



**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ISSUES PRESENTED ..... 3

STATEMENT OF FACTS ..... 3

    1. Background ..... 3

    2. Facts Concerning Arbitration ..... 5

    3. Facts Concerning the Instant Lawsuit . 5

    4. Default Judgment ..... 6

ARGUMENT ..... 3

    1. Standard of Review ..... 7

    2. The Four Factors To Be Shown By the  
    Moving Party ..... 11

    3. The Trial Court Erred In Assessing  
    Due Diligence With Reference to Passage  
    of Time From Filing of the  
    Complaint, Rather Than Discovery of  
    Entry of Default Judgment ..... 12

    4. Appellants Submitted Sufficient  
    Evidence Supporting a Prima Facie  
    Case ..... 18

    5. Appellants Adequately Demonstrated  
    That Their Failure to Answer Was  
    Due to Mistake, Inadvertence, Surprise,  
    Or Excusable Neglect ..... 22

    6. Better Foods Will Not Suffer a  
    Substantial Hardship If the Default

Judgment is Vacated ..... 24

7. Costs and Terms ..... 25

CONCLUSION ..... 25

## TABLE OF AUTHORITIES

### CASES

<i>Johnson v. Cash Store</i> , 116 Wn.App. 833, 840, 68 P.3d 1099 (2003) .....	7, 16, 17
<i>Showalter v. Wild Oats</i> , 124 Wn.App. 506, 510, 101 P.3d 867 (2004) .....	7
<i>Morin v. Burris</i> , 160 Wn.2d 745, 753, 161 P.3d 956 (2007) .....	8
<i>Morin</i> , 160 Wn.2d at 748, 161 P.3d 956 .....	8
<i>Braam v. State</i> , 150 Wn.2d 689, 706, 81 P.3d 851 (2003) .....	8
<i>Showalter v. Wild Oats</i> , 124 Wn.App. at 511, 101 P.3d 867 .....	8, 22
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968) .....	9
<i>Little v. King</i> , 160 Wash.2d 696, 715-6, 161 P.3d 345 (2007) .....	10, 11
<i>Luckett v. Boeing Co.</i> , 98 Wash.App. 307, 312, 989 P.2d 1144 (1999), <i>review denied</i> , 140 Wn.App. 1026 (2000) .....	14
<i>In re Marriage of Thurston</i> , 92 Wash.App. 494, 500, 963 P.2d 947 (1998), <i>review denied</i> , 137 Wash.2d 1023, 980 P.2d 1282 (1999) .....	14
<i>In re Estate of Stevens</i> , 94 Wash. App. 20, 971 P.2d 58, as amended, (1999) .....	15
<i>State Bank v. Hickey</i> , 55 Wash.App. 367, 777 P.2d 1056 (Div. 1 1989) .....	15

*State v. Ward*, 125 Wash.App. 374,  
104 P.3d 751 review denied, 155 Wash.  
2d 1025 (2005) ..... 15

*Suburban Janitorial Services v.  
Clarke American*, 72 Wash. App. 302,  
863 P.2d 1377 (1993) ..... 16

*In re Marriage of Tang*, 57 Wn.App.  
648, 653, 789 P.2d 118 (1990) ..... 21

*Griggs v. Averbeck Realty, Inc.*, 92  
Wash. 2d 576, 599 P.2d 1289 (1979) ..... 21

*Gutz v. Johnson*, 128 Wash. App. at 901,  
920, 117 P.3d 390 (2005) ..... 24

*Housing Authority of Grant County v.  
Newbigging*, 105 Wash. App. 178, 19  
P.3d 1081 (2001) ..... 24

**RULES:**

CR 6(b) ..... 13,

CR55(c) ..... 8

CR 60 ..... 8,12

CR 60(b) ..... 8,14,

## INTRODUCTION

The parties to the lawsuit underlying this appeal are commercial property developers. On June 14, 2005 Plaintiff, Better Foods Land Investment, entered into a Purchase and Sale Agreement to develop Centerpointe Retail Center. The Seller was defendant, Centerpointe, LLC aka Original Centerpointe, LLC. The LLC consisted of two members, defendants Rick Bowler and Marilee Thompson.

A dispute arose under the Purchase and Sale Agreement, which mandated arbitration. Better Foods commenced arbitration in Multnomah County, Oregon and filed the instant lawsuit against Centerpoint, LLC and it's members in Clark County Superior Court. Bowler and Thompson were not parties to the Sale Agreement as individuals or marital community, nor did they sign a personal guarantee for any obligation or liability. Nevertheless, Better Foods sued the LLC members for the full measure of damages claimed and moved

to compel Bowler and Thompson to join in the arbitration. The trial court ruled that there was no basis shown to "pierce the veil".

The arbitration went forward without Bowler and Thompson, culminating in a monetary award against Centerpointe, LLC only. Said award was entered as a Clark County Superior Court judgment (principle amount: \$736,749.55) on September 26, 2008.

Bowler and Thompson's attorney withdrew on September 18, 2008. On October 3, 2008, Better Foods moved to obtain default judgment against Bowler and Thompson. Unfortunately, Bowler and Thompson didn't receive notice of the default motion until after the scheduled October 10 hearing. Default judgment was entered in the sum or \$736,749.55 on October 19, 2008.

After learning of the default judgment, Bowler and Thompson sought to vacate the default judgment on November 18, 2008. The trial judge denied the motion as untimely, saying that, since

the complaint was filed in March, 2008, defendants squandered the eight or nine months they had to file their answer; that they only reacted after a garnishment issued.

As the trial court abused its discretion in denying the motion. Judgment should be set aside and the case remanded for further proceedings.

#### **ISSUE PRESENTED**

1. Did the trial court abuse its discretion in denying the motion to vacate the default judgment as untimely?

Answer: Yes.

#### **STATEMENT OF FACTS**

##### **1. Background**

Better Foods Land Investment Co. (hereinafter Better Foods) entered into a Purchase and Sale Agreement to purchase a site to develop Centerpointe Retail Center in Vancouver, Washington. Seller was Centerpointe LLC, a limited liability corporation consisting of two

members: Rick Bowler and Marilee Thompson, who are husband and wife. Bowler and Thompson did not agree to any term of the purchase and sale agreement in their individual or marital capacity. Better Foods did not require them to sign a personal guarantee for any personal obligation of liability. CP at 234.

Better Foods closed the transaction relying upon purchase agreement terms by requiring Centerpointe to construct a right-of-way for vehicle access to the property. This access point had been opposed by the County and was never approved. Centerpointe posted in escrow \$40,000, which was the agreed amount needed for the construction of the right-of-way, if approved. Shortly after the sale was finalized, Centerpointe transferred proceeds from the sale minus the escrow amount to its two principals Bowler and Thompson. Centerpointe failed to maintain the LLC in an active basis and was dissolved by the Secretary of State, although

subsequently reactivated and reinstated under a different name since someone else claimed Centerpointe. The new entity was called the Original Centerpointe, LLC, aka Centerpointe, LLC. CP at 235.

**2. Facts Concerning the Arbitration**

Arbitration was filed in Multnomah County. Bowler and Thompson maintained their position in the arbitration that they are not subject to the terms of the purchase and sale agreement, but they were required by the arbitrators to participate in discovery subject to an ultimate determination of whether they're subject to the terms and conditions of the agreement. The trial court was advised that the arbitration panel was prepared to determine whether any individual liability exists. CP at 235.

**3. Facts Concerning the Instant Lawsuit**

On March 5, 2008, Better Foods commenced this action, in Clark County Superior Court, seeking judgment in full measure jointly and

severally against Centerpointe LLC, and its members, Bowler and Thompson. Complaint CP 1-37. Better Foods sought to pierce the veil, i.e., alter ego as to Bowler and Thompson. By motion dated March 5, 2008, Better Foods moved to compel Bowler and Thompson to abide by the arbitration clause of the Purchase and Sale Agreement. CP at 38. The trial court ruled that "Bowler and Thompson are not subject to the arbitration agreement as there is no showing of fraud, incorporation by reference, assumption or agency which would lead to an opportunity to pierce the veil." Memorandum of Decision, Page 2 of 3. CP at 235.

#### **4. Default Judgment**

Bowler and Thompson's attorney withdrew from the Superior Court case on September 18, 2008. CP 246. Better Foods obtained a \$736,749.55 judgment against Centerpointe LLC, but not Bowler and Thompson, on September 26, 2008, CP 262. Better Foods noted a motion for default October

10, 2008, and was successful in having default judgment entered against Bowler and Thompson on October 19, 2008. CP 292 and at 309.

Due to their eight day absence and a mailing address mix-up, Bowler and Thompson didn't receive notice of Better Food's default motion in time. Bowler and Thompson learned that a default judgment had been awarded against them after the fact, and filed their motion to set aside the default judgment on November 18, 2008. CP 296.

### **ARGUMENT**

#### **1. Standard of Review**

"Any discussion of default judgments begins with the proposition that they are not favored in the law" *Johnson v. Cash Store*, 116 Wn.App. 833, 840, 68 P.3d 1099 (2003). "Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits." *Showalter v. Wild Oats*, 124 Wn.App. 506, 510, 101 P.3d 867 (2004). "This court has long favored resolution

of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to and CR 60 and for equitable reasons in the interests of fairness and justice". *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007).

An Appellate Court will review a trial court's ruling under CR60(b) for an abuse of discretion. *Morin*, 160 Wn.2d at 748, 161 P.3d 956. Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. *Braam v. State*, 150 Wn.2d 689, 706, 81 P.3d 851 (2003).

The Court's primary concern is whether the default judgment is just and equitable; thus, the Court will "evaluate the trial court's decision by considering the unique facts and circumstances of the case before" it. *Wild Oats*, 124 Wn.App. at 511, 101 P.3d 867. Further, pursuant to *Wild Oats*, an Appellate Court is more likely to reverse a trial court decision refusing to set

aside a default judgment. *Id.*; see also *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968) (Where the determination of the trial court results in the denial of a trial on the merits, an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues).

The trial court entered default judgment against Bowler and Thompson in the principal sum of \$736,749.55. CP 292.

This court has acknowledged that the amount of damages awarded is a relevant factor that may be considered by a trial court in deciding whether to set aside a default judgment. See *White*, 73 Wash.2d at 353, 438 P.2d 581 ("where, as here ... the damages sought are substantial and unliquidated" even a "tenuous" defense may support vacation of the default judgment when other factors are met); *Graham*, 192 Wash. at 126-27, 72 P.2d 1041 ("it is to be borne in mind that, by the 'entry of default,' [the defaulting parties] were not only denied a trial on the allegations of the [ ] complaint, but were also subjected to an affirmative judgment ... in a large sum

without an opportunity to contest the claim.”).

It is well established in federal courts that default judgments are especially disfavored when substantial amounts of money are involved. See 10A Wright, Miller & Kane, *supra*, § 2681, at 10-11; 10 Moore, *supra*, § 55.20[2][b], at 55-28 to -29; 47 Am.Jur.2d *Judgments* § 663\_\_ (2006) (noting that amount of money involved is a relevant factor in determining whether to set aside a default judgment); *Hutton v. Fisher*, 359 F.2d 913, 916 (3d Cir.1966) (“ ‘Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits.’ ”) (quoting *Tozer v. Charles A. Krause Milling Co.* 189 F.2d 242 (3d Cir.1951)); *Hertz v. Berzanske*, 704 P.2d 767, 773 (Alaska 1985) (setting aside default judgment of approximately \$436,000, noting “a controversy concerning damages of this magnitude should be resolved on its merits whenever possible”).

*Little v. King*, 160 Wash.2d 696, 715-6, 161 P.3d 345 (2007).

2. The Four Factors To Be Shown By the Moving Party

A defendant moving to vacate the default judgment must show:

1. That there is substantial evidence supporting a prima facie defense;
2. That the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect;
3. That the defendant acted with due diligence after the notice of the default judgment; and
4. That the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

The first two factors are primary while the second two are secondary. This is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity. *Little v. King*, 160 Wash.2d 696, 161 P.3d 345 (2007).

In the instant case, the trial court's denial of Bowler and Thompson's motion to vacate

default judgment focused on the third factor, i.e., whether defendants acted with due diligence. The court found that Bowler and Thompson failed to move with due diligence, i.e., defendants squandered their opportunity to file an answer while eight or nine months passed from the time the complaint was filed.<sup>1</sup>

**3. The Trial Court Erred In Assessing Due Diligence With Reference to Passage of Time From Filing of the Complaint, Rather Than Discovery of Entry of Default Judgment**

The portions of CR 60 material to this appeal are as follows:

---

<sup>1</sup> THE COURT: Okay. The complaint was filed in March and no answer was ever filed on behalf of Thompson and Bowler, and they had a full opportunity to file their answer eight, nine months. And the total dealings that they had filed that it was strictly center point and the argument whether they were subject to the arbitration agreement, but they never filed an answer and - but they had appeared in the sense that they were arguing the issues as to the arbitration.

They did receive notice. They did not respond to the notice. They only responded after the garnishment had occurred and the check had been disbursed from the Court. Not timely. So I'm going to deny the motion.

RP Page 7, Line 21 to end.

**(b) Mistakes; Inadvertence;  
Excusable Neglect; Newly  
Discovered Evidence; Fraud; etc.**

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

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

.....

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

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

Also material is CR 6(b), which in relevant part states:

[T]he court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done

where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

A motion to vacate under CR 60(b) must be filed within a "reasonable time." The critical period is the period between the party's discovery of the judgment or order and the filing of the motion to vacate. *Luckett v. Boeing Co.*, 98 Wash.App. 307, 312, 989 P.2d 1144 (1999), review denied, 140 Wn.App. 1026 (2000). (held: four months delay without good reason was unreasonable). What constitutes a "reasonable time" depends on the facts and circumstances of each case. *Id.* "Major considerations" include prejudice to the nonmoving party and "whether the moving party has good reasons for failing to take appropriate action sooner. *Id.* (citing *In re Marriage of Thurston*, 92 Wash.App. 494, 500, 963 P.2d 947 (1998), review denied, 137 Wash.2d 1023, 980 P.2d 1282 (1999)).

Under Rule 60(b) that which has been deemed to constitute a "reasonable" time varies significantly. See, e.g., *In re Estate of Stevens*, 94 Wash. App. 20, 971 P.2d 58, as amended, (1999) (court properly refused to vacate order of default, where party "chose to do nothing" for three months after order was entered); *Peoples State Bank v. Hickey*, 55 Wash.App. 367, 777 P.2d 1056 (Div. 1 1989) (court refused to vacate default judgment after the defendant "slept on her rights for 2 ½ years" before moving to vacate); *State v. Ward*, 125 Wash.App. 374, 104 P.3d 751 review denied, 155 Wash. 2d 1025 (2005) (holding that delay of 10 years from the time the grounds could have been asserted was an unreasonable amount of time to wait to bring motion under Rule 60(b)(11) when no good reason for the delay was stated).

Clarke argues that, even if relief is barred under CR 6 and CR 60(b)(1), the court was authorized to grant relief under CR 60(b)(4) and (b)(11). Neither section contains any explicit time

limitation so the courts have required that application for relief be made within a reasonable time. The critical period in determining whether a time is reasonable is the time between learning of the default judgment and filing the CR 60 motion. Here, Clarke applied for relief promptly upon learning that judgment had been taken against it. Nor does the time of 17 months from judgment and 13 months from the last letter preclude relief. (footnote omitted). Accordingly, we hold that Clarke's application was made within a reasonable time under both subsections.

*Suburban Janitorial Services v. Clarke American*, 72 Wash. App. 302, 863 P.2d 1377 (1993) (emphasis added).

In the instant case, the trial judge sealed his denial of defendants' motion to vacate by saying, "(t)hey only responded after the garnishment had occurred and the check had been disbursed from the court. Not timely. So I'm going to deny the motion," RP 8 at 5-7. In *Johnson v. Cash Store*, 116 Wn App 833, 68 p.3d 1099 (2003), held it was proper to set aside a

default judgment where, "Cash Store filed a motion to vacate the default judgment less than a month after it received notice of the writ of garnishment." *Johnson v. Cash Store*, at 842.

Bowler and Thompson's attorney, Joseph Vance, withdrew on September 18, 2008. On October 3, 2008, Better Foods mailed Notice of Motion for Order of Default, set for October 10, 2008, to defendants. CP 264.<sup>2 3</sup> Default judgment

---

<sup>2</sup> The Notice was sent to the address provided in Vance's Notice of Intent to Withdraw. Unfortunately, this was not Bowler and Thompson's mailing address. CP at 299.

<sup>3</sup> Notice of the hearing was insufficient under CR5(b)(2)(A).

Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion. (CR 55(a)(3)). It is undisputed that Better Foods mailed a notice of hearing that states, "Please take notice that plaintiff Better Foods Land Investment Co.'s Motion for Order of Default Against Defendants Rick Bowler, Merilee Thompson, and Original Centerpointe, LLC aka Centerpointe, LLC is set for hearing before Judge Harris on Friday, October 10, 2008 at 9:00 a.m." CP 287. The certificate of service states that it was mailed to Bowler and Thompson on October 3, 2008.

12CR 5(b)(2)(A) explains that services by mail shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day.

October 3, 2008, the date the notice was mailed, was a Friday and there were no legal holidays that week. Thus

was entered on October 19, 2008. Bowler and Thompson obtained a new lawyer to represent them. Defendants' new attorney filed defendant's motion to set aside the default judgment on November 18, 2008. CP 296.

Given the burden of deducing what had transpired, and locating a replacement lawyer with availability to take on the chore, coupled with the vicissitudes of attorney and court schedules, Appellants submit a one month delay from entry of default judgment to motion to set aside said judgment, is not an unreasonable time.

**4. Appellants Submitted Sufficient Evidence Supporting a Prima Facie Defense**

The instant case took an unusual path to entry of default judgment. The parties participated in significant litigation of the issue contained in plaintiff's complaint before Better Foods moved to obtain default judgment.

---

under this court rule, the services was "deemed complete" on October 6, 2008. CR 5(b)(2)(A). October 6 was four days before the October 10 default hearing and, therefore, the mailing failed to satisfy the five-day notice requirement. CR 55(a)(3).

CP 38 and 307. The court entered a three-page Memorandum of Decision (CP 234) covering the pivotal issue in the case against Bowler and Thompson, i.e., whether grounds exist to pierce the veil that protects LLC members Bowler and Thompson from liability incurred in the name of Centerpointe, LLC.<sup>4</sup> "This is an action to pierce the corporate veil." Plaintiff's Response In Opposition To Defendants' Motion To Set Aside Default Judgment, Page 2, Line 2. CP at 308.

The disputed Purchase and Sale Agreement (Exhibit 1 to Plaintiff's Complaint) and Escrow Closing Agreement (Exhibit 3 to Plaintiff's

---

<sup>4</sup> **RCW 25.15.125 -- Liability of members and managers to third parties.**

(1) Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

Complaint) were executed by Bowler and/or Thompson in their representative capacity. CP at 10-37. The details of Bowler and Thompson's involvement and their legal defense against personal liability is set forth in great detail in Defendants, Rick Bowler's and Marilee Thompson's twelve-page Response to Motion to Compel Arbitration. The arbitration agreement is Section 10.14 of the parties' Purchase and Sale Agreement.

The trial court found that Bowler and Thompson were not bound by the LLC's contract:

Better Foods wishes to pierce the veil, i.e., alter ego as to Bowler and Thompson. In reviewing the case authority and the pleadings, I must conclude that the Bowler and Thompson are not subject to the arbitration agreement as there is no showing of fraud, incorporation by reference, assumption or agency which would lead to an opportunity to pierce the veil.

Memorandum of Decision, Page 2, Line 20-24 (CP 234). The veil that shielded Bowler and Thompson from liability under the arbitration clause

protects them with equal force from liability under other sections of LLC's contract with Better Foods.

Insofar as Bowler and Thompson's motion to vacate default judgment may have understated the aforementioned defense, the trial court record contained abundant evidence support the prima facie defense, "If the moving party is a defendant, the affidavit must set forth facts establishing a valid defense to the claim, although this requirement may be waived when existence of such a defense is readily evident from court records." *In re Marriage of Tang*, 57 Wn.App. 648, 653, 789 P.2d 118 (1990). In determining whether the defendant has at least a prima facie defense, the court may look beyond the affidavits and declarations submitted in connection with the motion, and may consider other materials in the court file. *Griggs v. Averbek Realty, Inc.*, 92 Wash. 2d 576, 599 P.2d 1289 (1979).

5. Appellants Adequately Demonstrated That Their Failure to Answer Was Due To Mistake, Inadvertence, Surprise, or Excusable Neglect

Bowler and Thompson possess a strong statutory defense against individual liability. See, RCW 25.15.125. Better Foods tried, and failed, to pierce the statutory veil. See Memorandum of Decision. CP 234. "If a strong or virtually conclusive defense is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the moving party timely moved to vacate and the failure to appear was not willful." *Showalter v. Wild Oats*, 124 Wash.App. 506, 101 P.3d 867 (2004).

The aforementioned decision of the trial court seemingly sidelined Bowler and Thompson from the dispute between Better Foods and Centerpointe LLC. The arbitration between the business entities went forward without Bowler and Thompson and culminated in a final judgment against Original Centerpointe LLC and

Centerpointe LLC on September 26, 2008. CP 262. Bowler's and Thompson's attorney withdrew on September 18, 2008. With the case seemingly concluded, one might appreciate how Bowler and Thompson, by October, 2008, may have been lulled into a sense that they no longer needed to remain vigilant in the litigation. Unfortunately, Bowler and Thompson came across Better Foods' notice of motion for default judgment after it had already taken place. The notice had been mailed to one of defendants' secondary addresses.<sup>5</sup> Bowler and Thompson found the letter among a backlog of mail after an eight-day absence from town. See, Motion and Declaration For Order Setting Aside Judgment As to Rick Bowler and Marilee Thompson. CP 296.

---

<sup>5</sup> The property address, not Bowler and Thompson's mailing address, was supplied on their attorney's Notice of Intent to Withdraw. CP 246.

6. Better Foods Will Not suffer a Substantial Hardship IF the Default Judgment is Vacated

According to Better Foods: "Plaintiff has and will continue to suffer substantial hardship if the court's default judgment is vacated. For almost two years, plaintiff has pursued defendants through the legal system, incurring substantial loss of time and expense, including attorney fees." Response In Opposition to Defendant's Motion to Set Aside Default Judgment. CP 307.

The possibility of a trial is an insufficient basis for the court to find substantial hardship on the non-moving party. *Pfaff*, 103 Wash. App. at 836, 14 P.3d 837; see also *Cash Store*, 116 Wash. App. at 842, 60 P.3d 1099 ("vacation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits."). This reasoning is consistent with Washington's policy that prefers parties resolve disputes on the merits, as opposed to default proceedings. *Wild Oats*, 124 Wash. App. at 511, 101 P.3d 867.

*Gutz v. Johnson*, 128 Wash. App. at 901, 920, 117 P.3d 390 (2005).

**7. Costs and Terms**

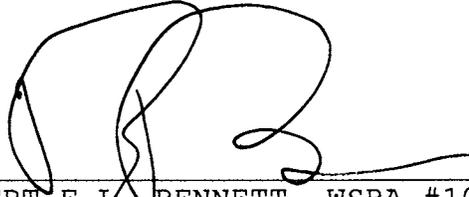
Upon ruling on motion to vacate a default judgment, the court may, in its discretion, award costs and terms to either party. If the defendant's motion is denied, the court may award costs and terms to the plaintiff. If the defendant's motion is granted, the court may award costs and terms to the defendant. *Housing Authority of Grant County v. Newbigging*, 105 Wash. App. 178, 19 P.3d 1081 (2001) (attorney fees awarded to defendant after successfully moving to have default judgment vacated).

**VI. CONCLUSION**

For the foregoing reasons, Appellant requests that the Court overturn the trial court's denial of Appellant's Motion to Set Aside the Order of Default and Default Judgment, and

allow the parties to resolve this matter on the merits.

RESPECTFULLY SUBMITTED this 1 day of July, 2009.

A handwritten signature in black ink, appearing to be 'R.E.L. Bennett', written over a horizontal line.

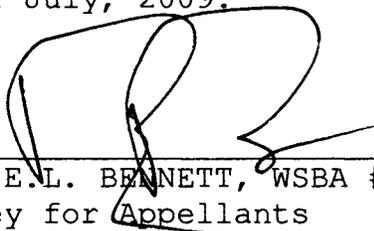
ROBERT E.L. BENNETT, WSBA #10827  
Attorney ~~for Appellants~~  
Bowler and Thompson

**CERTIFICATE OF MAILING**

I hereby certify that I served the forgoing BRIEF OF APPELLANTS on the following individuals on July 1, 2009, by mailing to said individual(s) a true copy contained in a sealed envelope, with postage prepaid, addressed to said individual at his/her last known address, to wit:

Julie R. Vacura  
Attorney at Law  
621 SW Morrison Street, Suite 1450  
Portland, OR 97205-3817

DATED this 1 day of July, 2009.

  
\_\_\_\_\_  
ROBERT E.L. BENNETT, WSBA #10827  
Attorney for Appellants

STATE OF WASHINGTON  
BY RB  
DEPUTY  
09 JUL -2 PM 12:26

FILED  
COURT OF APPEALS  
DIVISION II

**CERTIFICATE OF MAILING**