

70565-2

70565-2

NO. 70565-2-I

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

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STATE FARM FIRE AND CASUALTY COMPANY,

Appellant,

vs.

TRISTAN APPLEBERRY, a single man;

Respondent,

and

DEBRA SULLIVAN, Personal Representative of the Estate of Aaron J. Sullivan,

Defendant.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Jean Rietschel, Judge

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BRIEF OF APPELLANT

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## **I. INTRODUCTION**

Appleberry murdered Aaron Sullivan. When Sullivan's estate sued, Appleberry sought coverage under his parents' homeowners policy. State Farm defended under a reservation of rights, and filed this declaratory judgment action.

After moving for default, State Farm agreed to continue the motion two weeks to allow Appleberry more time to appear and answer. Within a couple days, attorney Patrick LePley was contacted about defending Appleberry. However, Appleberry did nothing, and the court entered default judgment. LePley called State Farm's counsel at 4:30 p.m. on the day default judgment was entered, but he did not appear until over three weeks later.

Appleberry submitted no evidence explaining his failure to appear and answer, much less showing excusable neglect. He submitted no substantial evidence supporting a prima facie defense to application of the willful and malicious acts exclusion in the homeowners policy. Therefore, the court erred in vacating default judgment.

## **II. ASSIGNMENT OF ERROR**

The trial court erred in setting aside the order of default and vacating default judgment on May 31, 2013. CP 224-26.

### **Issues Pertaining to Assignment of Error**

1. Did the trial court err in finding that Appleberry established excusable neglect when he provided no explanation why he took no action after being served with the summons and complaint, even after State Farm agreed to continue the motion for default two weeks to allow him more time to appear and answer?

2. Did the trial court err in finding the existence of a prima facie defense when Appleberry failed to submit substantial evidence why his conduct in pointing a loaded assault weapon at Sullivan's car, with his finger on the trigger, intending to scare the occupants, was not a willful and malicious act excluded under the homeowners policy?

3. Did the trial court err in considering Appleberry's deposition testimony taken in another action, when such testimony was inadmissible pursuant to CR 32 because State Farm had no notice of the deposition and was not present or represented at the deposition?

### **III. STATEMENT OF THE CASE**

#### **A. MURDER AND CONVICTION.**

On July 22, 2009, Tristan Appleberry shot and killed Aaron Sullivan with an AK-47 type assault weapon. Sullivan was sitting in the driver's seat of his car. Appleberry slid back the rack of the weapon, which made a very loud clacking sound. Another male began punching

the passenger side window. Sullivan began to drive away. Appleberry fired one shot, which travelled through the rear window and struck Sullivan in the back of the head. Sullivan died at the scene. CP 22-23.

According to Appleberry's inadmissible deposition testimony, submitted by defendants, he held the gun with his finger on the trigger. He knew this was not safe. He did this because "it's an easy way to hold a gun". His intent was "[t]o scare them away". CP 120.

Appleberry pleaded guilty to Murder in the Second Degree.<sup>1</sup> CP 10. He was convicted and sentenced to 240 months confinement. CP 13. The conviction was based on the following charge, as set forth in the information:

That the defendant TRISTAN NEVINS APPLEBERRY in King County, Washington, on or about July 22, 2009, while committing and attempting to commit the crime of Assault in the First Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Aaron Sullivan, a human being, who was not a participant in said crime, and who died on or about July 22, 2009.

CP 2-3, 20.

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<sup>1</sup> The Sullivan estate asserts that Appleberry's guilty plea was an *Alford* plea. CP 122

**B. HOMEOWNERS INSURANCE POLICY.**

State Farm issued a homeowners policy to Appleberry's parents. The policy required, in this context, a claim or suit against an insured for damages because of bodily injury caused by an occurrence. "Occurrence" was defined to mean an accident. CP 3.

The policy contained exclusions providing that Coverage L did not apply to:

bodily injury or property damage:

- (1) which is either expected or intended by the insured; or
- (2) which is the result of willful and malicious acts of the insured;

CP 3.

**C. DECLARATORY JUDGMENT ACTION AND MOTION FOR DEFAULT.**

Sullivan's estate sued Appleberry. CP 7. State Farm agreed to defend Appleberry under a full reservation of rights. State Farm reserved the right to deny coverage and withdraw from the defense. CP 2.

On March 6, 2013, State Farm filed this insurance coverage declaratory judgment action. CP 1. On March 11, Appleberry accepted service of the summons and complaint. CP 32.

Appleberry did not appear or answer. CP 147. On April 2, 2013, State Farm filed a motion for entry of default and default judgment. CP

35. The motion notified the court that Appleberry is an inmate at the Monroe Correctional Facility. CP 36. State Farm served counsel for the Sullivan estate with the motion. CP 71-72. State Farm noted the motion to be heard, without oral argument, on April 10. CP 33.

**D. CONTINUANCE OF MOTION AND ENTRY OF DEFAULT JUDGMENT.**

On April 3, 2013, Frank Shoichet, counsel for the Sullivan estate, called State Farm's attorney and said he was working with Appleberry's parents to try to find Appleberry a lawyer. He asked State Farm to continue the motion for default a couple of weeks. State Farm agreed. State Farm renoted the motion to be heard, without oral argument, on April 24. CP 73, 126, 147-48, 198.

Shoichet quickly contacted a lawyer representing Appleberry's parents, told her about the motion for default, and asked her to bring the matter of payment for a lawyer for Appleberry to the attention of Appleberry's parents. CP 126.

On April 3, 2013, Shoichet sent attorney Patrick LePley a copy of the motion for default. Shortly thereafter, Shoichet asked LePley about his availability to assist Appleberry. LePley indicated he was willing to consider representing Appleberry, if Appleberry or someone on his behalf contacted LePley. CP 98.

On April 5, 2013, Shoichet told State Farm's counsel that attorney LePley was willing to defend Appleberry in the declaratory judgment action. CP 148.

On April 17, 2013, LePley told Shoichet that no one had requested his help or made arrangements for him to represent Appleberry. CP 98. On April 25, Shellie McGaughey, an attorney representing Appleberry's parents, contacted LePley about representing Appleberry. CP 99.

Appleberry did not appear or answer before the April 24 hearing date. On April 29, 2013, the court granted State Farm's motion and entered an order of default and default judgment, declaring that State Farm owed no duty to defend or indemnify Appleberry. CP 77-78, 79-80, 148.

No explanation for Appleberry's failure to timely appear or answer has ever been provided. Appleberry failed to submit any testimony by Appleberry, his parents, or his parents' lawyer providing any excuse.

On April 29, 2013, around 4:30 p.m., LePley called State Farm's attorney and asked if State Farm would agree to vacate the default judgment. State Farm's attorney responded by asking LePley if he represented Appleberry. LePley indicated he did not. On May 3, they spoke again. LePley stated that Appleberry's father had hired him, and asked if State Farm would vacate the default judgment. State Farm declined. CP 148-49.

On May 22, 2013, nearly three weeks later, LePley filed a notice of appearance on behalf of Appleberry. CP 81-82. That same day, he filed a Motion For Order to Show Cause to Set Aside and Vacate Default Judgment and to Grant Leave to Defendant Appleberry to File an Answer. CP 83-95. On May 31, the trial court granted the motion without oral argument and vacated the default judgment, concluding that Appleberry had established excusable neglect and the existence of a prima facie defense. CP 224-25.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW.

A trial court's decision on a motion to vacate a default judgment is reviewed for abuse of discretion. *Trinity Universal Ins. Co. v. Ohio Cas. Ins. Co.*, No. 67832-9-I, 2013 Wash. App. LEXIS 1921, at \*8 (Wash. App. Aug. 19, 2013). Discretion is abused when the court's decision is manifestly unreasonable or based on untenable grounds, or for untenable reasons. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 199, 165 P.3d 1271 (2007).

Evidentiary rulings are also reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 230 (1999).

**B. DEFAULT JUDGMENT WAS PROPERLY ENTERED.**

In Appleberry's motion, he asserted that the order of default and default judgment were improperly entered. The trial court correctly did not so rule.

Appleberry complained that he was not served with notice of the motion for default. However, a defendant who has not appeared in an action is not entitled to service of notice or papers in the action. RCW 4.28.210; CR 5(a). Specifically, a defendant who has not appeared is not entitled to notice of a motion for default. CR 55(a)(3); *Conner v. Universal Utilities*, 105 Wn.2d 168, 173-74, 712 P.2d 849 (1986).

Appleberry also complained that the court failed to enter findings of fact and conclusions of law. However, CR 55(b) provides that the court may conduct an evidentiary hearing when damages are sought in an uncertain amount, or when it is necessary to establish the truth of any averment by evidence or to make an investigation of any other matter. Only then are findings of fact and conclusions of law are required. *See* CR 55(b); *Trinity Universal Ins. Co. v. Ohio Cas. Ins. Co.*, 2013 Wash. App. LEXIS 1921, at \*28-29. Even under such circumstances, findings of fact and conclusions of law are not necessary where findings may be implied from the judgment, thus permitting appellate review. *Little v. King*, 160 Wn.2d 696, 706-07, 161 P.3d 345 (2007).

State Farm sought only declaratory relief, not damages. Findings of fact and conclusions of law were not required because the court did not hold an evidentiary hearing. No hearing was necessary because State Farm relied only on the factual allegations in the complaint to support its motion for default judgment.

The defaulting party is deemed to have admitted all of the factual allegations in the complaint. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 326, 242 P.3d 27 (2010). The plaintiff may therefore move for default based on the allegations in the complaint, and the trial court must determine whether they support the plaintiff's cause of action. *Id.* at 326, 332. In this case, they do.

State Farm alleged that Aaron Sullivan's estate sued Appleberry for shooting and killing Sullivan with a firearm. CP 2, 7. Appleberry was convicted of Murder in the Second Degree for causing the death of Aaron Sullivan. CP 2.<sup>2</sup> State Farm alleged that the conviction was based on the following charge as set forth in the information:

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<sup>2</sup> Appleberry asserts that his conviction was based on an *Alford* plea, and collateral estoppel may not be based on an *Alford* plea. CP 216. However, a conviction based on an *Alford* plea is an admission and evidence of the elements of the material facts of the crime, including intent to commit the acts that constituted the crime. *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 551, 794 P.2d 521 (1990). The conviction therefore could properly be considered by the trial court.

That the defendant TRISTAN NEVINS APPLEBERRY in King County, Washington, on or about July 22, 2009, while committing and attempting to commit the crime of Assault in the First Degree, and in the course of and in furtherance of said crime and in the immediate flight therefrom, and with intent to cause the death of another person, did cause the death of Aaron Sullivan, a human being, who was not a participant in said crime, and who died on or about July 22, 2009.

CP 2-3.<sup>3</sup>

Murder in the Second Degree requires either intent to kill another person but without premeditation, or causing the death of a person while in the course of committing a felony or in immediate flight therefrom. RCW 9A.32.050. Assault in the first degree requires intent to inflict great bodily harm. RCW 9A.36.011. These allegations therefore established that Appleberry intended to cause death and/or inflict great bodily harm on another person.

State Farm further alleged that the homeowners policy it issued to Appleberry's parents required an accident, and contained exclusions for bodily injury which is either expected or intended by the insured; or which is the result of willful and malicious acts of the insured. CP 3.

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<sup>3</sup> State Farm attached the complaint from the wrongful death lawsuit, the Judgment and Sentence Felony, and the Information upon which the criminal conviction was based as exhibits to the declaratory judgment complaint. CP 7-8, 10-18, 20-26. These attached documents became part of the complaint. See *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 204, 289 P.3d 638 (2012).

Appleberry's murder of Aaron Sullivan, with intent to cause death or inflict great bodily harm, was no accident. Aaron Sullivan's bodily injury was expected or intended by Appleberry, and was the result of his willful and malicious acts. The trial court's entry of default judgment necessarily implies findings of fact that Appleberry had such intent. *See Trinity Universal*, 2013 Wash. App. LEXIS 1921, at \*30-31. Further, Aaron Sullivan's bodily injury was the result of his willful and malicious acts. Therefore, the trial court properly entered default judgment finding no coverage.

**C. APPLEBERRY'S BURDEN OF PROOF ON MOTION TO VACATE.**

Although default judgments are not favored, the courts value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules. *Little v. King*, 160 Wn.2d at 703. The need for a responsive and responsible legal system mandates that parties comply with a judicial summons. *Johnson v. Cash Store*, 116 Wn. App. 833, 840-41, 68 P.3d 1099, *rev. denied*, 150 Wn.2d 1020 (2003). In determining whether a default judgment should be vacated, the courts apply equitable principles to ensure that substantial rights are preserved and justice is done. *Id.* at 841. "Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted". *Id.*

The default judgment may not be vacated unless Appleberry satisfies the requirements of one of the grounds in CR 60(b). CR 55(c)(1). Appleberry relied on CR 60(b)(1). A defendant moving for vacation under CR 60(b)(1) must show four factors: 1) the failure to timely appear was due to mistake, inadvertence, surprise, or excusable neglect; 2) substantial evidence supporting a prima facie defense; 3) defendant acted with due diligence after notice of the default judgment; and 4) vacating the default judgment would not cause the plaintiff substantial hardship. *Trinity Universal Ins. Co. v. Ohio Cas. Ins. Co.*, 2013 Wash. App. LEXIS 1921, at \*8.

Factors (1) and (2) are primary; the others are secondary. *Little v. King*, 160 Wn.2d at 704. Appleberry failed to satisfy factors (1) and (2).

When the defaulting party's evidence supports no more than a prima facie defense, as opposed to a strong or virtually conclusive defense, the reasons for the failure to timely appear will be scrutinized with greater care. *TMT Bear Creek Shopping Center, Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. at 205 (quoting *Johnson v. Cash Store*, 116 Wn. App. at 841-42). Default judgment will in any event not be vacated if the actions of the defaulting party leading to entry of default were willful. *Bear Creek*, 140 Wn. App. at 205-06; *Johnson v. Cash Store*, 116 Wn. App. at 841.

**D. THE COURT ERRONEOUSLY CONSIDERED APPLEBERRY'S DEPOSITION FROM ANOTHER ACTION TO FIND A PRIMA FACIE DEFENSE.**

Both Appleberry and the Sullivan Estate submitted Appleberry's deposition testimony from another lawsuit to attempt to establish a prima facie defense. CP 120, 130. This was the only evidence they submitted relating to Appleberry's intent or the facts relating to the murder he committed. State Farm had no notice of this deposition, and objected to its consideration. CP 140. The court erred in considering the deposition, and therefore erred in concluding that Appleberry submitted substantial evidence of a prima facie defense.

The deposition was taken in a suit filed by the Sullivan estate against Appleberry in Snohomish County. CP 122, 129. At the deposition, Appleberry was represented by a lawyer retained by his parents, not by any insurance company. CP 122. State Farm was given no notice of the deposition. CP 149. State Farm was not represented at the deposition. CP 149.

CR 32 provides in part:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

...  
... and, when an action has been brought in any court of the United States or of any state and another action involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Rules of Evidence.

State Farm was not present nor was it represented at the taking of Appleberry's deposition, nor did State Farm have notice of the deposition. State Farm was not a party to the Snohomish County action. State Farm is not Appleberry's or the Sullivan estate's representative or successor in interest. They are State Farm's adversaries; both Appleberry and Sullivan's estate have an interest in trying to establish coverage.

Further, admission of the deposition is not permitted as former testimony under ER 804(b)(1). That rule authorizes admission of former testimony when a declarant is unavailable as follows:

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

State Farm had no opportunity to develop Appleberry's testimony by direct, cross, or redirect examination, because it had no notice of the deposition. Nor did State Farm have a predecessor in interest present at

the deposition. To the contrary, both Appleberry and Sullivan's estate have an interest in trying to establish coverage.

Therefore, the court erred in considering Appleberry's deposition testimony. The trial court may not base its finding of a prima facie defense on inadmissible evidence. *See Prest v. American Bankers Life Assur. Co.*, 79 Wn. App. 93, 98, 900 P.2d 595 (1995), *rev. denied*, 129 Wn.2d 1007 (1996) (trial court erroneously relied upon inadmissible insurance application as evidence supporting prima facie defense). Since Appleberry offered no other substantial evidence to show a prima facie defense, the court erred in vacating the default judgment.

**E. EVEN IF THE DEPOSITION TESTIMONY IS CONSIDERED, APPLEBERRY FAILED TO PRODUCE SUBSTANTIAL EVIDENCE OF A PRIMA FACIE DEFENSE.**

Even if Appleberry's deposition testimony is considered, he has failed to submit substantial evidence of a prima facie defense. Whether or not Appleberry intended to pull the trigger, his conduct in aiming a loaded assault weapon at an occupied vehicle, with his finger on the trigger, intending to scare the occupants, was a willful and malicious act. In fact, this would have been a criminal act under Washington law even if Appleberry had not fired the weapon.

Moreover, Appleberry's "slamfire" theory, not presented until his motion reply, is nothing but speculation and conjecture. Indeed, its application is contradicted by Appleberry's own testimony.

Appleberry does not dispute that he pointed a loaded AK-47 type assault weapon at the rear of an occupied car. He testified he held the gun with his finger on the trigger. He admits he knew this was not safe. He intended "[t]o scare them away". CP 120.

Appleberry claims he did not pull the trigger. This is inconsistent with his guilty plea to second degree murder, a crime requiring intent, which resulted in a twenty year prison sentence. CP 13. A conviction based on an *Alford* guilty plea is an admission and evidence of the elements of the material facts of the crime, including intent to commit the acts that constituted the crime. *New York Underwriters Ins. Co. v. Doty*, 58 Wn. App. 546, 551, 794 P.2d 521 (1990). Appleberry's conviction of Murder in the Second Degree required intent to cause death and/or inflict great bodily harm on another person.

Appleberry fails to explain his denial that he intended to pull the trigger. But even if his denial is taken at face value, it would at most create an issue whether the shooting was an accident, or whether he expected or intended bodily injury. It would not create a prima facie

defense to the exclusion for “bodily injury . . . which is the result of willful and malicious acts of the insured”. CP 3.

The willful and malicious acts exclusion does not require intent to cause bodily injury. Otherwise, it would duplicate the expected or intended injury exclusion and the policy’s accident requirement.

[T]he willful and malicious acts exclusions at issue here do not require an intent to injure. If they did, they would be superfluous, since the policies contain separate exclusions for injuries “expected or intended” by an insured.

Although we construe insurance exemptions strictly against the insurer and in favor of coverage, we must also give each exclusion meaning and interpret exclusions in the context of the entire policy. The policy’s general language extends coverage only to accidents. Thus, for the willful and malicious acts exclusions to have any meaning, they must apply to some unintended and accidental injuries.

*Hall v. State Farm Fire & Cas. Co.*, 109 Wn. App. 614, 620, 36 P.3d 582 (2001), *rev. denied*, 146 Wn.2d 1021 (2002) (citation omitted).

*Hall* involved application of identical policy language to a similar factual scenario. During a verbal altercation, Hall pulled out a handgun and pointed it at Truong’s head. Truong grabbed for the gun and punched Hall. The gun went off and Truong was shot. *Hall*, 109 Wn. App. at 617.

Although Hall did not intend to pull the trigger, the Court of Appeals affirmed judgment declaring coverage was excluded by the willful and malicious acts exclusion. Truong’s injuries resulted from

“pulling a loaded gun during the confrontation”, a willful and malicious act. *Id.* at 620-22.

Similarly, Appleberry pointed a loaded weapon at an occupied car. He testified that his finger was on the trigger; that he knew it was not safe to point the gun at someone with his finger on the trigger; and that he held his finger on the trigger to scare the occupants of the car.

Appleberry’s conduct was willful. “The term ‘willful’ means that the act is volitional”. *Snoqualmie Police Ass’n v. City of Snoqualmie*, 165 Wn. App. 895, 908, 273 P.3d 983 (2012). Appleberry willfully pointed a loaded assault weapon at an occupied vehicle, with his finger on the trigger, to scare the vehicle’s occupants.

Appleberry’s conduct was malicious. “Malicious” means “having, or done with, wicked or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse”. *Keathley v. State Farm Fire & Cas. Ins. Co.*, 594 So.2d 963, 965 (La. App. 1992). In our society, pointing a loaded assault weapon at people, with a finger on the trigger, to scare them, is malicious. No reasonable juror could conclude otherwise.

Appleberry’s acts would have been an intentional tort, even if he had not fired the gun. Someone who acts intending to cause another person an imminent apprehension of a harmful or offensive conduct, and

puts the other person in such imminent apprehension, is liable for assault. *Brower v. Ackerley*, 88 Wn. App. 87, 93, 943 P.2d 1141 (1997), *rev. denied*, 134 Wn.2d 1021 (1998). Thus, assault includes “the pointing of a loaded pistol at one who is in its range”. *Id.* at 92 (quoting *Howell v. Winters*, 58 Wash. 436, 438, 108 P. 1077 (1910)). See also *Allen v. Hannaford*, 138 Wash. 423, 244 P. 700 (1926) (affirming judgment for assault based on pointing an unloaded pistol at another person and threatening to shoot).

Indeed, Appleberry’s intent would have been criminal, even if he had not fired the gun. Any person who aims a firearm at or towards any human being is guilty of a gross misdemeanor. RCW 9.41.230. Further, it is unlawful, and a gross misdemeanor, for any person to carry, exhibit, display, or draw any firearm or other weapon capable of producing bodily harm in a manner that manifests an intent to intimidate another. RCW 9.41.270.<sup>4</sup> Appleberry had such an intent when he pointed the loaded weapon at Sullivan’s car. He intended “[t]o scare them away”. CP 120.

Appleberry did more than what these statutes prohibit. He aimed a loaded firearm at Sullivan’s car, with his finger on the trigger, intending to

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<sup>4</sup> This statute has an exception for acts committed by a person while in his place of abode. However, the exception only applies when a person is in his dwelling. It does not apply when he is in his yard. *State v. Smith*, 118 Wn. App. 480, 484, 93 P.3d 877 (2003), *rev. denied*, 151 Wn.2d 1014 (2004).

scare the vehicle's occupants. As a result, he shot and killed Sullivan. Appleberry acted with criminal intent. No reasonable juror could find that Appleberry's conduct was not willful and malicious.

Sullivan's death resulted from Appleberry's willful and malicious acts. "The result of" in the exclusion denotes a causation analysis. *Hall*, 109 Wn. App. at 621. If Appleberry had not pointed a loaded assault weapon at Sullivan's occupied vehicle, Sullivan would not have died. *See Hall*, 109 Wn. App. at 620-22 (injury resulted from act of pulling a loaded gun during confrontation, which accidentally discharged during struggle).

Finally, Appleberry submitted a Wikipedia internet article describing something called "slamfire", an unintended discharge of a firearm. This article should not have been considered. It was not authenticated, and it was inadmissible hearsay. ER 801, 802, 901(a). Moreover, Appleberry submitted no expert testimony or other substantial evidence connecting "slamfire" with Appleberry's murder of Sullivan.

To the contrary, the article states that slamfire is caused by a defect in the firearm, and occurs while a round is being loaded in the chamber. CP 221. But Appleberry's gun fired while he was aiming it at Sullivan's car with his finger on the trigger. He was not loading a round into the chamber. CP 120. Moreover, a Washington State Patrol forensic scientist

tested the weapon and determined it functioned in a normal manner. CP 210.

Appleberry's "slamfire" theory is speculation and conjecture, not substantial evidence. It may not be used to establish a prima facie defense. *Compare Little v. King*, 160 Wn.2d at 705 (holding speculation of a causal relationship between a preexisting condition and an injury was not substantial evidence permitting vacation of default judgment).

The prima facie defense factor avoids a useless subsequent trial. *Johnson v. Cash Store*, 116 Wn. App. at 841. The defendant must submit affidavits precisely setting forth the facts constituting a defense. He cannot rely merely on allegations and conclusions. *Id.* at 847.

[N]o rational rule would require an exercise in futility. If a defaulted defendant can assert no meritorious defense, no reasonable purpose would be served by setting aside a default judgment no matter how persuasive the plea of mistake, inadvertence, or excusable neglect.

*North Western Mortg. Investors Corp. v. Slumkoski*, 3 Wn. App. 971, 973, 478 P.2d 748 (1970).

Appleberry failed to submit substantial evidence of a prima facie defense to application of the willful and malicious acts exclusion. Therefore, the trial court abused its discretion in vacating the default judgment.

**F. APPLEBERRY FAILED TO SUBMIT ANY EVIDENCE SHOWING HIS FAILURE TO TIMELY APPEAR AND ANSWER WAS DUE TO MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE.**

Appleberry failed to submit any evidence showing his failure to timely appear and answer, even after State Farm agreed to continue the motion for default two weeks, was due to mistake, inadvertence, surprise, or excusable neglect. He did not even submit testimony by himself, his parents, or his parents' attorney to explain this failure. He failed to provide any explanation at all for his failure to respond. The court's finding of excusable neglect therefore was an abuse of discretion.

LePley submitted a declaration, as did Shoichet, counsel for the Sullivan estate. CP 96-120, 121-30. However, their testimony does not explain Appleberry's failure to timely appear or answer, and for good reason. These lawyers have no personal knowledge which would allow them to testify about this. *See* ER 602.

Appleberry has provided no explanation why he did nothing in response to being served with the summons and complaint. The summons notified Appleberry that he was required to respond to the complaint in writing within 20 days. CP 30. The summons also notified him that if he served a notice of appearance, he was entitled to notice before a default judgment may be entered. CP 30. Yet he did not answer or serve a notice of appearance.

The fact Appleberry was in prison did not prevent him from defending. After default judgment was entered, attorney LePley appeared for Appleberry and moved to vacate the default judgment on his behalf. CP 81-82, 83-95. Appleberry has submitted no evidence indicating anything changed which first permitted him to retain counsel after default judgment was entered.

Appleberry had his own attorney, Nicholas Scarpelli, who represented him at his deposition on July 19, 2012. CP 122, 129. Appleberry submits no evidence that he was unable to contact Scarpelli to ask him about the summons and complaint when he was served on March 11, 2013. Indeed, it is quite possible that Appleberry did contact Scarpelli, or another lawyer. Appleberry submits no evidence to the contrary.

Further, State Farm agreed to continue the motion for default two weeks, during which time Shoichet contacted counsel for Appleberry's parents, and also contacted LePley, who said he may be willing to represent Appleberry. But LePley did not appear for Appleberry until three weeks after default judgment was entered. CP 79-80, 81-82.

Appleberry has provided no explanation why he did not timely appear or answer during that two-week period. Appleberry has not submitted his own testimony, his parents' testimony, or the testimony of

his parents' attorney. Without any explanation, he has not shown excusable neglect.

These facts are not unlike those in *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 196 P.3d 711 (2008). In *Rosander*, a Canadian defendant did not appear or answer, and the plaintiff moved for default judgment. On the morning of the default hearing, a representative of the defendant's insurer called the plaintiff's counsel and stated that the claim manager for the case was suffering from medical problems. The plaintiff's counsel agreed to continue the default hearing for two weeks. The defendant did not appear or answer during the two week period, and default judgment was entered. The Court of Appeals concluded that the defendant had every opportunity to associate with American counsel, and its failure to do so was not excusable neglect. *Rosander*, 147 Wn. App. at 407.

Similarly, Appleberry, or his parents on his behalf, had every opportunity to retain counsel to appear and answer the complaint, both before and during the two-week period after the default hearing was continued. He has provided no explanation for his failure to do so.

Shoichet and LePley both submitted declarations apparently for the purpose of inferring that counsel for Appleberry's parents may not have relayed information from Shoichet about the default hearing. CP 96-120,

121-30. However, Shoichet and LePley cannot and do not actually testify the attorney did not relay the information, probably because they have no personal knowledge of what that attorney did or did not do.

Shoichet gave inadmissible hearsay testimony that on April 25, the parents' attorney said she had not yet met with her clients. CP 126. Shoichet and LePley both testified (again inadmissible hearsay) that the parents' attorney told them on April 25 she planned to meet with her clients on April 29. CP 99, 126. However, LePley also testified that on April 25, counsel for Appleberry's parents contacted LePley about representing Appleberry. CP 99. This was four days before default judgment was entered. *See* CP 79-80, 99.

Critically, counsel for Appleberry's parents' did not tell Shoichet or LePley that she had not communicated with Appleberry's parents about the default hearing, for example, by telephone or in writing. She said only she had not yet met with them. *See* CP 126. Appleberry provided no evidence whatsoever that he or his parents did not know about the default hearing after State Farm agreed to the two week extension.

In any event, Appleberry cannot rely on the actions of somebody else's agent to show his own neglect was excusable. In fact, Washington courts refuse to find excusable neglect where a defendant's own agent or employee fails to forward the summons and complaint to counsel. *Bear*

*Creek*, 140 Wn. App. at 212-13; *Johnson v. Cash Store*, 116 Wn. App. at 848-49.

In *Prest v. American Bankers Life Assur. Co.*, 79 Wn. App. 93, 900 P.2d 595 (1995), *rev. denied*, 129 Wn.2d 1007 (1996), the defendant claimed that its own general counsel was out of town when the summons and complaint were received, resulting in the file being mislaid and the consequent failure to forward the summons and complaint to general counsel in time. The Court of Appeals held the trial court abused its discretion when it concluded this failure was excusable neglect, and reversed an order vacating default judgment. *Prest*, 79 Wn. App. at 100.

Appleberry has provided no evidence explaining why he took no action in response to service of the summons and complaint. He has not shown that he could not or did not contact an attorney. Moreover, he has not explained why, after State Farm agreed to continue the motion for default two weeks, he did not appear or answer until after default judgment was entered. The trial court therefore abused its discretion when it found excusable neglect.

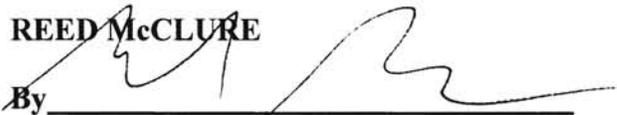
## V. CONCLUSION

Appleberry failed to submit substantial evidence supporting a prima facie defense to application of the willful and malicious acts exclusion in his parents' homeowners policy. Pointing a loaded assault

rifle at an occupied car, with a finger on the trigger, to scare its occupants was willful and malicious. Further, Appleberry submitted no evidence explaining why he failed to appear and answer, even after being given an extra two weeks, much less showing excusable neglect. Therefore, the trial court abused its discretion when it vacated the default judgment.

DATED this 12<sup>th</sup> day of September, 2013.

**REED McCLURE**

By 

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