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## ARGUMENT

### A. The Trial Court's Decision Is Based on Untenable Grounds

The Defendants' complete failure to recognize the court's jurisdiction in this lawsuit shows the untenable grounds for the trial court's decision that Defendants' "intent to defend" (1) satisfied the notice of appearance requirements in CR 4(a)(3) and CR 55(a)(3), and (2) amounted to "good cause" to set aside the Order of Default. Attorney admitted negligence should not be a basis to find "good cause." Defense counsel revealed his own neglect and lack of intent to defend by his assertions that he did not know the lawsuit was filed. Record evidence shows that it was made known to him. Tompkins' own disregard created the reasonable impression he was not representing Defendants in the litigation as required in *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). It held 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*." *Id.* at 756. Following the Supreme Court's rejection of the informal appearance doctrine, in this *de novo* review of whether there was an appearance absent actual Notice of Appearance, the evidence shows the trial court abused its discretion.

Whether Defendants' actions are insufficient to constitute an appearance under the civil rules of procedure is a question of law. *See Morin, id.* 749.<sup>1</sup> The trial court's acceptance that Defendants' intent to defend constituted an informal appearance (**RP 16**) is contrary to the evidence and *Morin*.

**1. The Facts Do Not Support An Appearance or Intent To Defend**

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. . . .

The trial court found credible a bald assertion by the attorney representing Defendants in the hearing, Christopher Tompkins, that "we intended to defend the lawsuit" (**RP 4**). It agreed and further viewed that intent as an informal appearance (**RP 16**) despite contrary evidence presented that **Tompkins admitted several times that he was unaware the lawsuit was filed. (CP 1025)**. Those admissions substantiate Ms. Meade's argument that Tompkins perpetuated claim negotiations showing

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<sup>1</sup> Due to inadvertent error Appellant's Opening Brief referred to this case as *Morinet et al v. Johnson et al v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). All citations therein to that case are intended to be to *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).

*no intent to defend* against her malpractice *lawsuit*. Without conformity to the rules to appear and defend against the litigation, she was entitled to seek default without notice. Respondents' unsupportable assertion of "intent to defend" is insufficient to conclude that good cause (Respondents' admitted negligence) exists under CR 55 (c) to set aside default as the evidence demonstrated.

The evidence presented shows that Tompkins clearly did not intend to defend the *lawsuit* because he negligently forgot about it – for many months. Ms. Meade's attorneys (hereinafter "KLF") took open, legitimate steps to engage him and Defendant Attorney Nelson in the litigation.<sup>2</sup> Also

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<sup>2</sup> As identified in prior briefs, including Pl.'s Reply in Supp. of Mot. for Default J. and Resp. to Untimely Mot. to Set Aside Default (CP 879-880), on April 25, 2008 Nelson had told Meade that the statute of limitations would run on April 7, 2011. (CP 954) Believing this was actually error, beginning July 23, 2010 KLF Attorney Katherine Christopherson emailed Tompkins notifying him we had to file a lawsuit Monday August 2, 2010 and asked to have them accept service on behalf of defendants. *See Krafchick Decl.* ¶ 19-24 (CP 898-899 and 910). Emails ensued with Tompkins' email July 27, 2010 to Attorneys Christopherson and Van Swearingen **acknowledging he was aware that we would file the lawsuit** Tuesday July 27 or Wednesday July 28, 2010. **Tompkins also set out his belief that the lawsuit had to be filed the following week.** If defense counsel could not contact Nelson, so they could accept service in lieu of filing, **we told him we would file July 28, 2010.** Also July 27, 2010, Attorney Van Swearingen emailed Tompkins regarding service in an exercise of courtesy given the nature of the lawsuit (attorney malpractice) to avoid having to do the public filing on July 28, 2010 if Tompkins could accept service for Nelson, but Tompkins declined for lack of client consent. **July 28, 2010 KLF filed the Complaint for Legal Malpractice** to avoid running of statute of limitations. This was necessitated because the Answer in underlying MVA case said the MVA complaint was not timely served and asserted a statute of limitation defense, which was served on Attorney Nelson on July 30, 2007. KLF became aware that Ms. Meade was also faxed a copy of that answer July 30, 2007, which set the expiration date for the malpractice statute of limitations, despite notice to Meade from Nelson that the statute would run much later. The Legal Malpractice Summons and Complaint was also served July 28, 2010 on the Nelson Law Firm PLLC.(CP 1)

overlooked by the court and omitted from the itemized “communications” in Respondents’ brief (at 14 and 28) is the *second service of process* of the Summons and Complaint on September 28, 2010. Additionally disregarded is that once again neither attorney filed a Notice of Appearance or an Answer when given the second clear chance to do so. Ignoring that second legal process, along with the bare, contradictory assertion by Tompkins that they intended to defend is insufficient to set aside default. *See Penfound v. Gagnon*, 172 Wash. 311, 312, 20 P.2d 17 (1933) (holding that a bare statement, that defendants have a meritorious defense to avoid vacation of default and judgment, was insufficient without the facts constituting the defense set forth by the defendants in supporting affidavits). Defendant Nelson did not set forth the facts regarding the intent in a supporting declaration.

On *August 4, 2011*, a year after the lawsuit was twice served, an email to KLF from Tompkins indicated he was not aware of the lawsuit filed on July 28, 2010 until that day (August 4, 2011). (Somehow he forgot the pre and post-filing contacts from KLF in making his remarks, but now invokes those contacts to challenge the default.) The evidence of Tompkins’ admissions reveal that he was off guard and had not recognized the court’s jurisdiction in the matter. He wrote, “I am flabbergasted to learn today that you filed the lawsuit on July 28<sup>th</sup> without any word of notice to my office.

...” **CP 907**. This assertion was no slip. Tompkins repeated it in his brief opposing Plaintiff’s motion for default judgment and his effort to set aside default. (**CP 1023-1029**). Served on KLF on August 5, 2011, he again stated in the brief that only on August 4, 2011 did he learn “for the first time” that a Complaint had been filed against his client on July 28, 2010. (**CP 1025**). His statement appears for a third time in Tompkins Decl. in Supp. of Defs.’ Mot. to Set Aside order of Default ¶ 8 (**CP 970**) filed on August 26, 2011. This important evidence cannot be retracted or dismissed because it tells the real story. It evidences negligence that occurred. Tompkins was disingenuous with the trial court and in his briefing. There is only silence from Nelson.

The good cause ruling rests on untenable grounds. As Ms. Meade has asserted, Tompkins treated the matter as claims negotiations. The above cited evidence dispels Tompkins’ “intent to defend” the litigation of which KLF attorneys apprised him on July 27, 2010 by calls and email, and in their August 23, 2010 letter. Along with communication breakdown between Attorneys Tompkins and Nelson (**RP 3**), *these omissions and contradictions should not be discounted and substituted with the hollow statement they intended to defend*. The trial court erred in concluding there was “good cause” to set aside default under CR 55(c).

**2. Substantial Evidence That Plaintiff Reasonably Harbored Illusions About Whether They Intended to Defend Should Have Been Considered**

Defense failures left the reasonable illusion for Ms. Meade and her attorneys that Defendants did not intend to defend the *lawsuit* and therefore were not entitled to notice of the motion for default. Attorney Nelson must be held to the same rules as other litigants: that “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.” *Smith v. Arnold*, 127 Wn. App. 98, 104, 110 P.3d 257 (2005).

Only in *August, 2011*, upon Ms. Meade’s Mot. for Default J., long after the issuance of the Order of Default November 23, 2010, did Attorney Tompkins enter his Notice of Appearance (**CP 1032**) in the malpractice lawsuit. Finally, the Notice showed that Defendants were represented by Betts, Patterson and Mines, P.S. (hereinafter “BPM). **CP 1023-1029**. Before that, responding to pre-lawsuit communications from Ms. Meade’s attorneys to Tompkins that her lawsuit would be filed, Thompkins’ pre-litigation email on July 27, 2010 said that he did not have authority to accept service and would seek consent to accept service, then “*contact you when we have a response.*” Respondents’ Br. at 5; **CP 909-910**. Several months passed with no contact from Tompkins to Ms. Meade’s attorneys giving the response from Defendant Attorney Nelson.

**CP 898-899.** Despite KLF's additional post-filing notice of the lawsuit with the cause number on it to Tompkins (in the August 23, 2010 settlement demand letter), Defendants still did not respond. Five more weeks passed without Attorneys Nelson or Tompkins responding to the settlement demand or serving a Notice of Appearance or filing an Answer to the Complaint.

With Tompkins lacking authority and no conveyed response of Attorney Nelson, Ms. Meade's attorneys took the clearest, decisive route to alert Defendant Attorney Nelson to file an Answer and serve a Notice of Appearance in the litigation: KLF effected a second service of process of the Summons and Complaint on Defendant Attorney Nelson personally on September 29, 2010. **CP 899.** This reset the procedural time limits and gave him personally a fresh opportunity to serve a timely Notice of Appearance and answer the malpractice Complaint. Still legal process was ignored.

Attorney Tompkins acknowledged his "communication failure" to the trial court. "[W]e failed to file a formal notice of appearance or an answer" and "we were aware of their intent to file a lawsuit and serve our client." **RP 3.** "[T]here was a communication failure of sort between Mr. Nelson (the defendant) and my office. . . ." He never elaborated on the scope of the failure. Without a filed Notice of Appearance or some clear

communication to KLF that Notice and an Answer would be forthcoming (though late), it is impossible to know at what point Nelson and Tompkins confirmed *Tompkins' representation in the lawsuit* until Ms. Meade filed the Motion for Default Judgment.<sup>3</sup> Tompkins' delayed negotiation letter dated October 28, 2010, three months after the original service of process, still did not acknowledge the Court's jurisdiction in the litigation with a Notice of Appearance or even mention appearing in the *lawsuit*. **CP 984-985**. Neither Attorneys Nelson nor Tompkins recognized the Court's jurisdiction in the *lawsuit*<sup>4</sup> as *Morin* requires. Tompkins discussed the Defendants' claim stage positions as to their perceived weaknesses in Ms. Meade's "claim." Tompkins' letter was exactly the impermissible letter the *Morin* opinion criticized for being used to ignore the summons and complaint if informal appearances, such as Tompkins' letter, are allowed.

The informal appearance doctrine urged by the respondents 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*

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<sup>3</sup> It became certain only with Tompkins' Notice of Appearance August 4, 2011 (CP 987), email, brief and declaration, which said he actually did not know the lawsuit was filed July 28, 2010.

<sup>4</sup> The obvious reason is readily apparent in Tompkins' admission (made three times) a year later: he was not aware of the lawsuit until August 4, 2011, despite steps KLF took.

*formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment.* Accordingly, we hold that parties cannot substantially comply with the appearance rules through pre-litigation contacts.

*Morin, id.* at 757 (emphasis added).

The Washington Supreme Court's emphatic standards support Appellant in three significant respects. First, it directs parties to the mandatory formalities to avoid dilatory conduct and promote fairness. Hence, the trial court's ruling (**RP 17**) and Respondents' position (Respondents' Br. at 10) that Ms. Meade's argument exalts "form over substance" is erroneous.

Second, the Supreme Court did not carve out any exception in this reasoning for letters drafted by attorneys for parties to a dispute. Defendants' essential argument<sup>5</sup>, that use of an attorney in claim negotiations shows intent to defend in litigation and substantially complies with the appearance requirements, perverts the pronouncements in *Morin*. This interpretation would revise the procedural rules by allowing a complete end run around the rules, which *Morin* has clarified. It would promote widespread use of the informal appearance doctrine by attorneys who are involved in the claims stage negotiations with a presumption that when litigation commences that the defendant will be represented by that

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<sup>5</sup> Respondents' Br. at 15 and in argument distinguishing legal authority Appellant cited.

same attorney, even if the attorney does not abide by the civil procedures. This interpretation would also create a double standard for non-attorney claims representatives and presumptive attorney representation in the litigation by extending the time for the latter to comply with CR 4(a)(3) and CR 55(a)(3). The purpose and procedures available to plaintiffs to obtain justified default orders would be whittled away. Abusive, dilatory tactics would become fair game and beyond challenge by wronged plaintiffs.

Third, *Morin's* prohibition against parties substantially complying with the appearance rules through "pre-litigation contacts" also applies to the type of *post-filing* contacts present here.<sup>6</sup> Substantial compliance with CR 4(a)(3) and CR 55(a)(3) rules *after* litigation was filed has not been demonstrated based on the disavowed letter. "It appears to us 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*." *Id.* at 756.

Without a formal Notice of Appearance or indication that Attorney Tompkins or Attorney Nelson or other counsel would serve a Notice of

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<sup>6</sup> More specifically, KLF's July 31, 2010 release of previously agreed Social Security records, KLF's settlement demand letter August 23, 2010 confirming the lawsuit filing, the second service of process after no responsive communication or pleadings, and Tompkins' delayed negotiation response letter October 28, 2010.

Appearance or file an Answer to the Complaint, Defendants did not substantially comply with the rules or recognize the Court's jurisdiction. Respondents' assertion that Ms. Meade's attorneys "unquestionably knew Nelson was represented" by BPM is true *only* as to BPM's representation of Nelson for Nelson's *Appeal* of dismissal of Ms. Meade's personal injury lawsuit. The KLF attorneys did not know who was defending the malpractice lawsuit, not just perpetuating claim negotiations. *See CP 897-898*. The continuous delay after KLF tried unsuccessfully to engage Tompkins and no indicated response from Nelson, led to the motion for default.

Defendants were not entitled to notice of the motion. There is nothing that Defendants showed or can show that they acknowledged *a dispute existed in court*. It is especially surprising that with an attorney defendant and ample notice of the lawsuit, there is no explanation why they never made any inquiries, never filed an Answer or never sought any extension to do so until the Motion for Default Judgment. was filed. Any of these steps would have prevented default and allowed Ms. Meade to pursue her case. This is exactly the use of a letter and loose pre and post-filing inaction which *Morin* disapproved.

The trial court abused its discretion in setting aside default by stating that "there was not an actual notice of appearance," but that good cause

had been shown under CR 55(c) because Defendants showed an “intent to defend.” **RP 16**. As noted above, the court relied on admitted negligent conduct by Attorney Tompkins to reach its good cause determination without considering Tompkins’ admission that he did not know the lawsuit was filed and, therefore could not have intended to defend or be able to recognize the court’s jurisdiction. This Court should not permit such negligence to establish “good cause.”

**B. Without Satisfying *Morin*’s Requirement to Comply With CR 4(a)(3) and CR 55(a)(3) Formalities, There Was No Basis to Determine Defendants Showed Good Cause**

**1. The Rules of Civil Procedure Require More for An Appearance**

The pre and post-litigation filing contacts were not sufficient for the trial court to conclude that Defendants established an “appearance” for purposes of CR 55(a)(3). *Morin* discussed CR 4(a)(3), stating that the rule provides that a “notice of appearance” shall “be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons.” *Id.* at 753-754. *Morin* further acknowledged that CR 55 does not define “appear” or “appeared,” for entitlement to notice for a default hearing. *Id.* at 754. CR 55(a)(3) provides that “[a]ny party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the

motion. . . .” The rule further provides, “[f]or 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).” CR 55(c)(1).

**2. Lack of Substantial Compliance With Appearance Procedures And Evidence of Negligence Prevents Good Cause**

Good cause to vacate default is not present here because there was not substantial compliance with the appearance rules. Defendant Attorney Nelson did not respond to service of process of the Summons and Complaint *twice* and Tompkins’ post-filing letter is precisely the informality *Morin* described as unacceptable. *See Morin, id* at 757. The Washington Supreme Court ensured that parties could not ignore a lawsuit under the guise of protracted, unproductive negotiation tactics then conveniently invoke the rejected informal appearance doctrine or claim substantial compliance to avoid the consequences of stalling or negligence. Parties must establish they actually appeared or substantially complied with the appearance requirement and were entitled to notice. *See Id.* at 755. *Morin* observed that this has been applied to various defendants’ conduct after litigation commenced, e.g. where they served interrogatories, personally appeared in court to oppose a temporary restraining order, and served a demand for security for costs. Those

examples reflect some recognition of the court's jurisdiction. But such substantially complying conduct is not present here where the formal time limits and procedures were unacceptably ignored.

Certainly, there is appeal to the concept of less formal forms of dispute resolution; under some circumstances, less formal forums are available. *See, e.g., ch. 7.04A RCW* (uniform arbitration act). *But litigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose, and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.*

*Morin, id.* at 757 (second emphasis added).

**3. There Is No Double Standard For Attorneys To Support Good Cause To Set Aside Default On The Undisputed Facts**

Despite the formalities reiterated in *Morin*, Defendants essentially argue that CR 4(a)(3) and CR 55(a)(3) apply differently here because lawyers with an “intent to defend” were involved, not just insurance adjusters. This argues for lesser standards to apply to lawyers, than courts impose on non-lawyer representatives, to prevent entry of default from failure to appear. According to their rationale, absent *either attorney* filing a Notice of Appearance or answering Ms. Meade’s Complaint, the “intent to defend” constitutes good cause under CR 55(c). To the contrary, *Morin’s* mandated standards applied to the following undisputed facts

dispel Respondents' argument and the trial court conclusion that good cause was shown.

- KLF knew Attorney Tompkins represented Attorney Nelson in his *Appeal* of the dismissal of Ms. Meade's personal injury claim for Nelson's failure to timely serve that lawsuit;
- Tompkins engaged in malpractice claim negotiations with KLF for Attorney Nelson starting in 2008 and into 2010;
- KLF told Tompkins on July 27, 2010 that they would file and serve a malpractice lawsuit on July 28, 2010 to prevent expiration of the statute of limitations (**CP 898 and 908-910**);
- Tompkins told KLF he did not have authority to accept service, would seek it and contact KLF *when he had a response*, but never informed KLF whether Attorney Nelson had given Tompkins a response (**CP 909-910**);
- KLF filed and served the Summons and Complaint on the Nelson Law Firm July 28, 2010 (**CP 1**);
- KLF sent a post-suit filing settlement demand with the cause number on August 23, 2010 to Tompkins five weeks after the filing and service of the Summons and Complaint on Attorney Nelson's law firm, but KLF got no Notice of Appearance or Answer to the Complaint and no response to the KLF letter from Attorneys Tompkins or Nelson (**CP 899 and 978-979**);
- KLF effected another (second) service of process of the Summons and Complaint on Attorney Nelson personally on September 29, 2010, two months after the first unanswered service of the Summons and Complaint (**CP 2**);
- Tompkins stated in court that he cannot claim that not filing a notice of appearance or answer was a mistake or excusable neglect and that communication failure with Attorney Nelson was not attributable to any action of Ms. Meade or KLF (**RP 3**).

- At the hearing, Tompkins made clear that these omissions resulted from his own office and client procedure breakdown:

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.**

#### **4. The Trial Court Erred By Basing Good Cause On The Rejected Informal Appearance Doctrine**

Despite these facts, Tompkins argued, and the trial court agreed, that default should be set aside because they intended to defend the lawsuit. This decision was an erroneous application of *Morin*. 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)). It is also "abused when it is based on untenable grounds, such as a misunderstanding of law." *Little v. King*, 160 Wn2d 696, 703, 161 P.3d 345 (2007). Tompkins' and Nelson's

“communication failure” amounts to a failure to exercise ordinary care required of attorneys 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 litigation.

Finding there was an informal appearance, Judge Lawlor concluded that default should be set aside under CR 55(c) for good cause stating 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” due to “correspondence and the contacts.” **RP 16.** Judge Lawler never specifically found “substantial compliance” with the appearance requirements or that Defendants were entitled to notice. He placed fault on Ms. Meade’s attorneys for not asking Defendants to Answer without considering KLF’s efforts to do so by a second service of process on Attorney Nelson on September 29, 2010 or Defendants’ disregard of legal process a second time. **RP 17. CP 2 and 899.** The adequacy of KLF’s decision to serve Attorney Nelson personally was superior to a single call that can easily go unanswered. Especially since the KLF attorneys believed that it would result in an Answer to the Complaint and end the disregard of Ms. Meade’s lawsuit. However, the trial court condoned informal appearance, which *Morin* rejected, rather than formal or substantial compliance with CR 4(a)(3) and 55(a)(3).

**The Court abused its discretion.** “Discretion is abused if it is exercised on untenable grounds or for untenable reasons.” *See Morin, id* at 753. Judge Lawlor’s decision is manifestly unreasonable based on untenable grounds for untenable reasons. Cases involving a letter response from a defendant, which did not address the lawsuit, concluded that the informal contact was not sufficient to be an appearance. *Professional Marine Co. v. Those Certain Underwriters at Lloyds*, 118 Wash. App. 708, 711, 77 P.3d 658 (2003) (finding no informal appearance) should not be discounted because it involved an insurer. A deficient letter rejected the insured’s demand without indicating an intent to defend against the lawsuit or referring to the lawsuit or requesting additional information or the complaint. *See also, Wilson v. Moore and Ass’s, Inc.*, 564 F.2d 366, 369 (9<sup>th</sup> Cir. 1977) (finding no appearance where defendant sent a letter to plaintiff, which was partially responsive to the complaint, but no formal appearance was filed and the defendant ignored warnings from the plaintiff that default would be taken).

Ms. Meade’s default order should not be set aside. Under the circumstances, default fairly accomplishes the valued 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.” See *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007).

The Court in *Sacotte Construction Inc. v. National Fire & Marine Ins. Co.*, 143 Wn.App. 410, 414, 177 P.3d 1147 (Div. 1, 2008) (involving a phone call that defendant was entering a notice of appearance and a confirming email of the call) held that substantial compliance can be accomplished by 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.

Attorney Tompkins’ explanations do not show substantial compliance to appear and defend the lawsuit. Tompkins admitted: “*that we failed to file a formal notice of appearance or an answer*” (RP 3), he knew before suit was filed “of their intent to file a lawsuit” (RP 3), and Ms. Meade’s attorneys “didn’t attempt to conceal the existence of litigation here.” RP 11. It is easy a year later to raise intent to defend, but *Tompkins’ forgetfulness that the lawsuit was filed and the absence of a filed declaration from Nelson furnishes no support for “intent to defend.”*

Breakdown of communications, internal office procedures and losing track of pleadings is negligence. It should not suffice for good cause. 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 service, due to a registered agent forwarding the summons to a wrong company employee instead of the legal department, was inexcusable, prejudicial to plaintiff and not a basis to vacate a default order). In *Conner v. Universal Utilities*, 105 Wn.2d 168, 712 P.2d 849 (1986), the 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. *See also, 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). Lesser standards should not be applied here.

#### **5. Respondents Raise Improper Arguments That Should Not Be Considered**

Respondents' improper "unclean hands" argument (Respondents' Br. at 20) was not argued to the trial court. On the contrary, Tompkins acknowledged that they were aware of "their intent to file a lawsuit and to serve our client" (RP 3) and there was not concealment. **RP 11**. There was no evidence or finding of unclean hands, an accusation that is not synonymous with asserting form over substance, and is completely improper here. The concern in *Morin* as to the behavior in *Gutz v.*

*Johnson*, 128 Wn. App. 901, 117 P.3d 390 (2005), remanded 160 Wn.2d 745, 760, 161 P.3d 956 (2007) is distinguishable. In *Gutz*, there was an inference that plaintiff's counsel actively concealed the fact that a summons and complaint had been filed. *Id.* at 758. Having given Tompkins and his staff pre and post-litigation communications of the lawsuit, there was no inequitable attempt by KLF to conceal litigation. Respondents are silent about the second service of process by KLF and KLF's restraint from quickly filing for a default order, which afforded Attorney Nelson greater opportunity to assert defenses and appear.

Next, their negligent failure to appear cannot be characterized as a "simple oversight." (Respondents' Br. at 22) Respondents' explanations (failure in triggering office procedures and communication with Attorney Nelson) have been rejected by courts as not excusable. Losing track of the summons and complaint was inexcusable neglect resulting in reversal of an order granting a motion to vacate default judgment in *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) where insurer's failure to respond in the two months between service and the default order was due to the summons and complaint being "misplaced" and not forwarded to corporate counsel). Less standards should not be tolerated here.

Respondents' argument that they have "*prima facie* defenses" to the complaint is improper, irrelevant, and prejudicial. These supposed defenses should not be considered. The criteria to set aside a default order differs from and does not require the four factors to vacate default judgment. See *In Re Estate of Stevens*, 94 Wn. App. 20, 30 and 35, 971 P.2d 58 (1999). Ms. Meade contested these disparaging, erroneous defenses (**CP 1005-1018 and CP 876-954**) and pointed out that these causation defenses are not 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). Respondents' reliance on *Grant v. Boccia*, 133 Wn. App. 176, 137 P.3d 20 (2006) is misplaced since it was overruled by *Anderson. Id.* at 612.

**6. Substantial Hardship Is Not An Element For Good Cause, However Vacating Default Was Prejudicial To Ms. Meade**

Respondents raised the four part test to set aside default judgment under CR 60, although it is not required to set aside a default order. Still, Appellant strongly disagrees with Respondents that vacating default has not been prejudicial to her. Ms. Meade endures incredible hardship by the delay as she waits for resolution of her accident claim. Injured and disabled from the August 4, 2004 car crash, she is also a victim of malpractice by Attorney David Nelson. Delay is prejudicial and prevents

compensation for her injuries. Ms. Meade has been unable to work due to the injuries she suffered and as a single mother is unable to assume many duties for her son who tragically has had to be her care giver. **CP 669-673, CP 771-774.** Her opening brief and Motion for Default Judgment fully supports her damages. Ms. Meade's counsel did nothing to occasion the negligence of defense counsel as Tompkins acknowledged in court. **RP 3-12.** Having been told when we intended to file the complaint, along with Attorney Nelson being served on two separate occasions, they could have taken the litigation seriously as must all parties and their counsel. Vacating default order was an abuse of discretion based on untenable grounds.

### **CONCLUSION**

*Morin's* requirements support Ms. Meade's position. This case begs the question of whether "substantial compliance" will be reinterpreted to embody the rejected informal appearance doctrine. Any attorney out of law school knows that a Complaint must be answered and failure means suffering the consequences as *Morin* pointed out. Negligent attorneys should not be afforded latitude and the potential for abuse inherent in the rejected informal appearance doctrine. Attorneys Tompkins and Nelson had multiple opportunities to rectify this situation, but happened to wait for the Motion for Default Judgment to speak up. If the default order is sustained, Defense counsel had no right to appear to resist the default

judgment. The trial court abused its discretion by permitting contradicted “intent to defend” in the context of admitted negligence to satisfy the appearance requirements. The record shows that “good cause” to set aside default rested on untenable grounds and untenable reasons.

Respondents did not establish any intent to appear in the litigation in Court. Attorneys Tompkins’ and Nelson’s erratic conduct and delay left a reasonable illusion that they did not intend to appear in the lawsuit. Attorney Nelson did not bother to respond to legal process or file a declaration to set aside default. Without substantially complying with the appearance rules and contrasted against Tompkins’ multiple admissions that he did not know the case had been filed, intent to defend statements are self-serving, contradicted and unsupported. No declaration by Defendant Nelson explains supporting facts to be the basis of this late, contradictory intention. Poor communication between Tompkins and Nelson should not be condoned giving a lenient double standard to lawyers.

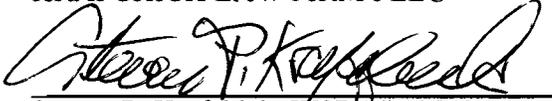
Ms. Meade honestly and openly abided by the rules. She was fairly entitled to order of default without giving notice. Her Order should be reinstated and Motion for Default Judgment. be permitted to go forward *without participation of Defendants*. Since Attorney Tompkins did not attribute the communication failure he had with Attorney Nelson to Ms.

Meade or her attorneys, there was no “gotcha” practice or attempt to put form over substance. Applying the firm standards articulated in *Morin*, it is clear that the trial court has erred. Good cause was not shown under CR 55(c) for the trial court to set aside the default order.

We therefore respectfully ask this Court to reverse the trial court, reinstate the Order of Default, and enter an Order for Default Judgment for Ms. Meade, as requested in our Motion for Default Judgment and Reply (CP 12-32 and CP876-973) supported by filed declarations in the record, due to the undue delay and the consequence to Ms. Meade. *See* Injuries due to Collision CP 775 – 780 (Dr. Bittner Decl.), CP 781-786 (Dr. Nakashima Decl.), CP 787 – 801 (Dr. Brown Decl.), CP 802 – 809; Causation Evidence CP 775 – 809 (Drs. Bittner, Nakashima and Brown Decls.); Vocational Report CP 827-863 (Kathy Reid Decl.); Economic Loss CP 810-826 (Robert Moss Decl.); General Damages CP 669-770 (Meade Decl.), 775-809 (Dr. Bittner Decl.), 771 – 774 (Victor Decl.).

DATED this 7<sup>th</sup> day of February, 2012.

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BY

COURT OF APPEAL OF WASHINGTON  
DIVISION II

CHARITY MEADE,

Plaintiff,

v.

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

Defendants.

NO. 42685-4

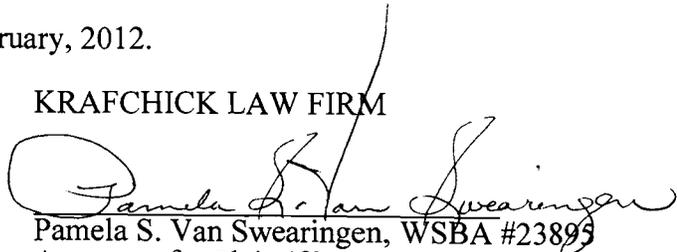
CERTIFICATE OF SERVICE OF BRIEF OF  
REPLY BRIEF OF APPELLANT

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 February 7<sup>TH</sup>, 2012, I caused to be served, via messenger service, a copy of Appellant's Reply Brief 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 7<sup>TH</sup> day of February, 2012.

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