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NO. 42685-4-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

CHARITY MEADE,

Petitioner,

vs.

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

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Appellant Charity Meade appeals the trial court's determination that Respondent David Nelson had substantially complied with the requirements for an appearance, although no formal Notice of Appearance or Answer had been filed when she moved for entry of default. Meade also appeals the trial court's determination that good cause exists to set aside the Order of default pursuant to CR 55.

While no formal Notice of Appearance or Answer was filed with the court, Meade's attorneys unquestionably knew Nelson was represented by Betts, Patterson & Mines, P.S. ("BPM") and Christopher Tompkins ("Tompkins"). Not only had the attorneys engaged in extensive pre-litigation contact, but *after* the Complaint was filed, and after the statute of limitations on Meade's claim would have expired had a lawsuit not been commenced, Meade's attorneys sent a settlement demand letter to Tompkins. Tompkins responded with a letter discussing the merits of Meade's claim, and made a counter-offer. This letter was copied to David Nelson, Tompkins's client and the respondent/defendant in this matter.

After receiving Tompkins's letter, Meade's attorneys concluded that "settlement at any fair number for plaintiff would be impossible" (CP 899) and her case would be better served by seeking a default rather than proceeding on the merits. Despite multiple post-litigation

communications concerning Meade's claim, Meade's attorneys moved for an Order of default without giving Tompkins *required* notice and without inquiring as to the lack of a Notice of Appearance or Answer. (*See* Appellant's brief at 7, "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.") When Nelson learned that the Court had entered an Order of default, and Meade was moving for default judgment, Tompkins immediately filed a Notice of Appearance, an Answer, and moved to vacate the Order of default.

On September 8, 2011, Judge James Lawler heard Nelson's Motion to Vacate the Order of Default. At the hearing, Judge Lawler found both that Nelson had complied with the appearance requirements under CR 55(a)(3) and also found good cause to grant Nelson's Motion to Set Aside the Order of Default. In finding for Nelson and vacating the Order of default, Judge Lawler made the following ruling:

I think good cause has been shown under CR 55(c). It's clear that there was not an actual notice of appearance, but just as clearly there was an intent to defend this case and it's a bit disingenuous to argue that the correspondence and the contacts did not constitute that, did not constitute an informal appearance. It was clear that Mr. Nelson was represented by counsel. It was clear that they were defending him. There were settlement discussions. There were discussions in the letter of October 28th talking about admissibility of evidence. All

of those things make it very clear to me that they intended to defend.

(RP at 18-19.)

Despite myriad pre and post litigation communications, and notwithstanding Judge Lawler's ruling, Meade's attorneys continue to assert in this Court that they did not realize Tompkins was retained to represent Nelson in the pending lawsuit. Because the trial court correctly decided that Nelson had complied with the appearance requirements under *Morin v. Burriss* and CR 55(a)(3), and because the trial court did not abuse its discretion in finding that good cause was shown under CR 55(c)(1) to vacate the Order of default, this Court should affirm the trial court's order.

II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court correctly found that Tompkins's conduct constituted an appearance. The trial court's finding that,

[i]t was clear that Mr. Nelson was represented by counsel. It was clear that they were defending him. There were settlement negotiations. There were discussions in the letter of October 28th talking about admissibility of evidence. All of those things make it very clear to me that they intended to defend

(RP 16 -17) is supported by the evidence and should be affirmed.

Assignment of Error No. 2. The trial court correctly held that Nelson demonstrated “good cause” and granted Nelson’s Motion to Vacate the Order of Default.

III. STATEMENT OF THE CASE

Nelson previously represented Meade in a personal injury claim arising out of an automobile accident. (CP 968.) In or around March 2008, Meade’s personal injury claim was dismissed by the trial court because Nelson had failed to timely serve the lawsuit on the opposing party. (*Id.*) In or around May 2008, Tompkins and BPM were retained to assist Nelson with Meade’s appeal. (*Id.*) Meade retained the Krafchick Law Firm to bring a malpractice claim against Nelson sometime in 2008 (CP 969), and Meade subsequently filed this lawsuit against Nelson for attorney malpractice. (*Id.*)

Counsels’ Communications – Pre-Filing of Complaint

In or around September 2008, Tompkins had at least one conversation with the Krafchick Law Firm regarding his representation of Nelson. (CP 969.) In September, October, and November 2009, after the Court of Appeals had denied Meade’s appeal, Tompkins or his associate had at least three conversations with the Krafchick Law Firm regarding his representation of Nelson, including a discussion of possible early mediation. (*Id.*)

In January and early February 2010, Meade's attorneys provided Tompkins with authorizations to obtain Meade's medical/ social security records. (*Id.*) There were also multiple discussions between Tompkins and the Krafchick Law Firm regarding the merits of Meade's claim and possible mediation. (*Id.*) In May 2010, the Krafchick Law Firm sent Tompkins additional client materials and again raised the issue of settlement. (*Id.*)

On July 27, 2010, Tompkins and Meade's counsel exchanged emails regarding Meade's intent to file this lawsuit – as Meade's attorneys were concerned that the statute of limitations for bringing this claim was about to run. (*Id.*) Meade's attorneys inquired into whether Tompkins would accept service on Nelson's behalf. (CP 909-910.) Tompkins's email in response stated that he did not have authority to accept service on behalf of *his client*:

We have told you that we would *seek our client's consent to accept service*. We can't and won't accept service without his permission. We will contact you when we have a response.

(*Id.*) Tompkins's response clearly stated that he continued to represent Nelson; it gave no indication that he would not continue to represent Nelson after litigation commenced or that he lacked "authority to respond to litigation" as suggested by Meade. (Appellant's brief at 20.)

Counsels' Communications – Post-Filing of Complaint

On July 28, 2010, Meade filed this lawsuit against Nelson. (CP 969.) The Krafchick Law Firm did not provide a copy of the Summons and Complaint to Tompkins – nor did Nelson. (*Id.*) On July 30, after the Complaint had been filed and served, Tompkins and Meade's attorney, Katherine Christopherson, had a telephone call regarding Meade's claim. (*Id.*) The very same day, Christopherson confirmed their conversation in an email sent to Tompkins; she also attached Meade's Social Security Claim File. (*Id.*) In neither of these communications did Christopherson mention that just two days prior, she had filed the malpractice lawsuit against Tompkins's client. (CP 970.)

No Notice of Appearance or other pleading was filed on behalf of Nelson, although it would be Tompkins's and BPM's customary practice to file a Notice of Appearance upon receipt of a Complaint. (*Id.*) Apparently, having not received a copy of the Complaint, the fact that no pleading had been filed was overlooked. (*Id.*)

Even though Meade's attorney never received Tompkins's Notice of Appearance, on August 23, the Krafchick Law Firm sent a settlement demand letter to Tompkins. (*Id.*) In this letter, Meade's attorneys alleged that they would "dismiss the pending lawsuit" if Tompkins accepted their settlement demand. (*Id.*; CP 979) On September 8, 2010, Tompkins had a

telephone conversation with Meade's counsel, in which they briefly discussed the status of the case and potential settlement. (*Id.*) No mention was made during that discussion about the lack of a Notice of Appearance or responsive pleading. (*Id.*) On October 28, 2010, Tompkins sent a letter to Meade's attorneys in response to the August 23 letter, discussing the merits of Meade's claim and evidentiary issues Meade would confront at trial, and making a settlement offer. (*Id.*; CP 984-85.) Tompkins's letter reflected an awareness that suit had been filed, as otherwise the statute of limitations would have run and there would have been no reason to offer any amount in settlement. (*Id.*) Because Meade's attorneys "did not believe there was any reasonable basis for settling the lawsuit" (CP 899) they never responded to the letter, and instead moved for an Order of default without notice to Nelson or Tompkins. (CP 970.)

On August 4, 2011, Tompkins learned that a Motion for Default had been filed on November 23, 2010; an Order of default was entered the same day; and Meade had moved for default judgment on August 3, 2011 – with a hearing set for August 8, 2011.¹ (*Id.*) Meade's attorneys did not provide Tompkins with notice of any of the above. (*Id.*)

¹ The motion for default judgment hearing was originally scheduled for August 5 in Cowlitz County. The matter was transferred to Lewis County, and re-noted for September 2, 2011.

On August 4, 2011, Tompkins filed a Notice of Appearance and an Answer on behalf of Nelson. (*Id.*) He also emailed Meade's attorney, Steven Krafchick, and requested that he withdraw the Motion for Default Judgment and agree to set aside the Order of default because of lack of required notice. (CP 971.) On August 5, 2011, Krafchick responded and declined to do so, on the ground that all contacts were pre-litigation contacts and that no notice was required. (*Id.*) Tompkins responded with an email including copies of the July 30, 2010 email and October 28, 2010 letter, and again requested that Krafchick agree to strike the motion for default judgment and agree to set aside the Order of default. (*Id.*) Krafchick never responded. (*Id.*)

On August 5, 2011, Nelson served on Meade a Motion to Vacate the Order of Default, and to Oppose Plaintiff's Motion for Default Judgment.² (CP 1023.) On August 8, the date of the hearing, Nelson and Meade were notified by the Cowlitz County clerk that all judges had recused themselves, and this matter would be heard in Lewis County. (CP 870 -75.)

² The original Motion to Vacate the Order of Default and Opposition to Default Judgment was never filed with the Cowlitz County Superior Court because counsel was informed by the clerk's office not to file it, but rather to bring it to the hearing in light of the timing involved. Because the hearing was re-noted, Nelson filed a revised Motion to Vacate the Order of Default.

On September 2, 2011, this matter was heard by Judge Lawler in Lewis County Superior Court. (CP 1037-38.) After reviewing the pleadings on file and hearing oral argument, Judge Lawler granted Nelson's Motion to Vacate the Order of Default, finding that Nelson had complied with the requirements for an appearance and was therefore entitled to notice of the Motion for an Order of Default and held that good cause existed to set aside the default under CR 55(c)(1). (*Id.*) On October 15, 2011, following the issuance of this order, Meade sought appellate review by the Court of Appeals.

IV. ARGUMENT

A. Standard of Review.

The Court of Appeals reviews questions of law de novo, including questions of whether, on undisputed facts, an appearance has been established as a matter of law. *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 196 P.3d 711 (2008). The Court of Appeals reviews a trial court's decision on a motion to vacate an Order of default for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007) (the Supreme Court declined to adopt the substantial evidence standard proposed by the Court of Appeals, (Division II). "Discretion is abused if exercised on untenable grounds or for untenable reasons." *Id.* Trial courts can vacate an order of default for good cause shown. *Aecon Bldgs Inc. v.*

Vandermolen Constr. Co., 155 Wn. App. 733, 738-39, 230 P.3d 594 (2009).

Nelson asks this Court to affirm both the trial court's decision that Nelson had complied with the appearance requirements under CR 55(a)(3), and that good cause was shown under CR 55(c)(1) to vacate the Order of default.

B. The Trial Court Correctly Found that Nelson Had Appeared Under CR 55(a)(3).

The trial court's decision to vacate the Order of default was correct. While Nelson acknowledges that he did not file a formal pleading and that Tompkins did not send a letter explicitly stating "we continue to represent Nelson with regard to your lawsuit" prior to the entry of default, Meade's argument exalts form over substance precisely as rejected by the Supreme Court in *Morin v. Burris*.

Meade's counsel was aware that Tompkins represented Nelson and that Nelson intended to defend against Meade's claim. In addition to multiple pre-litigation communications, Meade's counsel had at least *four* post-litigation communications with Tompkins or his associate, at least two of which were initiated by Meade's attorneys. Meade's attorneys evidenced no uncertainty in those communications as to whether BPM and Tompkins continued to represent Nelson, or whether Nelson intended to defend Meade's claims – and there was no reason for Meade's attorneys to

initiate post-litigation communications with Tompkins about her claim unless they understood that Tompkins continued to represent Nelson.

Furthermore, as demonstrated in the email correspondence and the August 23 and October 28, 2010 letters, Tompkins was aware that the Complaint had been filed. In fact, both parties knew that the Complaint had to have been filed or the statute of limitations would have run on the claim – in which case there would have been no reason for Tompkins to engage in settlement discussions.³ These communications constitute a written, post-litigation appearance which substantially complied with the requirement for appearance under *Morin v. Burris*, and which apprised Meade of Nelson’s intent to defend the case.

Both parties rely on *Morin* as the definitive case on what constitutes an “appearance” under CR 55(a)(3). In *Morin*, the Washington Supreme Court consolidated three cases to consider the merits of whether a party had “appeared” for purposes of determining whether the defendants were entitled to notice of a motion for default. *Morin*, 160

³ Meade takes issue with Tompkins’s statement that he did not know that the Complaint was filed until August 4, 2011. This statement was alleged in Nelson’s Motion to Vacate the Order of Default/Opposition to Motion for Default Judgment. This Motion was never filed with the trial court, as it was written on limited time, and Nelson revised its Motion when the case was transferred to Lewis County. To clarify, Tompkins realized the Complaint was filed as the statute of limitations had almost run, he had just never *seen* a copy of the Complaint until that time.

Wn.2d at 748-49. The *Morin* Court reiterated that it did not intend to disturb long held principles of Washington jurisprudence:

- Washington policy has long favored resolution on the merits over default (*id.* at 749);
- It has been Washington’s policy for over a century to set aside default judgments liberally in the interests of fairness and justice (*id.* at 749, 754);
- Whether to set aside a default is an equitable proceeding, and equitable principles and terms apply (*id.*);
- A judgment will be set aside if plaintiff has acted such that enforcing judgment would be inequitable. If a party was entitled to notice, but did not receive it, the judgment will be set aside (*id.* at 755);
- The doctrine of substantial compliance applies, and has been recognized for over a century (*id.* at 749, 755);
- Substantial compliance may be satisfied informally (*id.* at 759);
- The court will not elevate form over substance (*id.* at 755, 759); and
- The court adheres to its “existing approach” (*id.* at 757).

Consistent with its reiteration of the above principles, the holding of *Morin* is quite limited:

Accordingly, we hold that parties cannot substantially comply with the appearance

rules through prelitigation contacts. Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing, though they may still be entitled to have default judgment set aside upon other well established grounds.

* * *

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

160 Wn.2d. at 757, 749. In sum, *Morin* held only that pre-litigation contact is not enough to qualify as an appearance; a party must take *some* action acknowledging the dispute exists in court.

The limited holding in *Morin* is not surprising in light of the facts of the three cases. In two of them, there were no post-litigation contacts whatsoever. The court's holding did not permit pre-litigation contacts to suffice for an appearance in the absence of any post-litigation contacts; it nowhere suggested that post-litigation contacts between counsel such as those here would not suffice to constitute substantial compliance with the appearance requirement.

In the third *Morin* case, *Gutz v. Johnson*, there were post-litigation contacts, but only between plaintiff's counsel and an insurance adjuster. *Id.* at 759. The court declined to hold that post-litigation contacts by an insurance adjuster were sufficient to constitute substantial compliance with the appearance requirement. The court did, however, hold that there

was sufficient evidence that plaintiff had inequitably attempted to hide the fact of litigation, and it remanded the case to determine if the default should be set aside on that basis. Again, the court's decision nowhere suggested that post-litigation contacts between counsel such as those here would not constitute substantial compliance with the appearance requirement.

As established *supra*, *Morin* does not support Meade's argument. Again, *Morin* held only that, because two of the three consolidated cases did not involve any post-litigation contacts and the third case involved only post-litigation communications with an insurance adjuster, the requirement for an appearance had not been satisfied. Unlike those distinguishable cases, Tompkins and Meade's counsel exchanged numerous written and oral communications regarding Meade's claim, including both written and oral communications regarding the potential for settlement of the litigation *after* the Complaint was filed on July 28, 2010:

1. On July 30, Tompkins and Meade's attorney, Christopherson, had a telephone call regarding Meade's claim.
2. The very same day, Christopherson confirmed their conversation in an email sent to Tompkins, attaching Meade's Social Security Claim File.
3. On August 23, Christopherson sent a settlement demand letter to Tompkins offering to dismiss the

litigation in exchange for payment of a demanded sum.

4. On September 8, 2010, Tompkins had a conversation with Christopherson to discuss the status of Meade's claim and the potential for settlement. Christopherson did not mention the lack of a written appearance or answer.
5. On October 28, 2010, Tompkins sent a letter to Meade's attorneys discussing the merits of Meade's claim and evidentiary issues Meade would face at trial. The letter made a settlement counter-offer to Meade's August 23 letter.

These contacts demonstrate Meade's understanding that Tompkins continued to represent Nelson and that Nelson intended to defend against Meade's claim. There was no reason for Meade's counsel to instigate communications with Tompkins – post filing of the Complaint – if Tompkins was not defending against the claim. And, there was no reason for Tompkins to make a settlement offer in October, 2010 if he was not aware of the ongoing litigation, as the statute of limitations on Meade's claim would have expired had litigation not been commenced.

The facts here are far different from those in *Morin*. First, multiple post-litigation communications, including communications instigated by plaintiff's counsel, gave notice of Tompkins's continuing involvement as Nelson's counsel and of Nelson's intent to defend this action; second, Tompkins's actions substantially complied with the requirement for an

appearance under *Morin*; and third, the Krafchick Law Firm's own conduct demonstrated its knowledge and understanding of Tompkins's ongoing representation and intent to defend.

In their appellate brief, Meade's attorneys argue that it was unclear from Tompkins's October 28 settlement letter whether Tompkins was representing Nelson in the lawsuit. (Appellant's brief at 19.) The Krafchick Law Firm offers no explanation for Tompkins's continued communications on behalf of Nelson if he was not retained as counsel (or for their failure to inquire, if there was uncertainty, instead of moving for default without notice). Although Tompkins did not write, "I continue to represent Nelson in your lawsuit", it was more than apparent that Tompkins was writing as Nelson's attorney, as the trial court found. The letter in question was drafted by an attorney; it was written on law firm letterhead; and the client, Nelson, was copied. The letter discussed the merits of Meade's claim; noted evidentiary difficulties she would face at trial and the potential for an appeal; and conveyed an offer of settlement.

Meade's argument that these communications were insufficient to convey an intent to act as Nelson's counsel is simply an attempt to elevate form over substance, and is "disingenuous", in the words of the trial court. (RP 16.) Meade was undeniably aware that Tompkins continued to represent Nelson and that Nelson intended to defend her claim.

1. The Cases Meade Relies Upon To Show Lack of Appearance Are Not Persuasive.

Meade argues that under well-established law, Nelson's conduct did not substantially comply with the appearance requirements. (Appellant's brief at 20-21.) The cases, however, are not persuasive as the facts in each case are distinguishable from the situation here.

Meade relies heavily on the Court of Appeals' (Division I) analysis in *Prof'l Marine Co. v. Underwriters at Lloyds*, 118 Wn. App. 694, 699, 77 P.3d 658 (2003). Meade argues, citing *Prof'l Marine*, that "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." (Appellant's brief at 20.) Plaintiff's characterization of *Prof'l Marine* is not correct.⁴ In *Prof'l Marine*, a marina insurer, Lloyds, filed a motion to vacate a default judgment arguing that because it had

⁴ Plaintiff also relies on *Wilson v. Moore & Assocs., Inc.*, 564 F.2d 366 (1977), to support her position that the requirement for an appearance is not satisfied when a defendant writes a letter to plaintiff's counsel post filing of the Complaint. In *Wilson*, the president of the company wrote a letter – partially in response to the Complaint – but no formal appearance was ever filed with the court. Again, *Wilson* is distinguishable – in particular because there was no communication from an attorney, and because the president's letter was only partially in response to the complaint. In addition, a federal court's determination as to what constitutes an appearance under the federal rules is not binding when there are Washington cases on point. *See State v. Brown*, 113 Wn.2d 520, 547-48, 782 P.2d 1013(1989) ("federal case law interpreting a federal rule is not binding on this court even where the rule is identical. . . . This court is the final authority insofar as interpretations of this State's rules is concerned. . . .").

informally appeared, the judgment should be set aside. *Id.* at 697. Lloyds argued that “informal appearance” was accomplished when its claims representative responded to plaintiff’s demand letter – even though the response was made *before* the Complaint was filed. *Id.* at 699. The Court held that informal appearance was not established because, although the Lloyds claims representative had communications with the plaintiff, Lloyd’s communications with the plaintiff were *before* the lawsuit was filed. *Id.*

Unlike this case, the communications in *Profl Marine* occurred entirely prior to litigation. They involved Lloyd’s itself, through a claim representative, rather than counsel. Lloyds did not demonstrate an “intent to defend” the litigation. *Profl Marine* is not on point, and is neither relevant nor persuasive.

Meade also relies on *Smith v. Arnold*, 127 Wn. App. 98, 110 P.3d 257 (2005), in support of her position that *post-litigation* communication is insufficient to constitute an appearance. Smith was a passenger in Arnold’s vehicle when he was injured in a car accident. *Id.* at 101. Under Arnold’s insurance policy, Smith was able to recover his medical expenses through Arnold’s PIP coverage. *Id.* In attempting to resolve his claim without litigation, Arnold’s insurer reached out numerous times to Smith to inform him that he was likely covered under Arnold’s PIP coverage. *Id.*

Smith and Arnold's insurer had pre-litigation communication about the PIP coverage, including settlement discussions, but the claim was not resolved. *Id.* at 102. After a lawsuit was filed, Arnolds' insurer contacted Smith and even inquired about the status of a default. *Id.* In finding that Arnold's pre-and post litigation communications were not adequate to constitute an appearance, the Court of Appeals, Division II stated:

[A]ction taken between an insurer and an insured under a PIP policy *is distinct from tort litigation* between the insured and a third-party tortfeasor. The Arnolds' policy contractually bound Allstate to cover Smith's PIP claim, and its handling of the claim is separate from a manifested intent to defend any future lawsuit Smith might have brought.

Id. at 110 (citations omitted, emphasis added). In other words, the *Smith* court held that the insurer's contacts were related to the PIP claim, not the tort litigation, and therefore did not meet the requirement to demonstrate an intent to defend the litigation. In addition, the contacts in *Smith* again involved a claim handler for the insurer, rather than an attorney.

In contrast, all pre and post litigation communications with Meade's counsel were made by an attorney representing Nelson; not by an insurance adjuster incapable of defending this matter in court. Second, Tompkins's communications only related to the malpractice claim alleged in Meade's lawsuit; there were no separate contractual issues. Third, Tompkins's communications continued a settlement discussion instigated

by Meade's counsel because a lawsuit had been brought against Nelson, his client. *Smith* is distinguishable, and is not persuasive.

C. The Trial Court Correctly Found That Good Cause Was Shown To Vacate The Order Of Default.

Pursuant to CR 55(c)(1) a court may set aside an entry of default “[f]or good cause shown and upon such terms as the court deems just.” A decision to set aside an Order of default under CR 55 is within the sound discretion of the trial court. *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 267, 271, 818 P.2d 618 (1991).

In *Canam v. Hambro Sys., Inc. v. Horbach*, the court explained that, “[i]n contrast with CR 60(e), which requires that a Defendant seeking to vacate a default judgment show a meritorious defense to the action, a party seeking to set aside an order of default under CR 55(c) prior to the entry of the judgment need only show good cause.” *Canam*, 33 Wn. App. 452, 453, 655 P.2d 1182 (1982). Two factors to be considered in setting aside a default order are excusable neglect and due diligence. *Seek Systems*, 63 Wn. App. at 271. Here, good cause is met because: (1) Meade is not before this Court with clean hands; (2) Nelson demonstrated excusable neglect; (3) Nelson demonstrated due diligence; (4) Nelson has *prima facie* defenses to Meade's claim; and (5) Meade will not be prejudiced by this delay.

1. The Trial Court Found Good Cause to Vacate the Order of Default Because Meade's Conduct Was Akin To The Plaintiff's Behavior in *Gutz v. Johnson*.

In *Morin*, the Washington Supreme Court made it clear that an attorney's attempt to race to the courthouse, with unclean hands, would not be rewarded:

Gutzes' counsel had no duty to inform Allstate of the details of the litigation. But counsel's failure to disclose the fact that the case had been filed and that a default judgment was pending when the Johnsons' claim representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of litigation. If the Johnsons' representative acted with diligence, and the failure to appear was induced by Gutzes' counsel's effort to conceal the existence of litigation under the limited circumstances we have described above, then the Johnsons' failure to appear was excusable under equity and CR 60.

Morin, 160 Wn. 2d at 759.

Similarly, Meade, apparently deciding that the value of her case was improved if she pursued a default instead of proceeding on the merits,⁵ decided not to clarify any uncertainty resulting from the absence of a formal appearance, or to inquire of counsel about an appearance and answer, and instead decided to gamble on her ability to obtain, and enforce, a default taken without notice to Nelson. The trial court

⁵ See discussion at 27, *infra*, regarding the insured's policy limits.

identified the inequitable nature of Meade's conduct, correctly characterizing Meade's conduct as:

the kind of gotcha practice of law that I don't think much of and it certainly doesn't do the profession much good when this kind of thing comes up.

(RP 17.)

2. Nelson's Failure To Respond Was The Result of Excusable Neglect.

The trial court set aside the entry of default because good cause – as required under CR 55(c)(1) – was shown. Tompkins, and Betts Patterson & Mines, did not receive a copy of the Complaint when it was filed. The lack of a copy of the Complaint removed the normal “trigger” for filing a Notice of Appearance or an Answer, and resulted in failure to file a responsive pleading. Moreover, Meade's counsel, in another departure from normal practice, did not contact counsel to ask about a responsive pleading, or mention the lack of a responsive pleading in any of their multiple communications.

Nelson's failure to respond to the Complaint was not the result of willful misconduct. There was no bad faith refusal to acknowledge the existence of the claim or attempt to dodge service. This record, replete with Nelson's correspondence acknowledging and attempting to resolve the claim, demonstrates that the failure to formally appear was the result of a simple oversight.

Furthermore, the situation at hand is distinguishable from the cases Meade cites in furtherance of her argument that Nelson's failure to answer, with no excuse, is not "excusable neglect." In *Wolfe v. Henry, Gerlich Tie & Timber Co.*, 123 Wash. 70, 211 P. 753 (1923), the trial court refused to vacate the default judgment because defense counsel failed to appear for trial. *Wolfe* is not on point. Likewise, *Lane v. Brown & Haley*, 81 Wn. App. 102, 912 P.2d 1040 (1996), is not persuasive because the Court of Appeals considered whether it should vacate a judgment on the merits, not an Order of default or default judgment. *Id.* at 105-06 ("the vacation of a default judgment is distinguishable from the vacation of a judgment on the merits in two ways. First, a court must apply a different set of equitable factors when considering a motion to vacate a default judgment as opposed to a motion to vacate a judgment on the merits.") Because vacating a judgment on the merits and vacating an Order of default concern entirely different equitable considerations, Meade's reliance on *Lane* is misplaced.

Furthermore, in *Brooks v. University City, Inc.*, 154 Wn. App. 474, 479, 225 P.3d 489 (2010), *review denied*, 169 Wn.2d 1004, 236 P.3d 205 (2010), the trial court refused to set aside an Order of default because the defendant appeared a year and a half after the Order of default, and the plaintiff had already settled with the co-defendant. The Court of Appeals

held that the trial court did not abuse its discretion by refusing to vacate the Order of default because it considered the resulting prejudice and inequity to the plaintiff. *Id.* at 477 (“To go back and undo it now where they’ve already settled and have no recourse against the other co-defendant for the rest of the damages would be inequitable, also to the plaintiff”). Again, this case is not on point. Nelson is the only defendant, so there would be no inequitable hardship in having this case decided on the merits.

Finally, Meade cites to other Washington cases that discuss what does not constitute “excusable neglect.” See *Puget Sound Medical Supply v. The Dep’t of Social and Health Services*, 156 Wn. App. 364, 234 P.3d 246 (2010); *Nightrunners Transp., Ltd.*, 147 Wn. App. at 407; and *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 900 P.2d 595 (1995), *review denied*, 129 Wn.2d 1007, 917 P.2d 129 (1996). All three of these cases involved a claims adjuster or attorney having timely received a copy of the pleading, but due to a breakdown of internal office procedures, the claims person and/or attorney never responded to the pleading.

The cases above are distinguishable because not only did the claims adjuster or attorney fail to respond to the Complaint, but they also never engaged in post-litigation contacts or conduct indicating their representation or demonstrating an intent to defend against the claim.

Here, although Tompkins failed to respond to the Complaint, Tompkins engaged in post-litigation conduct that demonstrated his continued representation of Nelson and intent to defend against the litigation. After the litigation was filed, Tompkins had multiple conversations with Meade's attorneys and even engaged in settlement discussions – discussions instigated by Meade. *Puget Sound Medical Supply, Nightrunners Transp., and Am. Bankers Life Assurance* are distinguishable.

3. Nelson Acted With Due Diligence When He Learned An Order of Default Had Been Entered.

Nelson acted with due diligence after learning of the default. Nelson learned of the default only on August 4, 2011, and filed a Notice of Appearance and an Answer that same day. Tompkins also emailed Meade's attorneys that very same day to request that they agree to vacate the Order of default as no notice had been given of the default proceedings. When Meade's attorney's refused, a Motion to Vacate the Order of Default/ Opposition to the Motion for Default Judgment was served on Meade the next day, on August 5, 2011, and Nelson's motion to set aside the default was heard as soon as it could be scheduled before the court.

Nelson's failure to appear was the result of excusable neglect, and Nelson demonstrated due diligence to set aside the default once he learned

of it. The Superior Court correctly set aside the entry of default, and certainly did not abuse its discretion in doing so.

4. Nelson Has *Prima Facie* Defenses To Meade's Claims.

Although demonstrating a defense to Meade's claim is not required for vacating an Order of default, Nelson's Motion to Vacate the Order of Default put forth *prima facie* defenses to Meade's claim, including defenses on liability, causation, and a limitation on available damages.

As the Court of Appeals opinion in the underlying litigation shows, Nelson filed his Complaint and provided a copy to the insurer of the defendants. Counsel appeared and defended, engaging in litigation activities for several months without raising an issue as to service of process. On the eve of the expiration of the statute of limitations, the defendant served an Answer raising lack of service as a defense and subsequently filed a motion to dismiss, which was granted. A jury may conclude that Nelson appropriately believed that the underlying defendant had waived service of process by its defense of Meade's claim.

Further, Nelson will defend Meade's claims on causation. Meade contends that the underlying accident caused fibromyalgia. But the proposition that trauma causes fibromyalgia was not generally accepted in the relevant scientific community at the times relevant to Meade's claim (i.e., when her underlying lawsuit would have been tried or settled). *See*,

Grant v. Boccia, 133 Wn. App. 176, 137 P. 3d 20 (2006) (given the clear disagreement in the relevant scientific community as to the cause of fibromyalgia, which conflict has also been recognized in other jurisdictions across the country, the trial court properly concluded the Grants' proffered expert testimony was subject to the *Frye* test and was inadmissible).⁶

In the context of this legal malpractice claim, Nelson also has a limitation of damages defense. The driver and owner of the car involved in the underlying accident were insured for a total of \$100,000. The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000). Courts consider collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: "[I]t would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff could have collected from the third party." *Id.* As Meade cannot recover more against Nelson than the loss proximately

⁶ Meade argues that this defense is less viable based on the Washington Supreme Court's decision in *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011). Whether or not this is correct, Meade's recovery is limited to what she would have obtained in the underlying lawsuit, and she will be required to establish that the science supported her claim when that lawsuit would have been determined.

caused by his negligence, her recoverable damages in this lawsuit may not exceed \$100,000 unless she establishes that the underlying defendant had sufficient resources to make additional payments on any judgment.

5. Vacating the Order of Default Will Not Prejudice Meade.

Meade alleges that Nelson's and BPM's dilatory conduct has significantly prejudiced her, and that the Order of default should not be set aside because of BPM's failure to respond to the Complaint. (Appellant's brief at 31.) Meade's argument that *Nelson's* delay has significantly prejudiced is specious when considering the following timeline:

- In or before September 2008, Meade retained the Krafchick Law Firm to bring a malpractice claim against Nelson. (CP 969.)
- On July 27, 2010, almost two years after retaining the Krafchick Law Firm, Meade's attorneys sent an email to Tompkins indicating their need to file the lawsuit because of the "*nearing statute of limitations.*" (CP 909.)
- Four months after serving Nelson, Meade chose to move for an Order of default instead of inquiring as to the status of an Answer. (Appellant's brief at 2.)
- Eight months after obtaining the Order of default, Meade moved for default judgment. (*Id.*)
- Immediately upon learning that there was an Order of default, and Meade was moving for default judgment, BPM filed a Notice of Appearance,

an Answer, and moved to vacate the Order of default. (CP 970-71.)

Admittedly, this lawsuit has been delayed. As recognized by the trial court, “this all could have been avoided if during these conversations plaintiff’s counsel had just said, “Hey, where is your answer? Let’s get this thing going.” The conduct Meade complains of was an unintentional failure to respond to the Complaint. As soon as the mistake was discovered, BPM acted with diligence to rectify the error. Neither the delay of which Meade complains nor any resulting prejudice was caused by Nelson.

V. CONCLUSION

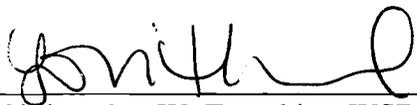
David Nelson was represented by Christopher Tompkins and Betts Patterson & Mines, P.S. when Meade moved for an Order of default. Meade knew this; which explains why she engaged in settlement discussions with Tompkins *after* filing the Complaint. Nevertheless, Meade argues that because no formal Notice of Appearance or Answer was on file with the court, Meade was not obligated to provide notice of the default proceedings.

The record is replete with facts establishing that Tompkins “appeared” under the standards set forth in the controlling case, *Morin v. Burris*; moreover, even though “appearance” was established and the Order of default must be set aside for failure to provide required notice,

Tompkins also demonstrated good cause under CR 55(c)(1) for setting it aside. The trial court's decision to vacate the Order of default was correct and should be affirmed.

DATED this 9th day of January, 2012.

BETTS, PATTERSON & MINES, P.S.

By  _____
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CERTIFICATE OF SERVICE

I certify that on the 9th day of January, 2012, I caused a true and correct copy of the foregoing document, Respondents' Brief, to be served on the following in the manner indicated below:

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