

No. 42685-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHARITY MEADE, Appellant,

v.

DAVID A. NELSON, Attorney; and,
NELSON LAW FIRM, PLLC, Respondent.

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DEPUTY

COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Charity Meade seeks reversal of the September 8, 2011 Cowlitz County trial court decision that set aside the Order of Default, which she obtained in her malpractice case against her former attorney about ten months earlier on November 23, 2010. Following months of limited, unproductive negotiations, Ms. Meade's attorneys gave the professional courtesy of phone and email notice to Attorney Christopher Tompkins that litigation was being filed to avoid expiration of the statute of limitations and requested him to accept service in lieu of filing. He indicated that he could not accept service for Defendants. Ms. Meade's attorneys therefore filed and served the summons and complaint on the Defendant Attorney Nelson and his law firm twice, on July 28 and September 29, 2010. In between these dates they sent Defendant's Attorney a settlement demand referencing the filed litigation. Two months passed without any response. Neither Defendant Attorney Nelson nor an attorney representing him ever served a notice of appearance, answered the complaint, or communicated any statement of intent to defend against the lawsuit. Nor did a settlement offer from defense counsel on October 28, 2010 mention the litigation or the court's jurisdiction in the dispute.

Four months after serving the Nelson Law Firm, Ms. Meade obtained the Order of Default on November 23, 2010. Eight months later, she filed for default judgment. Attorney Nelson and the Nelson Law Firm brought a motion to set aside the default August 26, 2011 and set it to be heard the same day as the Motion for Default Judgment. The trial court granted Nelson's motion and never reached Ms. Meade's motion. It held that "there was not an actual notice of appearance," but that good cause had been shown under CR55(c) because Defendants showed an "intent to defend."

B. ASSIGNMENTS OF ERROR AND ISSUES FOR REVIEW

Assignment of Error 1. The trial court committed error in an abuse of discretion by permitting Defendants' "intent to defend" to satisfy the appearance requirements in CR 4(a)(3) and 55(a)(3), a decision based on untenable grounds.

Assignment of Error 2. The trial court committed error by concluding that there was "good cause" to grant Defendants' Motion to Set Aside Order of Default in the absence of having served a notice of appearance or answered the summons and complaint, or recognized the jurisdiction of the court, and with resulting prejudice to Ms. Meade who was prevented from having her filed Motion for Default Judgment heard.

Issues Pertaining to Assignment of Error

1. Regarding the first Assignment of Error, is the trial court's determination that "there was not an actual notice of appearance" but "there was an intent to defend" (shown by settlement negotiations and defense counsel's letter), error for failing to satisfy notice of appearance requirements in CR4(a)(3) and CR55 (a)(3)?
2. Regarding the second Assignment of Error, did the trial court err in concluding there was "good cause" under CR 55(c) to set aside entry of default despite defense counsel's in court acknowledgment of the circumstances that: "we failed to file a formal notice of appearance or an answer," "plaintiff didn't attempt to conceal the existence of the litigation here," and "we were aware of their intent to file a lawsuit and to serve our client," but "there was a communication failure of some sort between Mr. Nelson and my office"?
3. Regarding the second Assignment of Error, did the trial court err in concluding "good cause" exists under CR 55(c) to set aside default when "there was not an actual notice of appearance" or response after each service of legal process, and there is evidence of negligence despite Defendants' claimed "intent to defend"?

4. Regarding the second Assignment of Error, was there substantial evidence that Plaintiff could have reasonably harbored illusions about whether Defendants intended to defend the matter and were therefore not entitled to notice before entry of default?

C. STATEMENT OF THE CASE

On August 4, 2004 Petitioner, Charity Meade, was injured in a motor vehicle collision. **CP 669-673**. Her attorney, Defendant David Nelson, brought a personal injury action (Case No. 07-2-00435-2). Answering interrogatories in the case he indicated, Ms. Meade's injuries were over \$250,000. **CP 1036**. However the MVA case was dismissed on summary judgment for his failure to serve the defendant within the applicable statute of limitations. **CP 13-14, 53**. The Appeals Court, Division II upheld that decision. **CP 52-56**. On Nelson's advice, Ms. Meade sought representation and retained the Krafchick Law Firm PLLC on April 25, 2008 to file a malpractice claim. **CP 954**. Nelson also advised her that the statute of limitations for malpractice was three years, so she needed to commence litigation by April 7, 2011. **CP 954**.

The Krafchick Law Firm PLLC obtained Nelson's case records from Attorney Christopher Tompkins at Betts, Patterson and Mines, to whom Nelson had referred the matter. It had several contacts with Tompkins since 2008 regarding claim negotiations. **CP 897-900**. **There was never a**

letter, notice or call to Ms. Meade's attorneys indicating that Attorney Tompkins would be representing defendants to defend in the litigation, wanted to enter an appearance, answer the complaint or have an extension to do so. RP 3. See also, the trial court's conclusion that "there was not an actual notice of appearance." **RP 16.**

With the statute of limitations for malpractice near, on July 23, 2010, as a professional courtesy, Plaintiff's attorney emailed Tompkins notifying him they had to file a lawsuit Monday August 2, 2010 and asked him to accept or waive service on behalf of Defendants. He declined indicating he needed consent from Attorney Nelson to do so. **CP 909-910.** Ms. Meade's attorneys realized the statute would actually run sooner and called Tompkin's staff, then emailed him. **CP 908-909.** Several emails ensued giving Tompkins full notice of the lawsuit. **CP 908-910.** July 27, 2010 Tompkin's email acknowledged he was aware that they would file the lawsuit that day or the next day (Wednesday July 28, 2010). He also set out his own belief that the lawsuit had to be filed the following week. **CP 909-910.** Email to Attorney Tompkins on July 27, 2010 from Ms. Meade's lawyer, Pamela Van Swearingen, sought Tomkins' acceptance of service of the summons and complaint as a courtesy to avoid filing the malpractice suit the next day in court (**CP 908-909**), **but he declined on the basis he did not have Attorney Nelson's consent to do so. CP 909-**

910. As fully disclosed to Tompkins, Ms. Meade's attorneys **filed the legal malpractice suit July 28, 2010** in Cowlitz County Superior Court and **served the summons and complaint on the Nelson Law Firm, PLLC** that day to avoid the expiration of the statute of limitations. **CP 1.** (The Answer in the underlying MVA case said that complaint was not timely served and asserts a statute of limitations defense was served on Attorney Nelson and faxed to Ms. Meade on July 30, 2007 setting the accrual date for the statute of limitations in her malpractice action.)

No answer, appearance, or conveyed intent to appear was sent, served or filed by anyone, so Plaintiff's attorneys made **two post - filing efforts.** First, they sent Tomkins a **last Settlement Demand letter, indicating the Complaint was filed by the designation "Re: Meade v. Nelson, Cause No. 10-2-01335-1"** August 23, 2010, (**CP 978-979**) and referenced the case in the letter. After five more weeks passed with no response to the filed lawsuit or the August 23, 2010 settlement demand letter, Ms. Meade's attorneys effected *a second service of the summons and complaint on Attorney Nelson personally by abode service* on September 29, 2010. **CP 2.** Again, there was no served notice of appearance, or response to the twice served litigation. **CP 7.** Thereafter, Ms. Meade's attorneys did not respond to Tompkins' settlement offer October 28, 2010, **which contained no comment on when there would**

be any response to pending litigation, provided no appearance formally or informally acknowledging the jurisdiction of the Court in the dispute, indicating when that might be forthcoming, or asking for an extension of the well overdue answer. CP 984-985. It merely continued the negotiating that had ensued for some time over the same perceived “claim” weaknesses.

With no indication that Defendants were submitting to the jurisdiction of the court, Ms. Meade filed for an order of default without notice to Nelson. **CP 3-5.** It was granted November 23, 2010. **CP 10-11.** Still, Defendants served no appearance or indication of intent to respond to the lawsuit for over eight months.

Finally, on August 3, 2011 Ms. Meade’s attorneys filed a Motion for Default Judgment. **CP 12-32.** The next day on August 4, 2011 Tompkins emailed a Notice of Appearance to the Krafchick Law Firm without leave of court, over a year after the Complaint was filed and first served and over eight months since the Default Order. **CP 864.** All Cowlitz County Superior Court judges recused themselves from Plaintiff’s Motion, so Judge Lawler from Lewis County was assigned the case. **CP 871-875.**

Defendants served a Response to Motion for Default Judgment and Motion to Set Aside Default and a Notice of Appearance August 5, 2011

without an accompanying motion for leave of court filed. **CP 1023-1029.** **Attorney Tompkins argued in it that on August 4, 2011 he only learned “for the first time - that a Complaint had been filed against his client on July 28, 2010. . . .” CP 1025.** Plaintiff filed a responding brief (**CP 876-892**) with an opposing declaration (**CP 894-954**). However, her attorneys later learned that Defendants *never filed* this oppositional response, motion or appearance. **CP 1019-1020.** On August 26, 2011 without filing a separate motion for leave of court to defend, Defendants served and filed a Motion to Set Aside Default set for the same day as Plaintiff’s Motion for Default Judgment, September 2, 2010. **CP 955-966.** Plaintiff objected to Defendants’ Motion, in part due to their failure to comply with CR 55 (**CP 1006**) and on the basis that Defendants were not entitled to notice of the default motion because they never appeared or responded to the lawsuit and recognized the court’s jurisdiction over the litigation. **CP 1005-1017.**

At the hearing, Judge Lawler took up Nelson’s motion to set aside default first. Tompkins made clear what he was not contesting:

We are not contesting the fact that we failed to file a formal notice of appearance or an answer. We can’t. We’re not contesting that failure was a mistake and result of an oversight. We agree as plaintiff has pointed out in their pleadings that we were aware of their intent to file a lawsuit and to serve our client.

. .we're not exactly sure almost 13 months later exactly what happened except that there was a communication failure of some sort between Mr. Nelson and my office. Mr. Nelson recalls that he was told by us that we'd get a copy of the Complaint from Mr. Krafchick's office, he didn't need to send it to us. That message never made its way to me.

*** * ***

The plaintiff didn't attempt to conceal the existence of the litigation here.

RP 3 and RP 11. (Emphasis added.)

Tompkins argued that default should nonetheless be set aside because they intended to defend the lawsuit. While not stating there was an informal appearance or due diligence in making an appearance after entry of default, Judge Lawlor concluded that default should be set aside under CR 55(c) for good cause. The court stated that “there was not an actual notice of appearance,” but there was an “intent to defend” and “(i)t was clear Mr. Nelson was represented by counsel” referencing the “correspondence and the contacts.” **RP 16.** Judge Lawler did not specifically mention substantial compliance with the appearance requirements or that Defendants were entitled to notice. The court also acknowledged that “defense could have answered, they could have responded, they could have done a number of things,” but in decrying “gotcha” law practice said that Plaintiff’s counsel could have asked for the answer. **RP 17.** However, the trial court overlooked the more than

equivalent significant conduct Ms. Meade's counsel took: (1) their letter after filing and (2) effecting a second service of process on Attorney Nelson personally by abode service on September 29, 2010. **CP 978-979, CP 2.**

D. ARGUMENT

The Superior Court erred in permitting Defendants to bring their motion without leave of court or a timely notice of appearance, and implicitly concluding that Defendants appeared in the case under CR 4(a)(3) and 55(a)(3). The trial court further abused its discretion in deciding that good cause exists under CR 55(c) to set aside default on untenable grounds. The court overlooked a crucial fact, the second service of process on Attorney Nelson personally, in relation to pre-and-post litigation negotiations. Omitting this and the overall unique case circumstances, the trial court's interpretations of "informal appearance" adhered to the old informal appearance doctrine specifically rejected in *Morin et al v. Johnson et al*, 160 Wn.2d 745, 161 P.3d 956 (2007). The trial court blurred the standard for substantial compliance effected informally. *Morin* imposed a higher burden on defendants, than the informal appearance doctrine that Defendants essentially showed, by requiring formalities and acknowledgment of the jurisdiction of the court in the dispute. *Morin* clearly required the formal time limits and

procedures for appearances as for complaints, answers, subpoenas and notices of appeal to ensure fairness.

As a matter law, under the circumstances, the Defendants achieved no appearance. Plaintiff undertook all appropriate steps and procedures to get Defendants to respond to the litigation. With both Nelson an attorney and his firm named parties, there was more opportunity to be apprised of the litigation, more time to respond than is normally available to parties, and certainly more knowledge on how to respond. Without initially rushing to default over Defendants' delay, Ms. Meade finally availed herself of her procedural rights after the second service of process was ignored by Attorneys Nelson and Tompkins. Their continued negotiation letter discussed perceived weaknesses, not of her allegations or lawsuit, but her "claim." Defendants' conduct was not sufficient to indicate an intent to defend and does not constitute substantial compliance satisfied informally. Plaintiff's motion under CR55(a) was not "gotcha practice of law" as the trial court characterized it.

Tompkins essentially admitted negligence stating: "communication failure of some sort between" Attorney Nelson and Attorney Tompkins' office. The "communication failure" amounts to a failure to exercise ordinary care and amounts to inexcusable neglect under the circumstances: two attorneys, two services of process with more response time resulting

from the second service, and no attempt by Ms. Meade's attorneys to conceal the fact of litigation. Having started litigation in July *after first notifying Attorney Tompkins*, nothing required Ms. Meade to do more to obtain Defendants' response to the court's jurisdiction. Plaintiff then went to the extraordinary step of serving Defendants a second time to elicit a response acknowledging the court's jurisdiction. Washington Courts have not allowed inexcusable neglect to constitute good cause to set aside default. It should not be allowed in this malpractice case that has caused significant, unfair delay for Ms. Meade who was rendered completely disabled from the car accident.

The Superior Court's errors substantially altered the status quo restricting Ms. Meade's freedom to seek default judgment, which she had properly filed and is entitled to seek under the civil rules and legal precedent.

1. Standard of Review

The Appellate Court reviews *de novo* questions of law, including the adequacy of notice and whether, on undisputed facts, appearance has been established as a matter of law. *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 399, 196 P.3d 71 (Div. II, 2008), *citing Dep't of Ecology v. Campbell & Gwinn, LLC* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Whether Defendants' actions are insufficient to constitute an appearance

under the rules is a question of law. *Morin et al v. Johnson et al*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007).

The standard of review of the trial court's determination of whether a party has informally appeared and the setting aside the order of default is for abuse of discretion. *Morin, id* at 753. "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." *Id.*; *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). The Court of Appeals will not substitute its judgment for that of the trial court, unless it is manifestly unreasonable or based on untenable grounds or for untenable reasons. *Professional Marine co. v. Those Certain Underwriters at Lloyds*, 118 Wash. App. 708, 711, 77 P.3d 658 (2003) (insurer had not "appeared" informally by sending a letter rejecting insured's demand that did not indicate an intent to defend against the lawsuit or refer to the lawsuit or request additional information or the complaint). A decision is untenable if it rests on an erroneous application of law. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

Although resolving cases on their merits is favored, default judgments serve the purpose of promoting "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 696, 703, 161 P.3d 345 (2007); *see also Showalter*, 124 Wn. App. at 510.

2. Error Has Occurred Because Under the Circumstances and The Law Defendants Were Not Entitled to Notice

Defendants were not entitled to notice of the motion for default because they did not appear in the action. They argued, however, that they “intended to defend” and have substantially complied with the appearance requirement, thereby entitling them to notice of the motion for default.

a. CR 55(a)(3)’s Notice of Motion Is Served Only If A Party “Appeared” Either By Serving A CR 4(a)(3) Notice of Appearance Or Substantially Complying With CR 4

CR 55(a)(3) requires notice of a motion for default to be given to any party who has “appeared” in the action. It states,

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. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion. . .

Defendants did not answer, demur or give notice of appearance. Nor did they substantially comply with the appearance requirements in CR 4(a)(3) to be entitled to notice of Plaintiff’s Motion for Default Order. It requires a notice of appearance, if made “shall be in writing, shall be

signed by the defendant or his attorney, and shall be served on the person whose name is signed on the petition.”

RCW 4.28.210 sets forth what constitutes an “appearance.” It states in pertinent part:

A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him. . . .

As held in *Smith v. Arnold*, 127 Wn. App. 98, 104, 110 P.3d 257 (Div. II, 2005), these methods are not exclusive. “Informal” acts have constituted an “appearance.” *Profl Marine Co. v. Underwriters at Lloyd's*, 118 Wn. App. 694, 708, 77 P.3d 658 (2003); *Gage v. Boeing Co.*, 55 Wn. App. 157, 162, 776 P.2d 991, review denied, 113 Wn.2d 1028 (1989). Whether a party has “appeared” informally is generally a “question” of intention, evidenced by conduct, such as the indication of a purpose to defend or a request for affirmative action from the court, constituting a submission to the court's jurisdiction. *Smith*, 127 Wn. App. at 104. “The existence of such documentary evidence is conclusive of the party's appearance and entitlement to notice of further proceedings. Likewise, a trial court's finding that a party has appeared *informally* must also be

supported by evidence of actions manifesting an unquestionable intent to appear and defend the matter in court.” *Id* at 105.

A party will not be considered to have appeared informally if the plaintiff could reasonably harbor illusions about whether the party intended to defend the matter. *Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366, 369 (9th Cir. 1977); *Gage*, 55 Wn. App. at 162.

However, now more is required by the *Morin* decision. It clarified and increased what is necessary to satisfy the appearance requirement of CR 4: substantial compliance informally met, which recognizes the jurisdiction of the court in the dispute. *Morin*, 160 Wn.2d at 749. Sufficient circumstances to satisfy substantial compliance are not present in this case. What is apparent is unacceptable reliance on the rejected informal appearance doctrine.

The substantial compliance test determines whether CR 55(a)(3) requires notice if there has been an informal appearance. *Id*. Prelitigation contacts alone are not sufficient to establish substantial compliance with the appearance requirements of CR 55(a)(3). Instead, those who are properly served with a summons and complaint must in some way appear and acknowledge the jurisdiction of the court *after* they are served and litigation has commenced. *Id*. at 757.

Neither Defendants nor any attorney representing them responded to the summons and complaint, indicated any intention to do so or served a notice of appearance that recognized the jurisdiction of the Superior Court in the litigation, which might otherwise qualify as an appearance in court under *Morin*. Attorney Defendant Nelson and his law firm, having received service of process twice over two months, did not serve an appearance or plead defenses to the complaint though he was capable of doing so and understood the implications of not doing so.

b. Intent To Defend, Before Or After A Case Is Filed, Does Not Meet The Appearance Requirements

The trial court erred in permitting Defendants' "intent to defend" to satisfy the appearance requirements in CR 4(a)(3) and CR 55(a)(3). The decision is contrary to settled law by our Supreme Court that

mere intent to defend, *whether shown before or after a case is filed*, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*.

Morin, 160 Wn.2d at 757 (bolding emphasis added).

The trial court's decision that Defendants made an "informal appearance" based on their alleged "intent to defend the case" is untenable after the changed legal standards enunciated in *Morin* and because their alleged "intent to defend" is questionable under the unique circumstances. The Supreme Court laid to rest the relaxed informal appearance doctrine,

which it does not condone. A defendant must “take some action acknowledging that **the dispute is in court**” before being entitled to a notice of default. *Morin, id* at 757. The Supreme Court was emphatic in rejecting the informal appearance doctrine, which it specifically said

would permit any party to a dispute, or any claims representative to a potential dispute, **to simply write a letter expressing intent to contest litigation, then ignore the summons and complaint or other formal process and wait for the notice of default judgment before deciding whether a defense is worth pursuing.** If a less formal approach to litigation is to be adopted, it should be by rule and not by this court's adoption of an informal appearance rule. **Parties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment.**

Morin, id at 757. (Emphasis added.) The Supreme Court insists that the same proper, timely service and filing “in accordance with the rules” required for complaints also be adhered to for “appearances, answers, subpoenas, and notices of appeal.” “Each have its purpose, and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.” *Morin, id.*

c. The Trial Court Decision Rests On Untenable Grounds Rejected by Washington Courts: There Was No Appearance Nor Substantial Compliance With the Appearance Rules, And Defendants' Alleged Intent to Defend Was Contradictory

The trial court's decision rests on untenable grounds rejected by *Morin*. Tompkins October 28th settlement offer continued previous

protracted “claim” negotiations pointing out weaknesses (CP 984-985) of Ms. Meade’s position without indicating that the Defendants were submitting to the jurisdiction of the court as to the lawsuit. The offer repeatedly refers to the “claim” rather than the lawsuit. The letter is starkly silent as to whether Tompkins was representing Nelson in the lawsuit, or as to any reason for their delays in responding to the two previous summons, or as to a needed extension of time to respond to the second service of process. The letter did not reveal who intended to defend the lawsuit in court though both Attorneys Tompkins and Nelson knew the lawsuit was filed and answers were long overdue following both services of process beginning in July, 2010.

Showing no intent to defend, they ignored the jurisdiction of the court and their obligation to acknowledge it in the dispute. **Tompkins’ assertion is further undercut by his contradictory statement in a brief that he served stating that he had no notice of the Complaint until August 4, 2011 after Plaintiff filed her Motion for Default Judgment. Therefore, he could not have had an “intent to defend.” CP 1025.** The bare assertion that Defendants intended to defend without the facts constituting intent to defend is insufficient for setting aside default. *See Penfound v. Gagnon*, 172 Wash. 311, 312, 20 P.2d 17 (1933) (holding that

a bare statement of a meritorious defense to avoid vacation of default and judgment was insufficient without the facts constituting the defense).

Tompkins' letter is precisely the letter the *Morin* opinion described and denounced (*Morin*, 160 Wn.2d at 757), which is quoted above. In all, their conduct created the illusion that Tompkins did not intend to defend the lawsuit and, as he indicated to Meade's attorneys in July before the filing, that he had no authority to respond to litigation. **CP 909-910**. It left the appearance that they were choosing not to defend and preferred to just settle the "claim." It would have been simple for Tompkins to include a notice of appearance or reference that he intended to respond to the lawsuit in his October letter, if he in fact intended to defend. Given these circumstances and *Morin's* clear standards, tenable grounds are not present to determine that Tompkins conduct constitutes an "appearance" even under the defunct informal appearance doctrine. Lacking intent and recognition of the court's jurisdiction in the litigation, Defendants have not satisfied CR 4(a)(3) or 55(a)(3).

Cases involving a letter response from a defendant who did not address the lawsuit have concluded that the informal contact was not sufficient to be an appearance. Hence, the party was not entitled to notice under CR 55 for failure to demonstrate *a clear purpose to defend the suit*. See *Profl Marine Co. v. Underwriters at Lloyd's*, 118 Wn. App. 694, 711,

77 P.3d 658 (2003) (finding that insurer had not “appeared” by sending a letter rejecting insured’s demand to be defended or indemnified, and which did not address the insured’s indication that rejection would result in a lawsuit). *See also, Wilson v. Moore and Ass’s, Inc.*, 564 F.2d 366, 369 (9th Cir. 1977) (no appearance occurred where the defendant sent a letter to the plaintiff which was partially responsive to the complaint, but no formal appearance was filed and the defendant ignored warnings from the plaintiff that a default would be taken). Similarly, Tompkins inaction to served legal process (**CP 909-910**), along with Plaintiff’s pre and post-filing notices of the lawsuit and his October letter with a settlement offer (**CP 984-985**), does not show clear intent to defend the lawsuit to constitute an appearance or informal substantial compliance with the appearance rules. In *Smith v. Arnold*, 127 Wn. App. 98, 111, 110 P.3d 257 (Div. II 2005), Division Two held that although a settlement offer was the strongest evidence of the carrier’s intention to defend, the superior court considered all the evidence before it and found that it was insufficient to prove an unmistakable intent to defend a lawsuit. It also observed that “(i)n the months following the letter, Allstate did not ask about Smith’s lack of a response to the offer. Smith could have reasonably inferred that his not acting on the offer put the Arnolds and Allstate on notice of an intent to file suit--particularly in light of the impending statute of

limitations--to which they did not respond, even after the suit was filed.”

Id. at 112.

Applying *Morin*'s higher standards, it is untenable to conclude that substantial compliance with the notice requirements occurred absent Defendants' clear intent to defend and recognition of the court's jurisdiction. The Supreme Court expects more than intent to defend: **acknowledgment of the jurisdiction of the court** must be shown for substantial compliance with the rules to conclude that a party has appeared:

However, whether or not a party has substantially complied with the rules must be decided against the fact that litigation is a formal process. Those who are served with a summons *must do more than show intent to defend they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences.*

* * *

We hold that merely showing intent to defend before a case is filed is not enough to qualify as an appearance in court.

Morin, id at 749 (citations omitted) (emphasis added); *accord Sacotte Construction Inc. v. National Fire & Marine Ins. Co.*, 143 Wn.App. 410, 414, 177 P.3d 1147 (Div. 1, 2008) ([S]ubstantial compliance can be accomplished with an informal appearance if the party shows intent to defend **and** acknowledges the court's jurisdiction over the matter after the

summons and complaint are filed.) *Sacotte's* holding, that there was substantial compliance informally, is distinguishable from this case: a phone call that the defendant was entering an informal notice of appearance in the action along with a confirming email of the call.

Attorney Tompkins' explanations do not show substantial compliance. It reveals negligence. Tompkins cannot explain repeatedly ignoring legal process, short of "a communication failure of some sort." **RP 3. He did not claim excusable neglect, surprise, irregularity in obtaining the decision, etc. Nor did the trial court find any of those factors.** Tompkins admitted in court: "**that we failed to file a formal notice of appearance or an answer**" (**RP 3**), that he knew before suit was filed "of their intent to file a lawsuit" (**RP 3**), and that Ms. Meade's attorneys "didn't attempt to conceal the existence of litigation here." **RP 11.** His October 28, 2010 settlement offer does not directly reference the litigation or give any defenses he is raising on Nelson's behalf or indicate that he will be entering a notice of appearance. **CP 984-985.** It strictly continues settlement communications, without substantially or minimally complying with the notice of appearance standards. Tompkins never gave a reason as to why he or Attorney Nelson never complied with the civil rules. There is substantial evidence that with Defendants' lack of involvement, Plaintiff could have and did reasonably harbor illusions about whether Defendants

intended to defend the matter. Defendants were not entitled to notice before entry of the default order.

Washington courts have rejected similar attempts to show informal acts comply substantially with the appearance rules. The decision in *Profl Marine Co. v. Underwriters at Lloyd's*, 118 Wn. App. 694, 711, 77 P.3d 658 (2003), held that the insurer had not appeared by virtue of an offer rejection letter that did not address the insured's indication of an imminent lawsuit or request a copy of the complaint. *Morin* reversed the appellate court order that had affirmed vacating default judgment in *Matia Investment Fund, Inc. v. City of Tacoma*, 129 Wn. App. 541, 119 P.3d 391 (2005) because the intent to defend before the case was filed was not enough to qualify as an appearance in court and did not entitle the defendant to a notice of motion for default. *Morin*, 160 Wn.2d at 749. See also, *Conner v. Universal Utilities*, 105 Wn.2d 168, 712 P.2d 849 (1986) (failure of a utility's attorney to pass pleadings to the company's insurance carrier and answer the summons in 20 days permitted judgment to be entered without notice); *Wilson v. Moore and Ass's, Inc.*, 564 F.2d 366, 369 (9th Cir. 1977) (no appearance where the defendant sent a letter which was partially responsive to the complaint, but no formal appearance was filed and the defendant ignored warnings from the plaintiff that a default would be taken).

d. Without An Appearance, Notice of the Default Motion to Defendants Was Not Required

Without an appearance Defendants were not entitled to notice of the motion for default under CR 55 (a)(3). Defendants' claimed intent to defend was illusory. There are inadequate reasons to set aside default with nothing more than negotiations. Tompkins inability to accept service (**CP 909-910**) signaled that he was not in a position to recognize the jurisdiction of the court. He did not do so. It was far from clear that Tompkins intended to file a notice of appearance or intended to defend Attorney Nelson. Neither "appeared" or substantially complied with CR 4(a)(3)'s requirement for a notice of appearance. Defendant Nelson could have entered the appearance, and as an attorney knew vastly more about the civil rules than most litigants. He had double the chance to rectify untimeliness or any communication issues to which Tompkins attributes the neglect.

Much more than just a "call" from Ms. Meade's attorneys attempted to elicit Defendants' response to defend and appear in the case: 5 weeks after service, Ms. Meade's attorneys sent a letter August 23, 2010 indicating suit had been filed and demanding settlement, which got no response, even after the second service (two months after the first service). Ms. Meade did not rush to file the motion for default when the Nelson Law Firm

PLLC failed to timely answer or file a notice of appearance in August 2010. Despite ample time and events to remind Attorneys Nelson and Tompkins of action they had to take if they intended to defend in the lawsuit, there was no response to the lawsuit or recognition of judicial jurisdiction. They point only to Tompkins' continued settlement posturing – the type of letter *Morin* specifically condemns.

There simply was no informal appearance that would entitle Defendants to notice of the motion for default per CR 55(a)(3). While substantial compliance with the appearance requirement is permitted, *Morin* held that it must apprise the plaintiff of the defendants' intent to litigate the case. That is “acknowledge that a dispute exists *in court*.” *Id.* at 756. This did not happen.

3. The Superior Court Erred In Concluding That Good Cause Exists To Set Aside Default

Defendants' negligence (the failure to exercise ordinary care) cannot constitute “good cause” to grant Defendants' Motion to Set Aside Order of Default. CR 55 (c)(1) permits the court to set aside an entry of default for “good cause shown and upon such terms as the court deems just.” It provides:

For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).

The trial court has the authority to set aside a default order under CR 55 if the moving party demonstrates “good cause” by a showing of excusable neglect and due diligence. *In Re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999); *Johnston v. Medina Improvement Club, Inc.*, 10 Wn.2d 44, 53, 116 P.2d 272 (1941). A party who (1) shows that the failure to timely respond was due to excusable neglect, and (2) acts diligently in seeking to set aside the order will not be detrimentally affected by how broadly or narrowly an “appearance” is defined. *Smith v. Arnold*, 127 Wn. App. 98, 108, 110 P.3d 257 (Div. II 2005).

The trial court made no determination as to any due diligence by the Defendants or Tompkins after entry of the order of default, but only determined there was good cause shown. We submit that if the Court got past its “gotcha” concerns and made an assessment of excusable neglect and due diligence, the admitted failure to exercise of ordinary care by defense counsel would have resulted in finding inexcusable neglect and prevented the conclusion that there was “good cause.”

With full opportunity to answer and no excuse, the failure of counsel is not “excusable neglect.” *Wolfe et al. v. Hernr Gerlich Tie & Timber Co.*, 123 Wash. 70, 211 P. 753 (1923) (counsel’s failure to appear on behalf of client did not justify vacating default judgment). *See also*,

Lane v. Brown & Haley, 81 Wn.App. 102, 106-107, 912 P.2d 1040 (1996), *review den.* 129 Wn.2d 1028, 922 P.2d 98 (1996) (attorney's neglect did not justify vacating summary judgment as incompetence of counsel is not sufficient grounds for relief from judgment).

Break-down of internal office procedures is also not excusable neglect. *See Brooks v. University City, Inc.*, 154 Wn. App. 474, 479, 225 P.3d 489 (2010), *review den.* 169 Wn.2d 1004, 236 P.3d 205 (2010) (default entered over one year after service of the summons and complaint with appearance over two years after being served due to registered agent forwarding summons to wrong company employee instead of legal department was inexcusable, prejudicial to Plaintiff and not a basis to vacate default order). *See also, Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 407, 196 P.3d 711 (2008) (rejecting an insurer's attempt to vacate a default judgment with the excuse that the relevant claim handler was out of the office on medical leave) and *Puget Sound Medical Supply v. The Dep't of Social and Health Services*, 156 Wn. App. 364, 375-376, 234 P.3d 246 (2010) (failure to calendar and changes with an attorney leaving the firm did not constitute tenable grounds for excusable neglect). Losing track of the summons and complaint has been found inexcusable neglect resulting in reversal of an order granting a motion to vacate default judgment. *See Prest v. Am. Bankers Life*

Assurance Co., 79 Wn. App. 93, 100, 900 P.2d 595 (1995), *review den.* 129 Wn.2d 1007, 917 P.2d 129 (1996) (finding inexcusable neglect where insurer's failure to respond in the two months between service and the default order was due to the summons and complaint being "mislaidd" and, thus, not forwarded to corporate counsel). Though excusable neglect can be found if the tardy party acted diligently, not attempting to seek additional time when the party had the opportunity to do so is not grounds for "excusable neglect." *Puget Sound Medical Supply*, 156 Wn. App. at 376.

Defendants did not claim and in fact stated that their failure to timely appear and answer the complaint was not a result of their mistake, inadvertence, surprise or excusable neglect. **RP 3.** Tompkins further admitted that he cannot explain a communication issue with Nelson. **RP 3.** Clearly, their negligence cannot constitute "good cause" when failing to timely answer or appear. Accordingly, concluding that good cause exists to set aside the default order constitutes an error of law.

Defendants can also hardly show due diligence after the entry of the default order, which was over eight months earlier. The trial court made no finding of due diligence to support good cause. This remains especially inexcusable in this malpractice action when there was every opportunity

for one or both of these attorneys at some point to appear and respond or seek an extension.

To the extent that the trial court was in any way persuaded by Defendant's argument that they had a prima facie defense to the complaint, that was error and prejudicial to Ms. Meade, especially if they had made no appearance to be presenting that argument. The criteria to set aside a default order does not require the four factors needed to vacate a default judgment under CR 60(b), the latter of which actually includes showing a meritorious defense. See *In Re Estate of Stevens*, 94 Wn. App. 20, 30 and 35, 971 P.2d 58 (1999). Ms. Meade also contested the adequacy of those defenses before the trial court and in their opposition brief (**CP 1005-1018 and CP 876-954**). These are now less viable following the Washington Supreme Court's decision in *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 609-612, 260 P.3d 857, 865-866 (2011). (*See especially* fn 7 at 610).

Ms. Meade endures substantial hardship by all the delay. She has been waiting seven years for resolution of her claim. Injured August 4, 2004, then becoming a victim of admitted malpractice by her attorney David Nelson, she still waits for compensation for her injuries. The delay in resolution first rests at the feet of her former counsel Attorney Nelson, and now at the feet of current defense counsel for Attorney Nelson. Prejudice

due to delay has already spanned seven years. It is unfair to force Plaintiff to continue that wait. **CP 669-673, CP 771-774.**

Ms. Meade's counsel did nothing to occasion the negligence of defense counsel. Attorney Tompkins acknowledged this in court. **RP 3-12.** With his awareness of when we intended to file the complaint and his belief that we had at least another week to file, along with Defendant Nelson being served on two separate occasions, they could have taken the litigation seriously as must all parties and their counsel. Some contact could have notified Ms. Meade of the appearance or a formal notice of appearance, if not an answer to the complaint, if they truly intended to defend against the lawsuit and not just negotiate at the claim stage. Because the clock was reset to give them another opportunity to respond with the second service, their neglect thereafter left Ms. Meade to justifiably seek default. Plaintiffs should not even have to meet the burden met here to get attorneys or parties to timely respond to properly served litigation and conform to the rules of procedure than all the steps taken here.

The dilatory conduct by Attorney Nelson, and particularly his counsel, and been unfair and has significantly prejudiced Ms. Meade. As the materials in her Motion Default Judgment establish, she is disabled and cannot work. She is and has been a single mother all of that time,

unable to be a breadwinner or a complete mother to her son. In fact, her son had to assume the role of caring for his mother in a very tragic reversal of roles. **CP 669-673, CP 771-774.** Good cause is manifestly untenable because Defendants inexcusable neglect and lack of diligence. Vacating her default order is unfair and prejudicial to Ms. Meade.

E. CONCLUSION

Ms. Meade has shown that the trial court's decision to set aside the order of default was based on untenable grounds for untenable reasons and should be reversed for abuse of discretion. Ms. Meade is entitled to have her Motion for Default Judgment entered and respectfully requests this Court to do so. She was entitled to order of default without notice to Defendants following the Defendants' or their counsel's failure: (1) to appear or substantially comply with the appearance requirements in CR 4(a)(3) and CR55(a)(3), and (2) to defend in the lawsuit and recognize the jurisdiction of the court. Attorney Tompkins has stated that he cannot claim this was mistake or excusable neglect. He does not attribute the communication failure he had with Attorney Nelson to any action of Ms. Meade or her attorneys. There was no "gotcha" practice that can be a tenable grounds to conclude that good cause exists to vacate the default order. Under the standards clarified in the *Morin* decision, the trial court has erred with its manifestly unreasonable holding based on untenable

grounds that do not comport with Washington law. Defendants did not appear based on their mere intent to defend and their limited negotiations, without more, before and after Ms. Meade filed her lawsuit. Good cause was not shown under CR 55(c) for the trial court to set aside the default order and it must be reversed.

We therefore respectfully ask the Court to reverse the trial court and to further enter an Order for Default Judgment for the Plaintiff as requested in our Motion.

DATED this 9th day of December, 2011.

KRAFCHICK LAW FIRM

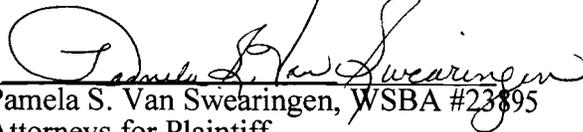
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Attorneys for Plaintiff

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COURT OF APPEAL OF WASHINGTON
DIVISION II

CHARITY MEADE,

Plaintiff,

v.

DAVID A. NELSON, Attorney; and,
NELSON LAW FIRM, PLLC.,

Defendants.

NO. 42685-4

CERTIFICATE OF SERVICE OF BRIEF OF
APPELLANT

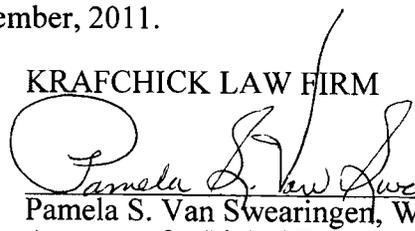
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DIVISION II

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein. On December 9, 2011, I caused to be served, via messenger service, a copy of the attached on the following counsel of record: Christopher W. Tompkins, Betts, Patterson & Mines, P.S., 701 Pike Street, Suite 1400, Seattle, WA 98101, Attorney for David A. Nelson, Esq.

DATED this 9th day of December, 2011.

KRAFCHICK LAW FIRM

By:


Pamela S. Van Swearingen, WSBA #23895
Attorneys for Plaintiff