide for a postjudgment compound interest rate. Because the contract does not specify a postjudgment interest rate and compounding postjudgment interest is strongly disfavored, the court was limited to an award of simple interest per annum.

B. Attorney Fees From Trial

Veristone challenges the amounts of attorney fees awarded, arguing the court failed to enter adequate findings of fact to support its awards. When awarding attorney fees, the trial court "must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question."[61] The findings must "show how the court resolved disputed issues of fact and the conclusions must explain the court's

---

[58] CP at 23.

[59] Jones Assocs., Inc. v. Eastside Props., Inc., 41 Wn. App. 462, 465, 704 P.2d 681 (1985) (citing Yeats v. Estate of Yeats, 90 Wn.2d 201, 204, 580 P.2d 617 (1978); In re Estate of Larson, 71 Wn.2d 349, 354, 428 P.2d 558 (1967)).

[60] CP at 23.

[61] SentinenC3, Inc. v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

analysis."[62] Because the trial court did not enter findings of fact or conclusions of law for its attorney fee awards, thereby preventing review of its reasonableness determinations, remand is required.[63]

MLC argues that CR 55(b)(1) vitiates this requirement because it states "[f]indings of fact and conclusions of law are not necessary under this subsection even though reasonable attorney fees are requested and allowed." The rules of civil procedure are interpreted to effectuate the drafters' intent.[64] The plain language of CR 55(b)(1) does not preclude entry of findings of fact for an award of attorney fees on default judgment for an amount certain. As noted, effective appellate review requires findings revealing how the trial court arrived at the amount of attorney fees. MLC cites no authority for the proposition that the drafters of CR 55(b)(1) intended to prevent meaningful review of attorney fees. Remand is required for entry of findings of fact.

III. Sanctions

At the same time the trial court entered a judgment on Lot 2, it also entered an "Order Granting Plaintiff's Motion for Entry of Judgment."[65] For Lots 3 and 4, it simultaneously entered amended judgments and "Order[s] Granting Plaintiff's

[62] Berryman v. Metcalf, 177 Wn. App. 644, 658, 312 P.3d 745 (2013).

[63] Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

[64] Denney v. City of Richland, 195 Wn.2d 649, 653, 462 P.3d 842 (2020) (citing Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1,9-10, 43 P.3d 4 (2002)).

[65] CP at 1412.

Motion[s] to Correct Judgment."[66] The three orders granting MLC's motions to enter or correct judgments also required that Veristone pay MLC $29,577 for the Lot 2 litigation, $66,275 for Lot 3, and $49,926.03 for Lot 4.

Although the amounts correlate to the fee awards imposed against Emerald Valley, the orders do not state a basis for the award or explain the amounts awarded against Veristone. MLC's motions to enter or correct judgment requested sanctions against Veristone under CR 11 "in the amount of [MLC's] fees for having to respond to this improper objection."[67] If the court's award to MLC was a sanction against Veristone for violating CR 11, the trial court must "specify the sanctionable conduct in its order."[68] "The court must make a finding that either the claim is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, *or* the paper was filed for an improper purpose."[69] Remand is appropriate when the trial court fails to do so.[70]

Remand is required for the trial court to articulate the basis for the awards and to enter explicit findings supporting the amount of any awards. If the awards are based upon a violation of CR 11, the court must enter specific findings identifying the sanctionable conduct and the basis for a reasonable sanction.

---

[66] CP at 685, 689, 2128, 2132.

[67] CP at 528, 1261, 1970.

[68] Heckard v. Murray, 5 Wn. App. 2d 586, 595, 428 P.3d 141 (2018) (quoting Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994)).

[69] Biggs, 124 Wn.2d at 201.

[70] See id. at 201-02 (remanding for entry of findings when the trial court did not make adequate findings to explain CR 11 sanctions).

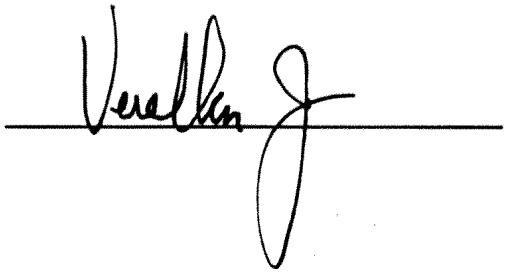
IV. Attorney Fees On Appeal

Both Veristone and MLC request attorney fees from this appeal under RAP 18.1 and RCW 60.04.181(3). RCW 60.04.181(3) authorizes an award of attorney fees to the prevailing party in a lien priority action, including fees incurred in proceedings in the Court of Appeals. Because MLC prevails on the issues involving lien priority, we award it reasonable attorney fees upon compliance with RAP 18.1(d).

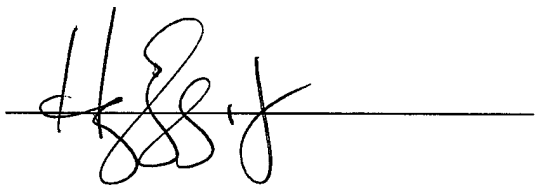
V. Conclusion

The trial court did not abuse its discretion by denying Veristone's motions to vacate default judgments. The court erred by entering an award of compound postjudgment interest when it was limited to an award of simple interest per annum. Remand is required for entry of findings of fact for the court's award of attorney fees and for the sanctions it entered against Veristone.

Therefore, we affirm in part, reverse in part, and remand.



WE CONCUR:



FILED
5/5/2021
Court of Appeals
Division I
State of Washington

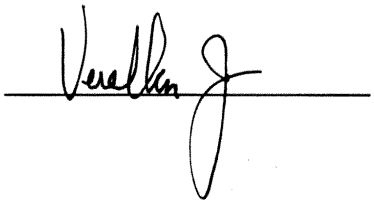
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MILWAUKIE LUMBER COMPANY, Respondent, v. VERISTONE FUND I, LLC, Appellant.	)	No. 82052-4-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's March 29, 2021 opinion. The panel has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



RCW 60.04.141

Lien—Duration—Procedural limitations.

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time in the superior court in the county where the subject property is located to enforce the lien, and service is made upon the owner of the subject property within ninety days of the date of filing the action; or, if credit is given and the terms thereof are stated in the claim of lien, then eight calendar months after the expiration of such credit; and in case the action is not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the action for want of prosecution, and the dismissal of the action or a judgment rendered thereon that no lien exists shall constitute a cancellation of the lien. This is a period of limitation, which shall be tolled by the filing of any petition seeking protection under Title Eleven, United States Code by an owner of any property subject to the lien established by this chapter.

[**1992 c 126 § 8**; **1991 c 281 § 14**.]

SCHWEET LINDE & COULSON, PLLC

June 04, 2021 - 4:52 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82052-4
Appellate Court Case Title:	Milwaukie Lumber, Respondent v. Popick and Veristone, et al., Petitioner
Superior Court Case Number:	18-2-01115-2

The following documents have been uploaded:

- 820524_Other_20210604165107D1650406_8146.pdf
  This File Contains:
  Other - Appendix
  The Original File Name was Appendix1.pdf

A copy of the uploaded files will be sent to:

- AppellateAssistants@schwabe.com
- Whansen@Williamskastner.com
- dbetz@fifthavenue-law.com
- emorris@williamskastner.com
- erhode@gillaspyrhode.com
- hmcnamee@gillaspyrhode.com
- kstephan@rcolegal.com
- mhenry@schwabe.com
- pspratt@schwabe.com
- scarpenter@fifthavenue-law.com
- tharris@fifthavenue-law.com
- tomlinde@schweetlaw.com

Comments:

Sender Name: Maureen Fitzgerald - Email: maureenf@schweetlaw.com
Filing on Behalf of: John Anthony Mcintosh - Email: johnm@schweetlaw.com (Alternate Email:)

Address:
575 S Michigan ST
SEATTLE, WA, 98108
Phone: (206) 381-0127

Note: The Filing Id is 20210604165107D1650406

SCHWEET LINDE & COULSON, PLLC

June 04, 2021 - 4:50 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	82052-4
Appellate Court Case Title:	Milwaukie Lumber, Respondent v. Popick and Veristone, et al., Petitioner
Superior Court Case Number:	18-2-01115-2

The following documents have been uploaded:

- 820524_Petition_for_Review_20210604165002D1842545_6573.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- AppellateAssistants@schwabe.com
- Whansen@Williamskastner.com
- dbetz@fifthavenue-law.com
- emorris@williamskastner.com
- erhode@gillaspyrhode.com
- hmcnamee@gillaspyrhode.com
- kstephan@rcolegal.com
- mhenry@schwabe.com
- pspratt@schwabe.com
- scarpenter@fifthavenue-law.com
- tharris@fifthavenue-law.com
- tomlinde@schweetlaw.com

Comments:

Sender Name: Maureen Fitzgerald - Email: maureenf@schweetlaw.com
Filing on Behalf of: John Anthony Mcintosh - Email: johnm@schweetlaw.com (Alternate Email:)

Address:
575 S Michigan ST
SEATTLE, WA, 98108
Phone: (206) 381-0127

Note: The Filing Id is 20210604165002D1842545