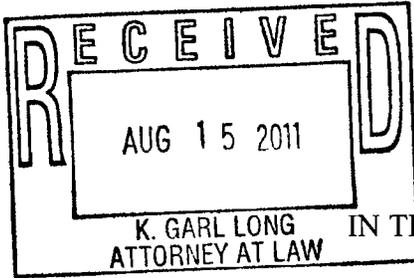


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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION ONE

Court of Appeals No. 66738-6
Skagit Superior Court No. 09-2-02483-1

Soren and Janice JENSEN
Plaintiff/Appellants,

v.

Dave LUECKE, Diane VAN ACKEREN, et al,
Defendants/ Respondent.

RESPONDENT'S BRIEF

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STATE OF WASHINGTON

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I.

BRIEF ARGUMENT

This is a review of a trial court order granting relief from judgment. After Plaintiffs filed suit, Defendants answered pro se; and the parties engaged in communications. Plaintiffs nevertheless procured a default judgment without prior notice to Defendants. The trial court's vacated the default motion on reasonable grounds.

II.

FACTUAL BACKGROUND

This case originates from a real estate purchase and sale agreement. On July 15th, 2009, Plaintiffs verified and counsel signed on the same day. (CP 3-8). Defendant Dave Luecke was given a copy on July 20th, 2009. (CP 61-78) Defendants made immediate contact with Plaintiffs' counsel after. (CP 52) They created their Answer and caused service on August 12th, 2009. (CP 18-19; CP 102-104) On October 22nd, the Jensens again served the complaint and then filed their process in the Superior Court of Skagit County. (CP 9) Defendants didn't give another answer because, as there was no difference between the two documents, they thought it needless to serve duplicate forms. (CP 53; CP 100-101) The parties engaged in extensive communications before Plaintiffs moved

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for default; and in one of these, Luecke told Long he'd provided an Answer. (CP 39-42; 100-101) On January 7th, 2010, Plaintiffs moved for and procured default judgment against Luecke and Ackerman without first giving notice to Defendants. (CP 10-11; CP 18-19) They did not inform the Court that Defendants had given an Answer. (CP 39-42). Defendants moved for relief under CR 60 upon learning of Plaintiff's action; the trial court denied their motion on procedural grounds with leave to refile. (CP 38) Defendants filed on January 6th, 2011; less than one year after entry of judgment. (CP 57-78; 100-102). The motion was granted, leading to this appeal.

III. ISSUE

The issue presented upon appeal is whether the trial court acted within its discretion in vacating a default judgment.

IV. ARGUMENTS

1. **The trial court's decision was discretionary.**

Default judgments are disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.

Griggs v. Averbek Realty, Inc., 92 Wn.2d 576 , 581, 599 P.2d 1289

(1979). A trial court's decision to vacate a default decree is reviewed only for abuse of discretion. *Id.* at 92 Wn.2d 582. A trial court abuses its discretion if "it is exercised on untenable grounds for untenable reasons." **In re Marriage of Tang**, 57 Wn. App. 648 , 653, 789 P.2d 118 (Div. I, 1990). Thus, if a trial court's ruling is based upon tenable grounds and is "within the bounds of reasonableness," it must be upheld. **In re Estate of Stevens**, 94 Wn. App. 20, 30, 971 P.2d 58 (1999). The "overriding concern" of the courts is to do justice. **Calhoun v. Merritt**, 46 Wn. App. 616, 731 P.2d 1094 (1986); **Griggs v. Averbek Realty, Inc.** at 92 Wn. App. 619.

Appellants do not argue under the correct standards, instead choosing to proceed as if this appeal should be conducted as a *de novo* review.

2. Defendants communications with Plaintiffs constitute an "appearance," entitling them to notice of the default hearing.

Default judgments are disfavored and are normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party. **Batterman v. Red Lion Hotels**, 106 Wn. App. 54, 61 (Div. I, 2001) This court reviews a trial court's decision to

vacate a default judgment for an abuse of discretion. **White v. Holm**, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). If a party appears before a motion for default is filed, that party is entitled to notice before a valid order of default may be entered. **CR 55 (a)(3)**; Thus, where a defendant has appeared and default is taken without notice, s/he is entitled to vacation of the default judgment as a matter of right. **Prof'l Marine Co. v. Those Certain Underwriters at Lloyd's**, 118 Wn. App. 694, 708, 77 P.3d 658 (2003); **Shreve v. Chamberlin**, 66 Wn. App. 728, 832 P.2d 1355 (1992). A default judgment entered against a defendant who has "appeared" in the action but who has not been provided with the notice required by CR 55(a)(3) is void, as is the underlying order of default, no matter how much time has passed or whether the defendant can demonstrate a meritorious defense. **Matia Inv. Fund, Inc. v. City of Tacoma** 129 Wn. App. 541 (Div. II, 2005)

Informal acts may constitute an appearance under CR 55 (a)(3). **Colaracio v. Burger** 110 Wn. App. 488, 499 (Div. I, 2002). The concept of informal acts of appearance must be construed broadly; thus, whether a party has "appeared" is generally a question of intention, as evidenced by acts or conduct, such as the indication of a purpose to defend. **City of Des**

Moines v. \$81,231 in United States Currency, 87 Wn. App. 689, 696, 943 P.2d 669 (Div. I, 1997) 696; **Gage v. Boeing Co.**, 55 Wn. App. 157, 161, 776 P.2d 991 (Div. I, 1989). Such acts needn't even acknowledge the existence of litigation; our courts instead focus on the facts demonstrate the intention to defend. **Batterman v. Red Lion Hotels**, supra. Such broad construction of the concept of appearance serves the object of apprising the plaintiff whether defendant intends to litigate the case. **Colaracio v. Burger** at 110 Wn. App. 496; citing **Batterman v. Red Lion Hotels**, supra.

Accordingly, defendants were entitled to notice where their insurance representative engaged in settlement discussions before and after suit was commenced. **Colaracio v. Burger**, supra; see also **Batterman v. Red Lion Hotels**, supra; **Gutz v. Johnson** 128 Wn. App. 901 (Div.II, 2005). A municipality informally appeared by denying plaintiff's pre-action claim for damages. **Matia Inv. Fund, Inc. v. City of Tacoma**. In a forfeiture action, a municipality successfully contested a default obtained in a lower court where the claimant ignored the fact it brought a related action in superior court. **City of Des Moines v. \$81,231** 87 Wn. App. 689, 943 P. 2d 669 (Div. I, 1997).

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In this case, the Jensens obtained default despite the fact that Defendants delivered an Answer to their Complaint and made frequent contact with Plaintiffs' counsel. The adversarial process had not been halted; rather, Plaintiffs had simply refiled their Complaint, perhaps as a procedural precaution. The effort and detail put into this document leaves no room for doubt as to whether they intended to defend the claim. The Answer they gave the Jensens was an appearance by any construction of fact. The judgment they obtained was therefore void.

3. The Jensen's actions provide further grounds to vacate default.

It should always be born in mind that the Jensens filed their Complaint twice, perhaps to ensure proper commencement because they first served more than 90 days before filing. To obtain the judgment, their counsel chose not to inform the trial court that Defendants had already given them a timely Answer after they were first served. He also neglected to say that the parties had been in communication. These omissions affected the integrity of the proceedings, creating an irregularity which have been shown to justify relief from judgment under various applications of CR 60(b). See e.g., Suburban Janitorial v. Clarke

American, 72 Wn. App. 302, 863 P. 2d 1377 (Div.I, 1992). (Plaintiff's counsel failed to inform defendants of default judgment for more than one year, e.g., judgment vacated pursuant to CR 60 (b)(4); **Mosbrucker v. Greenfield Implement**, 54 Wn. App 647 (Div.III, 1989) (Plaintiff failed to attach lease to Complaint upon which default was granted); see also **Kennewick Irrigation District v. Real Property** 70 Wn. App. 368, 853 P. 2nd 488 (Div.III, 1993) (Plaintiff's failure to inform trial court of payments made before entry of judgment gave substantial basis for vacating default).

All of these cases are instructive, and **Suburban Janitorial** is analogous because there the plaintiffs achieved a favorable result when their attorney chose not to speak. While this Court noted then that the circumstances in which silence should be considered as representation are rare, the case at hand presents a strong comparison. In **Suburban Janitorial**, judgment was vacated because the actions of counsel deprived the defendants of the *opportunity* to make a timely motion for relief under CR 60. Here, the Jensens took a default because their counsel chose not to inform the Court that Defendants had answered and/or that he was in

communication. This action gave the trial court more than reasonable grounds to vacate.

4. Defendant's Motion For Relief Was Timely.

Luecke and Ackerman brought their motion less than one year after entry of judgment, as CR 60 permits. Moreover, the trial court has weighed the equities and awarded terms to Plaintiffs, which Defendants have paid. It did not abuse discretion in doing so, nor were Plaintiffs prejudiced except by vacation of a default they procured by the means discussed above.

V.

CONCLUSION

The cases above show us that when persons fall into dispute and exchange communications, a plaintiff may not take ex parte default under the pretense that his opponent is hiding from litigation. The Jensens should have given notice to Defendants before seeking default judgment. The means they employed to obtain judgment were irregular and inequitable, if not fraudulent as defined by CR 60. The trial court recognized this and properly granted Defendants relief from judgment.

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DATED this 15 day of August, 2011.



JOSEPH D. BOWEN, WSBA #17631

PROOF OF SERVICE

I certify that on the 15th day of August, 2011, I served a true and correct copy of this document to the following parties in this action:

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