

69234-8

69234-8

No. 69234-8-I

WASHINGTON COURT OF APPEALS, DIVISION I

DANA AND HASAN AKHAVUZ,

Appellants.

v.

TRACY ARNOLD MOODY, SEVEN ENTERTAINMENT INC.,

Respondent,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Mary Yu)

REPLY BRIEF OF APPELLANTS

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I. GENERAL REPLY

Respondent Studio Seven's Response Brief ("Response") shows the unfortunate lengths taken to keep the law firm and insurer from being held accountable for the insurer's and the law firm's total and wholly unexcused failures to provide Studio Seven proper and timely representation -- for over a year in the case of the insurer; for over seven months in the case of the law firm, all to the prejudice of Appellants, Dana and Hasan Akhavuz. The Response does not even pretend to offer an excuse for either company's failure: not mistake, inadvertence, surprise, or excusable neglect. It offers no reason why the insurer and the law firm failed their professional and contractual duties, and in their duties to the Court – and all to the material benefit of the defense and incurable prejudice to the Akhavuzes.

The Response baldly says, in effect, a defendant can ignore litigation for 14 months with impunity. It can just pick up as if no untoward amount of time had passed; as if no defendants or witnesses had been kept from being interviewed or deposed close to the event; as if no evidence trails went stale; as if the discovery deadline was not past, and the trial date was but two months away. The Response stands for the proposition that the plaintiff who diligently, repeatedly sought early resolution can be stiff-armed, put on ice for 14 months – 18 months from

the first claim notice letter in January 2011 – and there is no penalty to the defendant or recourse for the diligent plaintiff. The legal system will punish, not reward the diligent parties who are now irreparably prejudiced in presenting their case; and reward, not punish the dilatory ones who broke the rules. That cannot be the law.

In an apparent effort to save the Firm from a share of the responsibility for the default judgment, the Response actually contends a long-time partner in the Firm, Mr. Mesher, and thus also the Firm, were not really the counsel for Studio Seven starting in November 2011 because, the Response claims, there is no proof the partner actually spoke to his clients so that there was no attorney-client relationship established. Response, p. 17. This argument ignores the reality and law of insurance coverage tenders and appointments of counsel (insureds are represented on tender and appointment of counsel, not on their conversation with counsel as is demonstrated by, among other things, application of the attorney work-product privilege immediately on tender); the role of the attorney and his relationship within a law firm (the knowledge of a partner/owner such as Mr. Mesher is imputed to his law firm); and the facts of this case in which the notice of appearance that was finally filed June 25, 2012, was explicitly made on behalf of “Lane Powell PC” which was retained over

seven months earlier (CP 273¹), not merely on behalf of individual attorneys then taking over the case from their partner.

The Response's novel approach to what constitutes representation of an insured, or a law partnership, and what is the meaning of the cases on default judgment in Washington, misstates both the law and the facts in each area. The unsavory point is, however, if the trial court is affirmed, this case will stand the law of default judgments on its head and destroy the principle that lawyers and insurers have actionable duties and responsibilities to the courts, as well as to their clients and opposing counsel. Affirmance would also call into question the immediate extension of privilege to the insured's communications to the insurer that, for now at least, springs into being immediately on the insured's tender.

II. REPLY ARGUMENT

A. **Basic Insurance Law and the Facts Demonstrate the Response is Incorrect to State There Was No Attorney-Client Relationship with Lane Powell in November 2011 Given Studio Seven's Tender and Founders' Appointment of Lane Powell.**

1. **Background Facts on Tender.**

Studio Seven argues that it cannot be bound by the earlier Lane Powell failures to "promptly" move to vacate the default in November

¹ The "Notice of Appearance of Lane Powell PC" states in relevant part: "NOTICE IS HEREBY GIVEN that defendants . . . hereby enter their appearance in the above entitled action by their attorneys LANE POWELL PC and" the specifically named individual attorneys. CP 273.

2011 and March 2012 because, allegedly, “no attorney-client relationship existed” until June 2012, when Lane Powell attorneys allegedly first called Studio Seven to discuss this case. Response, p. 17.² The Response argues this direct contact from the law firm to the client was required before the attorney-client relationship could commence. *Id.* This misstates well-settled insurance law which, as discussed below, provides for representation and the attorney client relationship upon tender and appointment of counsel. Both occurred over seven months before the motion to vacate default was brought at the end of June 2012, a year after entry of the default.

On February 5, 2011, Studio Seven’s manager, Nicole Russell, forwarded the Akhavuz’s claim letter to their insurer, Founders. CP 327 ¶ 15. It explicitly tendered the claim associated with that letter; Ms. Russell later provided “information” and a list of potential witnesses to help Founders “with its investigation of the claim.” *See* CP 327 ¶ 16-17 (“I believed that Founders was responsible for investigating, managing, and settling this claim”). The record does not reflect that Founders engaged in any discussions with Plaintiffs’ counsel, even though that had

² Studio Seven supplied a declaration stating that it “received” no communication from Lane Powell until June 2012. The Lane Powell partner handling this file from November 2011 to June 2012 has not submitted a declaration.

been requested. Rather, it began its investigation with information and witness names provided by Ms. Russell. *Id.*

Four months later, after getting no response from Studio Seven or its insurer, the Akhavuz served a formal summons and complaint and initial formal discovery requests of interrogatories and requests for production on Studio Seven and Moody. CP 20, 22 (declaration of service of all the documents). On May 26, 2011, Studio Seven forwarded the complaint and discovery requests to its insurer, Founders. CP 403. Studio Seven explicitly asked Founders to “manag[e] the litigation” involving the Akhavuz claim, CP 389, formally tendering the now-started litigation, including the discovery requests which, per the rules, required a response within 30 days.

Founders’ claims adjuster, Mr. Ortiz, called and spoke with or left a message with both of the Akhavuz’s attorneys on May 25 and 27, getting some information directly (CP 443-444 (Farrish Dec.)) and requesting a “specials package” for purposes of evaluating the claim. CP 425 ¶ 3 (Certa Dec.); CP 431 (voicemail message). These calls resulted in the June 13, 2011, settlement demand letter referenced by Mr. Ortiz. CP 466-67; 469-474 (demand letter).³ Although Mr. Ortiz’s declaration states that he then “assumed we were in the process of negotiation,” CP 467 ¶4, so

³ Pages two and three of the demand letter in the clerk’s papers are illegible so a clean copy is attached as App. D.

that the ball was in his court to respond to the settlement demand, there is no evidence or inference that Mr. Ortiz or anyone at Founders responded in any way. The next thing Mr. Ortiz notes is that he discovered the default judgment when he “was checking the trial docket online” in November 2011. *Id.*, ¶ 6.

At that point, “November 2011,” Mr. Ortiz states that Founders retained Lane Powell, and thus Mr. Mesher represented Studio Seven. CP 407-08 (2nd Baker Dec.); CP 467 ¶ 7 (Ortiz Dec.). By mid-November 2011, Lane Powell took affirmative actions on Studio Seven’s behalf, initiating settlement discussions with the Akhavuz’s counsel. CP 425-26. However, at no time in November 2011 did either Lane Powell or Mr. Mesher appear in the litigation; nor did they file an answer; nor did they respond to the discovery requests served in May; nor did they move to vacate the default judgment.

Instead, the Firm and Mr. Mesher dropped out of sight for four months until March 8, 2012, when, out of the blue, Mr. Mesher called Mr. Certa to begin “conversations” again, which were promptly scheduled. But the settlement discussions that got scheduled for March 14, 2012, were abruptly cancelled that morning by Mr. Mesher; nothing was scheduled in its place. CP 426 ¶¶ 7-8. Three months later on June 13, Mr. Certa heard from a new Lane Powell attorney, Mr. Baker, who

requested the default be vacated, then appeared two weeks later on June 25, *Id.*, ¶ 8, then later filed the motion to vacate.

2. Washington and General Insurance Law Both Provide that on Tender of the Complaint to the Insurance Company, the Insured Accepts the Attorney Engaged by the Insurer and Immediately Has, and Gets the Benefits of, the Attorney-Client Relationship, Including Protection of Communications With the Insurer.

The Response baldly contends that, because Studio Seven allegedly had no personal communication with the Lane Powell Law Firm or Mr. Mesher when they were engaged by Founders by November 2011, they had no attorney-client relationship in November 2011 (or March 2012) when Lane Powell attorneys contacted Mr. Certa about vacating the default and settling the case. Response, p. 17. The Response makes this assertion so it can claim the defense moved “promptly” to vacate the default when Lane Powell filed its motion to vacate at the end of June 2012, less than a month after the Studio Seven manager stated she personally became aware of the default judgment. The Response’s argument must be rejected because it flies in the face of settled insurance coverage law, including in Washington, and creates a means to avoid compliance with, and possibly subvert, the civil rules by unmitigated mischief.

It has long been the rule that the insurer has the right to select defense counsel for the insured and to control the defense.⁴ For instance, ABA Formal Opinion 282 explains:

Whenever the insured is served with the court process as a defendant, the contract of insurance expressly requires him to forward such process to the (insurer) so that the (insurer) may provide the means of defense. It is elemental that this includes retaining and compensating a lawyer at the insurer's expense. . . . Consent and approval to represent the insured are clearly implied when the insured complies with his reciprocal duty under the insurance contract by forwarding the court process to the insurance company.⁵

ABA Formal Opinion 282 (1950). The Restatement agrees, stating that it is “clear that the lawyer designated to defend the insured has a client-lawyer relationship with the insured.”⁶ *Accord* NEW APPLEMAN, § 16.04 (2)(b) (2012) (an insured's tender authorizes the insurer to retain counsel on behalf of the insured, thus forming an attorney-client relationship at the time counsel is retained pursuant to the tender). It is thus up to the insurer to hire an attorney to represent the insured's interests. *See generally Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986).

⁴ 3 Jeffrey E. Thomas, NEW APPLEMAN ON INSURANCE LAW § 16.04 (2)(b)-(d) (2012) (hereafter “NEW APPLEMAN”).

⁵ Such consent and approval by Studio Seven occurred here as shown by the testimony of Ms. Russell that both the January 2011 claim letter and then the May 2011 and complaint were immediately forwarded to Founders Insurance with the understanding that Founders would “manag[e] the litigation initiated by Plaintiffs. CP 326-27 ¶¶ 13-17, 18-19, 21.

⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f. (2000).

As indicated by Ms. Russell's declarations for Studio Seven, it expected Founders to "control the litigation." *See Benham v. Wright*, 94 Wn. App. 875, 973 P.2d 1008 (1999) (insurer may demand the opportunity to control the litigation). Thus, the insureds typically have very little, if any, say regarding which attorneys will be hired or the scope of the attorneys' work. Due to this unique relationship, the prevailing and long-standing doctrine is that an attorney-client relationship arises between the lawyer and the insured the moment that the insurance company retains the lawyer. *See, e.g.*, 14 George J. Couch, COUCH ON INSURANCE 2D § 51:103 (Ronald A. Anderson ed., rev. ed. 1984). The cases are in accord.⁷

An early case applying this doctrine is *Countryman v. Breen*, 263 N.Y.S. 603 (N.Y. Sup. Ct. 1933), *rev'd on other grounds*, 198 N.E. 536 (N.Y. 1935), an automobile accident case. The lawyer retained to defend

⁷ *See, e.g., Moritz v. Medical Protective Co. of Ft. Wayne, Ind.*, 428 F. Supp. 865, 871-72 (W.D. Wis. 1977) (stating that "when the insured elects to tender to the insurer the defense of a claim against him or her, he or she consents to having the insurer choose the lawyer who is to defend the claim"); *Petition of Preferred Accident Ins. Co. of N.Y.*, 78 N.Y.S.2d 674, 675 (N.Y. App. Div. 1948) (stating that insureds, by delivering summonses to insurance carriers and demanding a defense, impliedly authorized the carriers to obtain lawyers for them to act as counsel of record in the litigations); *Central Cab Co. v. Clarke*, 270 A.2d 662, 665 (Md. 1970) (upholding the trial court's determination that an attorney-client relationship arose when the company sent defense counsel the insured's file, even though the company and the lawyer had yet to agree on the fee); *Mitchum v. Hudgens*, 533 So. 2d 194, 202 (Ala. 1988) (holding that defense counsel who settles at the company's direction without the insured's consent bears no malpractice liability to the insured "because the insured, by contracting away the right to require such consent, has thereby impliedly consented to the settlement of claims against him, within policy limits, by appointed counsel at the direction of the insurer").

the insured negotiated a \$3,500 settlement with the plaintiffs and announced the settlement in open court. Subsequently, the insurance company's check was dishonored because the insurer became insolvent. The plaintiffs then applied to the court for entry of judgment against the insured on the settlement agreement. In an attempt to stave off judgment, the insured argued that he should not be bound to the settlement because "in reality" the defense attorney represented the insurance company, not him. *Id.* at 605. In the court's view, however, the insured consented to representation by asking the company to provide a defense, which foreseeably included hiring a lawyer who would operate subject to the insurance company's control.

Washington law is not only in accord with these authorities, it applies the protections of the attorney-client relationship even *before* an attorney is formally retained or appointed by bestowing on the insured the protections of the confidentiality of the attorney-work product doctrine for all communications with the insurer that begins the coverage:

An insured is contractually obligated to cooperate with the insurance company. Such an obligation clearly creates a reasonable expectation that the contents of statements made by the insured will not be revealed to the opposing party. The insurer on the other hand has a contractual obligation to act as the insured's agent and secure an attorney. The insured cannot choose the attorney but can expect the agent to transmit the statement to the attorney so selected. Without an expectation of confidentiality, an insured may be hesitant to disclose everything known. Such nondisclosure could hinder representation by the selected attorney.

In essence, the insurance company has been retained to provide an attorney and the expectation is that statements made by the insured will be held in confidence. Without such protection, the insured would bear many of the burdens of the insurance contract without reaping the benefits. Under these circumstances, we believe the statements are protected by CR 26(b)(3). If the statement were made directly to the selected attorney, it would obviously have been made in anticipation of litigation. The contractual obligation between insured and insurer mandates extension of this protection to statements made by an insured to his insurance company.

Heidebrink v. Moriwaki, 104 Wn.2d 392, 400-01, 706 P.2d 212 (1985).

Under settled Washington law, a plaintiff's attorneys know they can rely on the fact that defense attorneys retained or appointed by the insurance company to represent the insured do, in fact, speak for and represent the defendant and the defendant's interests. This permits negotiation as well as normal pre-trial discovery and allows the case to proceed. But the position proffered by the Response and mistakenly accepted by the trial court turns this well-settled rule on its head. Under that view, a plaintiff's attorney would not know if he or she could negotiate or litigate the case with the defense attorney until ascertaining whether the defense attorney had, in fact, conducted a personal conversation with the defendant and informed the defendant of all procedural elements of the case, because without that conversation, the defendant could not be bound to the attorney's actions. But as detailed *supra*, that is not the law under *Heidebrink* or the settled authorities throughout the country. Rather, since Studio Seven tendered defense of

the claim in January and May 2011, an attorney-client relationship arose between Lane Powell and Studio Seven upon Founders' retention of Lane Powell in November 2011.

Applying both *Heidebrink* and settled insurance law, once Studio Seven faxed and sent to Founders the complaint and the other materials served on it with the expectation Founders would manage the action, the attorney-client relationship between Studio Seven and Lane Powell was formed the moment Founders retained the Lane Powell law firm. Based on the conduct of the parties, the latest this would have occurred is November 16, 2011, when the Lane Powell attorney contacted the Akhavuz's attorney, Mr. Certa, and advised him Lane Powell had been retained to represent the defendants, that the defendants were aware of the default judgment entered against them, and that he wanted to discuss settling the matter. CP 425-426, ¶ 6 (Certa Dec., recounting phone call with Mesher on November 16, 2011); CP 467 ¶¶ 6-7 (Ortiz Dec., recounting retention of "Lane Powell" in "November" 2011).

There is no evidence of a "mistake" between Studio Seven and Founders as to who was to mount the defense – Founders was, and failed to do its job for six months. Lane Powell then failed to defend properly when hired in November 2011. If Studio Seven was truly unaware that it was being defended by Founders and Lane Powell until early June 2012,

as the Response argues,⁸ then Studio Seven failed to look out for its own interests by confirming the matter was being defended or had been settled within a couple of months after sending Founders the Complaint and discovery requests. *See Aecon Bldgs., Inc. v. Vandermolen Constr. Co.*, 155 Wn. App. 733, 741, 230 P.3d 594 (2009).

B. Serious Policy Problems Raised By The Response: Denial of Timely Discovery, Improper Control Of Witnesses, and Irreparable Prejudice to a Plaintiff's Case.

No court has ever held what the Response baldly suggests should be the law: that, *based on their own statements*, the insurer and attorneys for a defendant can sit on their hands for *over 13 months* (the insurer), or for *over seven months* (the attorney and his law firm), without any excuse or reason, and then come strolling into court over 14 months after the case was filed, and over 13 months after the complaint *and* case schedule *and* initial discovery requests were served, and say: “Oh dear, so sorry. Now (at the time all discovery should have been completed) it’s finally time! Let’s *start* the litigation process! Let’s start discovery!” This after the defendant has had continuous control of the premises and witnesses and had *refused to appear, answer the complaint, or respond to the plaintiffs’*

⁸ When read closely, even the carefully crafted declaration of Ms. Russell implies Studio Seven had contact with at least Founders about the case between June 2011 and June 2012. Ms. Russell’s declaration merely states that Studio Seven “did not receive further communications *from* Founders . . . in May or June 2011.” CP 327, ¶20. This does not foreclose Studio Seven or Moody calling or writing *to* Founders during May or June 2011. Nor does it eliminate any kind of communication between Studio Seven and Founders *after* June 2011.

basic initial discovery requests for over 13 months. Cf. CR 33(a) (answers to interrogatories are due 30 days from service); CR 34(b) (answers to RFP's are due 30 days from service). Such refusal to engage in discovery is itself ample basis to enter default. CR 37(d); *Pamelin Indus., Inc. v. Sheen-USA, Inc.*, 95 Wn.2d 398, 401-02, 622 P.2d 1270 (1981) (relief is warranted where facts fit CR 37(d) relief); *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 220 P.3d 191 (2009) (default upheld for discovery failures).

The prejudice here is real. The injury occurred on October 31, 2010. As is common in premises cases, Studio Seven, as the landowner, has had exclusive access to the most important evidence. Specifically, Studio Seven had exclusive access to: (1) the identities of the employees and patrons who were present at the time of the incident; (2) the maintenance and inspection logs for the premises and the employees and witnesses for timely follow-up near the time of the incident; (3) photographs of the premises; (4) documentation showing Studio Seven's actual or constructive notice that fake blood would be used at its premises on the night of Mrs. Akhavuz's fall; and (5) Studio Seven's relevant policies and procedures regarding the condition of its premises. Akhavuz's counsel first contacted Studio Seven on January 20, 2011, less than three months after this incident, requesting information about

Akhavuz's fall. Instead of cooperating, Studio Seven, its insurance company and its attorneys have engaged in persistent delay tactics. It is now three years since the date of Dana Akhavuz's fall. For three years, the Akhavuzes have been deprived of the ability to interview witnesses or review the evidence that is exclusively in Studio Seven's control. This has caused irreparable prejudice to the Akhavuzes as there is now a substantial risk that any remaining evidence will be stale and much will have disappeared out of memories or out of town.

Trial in this case was scheduled to begin on October 22, 2012, with the discovery period closing on September 9, 2012. The initial set of interrogatories and requests for production were served with the complaint in 2011. Studio Seven never responded to these discovery requests. Instead, as its manager testified, Studio Seven and (minimally) its insurer engaged in their own "investigation" *before* the complaint was even filed or served. Once their attorneys were appointed, the investigation included them as well. The Akhavuzes have been severely disadvantaged by this one-sided gamesmanship. Three years after the incident, Studio Seven is the only party that has had an opportunity to handle the most important witnesses and evidence in this case.

After all the delays, what would have been the likely result? Possible final resolution in late 2015 or 2016, with post-trial appeals. This

prolonged “resolution” for events that occurred in October 2010 and which the Akhavuzes started trying to resolve in December 2010. This is contrary to the mandate of CR 1 of speedy and inexpensive resolution of cases. It is the result the Response asks the Court to approve. It is hardly fair and just. While the failures may have been unintentional as far as current counsel go, the overall circumstances are redolent of tactical misconduct done to obtain the greatest advantage in the litigation unfairly in defiance of the rules, while minimizing the cost to the insurer. It is a dangerous template to allow. Affirmance would be wholly contrary to the underlying policies of the civil rules embodied in CR 1, and fundamental notions of fair play. Affirmance would mean an insured may simply ignore the many applicable court and ethical rules with impunity, even though neither the Firm nor the insurer claimed any excuse, much less that their “non-excuse” is relevant or controlling, all to hold a diligent plaintiff at bay. The law requires reinstating the default.

C. The Default Was Erroneously Vacated Because the Facts Here Do Not Meet the Requirements of *White v. Holm* and It Is Studio Seven's Burden to Establish Them. 1) The Claimed Defense Does Not Justify the Vacation of the Default Judgment Because It Is Barely a Prima Facie Defense and None of the Other Three *White v. Holm* Factors Are Met, Much Less All of Them; 2) Defendants' Failure to Timely Appear and Answer Is Not Excused; 3) Defendants Failed to Act with Due Diligence after Notice of the Default in November 2011; and 4) Plaintiffs Have Been Irreparably Prejudiced in Presenting Their Case While Defendants Are Not Harmed Because They Are Indemnified by Their Insurer.

The Opening Brief described how *White v. Holm* sets out the four criteria for determining whether to vacate a default and the fact it is the moving party's actions that must be scrutinized closely since it was that party's failures that led to the default:

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.

White v. Holm, 73 Wn.2d 348, 353, 438 P.2d 581 (1968) (emphasis added). See Opening Brief, pp. 18-20. Moreover, the Supreme Court recently emphasized in its 2007 *Little v. King*⁹ and *Morin v. Burris*¹⁰ decisions that defaults ***not*** be vacated when the criteria are not met, notwithstanding their normally disfavored status. See Opening Brief, pp. 20-26. Here, that boils down to a "close scrutiny" of the latter three factors which it was the duty of the Response to show, since it was the

⁹ 160 Wn.2d 696, 161 P.3d 345 (2007).

¹⁰ 160 Wn.2d 745, 161 P.3d 956 (2007).

defense failures that resulted in the default and the substantive defense is, at most, a barely prima facie defense.

The Response argues it has a strong defense as the primary justification for affirming the trial court, claiming there is no prejudice to the Akhavuzes. It is incorrect on both counts.

First, the claimed strong defense is not strong at all. At most it survives summary judgment in favor of the Akhavuzes. The trial court recognized that it is *potentially* a meritorious defense – a far cry from “conclusive.” This is because the genuine defense is based on only a declaration from the Studio Seven manager and one of its doormen, neither of whom identified Dana Akhavuz or claimed to have been in or around the area where the slip and fall occurred on the night in question. Neither do they even purport to directly challenge her view of the facts. Dana reported twisting an ankle, believing it a severe sprain, and interacting with a bartender and a bouncer inside the venue, who thought it was of little consequence and did not write an incident report. CP 448 ¶ 4.

Ms. Russell, the manager, not only fails to claim she was on the premises on the night in question, she affirmatively states that the performers that night did “use fake blood in its performance,” but then gives only her “understanding” of how the fake blood is used that is clearly not based on firsthand knowledge. Moreover, nothing she says

conflicts with Dana's recitation of the event, much less constitutes a total defense to her claims. At most, her statements about premises policies and not receiving any incident reports from that night beg the question, but they do not necessarily preclude summary judgment in favor of Dana Akhavuz. Even the trial court recognized it was at most a "potentially" meritorious defense and was far from conclusive. So even if Studio Seven arguably met the first prong of the *White* test on a minimal basis, that alone does not permit vacation of a default judgment where the defendant fails to meet all other three factors. And given the scrutiny that must be applied to whether Studio Seven met the other three factors, it becomes readily apparent from the recitation of facts and law *supra*, the factors are not met on this record, requiring reversal.

First, it cannot demonstrate its failure to appear was excused. *See White*, 73 Wn.2d at 352. There is no dispute that Studio Seven and its insurer received proper notice of the underlying case in May 2011. The failure to enter an appearance, or to file an answer, or to respond in any way for over six months after soliciting and receiving a detailed settlement demand letter from Plaintiffs' counsel in May 2011, and having received the initial set of discovery requests demonstrates that the failure to appear was unexcused and fails the test.

As most recently pointed out by Judge Quinn-Brintnall for Division II, “Appellate courts consider two factors when determining whether a trial court abused its discretion in finding good cause to vacate: (1) excusable neglect and (2) due diligence. *Seek Sys., Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 271, 818 P.2d 618 (1991).” *Meade v. Nelson*, ___ Wn. App. ___, 300 P.3d 828, 834 (Div. II., April 30, 2013). *Accord Aecon Bldgs., Inc.*, 155 Wn. App. at 738-41 (affirming trial court’s refusal to vacate default where the defendant could not establish either excusable neglect or due diligence, the components of “good cause”).

The Response also makes no showing as to the other two *White* factors. It does not argue, nor can it, that it acted with due diligence after the entry of the default judgment, given the length of time that elapsed between the court’s entry of default and the motion. Nor does the Response argue that Studio Seven will face substantial hardship if the default is reinstated. The insurer will pay the claim; the Firm and the insurer will have to sort out who ultimately bears how much of that cost. But balanced against that lack of harm to Studio Seven is the strong prejudice to the Akhavuzes of being denied access to witnesses and core evidence in the case for now over two years as well as the financial difficulties that they continue to have.

There can be no other conclusion than that the failure to satisfy the legal requirements of *White* means the trial court abused its discretion in granting the motion to vacate.

D. *Berger v. Dishman Dodge* Supports Reinstatement of the Default Judgment for Failure to be Diligent. The Insureds Had Reason to Believe Their Interests Were Not Being Protected Where They Allege They Had Not Heard Anything About the Case from Their Insurer or an Attorney for Over a Year After Tendering to Their Insurer and Should Have Contacted the Insurer Within a Month of the Tender, as Did the Insured in *Berger*.

Although the Response argues *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 748 P.2d 241 (1987), supports affirmance, a careful review shows the opposite is true: that decision shows several reasons why reversal and reinstatement of the default judgment is required. First, one reading of the Studio Seven submissions and the Lane Powell attorney's submissions is that Studio Seven knew nothing at all about the case after faxing the complaint to Founders on May 26, then mailing the rest of the materials served on them a day later, including the case schedule and discovery requests. But since Studio Seven had been prompt in forwarding on materials to Founders, and then providing information for the investigation through both Ms. Russell and Mr. Moody, it does not stand to reason they had no contact for an entire year thereafter. After all, it was the defendants in *White* and *Berger* who got on the insurance company that had made a mistake in sending the file to the wrong office,

or in not being sure if the defendant's personal attorney would do the defense and made sure it was cured immediately. Studio Seven cannot with a straight face say it could hear nothing about the case for an entire year and not be sufficiently concerned about whether it was being defended to contact Founders. In fact, the carefully written declarations do not preclude that, as Ms. Russell's declaration is silent about whom she or Studio Seven was in contact with between July 2011 and June 2012. All she says affirmatively was she was not aware of the default judgment, but nothing more. In fact, the only evidence implies that Founders was not defending the suit whether out of intent or negligence. Its claims adjuster noted he thought the demand letter meant settlement discussions were starting – but he then never responded to the demand to have a negotiation, or appoint counsel to address the discovery demands and file an appearance. As recently noted by Division II in *Meade*, 300 P.3d at 833, Studio Seven or Founders Insurance could have promptly engaged *counsel*, which counsel could have, at minimum, contacted plaintiffs' counsel and established an informal appearance by substantial compliance to the appearance rules, again, before the default *judgment* was entered at the end of June 2011. *See Meade*, 300 P.3d at 832-34 (affirming vacation of order of default before a default judgment could be entered because the defendant's *actions through counsel demonstrated both that it intended*

“to defend the suit and perform[ed] some act, formal or informal, acknowledging the jurisdiction of the court after litigation had commenced”) (quoting *Morin*, 160 Wn.2d at 757) (emphasis added).¹¹

Neither of those scenarios occurred here. No counsel appeared for the defendants until over six months *after* service of the complaint and tender of the defense to Founders Insurance, and nearly four months *after* entry of the default judgment. There was not then, and still is not now, an answer on file for the defendants. There certainly was no overt act indicating an intent to defend the suit prior to entry of the default judgment on June 28, 2011.

III. CONCLUSION

Appellants Dana and Hasan Akhavuz respectfully request this court reverse the superior court and reinstate the default judgment entered in June 2011, and leave it to the defendants, their insurer, and their appointed counsel to sort out who will repay the carrier for the judgment which must be paid. Anything less rewards and enhances the misfeasance and nonfeasance of all three who are responsible for their actions and

¹¹ As Division II aptly summarized:

In the aftermath of *Morin*, whether a plaintiff is “reasonably harbor[ing] illusions about whether the opposing party intends to defend” is not dispositive. 160 Wn.2d at 762 (Bridge J., concurring in part/dissenting in part). Instead, in light of the fact that “litigation is inherently formal,” a party must convey that it intends to defend the suit and perform some act, formal or informal, acknowledging the jurisdiction of the court after litigation has commenced.

Meade, 300 P.3d at 833.

inactions; would be inconsistent with the applicable case law; and would undercut and compromise the purpose of the civil rules which ultimately is to promote the “just, speedy, and inexpensive resolution of every action.” CR 1.

Appellants did everything in their power to bring their claims to the attention of the defendants and their insurer to get prompt resolution while the information was fresh and available to all parties. They did everything they could as responsible plaintiffs under the legal system. But Studio Seven and its authorized representatives at the Firm did not follow the rules. They failed to take one single step, failed to “perform some act, formal or informal, acknowledging the jurisdiction of the court after litigation ha[d] commenced” as required by *Morin* (see *Meade*, 300 P.3d at 833, ¶ 24) until filing the motion to vacate the default judgment literally one year after entry of that judgment (and over 13 months after entry of the order of default) and ***eight months after*** the Firm, on behalf of the insureds, contacted plaintiffs’ counsel and said it was aware of the default judgment. As Judge Appelwick so aptly characterized the similar situation where the claims adjuster “failed to make any inquiries into the status of the lawsuit” in *Aecon Bldgs., Inc.*, “He did not act with the diligence necessary for relief under equity or CR 60.” *Aecon Bldgs., Inc.*, 155 Wn. App. at 741. Granting relief under CR 60 when its legal

prerequisites are not met is necessarily an abuse of discretion, which must be reversed.

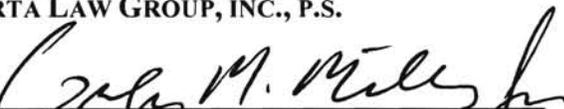
The insureds, their insurer, and the appointed counsel should not be allowed to profit from their total failures to participate as required by the civil rules, which to this day has not been rectified, as an answer has still not been filed. The trial court must be reversed and the default judgment reinstated.

Dated this 1st day of July, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459

CERTA LAW GROUP, INC., P.S.

By 
Pellegrino L. Certa, WSBA No. 25903
Cheryl J. Farrish, WSBA No. 41698

Attorneys for Appellants

APPENDIX

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Appendix D:	Letter from Certa-Collins Law Group, PLLC to Founders Insurance Company, dated June 13, 2011	D-1 to D-6
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APPENDIX D

CERTA-COLLINS LAW GROUP, PLLC

Attorneys & Counselors at Law
701 Fifth Avenue, Suite 4770
Seattle, WA 98104-7035

Telephone Number: (206) 838-2500
Toll Free Number: (866) 440-0260
Fax Number: (206) 838-2502

June 13, 2011

Sent via electronic and US mail

Carlos Ortiz
Founders Insurance Company
PO Box 5100
Des Plaines, IL 60017-5100

RE: Our Client : Dana Akhavuz
Your Insured : Tracy Moody dba Studio Seven
Date of Loss : October 31, 2010
Your Claim Number : 8510000556
Our File No. : 11-251

Dear Mr. Ortiz:

As you are aware, we represent Dana Akhavuz regarding the October 31, 2010 incident wherein she sustained personal injuries due to the negligence of your insured.

This matter has been thoroughly reviewed and the facts are set forth herein. Based upon the details of the incident and the laws of the State of Washington, we believe that your insured is fully liable for the injuries sustained by Mrs. Akhavuz.

This letter is an attempt to commence settlement negotiations and to reach an amicable resolution in an attempt to avoid the cost of the litigation process. These materials are being provided to you exclusively for settlement negotiations and may not be used as evidence at trial pursuant to ER 408.

Enclosed herein please find the following tabbed exhibits:

1. Group Health medical and billing records.

A. Introduction.

Mrs. Akhavuz was born on October 10, 1966 and was 44 years old at the time of this incident. She has a degree in cosmetology and has extensive experience in the beauty industry. Prior to this incident, she enjoyed her work as a cosmetology instructor at Shoreline Community

June 13, 2011
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College. She also operated a salon out of her home and benefitted from a steady and loyal client base. She lives with her husband, Hasan Akhavuz, in Brier, Washington.

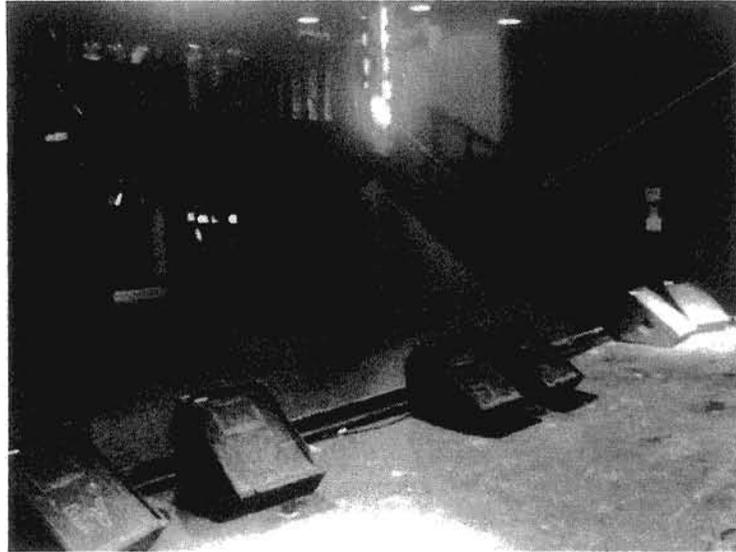
B. Facts of Loss and Liability.

On October 31, 2010, Mrs. Akhavuz attended a Halloween party at Studio Seven, which is located at 110 South Horton St., Seattle, Washington 98134. The Halloween party included musical performances, a costume contest, a “bloody t-shirt contest,” as well as a burlesque show. Throughout the night, performers slathered blood on both themselves and audience members. As is evident from the below promotional flyer, your insured was aware that fake blood would be used during these performances:



Unfortunately, Mrs. Akhavuz slipped on the fake blood located near the base of the stairs depicted on the far right hand side of the photograph below:¹

¹ Photograph obtained from Studio Seven’s Facebook site.



As a business owner, your insured had a duty to use reasonable care to protect its business invitees from the hazards involved in this case.

C. **Liability.**

This case is a premises liability case. To prevail, Mrs. Akhavuz must prove four basic elements: (1) the existence of a duty, (2) breach of that duty, (3) resulting in injury, and (4) proximate cause. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914, P2d 728 (1996). In Washington, the duty owed by a land owner to a person entering the land owner's premises depends on whether the entrant is a trespasser, a licensee, or invitee. In this case, Mrs. Akhavuz attended Studio Seven's Halloween party as a business invitee.

As an owner or occupier of premises, Studio Seven is liable for any physical injuries to its business invitees caused by a condition on the premises if the owner/occupier:

- (a) Knows of the condition or fails to exercise ordinary care to discover the condition, and should realize that it involves an unreasonable risk of harm to such business invitees;
- (b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and
- (c) Fails to exercise ordinary care to protect them against danger.

See WPI 120.07

Here, Studio Seven was aware that fake blood would be used during its Halloween Show. Studio Seven failed to take adequate precautions to contain and/or clean up the fake blood. Accordingly, Studio Seven breached its duty of care to Mrs. Akhavuz and is liable for her resulting injuries.

D. Injuries and Treatment.

Mrs. Akhavuz suffered the following injuries as a result of this October 31, 2010 incident:

- Fracture of proximal fibula;
- Intra-articular fracture of the distal tibia;
- Oblique fracture of the distal tibia

1. Group Health

First Date of Service: 10/31/10 Last Date of Service: 02/07/11 # of Visits: 16

On October 31, 2010, Mrs. Akhavuz presented to Group Health Urgent Care with complaints of extreme left ankle pain and swelling. She reported that she was unable to bear weight on her left foot. The attending physician, Amy Jermann, MD, performed a thorough physical examination and noted diffuse swelling of the left ankle, anterior ecchymosis, and tenderness at the distal fibula, proximal fibula, and medial malleolus. Dr. Jermann also noted significantly restricted left ankle range of motion. Dr. Jermann ordered x-rays, which revealed a non-displaced fracture of the proximal fibula, a minimally displaced intra-articular fracture of the distal tibia, and a minimally displaced oblique fracture of the distal tibia. These findings were confirmed by a left ankle CT. Dr. Jermann placed Mrs. Akhavuz in a long-leg splint, advised her to remain non-weight bearing, prescribed narcotic pain medication, and referred her to an orthopedic surgeon for further care. At the time of discharge, Mrs. Akhavuz was fitted for a pair of crutches and instructed on a home care regimen.

On November 4, 2010, Mrs. Akhavuz treated with Joseph Whatley, MD, an orthopedic surgeon. Dr. Whatley reviewed the x-rays taken at Urgent Care and confirmed that Mrs. Akhavuz had fractured her ankle in three places. Due to the complex nature of the fracture, Dr. Whatley recommended surgery to repair the fracture and stabilize the left ankle.

On November 5, 2010, Mrs. Akhavuz was admitted to Group Health for an open reduction and internal fixation of the left tibia and fibula. Dr. Whatley noted the pre-operative diagnosis as "left ankle pilon fracture." Prior to the procedure, Mrs. Akhavuz was placed under general anesthesia. Dr. Whatley then made a lateral incision over the distal fibula and dissected through to the skin and subcutaneous tissues to the level of fracture. Once the site was opened, Dr. Whatley visualized a long, oblique distal fibula fracture as well as disruption of the distal tibia. He also noticed the presence of several bone fragments consistent with fractured bones. Dr. Whatley used a bedside C-arm machine to confirm the location of the fractures and then

stabilized the fractures by inserting three cannulated screws and two lag screws into Mrs. Akhavuz' tibia and fibula bones. Following the surgery, Mrs. Akhavuz was placed in a short leg plaster splint.

Mrs. Akhavuz received post-operative care at Dr. Whatley's clinic through February 2011. The medical records indicate that Mrs. Akhavuz was completely bedridden for two weeks following the surgery. Once she was able to ambulate, she continued to suffer from left ankle tenderness with most activities. Unfortunately, Mrs. Akhavuz was forced to discontinue treatment in February 2011 due to insurance and financial issues.

E. Special Damages.

Medical Expenses:

The following is a breakdown of the medical expenses incurred by Mrs. Akhavuz as a result of the incident in question:

1. Group Health	:	\$14,732.10
TOTAL	:	\$14,732.10

Wage Loss:

At the time of this injury, Mrs. Akhavuz worked 3-4 days per week as a hairdresser and earned approximately \$300-400 per week. She was able to make her own hours and enjoyed a steady stream of clients.

Following this injury, Mrs. Akhavuz was unable to stand for prolonged periods of time, which is required as a hairdresser. As a result, she was rendered unemployed for several months. Mrs. Akhavuz lost many of her clients during this period of unemployment and she has been forced to try to rebuild her book of business. She currently works sees 3-8 clients per week and earns between \$150-200 per week.

November 2010 – February 2011: 4 months x \$1,600/mo	= \$6,400.00
March 2011 – June 2011: 4 months x \$800/mo	= \$3,200.00
TOTAL	\$9,600.00

In addition, Mrs. Akhavuz had just obtained her certificate in skincare at the time of this incident. She had several job interviews lined up; however, she had to cancel these interviews when she broke her ankle at your insured's facility. If this case is litigated, we will seek special damages associated with Mrs. Akhavuz's lost business opportunities.

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Page 6

F. General Damages.

We believe that liability in this case is clear and that your insured is solely responsible for the physical, emotional, and economic injuries sustained by Mrs. Akhavuz. The incident left Mrs. Akhavuz bedridden for several weeks and forced her to undergo a painful and invasive surgery. Mrs. Akhavuz continues to suffer from discomfort in her left ankle. For months following the injury, she was unable to walk without assistance and she had to dramatically alter her lifestyle in order to accommodate the injuries she sustained.

Given the foregoing and the documentation provided herein, Mrs. Akhavuz's general damages are substantial and compelling. She deserves to be fairly and adequately compensated for injuries from this incident.

G. Conclusion.

As noted above, we believe your insured is 100% liable for Mrs. Akhavuz's injuries. Based upon the foregoing and the medical documentation in support of her injuries, if this case were tried before a jury, we would ask for a jury to return a verdict in excess of \$200,000. However, as stated above, we hope to avoid litigation and settle this matter so that Mrs. Akhavuz can finally have some closure. Therefore, we have been instructed by our client to settle this matter for the fair and reasonable value of \$195,000 for full and final release of all claims.

We believe that this is a fair and reasonable settlement proposal in that a jury would award more for pain and suffering than what Mrs. Akhavuz has demanded.

We look forward to hearing from you after your review of this letter and its enclosures. This offer will remain open for acceptance for thirty (30) days from the date of this letter.

Sincerely,

CERTA LAW GROUP, INC., P.S.



Pellegrino L. Certa
Cheryl J. Farrish

Enclosures

cc: Client (w/o enclosures)

APPENDIX

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Appendix D: Letter from Certa-Collins Law Group, PLLC to Founders Insurance Company, dated June 13, 2011	D-1 to D-6

No. 69234-8

WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

DANA AND HASAN
AKHAVUZ,
Appellants,

vs.

TRACEY ARNOLD MOODY,
SEVEN ENTERTAINMENT,
INC.,
Respondents.

CERTIFICATE OF SERVICE

2013 JUL - 1 PM 4:42

COURT OF APPEALS DIV I
STATE OF WASHINGTON

I declare under penalty of perjury that on July 1, 2013, I caused true copies of the corrected REPLY BRIEF, this Certificate of Service, marked-up pages showing corrections to the Reply Brief, and a cover letter to the Court of Appeals, Div. I, to be filed with the Court Clerk and served on counsel of record by the following methods:

Gabriel Baker Jennifer Kali Sheffield Lane Powell 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338 Phone: (206) 223-7000 Fax: (206) 223-7107 Email: bakerg@lanepowell.com Email: sheffieldj@lanepowell.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other _____
Pellegrino Certa Cheryl J. Farrish Certa Law Group, Inc., P.S. 403 Columbia Street, Suite 500 Seattle, WA 98104-1625 Phone: 206.838.2500 Fax: 206.838.2502 Email: pcerta@certalaw.com cfarrish@certalaw.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input checked="" type="checkbox"/> Email <input type="checkbox"/> Other _____

Richard D. Johnson, Court Clerk Washington Court of Appeals, Div. I 600 University Street Seattle, WA 98101-1176 Phone: (206) 464-7750 Fax: (206) 389-2613	<input checked="" type="checkbox"/> Filing via Legal Messenger
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DATED this 15th day of July, 2013.


Sara Leming
Legal Assistant to Gregory M. Miller