

RECORD NO. 40142-8-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

STEVE AND DOROTHY FRIETAS,

Plaintiffs-Appellants,

v.

**FARMERS INSURANCE COMPANY, and THE CURE WATER DAMAGE,
INC., d/b/a THE CURE WATER DAMAGE, d/b/a THE CURE**

Defendants-Respondents.

Appeal from the Superior Court, Mason County

No. 08-2-00988-6 ◇ The Honorable Toni A. Sheldon

FILED
COURT OF APPEALS
10 JUN 16 AM 11:01
STATE OF WASHINGTON
BY

RESPONSE BRIEF OF CURE DISASTER SERVICE INC.

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TABLE OF CONTENTS

	<u>Page</u>
AUTHORITIES.....	3
ISSUE FOR REVIEW.....	5
STATEMENT OF THE CASE	8
ARGUMENT.....	16
CONCLUSION	33
CERTIFICATE OF FILING AND SERVICE.....	34

TABLE OF AUTHORITIES

Cases	Page
<i>Beyene v. Coleman Sec. Services, Inc.</i> , 854 F. 2d 1179 (9 th Cir. 1988).....	21
<i>Blomster v. Nordstrom, Inc.</i> , 103 Wash App. 252 (2000)	21
<i>City of DeMoines v. Personal Property Identified as \$8,231 in U.S. Currency</i> , 87 Wn. App. 689 (1997)	18
<i>Colacuricio v. Burger</i> , 110 Wash. App. 488 (2002)	17, 18, 32
<i>Dlouhy v. Dlouhy</i> , 55 Wn. 2d 718 (1960).....	17
<i>Dunlap v. Wayne</i> , 105 Wn. 2d 529 (1986).....	21
<i>Gage v. Boeing Co.</i> , 55 Wash. App. 157 (1989).....	18
<i>Griggs v. Averbek Realty, Inc</i> , 92 Wn. 2d 576 (1979).....	17
<i>Johnson v. Cash Store</i> , 116 Wash. App. 833 (2003)	20
<i>Lindgren v. Lindgren</i> , 58 Wash. App. 588 (1990)	18
<i>Little v. King</i> , 160 Wn. 2d 696 (2007)	21
<i>Matter of Disciplinary Proceeding Against Petersen</i> , 120 Wn. 2d 833 (1993)	21
<i>Morin v. Burris</i> , 160 Wn. 2d 745 (2007)	17, 18, 19
<i>Old Republic Nat'l Title Insurance Co. v. Law Office of Robert E. Brandt, PLLC</i> , 142 Wash. App. 71 (2008)	19

Orr v. Bank of America, NT & SA, 285 F. 3rd 764 (9th Cir. 2002)21

Pedersen v. Klinkert, 56 Wn. 2d 313 (1960)21

Sacotte Construction Co., Inc., v. Nat’l Fire & Marine Ins. Co., 143 Wn. App. 410 (2008)18, 19, 20, 31

Skilcraft Fiberglass, Inc. v. Boeing Co., 72 Wash. App. 40 (1993).....19

Smith ex rel. Smith v. Arnold, 127 Wn. App. 98 (2003)31, 32

State ex rel Allied Bldg. Credits, Inc. v. Superior Court,
44 Wn. 2d 39 (1953)21

Tiffin v. Hendricks, 44 Wn. 2d 837 (1954)19

TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.,
140 Wash. App. 191 (2007)20, 24

Warnock v. Seattle Times Co., 48 Wn. 2d 450 (1956)19

Washington State Physicians Insurance Exchange Ass’n v. Fisons Corp. 122 Wn. 2d 299 (1993)20

White v. Holm, 73 Wn. 2d 348 (1968)20, 24

Rules

Civil Rule 5518, 22, 34

Civil Rule 55 (a)(3)19

Civil Rule 60 (b)(1)20

ER 60525

ISSUE FOR REVIEW

Did the lower court properly exercise its discretion by setting aside a default order and vacating a default judgment the Frietas obtained against defendant The Cure Water Damage, Inc., d/b/a The Cure Water Damage, d/b/a The Cure which judgment the Frietas were attempting to collect from the unrelated corporation Cure Disaster Service Inc., d/b/a 1800WATER DAMAGE, where 1) Cure Disaster Service, Inc. was never named in the Complaint or Summons; 2) the Complaint states no claim against Cure Disaster Service Inc.; 3) there is no admissible evidence that Cure Disaster Service Inc. is the same corporation as defendant The Cure Water Damage, Inc.; 4) service of process was not effected upon one authorized to accept service of process on behalf of defendant The Cure Water Damage, Inc.; 5) Cure Disaster Service Inc. immediately upon being served with process directed to The Cure Water Damage, Inc. put the Frietas' counsel on notice in writing that they had served the wrong party and requested in writing that

the Frietas respond to Cure Disaster Service Inc. if there were some further question about whether process had been served in error upon Cure Disaster Service Inc.; 7) the Frietas ignored the request for response and then obtained a default order and later a default judgment without notice either to defendant The Cure Water Damage, Inc. or to the unrelated corporation respondent Cure Disaster Service Inc.; 8) Cure Disaster Service Inc. moved to set aside the default and to vacate the default judgment once it was apparent the Frietas would persist in attempting to collect from Cure Disaster Service Inc. the judgment taken by default against defendant The Cure Water Damage, Inc., especially where as here the Frietas failed to come forward with admissible evidence to rebut evidence that the company whose work allegedly gave rise to the claims asserted was owned by a Mark Brietbach, then residing and doing business at 201 Fucshia [*sic*] Avenue in Shelton, Washington (a residence owned by his parents, Larry and Donella Brietbach), using 1-800 932-7559 and UBI number 601922511 (assigned to AAA CURE WATER DAMAGE), which person has never been an owner, officer or employee of Cure Disaster Service

Inc. and at which address Cure Disaster Service Inc. has never done business, and which 800 number has never been used by Cure Disaster Service Inc., and which UBI number has never been associated with Cure Disaster Service Inc.?

STATEMENT OF THE CASE

Respondent Cure Disaster Service Inc. is a Washington corporation and has been such since January 17, 2002. Its principal place of business is in Seattle. CP 21 at ¶2; CP 23 ¶2; CP 33 at ¶¶ 1-9. Cure Disaster Service Inc. is not one of the named defendants in this case. Neither respondent Cure Disaster Service Inc. nor any of its principals, employees, officers, owners, etc. has any interest in or employment with the named defendant, The Cure Water Damage, Inc. CP 33 at ¶¶ 1-9. Moreover, Cure Disaster Service Inc. had no involvement in any project or services or work for the Frietas or otherwise at 1341 E. Old Ranch Road, the Frietas' residence in Allyn, Washington, either in September of 2002, as alleged by the Frietas, or at any time whatsoever. CP 21 at ¶2; CP 23 at ¶1-3; CP 33 1-9; CP 34 at ¶¶ 2, 7.

In September of 2008, the Frietas commenced suit against their homeowners' insurer and against a party named The Cure Water Damage, Inc., d/b/a The Cure, by filing a complaint for damages and for declaratory relief. CP 2. The Frietas' then counsel, Ms. Jany Jacob, directed a legal messenger to effect service of process upon Farmers Insurance Company, by leaving the same with Michael Smiley at Farmer's Legal Department offices on Mercer Island, and upon a Joseph DeMarco, for defendant The Cure Water Damage, Inc., on December 23, 2008. CP 3, 4.

Mr. DeMarco was at the time process was left with him the President of respondent Cure Disaster Service Inc. and was not affiliated in any way with defendant The Cure Water Damage, Inc. CP 23 at ¶2; CP 21 at ¶ 2. Upon reading through the documents the process server had left with him, Mr. DeMarco realized that the documents had been delivered to him in error. He therefore immediately tried to contact Plaintiffs' counsel, using the telephone number she had provided on the Summons. That number was not a working number. CP 23 at ¶2-3. Accordingly, he researched Plaintiffs' counsel on the Web, and finding her email address (info@janyjacob.com), that same day sent her an email advising that the documents had been directed to him in error. He explained that his company had never done any work for the Plaintiffs and suggested that she must have mixed up his corporation with some other company with a similar name. CP 23 at ¶4. Mr. DeMarco invited Ms. Jacob to contact him with any questions. CP 23 at ¶ 4. Plaintiffs' counsel made no response. When he heard nothing further from Plaintiffs' counsel, Mr. DeMarco reasonably concluded that she had realized her mistake and had re-directed process to the named defendant, The Cure Water Damage, Inc. CP 23 at ¶¶ 4-5.

Just under three months later, on March 20, 2009, the Frietas moved for an order of default against defendant The Cure Water Damage, Inc. The Frietas' motion was based upon the service of process left with Mr. DeMarco, President of

respondent Cure Disaster Service Inc. The Frietas' motion was made without notice to Cure Disaster Service Inc.¹ Absent from the Frietas' motion and supporting papers is any reference to the information they had received from Mr. DeMarco that process had been left with someone other than a named defendant apparently because of an error in identifying the party to be served. Supplemental Clerk's Papers 11 [Motion and Declaration in Support of Order on Default dated April 14, 2009] at ¶ 5.

On June 1, 2009, without notice either to defendant The Cure Water Damage, Inc. or to respondent Cure Disaster Service Inc., the Frietas moved the lower court for entry of default judgment against defendant The Cure Water Damage, Inc. CP 14. Again, the underlying basis for entry of judgment was the Summons and Complaint left with Mr. DeMarco, who had no connection with and has never been authorized to accept service of process for defendant The Cure Water Damage, Inc. and whose corporation, Cure Disaster Service Inc., is not a party to this action, not named in this action and had no involvement whatsoever with the events alleged as the basis for the Frietas' claims. CP ¶14; CP 23 at ¶1-3; CP 21 at ¶2; CP 33 1-9; CP 34 at ¶¶ 2, 7. Default Judgment in the amount of \$657,821.87, plus prejudgment interest in the amount of "\$65,782.187" [*sic*] on the Frietas' un-liquidated claim,

¹ There is no indication in the record or otherwise that notice was provided to the named defendant, The Cure Water Damage, Inc., either.

attorney's fees of \$5,000.00 and costs in the amount of \$250.00, was entered the same day the motion was filed. CP 17.

Cure Disaster Service Inc. was unaware of the referenced activity in this case—and had no reason to be aware of any such activity because it is not a party to and is not named in these proceedings – until the later part of July, 2009. CP 23 at ¶¶3-5; CP 21 at ¶¶ 3-4. In July, the Frietas’ counsel directed a demand for payment directly to an insurer who provided insurance coverage to respondent Cure Disaster Service Inc. for certain specified types of claims. The insurer thereafter advised Cure Disaster Service Inc. of the demand. Upon learning of the demand and of the Frietas’ attempts to collect from its insurer a default judgment entered against someone else, respondent Cure Disaster Service Inc. promptly retained counsel. CP 21 at ¶ 4.

On July 30, 2009, counsel for respondent Cure Disaster Service Inc. wrote to the Frietas’ counsel to request that the Frietas voluntarily cease and desist from further attempts to collect the default judgment that had been entered against defendant The Cure Water Damage, Inc. from this respondent Cure Disaster Service Inc. or its insurer. CP 22 at ¶¶1-5. In the referenced letter, counsel for Cure Disaster Service Inc. explained why it is improper for the Frietas to attempt to collect from a juridicial person other than the one against whom the default judgment was entered, particularly here where the default was taken without notice despite Mr. DeMarco’s email

to the Frietas' then counsel of record. Ample time was provided for the Frietas' counsel to confirm that the entity against which they were attempting to collect their judgment is not the party named in this case and has no connection therewith. CP 22 at ¶¶1-3. In a follow-up letter dated August 13, 2009, CP 22 at ¶2, counsel for Cure Disaster Service, Inc. provided a copy of the email dated December 24, 2008 by which Ms. Jany, the Frietas' then counsel of record, had been notified in writing that she had caused service of process to be effected upon someone with no connection to the events alleged in the Complaint and with no connection to any party named in the case, rendering the purported service of process ineffectual. The Frietas' counsel refused to concede the wrong corporation had been served or to acknowledge the impropriety of attempting to collect a judgment from someone not a party to the case. CP 22 at ¶¶3-5.

The Frietas' refusal to recognize their obvious impropriety led to a thorough review of the court file in the lower court and then the filing of a motion to set aside the default judgment or in the alternative to show cause why the Frietas should not be ordered to cease and desist from attempting to collect the default judgment from Cure Disaster Service, Inc. CP 22 at ¶¶ 3. The court below held a hearing on appropriate notice, and entered an order requiring the Frietas to appear and show cause on a date over 20 days hence as to why the default judgment should not be set aside, etc. SCP 28

[Order dated November 2, 2009]. To avoid the prejudice of any surprise evidence at the hearing and to test the bases of any assertions that might be made in the Frietas' anticipated submission, counsel for The Cure Disaster Service, Inc. timely sent notice of the depositions of Mr. and Mrs. Frietas for the Friday before the Monday hearing date. CP 34 ¶ at 5-6. The Frietas completely ignored the deposition notices and refused to attend their duly scheduled depositions. CP 34 ¶ at 5-6. Not until November 19, 2009 did the Frietas provide any response to the order to appear and show cause why the default judgment should not be set aside, etc. Counsel for The Cure Disaster Service, Inc. objected to the Frietas' allegations of fact both on the ground that the Frietas' allegations fail to meet the required standard of admissibility and on the ground that the Frietas' refusal to attend their depositions had deprived The Cure Disaster Service, Inc. the opportunity afforded by the discovery rules to inquire behind such allegations. CP 32 at p. 3.

At the show cause hearing, the lower court indicated it would not take testimony but would decide the issues on the written submissions of the parties and the oral argument of counsel.² As indicated in the Reply filed by Cure Disaster Service, Inc., in the court below, CP 32, the Frietas failed to meet their burden of proof: The only admissible evidence before the court established that Cure Disaster Service Inc. is

² The tape recording of the hearing is unavailable, apparently the result of a mechanical malfunction.

not and has never been The Cure Water Damage, Inc., was not involved in the work or services at issue, never had a contract with the Frietas, never did business in Shelton, never used the number 1-800 932-7559 (which appears on the face of the contract for the work that gave rise to the suit at bar), never employed or had any right of control over those who apparently operated a water cure or restoration business from Shelton by the name of The Cure Water Damage, Inc. or otherwise, which company did the work and used that 800 number and entered into the contract with the Frietas back in September of 2002, under UBI number 601922511. CP 21 at ¶2; CP 23 at ¶1-3; CP 33 1-9; CP 34 at ¶¶ 2, 7 The best admissible evidence of who is responsible for the allegedly deficient work is the agreement signed by Dorothy Freitas for that work, and the cancelled checks or check showing who was paid for that work. The Frietas never came forward with either the agreement or the cancelled check or checks for the work, but a copy of the agreement was submitted by the Frietas' insurer in connection with an unrelated motion while the show cause motion was pending. The agreement itself makes clear that the work at issue was performed by someone named Mark [Mark Brietbach] using a name and address and 800 number never used by respondent Cure Disaster Service Inc. CP 21 at ¶2; CP 23 at ¶1-3; CP 33 1-9; CP 34 at ¶¶ 2, 7.

Accordingly, the lower court entered an order setting aside the default and vacating the default judgment, having found that Joe DeMarco made reasonable inquiry as to whether Cure Disaster Service Inc. had ever done work at the address of the Frietas or otherwise for the Frietas and finding nothing, that it was reasonable for him to contact the Frietas' attorney to inform her that process had been delivered to the wrong party since Cure Disaster Service Inc. was not named in the Summons or Complaint. On the record, the lower court indicated concern that the Frietas' counsel, in making application for default despite receipt of Mr. DeMarco's email, failed to advise the court of the issue about the defendant's identity, etc. The lower court also noted that Cure Disaster Service Inc. had been adversely affected by the collection action taken against it by the Frietas and had taken steps to obtain relief from that action in a reasonable period of time. The lower court also stated on the record that Cure Disaster Service Inc. had shown a prima facie defense to the claims asserted, on the basis that it is not the corporation responsible for the work and that the default judgment seems to be without sufficient basis, but declined to award "attorney's fees at this time."³ An order was entered consistent with the court's

³ The lower court judge read her findings and rulings from notes, upon the conclusion of the hearing. Counsel's recitation above as to the same are based on his notes taken as the court

findings and conclusions after spirited and extensive oral argument. CP 41.

ARGUMENT

The court below properly vacated the default judgment because of lack of service of process on a person authorized to accept process for the named defendant, because the named defendant is a distinct juridicial person from that of respondent Cure Disaster Service, Inc., because of lack of notice as required by CR 55, because of the unfairness and lack of professionalism involved in the taking of this particular default judgment, and because of the lack of admissible evidence to support the judgment.

Having learned of their error in serving process on the wrong corporation, it was improper for the Frietas to persist in their efforts to collect on the default judgment of June 1, 2009 against respondent Cure Disaster Service Inc.

The Frietas' conduct in attempting an end- run around Cure Disaster Service Inc. by going directly to Cure Disaster Service Inc.'s insurer -- again, without notice to Cure Disaster Service Inc. -- is particularly egregious considering the Frietas had to know from the email sent to their counsel back in December of 2008 (and from the investigation they must have

announced her decision.

conducted or should have conducted thereafter) that they had not served the correct corporation. The Frietas had such knowledge when they represented to the lower court in March of 2009 by sworn declaration that “[a]t no time thereafter have the defendants filed a notice of appearance or delivered any pleadings responsive to the Complaint,” and have “**failed to respond** or otherwise defend in this action... .” [Emphasis supplied.] SCP 11[Motion and Declaration in Support of Order on Default dated April 14, 2009.] A more candid declaration would have disclosed that the same day service of process was left with Joseph DeMarco, “President 1-800-Water Damage” [Cure Disaster Service Inc.], Plaintiffs’ counsel was notified that the person served had indicated he believed there had been an error since his company is different from the company named in the Complaint. A more candid declaration also would have disclosed that the president of the corporation with whom process was left had indicated his company had “never done any work for Steve and Dorothy Frietas.” Any of the referenced disclosures would have allowed the lower court to inquire about whether service of process on the correct corporation had actually had been effected.

The Freitas acknowledge the policy that controversies be decided on the merits rather than by default, *Morin v. Burris*, 160 Wn. 2d 745, 749 (2007); *Griggs v. Averbeck Realty, Inc*, 92 Wn. 2d 576, 581 (1979); *Dlouhy v. Dlouhy*, 55 Wn. 2d 718, 721 (1960); *Colacuricio v. Burger*, 110 Wash. App. 488, 494 (2002)

, and that default judgments are disfavored, with the result that “appearance,” for purposes of the notice requirement in the context of a motion for default, is construed broadly. *Morin v. Burris*, 160 Wn. 2d 745, 749 (2007); *Colacuricio v. Burger*, 110 Wash. App. 488, 494-495 (2002); *City of DeMoines v. Personal Property Identified as \$8,231 in U.S. Currency*, 87 Wn. App. 689, 696-697 (1997); *Lindgren v. Lindgren*, 58 Wash. App. 588, 595 (1990)(default judgments disfavored to the end that court should exercise its discretion liberally and equitably to preserve substantial rights and assure justice done). In fact, default judgments are normally viewed as improper unless the adversarial process was halted by an unresponsive party. *Gage v. Boeing Co.*, 55 Wash. App. 157, 160-161 (1989).

When a party served with process responds to the summons, even informally, indicating a challenge to the claims or an intent to defend on whatever basis, such response is deemed an appearance for purposes of Civil Rule 55 and triggers the notice requirement in connection with a motion for default. *Sacotte Construction Co., Inc., v. Nat’l Fire & Marine Ins. Co.*, 143 Wash. App. 410, 415-416 (2008)(even informal appearance by telephone entitled party to notice of motion for default and it was abuse of discretion not to set aside default judgment based upon plaintiff’s failure to comply with CR 55 (a)(3)); *Colacuricio v. Burger*, 110 Wash. App. 488, 495-496 (2002)(informal acts may constitute an appearance); *City of*

DeMoines v. Personal Property Identified as \$8,231 in U.S. Currency, 87 Wn. App. 689, 696-697 (1997); *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wash. App. 40, 45 (1993). See *Warnock v. Seattle Times Co.*, 48 Wn. 2d 450, 452 (1956); *Tiffin v. Hendricks*, 44 Wn. 2d 837 (1954).

Civil Rule 55 (a)(3) requires that a party who has responded to a summons for any purpose be given notice of a motion for default, *Sacotte Construction Co., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wash. App. 410, 415 (2008), and a default judgment is properly set aside if it was entered without notice against a party entitled to notice. *Morin v. Burris*, 160 Wn. 2d 745, 749 (2007); *Sacotte Construction Co., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wash. App. at 415. Only substantial compliance with the appearance requirement is required in order to warrant setting aside a default judgment taken without notice. *Morin v. Burris*, 160 Wn. 2d at 745; *Sacotte Construction Co., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wash. App. at 415.

Apart from the above, default judgments are to be liberally set aside where taken under circumstances that were inequitable or unfair, or where the interests of justice would not be served by allowing the default judgment to stand. *Morin v. Burris*, 160 Wn. 2d 745, 749 (2007); *Sacotte Construction Co., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wash. App. 410, 415 (2008); *Old Republic Nat'l Title Insurance Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wash. App. 71, 74 (2008). The

referenced rule applies specifically where the conduct of plaintiff's counsel, as an officer of the court, is deemed unfair or less than courteous or professional, including to opposing parties. *Sacotte Construction Co., Inc., v. Nat'l Fire & Marine Ins. Co.*, 143 Wash. App. 410, 416-418 (2008). See *Washington State Physicians Insurance Exchange Ass'n v. Fisons Corp.* 122 Wn. 2d 299, 354 (1993).

Even where an informal appearance was never made, Civil Rule 60 (b)(1) warrants setting aside a default and vacating a default judgment where the defaulted party is able to show that there is substantial evidence to support at least a *prima facie* defense to the claim asserted; that the failure to appear was occasioned by mistake, inadvertence or excusable neglect or that there was irregularity in obtaining the judgment; that the party against which the default judgment was entered acted with due diligence with after receiving notice of the default judgment; and that substantial hardship to the plaintiff would not result from setting aside the default judgment. *White v. Holm*, 73 Wn. 2d 348, 352 (1968); *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wash. App. 191, 200-2001 (2007). Nevertheless, where the moving party demonstrates a strong defense, the Washington courts "will spend little time inquiring into the reasons for the failure to appear and answer, unless the failure to appear was willful and the motion untimely. *Johnson v. Cash Store*, 116 Wash.

App. 833, 841 (2003). See *Little v. King*, 160 Wn. 2d 696, 706 (2007).

In any event, it is improper for a plaintiff to take a default judgment without proffering admissible evidence of causation and of the quantum of damages. See *e.g. Blomster v. Nordstrom, Inc.*, 103 Wash App. 252, 259-260 (2000); *Matter of Disciplinary Proceeding Against Petersen*, 120 Wn. 2d 833, 879 (1993) (expert testimony required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson); *Dunlap v. Wayne*, 105 Wn. 2d 529, 535 (1986); *Orr v. Bank of America, NT & SA*, 285 F. 3rd 764,778-779 (9th Cir. 2002); *Beyene v. Coleman Sec. Services, Inc.*, 854 F. 2d 1179, 1181 (9th Cir. 1988)(only admissible evidence may be considered on dispositive motions). And, where an action is for an un-liquidated amount, damages must be specifically proved. *Pedersen v. Klinkert*, 56 Wn. 2d 313, 317 (1960). Similarly, where attorney's fees are awarded, the amount must be established by admissible proof. *State ex rel Allied Bldg. Credits, Inc. v. Superior Court*, 44 Wn. 2d 39, 41-42 (1953).

Here, Cure Disaster Service Inc. responded to the misdirected summons the same day it was delivered, first by telephone, and when that was unavailing, in writing, by indicating to Plaintiffs' counsel that process had been delivered to the wrong company. That response was a challenge to the allegation that the party served had performed work for

Plaintiffs as alleged. As such, it satisfied the substantial compliance standard under Civil Rule 55 as an appearance, entitling Cure Disaster Service Inc. to notice of any further proceedings against it in this action. The Frietas' failure to provide notice of the motion for default and their failure to provide notice of the motion for entry of default judgment violated CR 55, warranting that the default and default judgment be set aside, at least as to Cure Disaster Service Inc.

The setting aside of the default and vacation of the default judgment were particularly appropriate here where Mr. DeMarco specifically invited a response from the Frietas' counsel in the event of any question about whether Cure Disaster Service Inc., had not been involved in the alleged project at the Frietas' residence. The Frietas' failure to respond to Mr. DeMarco made it entirely reasonable for Mr. DeMarco, who is not an attorney and who justifiably wanted to avoid engaging counsel in regards to documents obviously delivered to him by mistake, to conclude the Frietas had realized their error and thereafter had proceeded against the named defendant by serving process on someone authorized to accept service of process for that corporation. The lower court's finding in this regard was reasonable and was based upon the evidence that had been adduced.

The Frietas' failure to at least disclose to the lower court in their moving papers that Mr. DeMarco had responded to the Summons, by indicating it had been delivered to the wrong

corporation, was improper. Given the content of Mr. DeMarco's written response to the Summons, the Frietas' then counsel surely understood that Cure Disaster Service, Inc. reasonably believed there was no need for it to make a more formal response, absent some further indication that the misdirected Summons was in fact intended for Cure Disaster Service, Inc., rather than for The Cure Water Damage Inc. as indicated on the face of the Summons and on the face of the Complaint.

It was obviously improper for the Frietas' then counsel to take advantage of the confusion caused by her own misdirecting of the Summons to a corporation not named in the Complaint and not listed on the Summons, her failure to make any response whatsoever to a reasonable and legitimate inquiry by an unrepresented party, and her failure to provide correct contact information on the Summons and Complaint. Such conduct, given the content of Mr. DeMarco's response to the Summons, falls short of the standard established by the cases cited above, warranting at least the setting aside of the default order and the vacation of the default judgment. Clearly, the interests of justice would not be served by allowing Frietas to profit from such conduct. As an officer of the court, the Frietas' then counsel's conduct in not responding to Mr. DeMarco's email was less than courteous under the circumstances, and in not disclosing the communication to the lower court, less than what is required of an Officer of the

Court, independently warranting the relief requested by Cure Disaster Service Inc. in the lower court.

Even if somehow it were deemed fair and equitable and professional under the circumstances for the Frietas' then counsel of record to ignore the written response of Cure Disaster Service, Inc. and to fail to disclose that response to the lower court, and even were it determined that despite making a written response to the mis-delivery of the Summons and Complaint, Cure Disaster Service Inc. was not entitled to notice of the motions for default and default judgment, under *White v. Holm*, 73 Wn. 2d 348, 352 (1968) and *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wash. App. 191, 200-2001 (2007) the default and judgment were properly set aside because Cure Disaster Service Inc. met its limited burden of showing a *prima facie* defense to the claims asserted. Specifically, the admissible evidence properly before the lower court establishes that Cure Disaster Service Inc. was not involved in the work or repairs at the Frietas' residence, either for the Frietas or for anyone else at that address. Accordingly, whether or not the Frietas have a claim against someone other than their own insurer in connection with whatever actually happened in September of 2002, and whether or not any such claim actually survives the applicable period of limitations (which Cure Disaster Service Inc. disputes), the Frietas have no claim against Cure Disaster Service, Inc. for any such work. Accordingly, the lower court was well within

its discretion in setting aside the default and vacating the default judgment.

Regardless, the default judgment is defective because it includes un-liquidated amounts without the Frietas' having proffered admissible evidence to support their claimed damages. The declaration of realtor Kristen Stancato lacks any basis for her opinions in paragraph 4 as to causation or damages, is speculative, conclusory, argumentative and is without foundation, and therefore fails to meet the standard for admissibility. Cure Disaster Service, Inc. properly objected to that declaration under E.R. 605 and did so timely in the lower court. CP 20 at p. 10-11; CP 32 at p. 3. Similarly, the declaration of Dorothy Frietas is inadmissible as conclusory and without foundation as to paragraphs 3; 4; 5; 6; 7; 8; 9; and 10. Cure Disaster Service, Inc. also properly and timely objected to the referenced testimony. CP 20 at p. 10-11.

The subject default judgment contains an award of attorney's fees. That award was not supported by admissible evidence, as required. It also includes prejudgment interest, and does so on an un-liquidated claim, contrary to the law of this jurisdiction, as cited above. Without proper and admissible evidence to support it, the default judgment was properly vacated.

As established by the declarations of Lisa Bongi, neither Cure Disaster Service Inc. nor any of its principals, owners,

officers, employees, etc. has ever had any interest in or employment with or control or right of control over the company that on September 25, 2002 undertook by contract with Dorothy Freitas to perform the work in question. CP 34 at ¶2. There was no admissible evidence to the contrary. Also established by the declaration of Lisa Bonggi is that neither Cure Disaster Service Inc. nor any of its principals, owners, officers, employees, etc. had any involvement in any project or services or work for Frietas or otherwise at 1341 E. Old Ranch Road, in Allyn, Washington, either in September of 2002, as alleged by the Frietas, or at any time whatsoever. CP 21 at ¶2; CP 23 at ¶1-3; CP 33 1-9. Again, there was no admissible evidence to the contrary.

Rather, the company Dorothy Freitas described in her declaration as having performed the work was 1) on an insurance company approved-contractor list; 2) advertised an 800 number on its website in September of 2002; 3) had a technician who could be at the Freitas' address in a half hour at the time she called; 4) does business in Shelton; 5) had a technician named "Mark"; 6) had a technician who wore a uniform with a company logo or service mark; and, as we know from the actual contract Dorothy herself signed, 7) did business at 201 S.E. Fucshia Avenue in Shelton, 8) and did so using the

number 1-800-932-7559. The only admissible evidence established that not even one of these eight identifying characteristics of the company with which the Frietas dealt is true of Cure Disaster Service Inc. or any other company as to which its owners, principals, officers, directors or employees has ever been a part. CP 21 at ¶¶2; CP 23 at ¶¶1-3; CP 33 1-9; CP 34 at ¶¶ 2, 7.

Accordingly, even had the lower court considered the Declaration of Dorothy Freitas, to which declaration Cure Disaster Service Inc. timely objected and moved to strike as inadmissible hearsay,⁴ neither that declaration nor anything else submitted by the Frietas proves that Cure Disaster Service Inc. either did the work, or that it is the same juridicial person as The Cure Water Damage, Inc., whom the Frietas chose to name as the defendant in their action. Accordingly, the lower court properly concluded that the Frietas failed to show cause why they should be allowed to proceed against respondent Cure Disaster Service Inc. to collect their default judgment.

Regardless, immediately after the Frietas caused process to be served upon Joseph DeMarco, Mr. DeMarco realized the

⁴ The objection was based upon lack of foundation for its conclusory statements, as speculation and as supposition, and on the ground that despite timely and proper notices of deposition of Dorothy and Steve Freitas for 10:00 AM and 1:00 PM on November 20 at Plaintiffs' counsel's office, both witnesses refused to appear, thereby preventing Cure Disaster Service Inc. from inquiring as to the basis if any for the statements and accusations made in the declarations.

documents had been delivered to him in error and immediately tried to contact Plaintiffs' counsel, using the telephone number she had provided, which was not a working number. CP 23 at ¶ 3. Accordingly, he sent her an email advising that the documents had been directed to him in error and advised after double checking that his company had never done any work for the Frietas. Mr. DeMarco invited Plaintiffs' counsel to contact him with any question about that fact. CP 23 at ¶ 3. Plaintiffs' counsel made no response, leading to the justifiable and reasonable conclusion that counsel had realized the mistake and had re-directed process to the named defendant, The Cure Water Damage, Inc. CP 23 at ¶ 3- 4. The Frietas' motion for default was made without notice either to Defendant The Cure Water Damage, Inc. or to non-party Cure Disaster Service Inc. Moreover, the Frietas failed to disclose to the lower court that Mr. DeMarco had in writing challenged the assertion that Cure Disaster Service Inc. had anything to do with the Frietas or their project in Shelton.

The lower court properly concluded that the Default Judgment in the amount of \$657,821.87 plus prejudgment interest in the amount of "\$65,782.187" [*sic*] on Plaintiffs' unliquidated claim, attorney's fees of \$5,000.00 and costs in the amount of \$250.00 was defective and invalid for several

reasons, including that it was taken without notice, despite an informal appearance that triggered the notice requirement of Civil Rule 55 (a)(3); that substantial evidence established a *prima facie* defense to any claim as against Cure Disaster Service Inc; that the failure to appear formally was occasioned by mistake, inadvertence or excusable neglect and that there was irregularity in obtaining the judgment, especially in that Plaintiffs' counsel failed to inform the lower court that the party it served with process indicated in writing in response to the Summons that it had no involvement in the subject project; that the party against which the default judgment was entered acted with due diligence after receiving notice of the default judgment; that substantial hardship to Plaintiffs would not result from setting aside the default judgment; that the default judgment was taken without admissible evidence of causation or of the quantum of damages; that the default judgment included liquidated damages on an un-liquidated claim and an attorney's fee award, but the amount of such award was not established by admissible proof, etc.

The Frietas' failure to at least disclose to the lower court in their moving papers that Mr. DeMarco had responded to the Summons by indicating it had been delivered to the wrong corporation was improper and frankly dishonest. That

Plaintiffs' counsel received Mr. DeMarco's December 23 email is beyond reasonable doubt in light of Ms. Jany Jacob's email to her client, attached to the Declaration of Dorothy Freitas as Exhibit A. CP 31. That email states that while Farmers had made a formal appearance in the case, there was "[s]till no *formal* submission from the Cure ..." [Emphasis added]

Again, a more candid declaration from counsel at the time of applying for the default would have advised the Court of the written response from Cure Disaster Service Inc., rather than to have finessed the issue by representing to the Court that service actually had been effected upon The Cure Water Damage, Inc. (knowing or having reason to know that such service was specifically being challenged) and representing that "[a]t no time thereafter have the defendants *filed a notice of appearance* nor delivered *any pleadings* responsive to the Complaint. *Having failed to respond* or otherwise defend in this action..." [Emphasis added] when the Freitas' counsel knew or had reason to know that the party served had made a response, albeit informally, and was challenging the claims on the basis they were directed to the wrong party. The interests of justice would not be served by allowing Plaintiffs to profit from such conduct.

Certainly it was unfair -- and unseemly -- for the Frietas' counsel to fail to respond to Mr. DeMarco's December 23 email, under circumstances counsel had to know would lead to the inference that Plaintiffs had realized their error and had proceeded to serve the entity that actually performed the work at issue.

Frietas' ignore *Sacotte Construction Co., Inc., v. Nat'l Fire & Marine Ins. Co.*, 143 Wash. App. 410, 415-416 (2008) and place heavy reliance on the earlier case from 5 years earlier of *Smith ex rel. Smith v. Arnold*, 127 Wn. App. 98, 110 P. 3d 658 (2003). That reliance is misplaced. *Smith v. Arnold* was an automobile personal injury action. The Arnolds were insured by Allstate, which settled several claims arising against its insureds, the Arnolds, from the subject accident. Correspondence was exchanged between Smith and the Allstate insurance adjuster, but no settlement was reached. Smith then sued the Arnolds, who were served with process. The Arnolds failed to notify Allstate however of service of the Summons and Complaint because, due to personal health issues of Ms. Arnold, the matter was a low priority for them. A courtesy copy of the Summons and Complaint was sent to Allstate on November 20. On December 20, Smith obtained an order of default, having received no response to the Summons from the

Arnolds or their insurer. The Arnolds received notice of the default but failed to move to set aside the same until March 25 of the following year. Of course, the lower court denied the motion to set aside the default, finding that the Arnolds had failed to make a sufficient appearance and that their failure to do so was not the result of excusable neglect.

The *Smith* Court noted that

“[w]hile some actions may be insufficient as a matter of law to constitute an appearance, the question of whether actions are sufficient to constitute an informal appearance will generally be a question of fact to be determined by the trial court. In reviewing such a determination, we will not substitute our judgment for that of the trial court.

Smith ex rel. Smith v. Arnold, 127 Wn. App. 98, 104, 110 P. 3d 658 (2003). [Citing *Colacurcio v. Burger*, 110 Wn.App. 488, 495, 497, 41 P. 3d 506 (2002), review denied, 148 Wn. 2d 1003, 60 P. 3d 1211 (2003)]. To constitute an informal appearance, the communication must indicate to the plaintiff that the defendant named in the suit intends to defend against the allegations of the Complaint. *Smith ex rel. Smith v. Arnold*, 127 Wn. App. at 110-112. With regard to excusable neglect, the *Smith* Court ruled that the Arnolds had waived the issue because it was not raised until it appeared in their Reply brief on the appeal, but that had it been raised timely, the Arnolds' position would not have carried because the reason proffered

for the lack of a timely appearance was that the matter was a low priority for the Arnolds and because the adjuster at Allstate⁵ was out on vacation when the Summons and Complaint were received by Allstate. *Smith ex rel. Smith v. Arnold*, 127 Wn. App. at 112-113.

In the case at bar, of course, the company upon whom service of process was effected is not named in the Summons or Complaint. In the crowded market of water/flood damage repair and restoration services, many companies use the words “cure,” “water,” and “damage.” CP 33 at ¶¶7, 9. Under the circumstances presented to the lower court, including specifically that the name of the company served does not appear anywhere in the summons or the Complaint, that an internal investigation by the company served confirmed that the job in question had not been done by it, and that written notice to that effect was sent to the Frietas’ counsel, inviting further communication in the event that the Frietas believed otherwise, it cannot be said that the lower court abused its discretion in entering the order of November 23, 2009.

III. CONCLUSION

Service of process on Joseph DeMarco of Cure Disaster Service Inc. was ineffective as a matter of law as to the separate

⁵ Probably more accurately, the *then* adjuster at Allstate.

and distinct juridicial person named as a party to the case. The lower court properly determined to set aside the default and to vacate the default judgment entered on June 1, 2009, based upon lack of service of process, lack of the notice required by CR 55, based upon the informal appearance received by the Frietas' counsel, the unfairness and lack of professionalism of the Frietas' counsel in connection with the motion for default, and because of the lack of admissible evidence to support the judgment.

Dated this 15th day of June, 2010.

GIBBONS & ASSOCIATES, P.S.

//s// 

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STATE OF WASHINGTON

CERTIFICATE OF FILING AND SERVICE

I certify that on this 15th day of June, 2010, I filed Non-Party Cure Disaster Service Inc.'s Response Brief with the Clerk's Office of the above-entitled court, 950 Broadway, Ste 300, MS TB-06

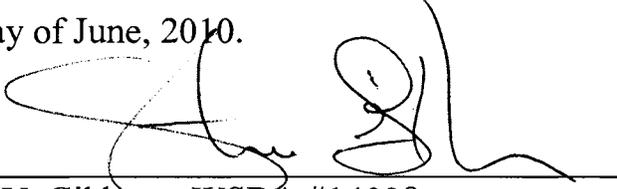
Tacoma, WA 98402-4454, via U.S. Mail, a true copy of this

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