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NO. 56552-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

MARIA HANES,

Appellant,

vs.

DOLLAR TREE STORES, INC.,

a Foreign Profit Corporation,
Respondent.

BRIEF OF RESPONDENT DOLLAR TREE STORES, INC.

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I. Introduction

Washington courts have "long favored resolution of cases on their merits over default judgments," and so "liberally set aside default judgments…for equitable reasons in the interests of fairness and justice." *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007). Further, a trial court's decision to set aside a default judgment is reviewed only for abuse of discretion. So long as the trial court's decision is based upon *any* "tenable grounds and is within the bounds of reasonableness, it ***must*** be upheld." *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990), *review denied*, 116 Wash. 2d 1009, 805 P.2d 813 (1991) (emphasis added). An appellate court is even less inclined to reverse a trial court decision that sets aside a default judgment than a decision which does not. *Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867, 869 (2004). The Court's foremost guidepost in its consideration is "whether or not justice is being done." *Griggs v. Averback Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (internal quotations omitted).

These principles are perpetually recited at the lead of appellate opinions reviewing a motion to vacate a default judgment. A policy of promoting justice by deciding cases on the merits is the greater context in which all such decisions are

made. To foster this policy, Washington courts' consideration when looking at default judgments repeatedly transcends the black-letter of CR 55(c) and CR 60—rules which apply to all judgments—and looks to general equitable principles to ensure that justice and substance rise above form.

Appellant Maria Hanes ignores these principles, suggesting that this Court should hold the value of an "organized" judicial system above the value of justice being done. Appellant then demonstrates how her distortion of principles would be applied to this case, seeking to exploit the lack of written findings in the lower court's order.[1] Appellant does not endeavor to discern whether any tenable grounds exist for vacating the default judgment against Respondent Dollar Tree Stores, Inc., per the mandate of the standard of review. Rather, Appellant identifies the most easily-defeated bases for the set-aside and effectively reads them into the Court's order, to her benefit. This tack allows Appellant to focus on black-and-white (rather than equitable) issues: the *Morin* substantial compliance doctrine and the improper assertion that the *White* equitable test is subject to a one-year limitation. In Appellant's *limited* consideration of the equitable principles that *should*

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[1] No authority requires the trial court to provide written findings in an order setting aside a default judgment.

guide this Court, she places unsupported, concrete limitations on the equitable tests in *White* and *Gutz* and limits her factual analysis to only the inferences that favor her position.

Predictably, this approach obscures the clear equitable grounds for the trial court's decision, and the reasonable factual determinations that support the same.

This Court should follow longstanding Washington law, focusing on equitable principles when deciding whether a case should be justly heard on the merits, and affirm the trial court decision to set aside this default judgment. First, the decision is reasonably made in light of the equitable considerations set out by the Supreme Court in the *Gutz* holding of the *Morin* case, as the conduct of Ms. Hanes' counsel induced the failure to appear. Second, the decision is reasonably made under a proper application of the *White* test. Dollar Tree showed a prima facie defense, and its non-appearance was occasioned by inadvertence and mistake. Dollar Tree was diligent in pursuing its motion after learning of the default judgment, and upholding the trial court will cause no prejudice to Ms. Hanes.

II. Response to Assignments of Error

1. The trial court did not err in granting Dollar Tree's motion to vacate the default judgment, because reasonable grounds exist that support the Court's

exercise of its discretion.

a. The Court's decision is tenable under the holding of *Morin v. Burris*, 160 Wn.2d 745, 759, 161 P.3d 956 (2007)(*Gutz v. Johnson*) , because the Court could have reasonably found that: (1) Dollar Tree's representative acted with diligence; and (2) Dollar Tree's failure to appear was induced by Ms. Hanes's attorney's (admitted) efforts to conceal the existence of litigation.

b. The Court's decision is also tenable under the *White* equitable test, because the Court could have reasonably found that: (1) Dollar Tree had prima facie defenses to liability and damages; (2) Dollar Tree's failure to answer was occasioned by mistake and inadvertence; (3) Dollar Tree was diligent upon learning of the default judgment; and (4) Ms. Hanes is not prejudiced by having to prove her case on the merits.

III. Response to Statement of the Case

Appellant Maria Hanes brought the lawsuit underlying this appeal against Dollar Tree Stores, Inc. based upon allegations that, on December 28, 2017, she was injured in the Graham, Washington Dollar Tree store. CP 3-6. She specifically alleges

that she slipped and fell when she stepped on a pile of merchandizing pegs on the floor and sustained injuries. *Id.* at ¶¶ 3.3, 3.4.

In February 2018, attorney Jonathan Barash sent notice to Sedgwick Claims Management Services, Inc. ("Sedgwick"), clearly understanding that Sedgwick represented Dollar Tree in regard to the subject claim. CP 115-116. Sedgwick is not an insurance company or a representative or agent of Dollar Tree's insurance company but, rather, a representative and agent of Dollar Tree itself, assigned to handle casualty claims. CP 106. That is, when it comes to an injury claim, Sedgwick *is* Dollar Tree.

Over the next seven months, Sedgwick's Jesse Owens communicated seven times with Mr. Barash and his paralegal Khanh Tran about the claim, until the last three attempts to communicate went unreturned. CP 107.

Over a year later, on November 25, 2019, Mr. Barash sent a demand letter to Mr. Owens, with an offer to settle the matter "short of litigation," again clearly demonstrating Mr. Barash's understanding that Sedgwick would represent Dollar Tree both before and during litigation of the claim. CP 117-119.

On December 6, 2019, Mr. Owens sent a letter acknowledging receipt. CP 108. On January 16, 2020, Mr. Owens left a voice mail for Mr. Barash with a counter-offer.

Id. Mr. Barash did not respond to the communications. Rather, per the court record, he chose to prepare a lawsuit, which was filed on January 28, 2020. CP 2-8. The Affidavit of Service evidences the suit's service on Dollar Tree's registered agent in Washington, an otherwise unaffiliated process receiving company, Corporation Service Company, on February 3, 2020. CP 10. No one disputes that Dollar Tree has a procedure in place for receiving documents served upon its registered agent and transferring these documents to Dollar Tree and its representative and agent, Sedgwick, by way of entry into the claim file. In this instance, an inadvertency in that procedure led to the suit papers not reaching the Dollar Tree and its claim file. CP 113.

Dollar Tree reached out to Mr. Barash on both January 31st and February 17th seeking to discuss the claim. CP 108-109. Mr. Barash did not return either communication, rather he filed a Motion for Default on the twenty-second day after service. CP 12-13.

Mr. Barash did not notify Dollar Tree or its representative about the suit that was filed. He did not notify Dollar Tree or its representative about the motion for default. He did not notify Dollar Tree or its representative about the motion for default judgment. Quite the contrary, Mr. Barash has (in an almost boastful fashion) made quite clear that once serving the

registered agent, every effort he made was about *not* providing information to Dollar Tree, ignoring communications and efforts to settle. CP 173.

Though unaware of suit, Dollar Tree continued to try to resolve the open claim. In the time period between the filing of the lawsuit and the motion for default judgment, Mr. Owens and his successor-adjuster, Mr. Davon Kent, initiated a combined ***thirty-four*** communications to Mr. Barash in an effort to resolve the claim: two live phone calls, eleven live messages with Mr. Barash's secretary, fifteen voice mails, and six emails. CP 108-113.

Among the many communications, were two live discussions between Mr. Kent and Mr. Barash. On April 1, 2020, Mr. Barash, despite having an order of default in hand, made no mention of the litigation or the default. CP 109. Rather, he advised Mr. Kent that "he did not have a counter offer at this time" and would "follow up." *Id*. Again, on April 27, 2020, the two spoke. CP 110. Again, Mr. Barash did not mention the lawsuit or order of default. *Id*. Instead, Mr. Barash told Mr. Kent that "the Sedgwick offer has not been accepted yet and he is unsure if they would accept." *Id*.

Among the other thirty-two communications, Mr. Kent also spoke to staff in Mr. Barash's office eleven times. CP 108-115. At no point in those eleven conversations did Mr.

Barash's office advise Mr. Kent of the suit or the default. *Id.* The eleven messages left with Mr. Barash's staff, and the fifteen voice mails and six emails all went ignored and unreturned, the last attempt having been made August 31, 2020. *Id.* After eight months of wasted effort attempting to further discussion of the claim and settlement with Mr. Barash, Dollar Tree and Sedgwick closed the file. CP 113.[2]

After the line went quiet, Mr. Barash put together his Motion for Default Judgment, which was filed October 2, 2020. CP 24-27. Mr. Barash then waited one year so that defenses under CR 60(b)(1)-(3) would be time-barred, and then served the Default Judgment on Dollar Tree's registered agent, on October 27, 2021. App. Brief, at FN 3; CP 130-131.

Dollar Tree's and Corporations Service Company's procedures for transferring served documents successfully ensured delivery of the Notice of Default Judgment to Dollar Tree and Sedgwick. CP 113. Diligently upon receipt, Dollar

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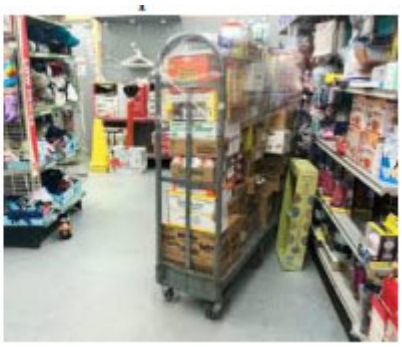
[2] As Mr. Barash rightfully noted in the lower court, in further recognition of his complete understanding that Sedgwick stood as Dollar Tree with regard to this claim and litigation, the cessation of communication and closing of the file coincided with the approaching of the statute of limitations, with Dollar Tree assuming Ms. Hanes did not intend to pursue the claim or litigation, having not heard anything further. CP 157.

Tree and Sedgwick retained counsel and moved to set aside the Default Judgment on November 22, 2021. CP 88-105.

In the motion, Dollar Tree identified specific evidence to support its prima facie defenses as to both liability and damages. *Id.*

As to liability, Dollar Tree presented the testimonial declaration of Graham, Washington Dollar Tree Store Manager Samantha Brown. Ms. Brown testified as to the "pegs" discussed in Ms. Hanes's Complaint. CP 147. Ms. Brown testified that the pegs are used for hanging merchandise and are sometimes removed temporarily during restocking. *Id*. She testified that the Store has clear safety and cleaning protocols, including inspections for trip and fall hazards repeatedly through the day, and procedures that signal a Dollar Tree employee has been notified of a hazard. CP 148-150. She testified that any loose pegs pulled or found would be placed in a large cardboard box, likely on a large stocking cart called a U-boat. *Id*. She further testified that with Dollar Tree's safety procedures as well as its stocking process, the only way a pile of pegs would have been put on the floor by a Dollar Tree employee would be if the employee was there with the pegs, to stock, and a U-Boat and large cardboard box would likely have been right with the pegs. *Id*.



Ms. Brown also provided evidence of Dollar Tree's defense of contributory negligence. Specifically, Ms. Brown was able to recreate the alleged scene, according to the allegations in the Complaint, to demonstrate the obvious nature of the alleged hazard. CP 148.

Additionally, Dollar Tree presented prima facie defenses against damages, including that (1) Ms. Hanes's own narrative of the incident did not support causation of hip, back, foot, and

knee treatment; (2) a reasonable alternative cause for spinal treatment in that Ms. Hanes had just undergone a cervical fusion surgery; (3) and that she was seeking general damages inconsistent with her injuries, treatment, and recovery. CP 88-105.

Considering the clear equitable basis, the motion was granted by the Honorable Judge Joseph A. Evans, without need for argument.

IV. Summary of Argument

In an effort to present a case for reversal, Appellant seeks to have this Court review the trial court's decision with consideration only of Appellant's chosen bases and factual inferences. Appellant's approach undermines longstanding legal and policy principles regarding default judgments and misapplies the applicable standard of review, abuse of discretion.

Washington courts have repeatedly and consistently articulated a clear preference for deciding cases on their merits. Accordingly, Washington courts have routinely turned to their equitable powers to ensure that technicalities within rules that duly apply to judgments upon fully-litigated issues do not

prevent a default judgment from being justly set aside. The black-letter provisions of CR 60(b) provide bases for setting a default judgment aside, but a party may also move to vacate a default judgment on an equitable basis. Appellant ignores this latter avenue for relief because she would otherwise have to admit that equity dictates affirming the trial court order.

Moreover, a trial court's order to set aside a default judgment is reviewed under the abuse of discretion standard. Appellant seeks to exploit the lack of written findings from Judge Evans by substituting her own factual findings and inferences, which she knows she can rebut, and limiting this Court's review to the same. Such is not an appropriate application of the abuse of discretion standard. As Washington courts have plainly stated, if there is *any* tenable grounds for the trial court's decision to set aside a default judgment, then the order must stand. Thus, this Court must review all potential equitable grounds and all potential reasonable factual findings and inferences, not just those chosen by Appellant.

Applying the appropriate principles and standard of review, this Court will find two clearly tenable, equitable

grounds for relief.

First, Dollar Tree was entitled to the requested relief under the *Gutz v. Johnson* equitable consideration set out in *Morin v. Burris*, 160 Wn.2d 745, 758-59, 161 P.3d 956 (2007). In *Morin*, the Supreme Court stated that a default judgment could be set aside if: (1) the defendant's representative acted with diligence; and (2) the defendant's failure to appear was induced by the plaintiff attorney's efforts to conceal the litigation. *Id*. Dollar Tree's diligence is unquestioned in this case, making thirty-four attempts to communicate with Mr. Barash, and moving quickly to vacate the default judgment after notice. Further, the trial court could reasonably find that non-appearance in the suit was induced by Mr. Barash. Not only does Mr. Barash admit that he was purposefully dodging communication with Dollar Tree so that he could obtain a default judgment, he also actively deceived Dollar Tree, making representations to Mr. Kent that settlement was still being negotiated despite having a default order in-hand. Appellant's suggestions that the Supreme Court's opinion in *Morin* was a directive to plaintiff's attorneys to ignore a defendant that is

trying to discuss or settle a case, in order to successfully obtain a default judgment, flies in the face of the policy that echoes throughout Washington's appellate law, that default judgments are not the favored result, as well Washington's clear preference for parties' engaging in good faith attempts to resolve cases.

Second, Dollar Tree was entitled to the requested relief under the *White* equitable test. Under appellate precedent, none more clear than *Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867, 869 (2004), the Court could reasonably find that all four *White* factors favored setting aside the default judgment. Dollar Tree provided evidentiary support for a prima facie liability defense and a finding of mistake/inadvertence both nearly identical to that endorsed by this Court in *Showalter*. Moreover, Dollar Tree demonstrated additional prima facie defenses of contributory negligence and unsupported damages. The Court does not weigh Dollar Tree's evidence; it only evaluates whether, if true, it makes the prima facie case. Dollar Tree's evidence clearly does so. Dollar Tree moved diligently to bring its motion to set aside in less than 30

days, a time-frame endorsed by appellate courts as diligent. *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003). And Ms. Hanes cannot establish prejudice, as her only argument to this Court on prejudice is that she suffers the hardship of having to litigate her case, a proffer of hardship explicitly rejected by Washington appellate courts. *Id.*

V. Argument

A. Washington Courts apply equitable principles to prioritize deciding cases on their merits.

Washington courts have "long favored resolution of cases on their merits over default judgments." *Morin v. Burris*, 160 Wn.2d. 745, 749, 161 P.3d 956 (2007). "We prefer to give parties their day in court and have controversies determined on their merits." *Id.* at 754 (internal quotations omitted). Accordingly, Courts "will liberally set aside a default judgment…for equitable reasons in the interests of fairness and justice." *Id.* at 7. Notably, "[a] proceeding to vacate or set aside a default judgment is equitable in character, and the relief sought is to be administered in accordance with the equitable principles and terms." *Id.* at 754.

Though the court does "value an organized, responsive, and responsible justice system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules…[t]he fundamental principle when balancing these competing policies is whether or not justice is being done." *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345 (2007), *as amended on denial of reconsideration* (Oct. 3, 2007) (internal quotations omitted). "The system is flexible, because 'what is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.'" *Id.* at 703, *quoting Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).[3] When invoking the "aid of a court of equity, the relief given will not follow technicalities but will simply meet the ends of justice."

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[3] Appellant quotes the "value of organization" line from *Little* to suggest this Court should stringently apply the rules Appellant seeks to enforce, but neglects the two lines that follow, which clearly undermine strict application of any technical rule. Appellant's reference to *Little* to promote the idea of strictly applying court rules to affirm defaults is confounding considering the Court in *Little* does not engage in analysis of any specific rule or procedure but only the equitable tests Washington courts have used in the past.

Casa del Ray v. Hart, 31 Wn. App. 532, 538, 643 P.2d 900 (1982).

B. The standard of review is abuse of discretion.

This Court "review[s] a trial court's decision on a motion to vacate a default judgment for abuse of discretion." *Morin*, 160 Wn.2d at 753. Thus, if the trial court's ruling is based upon ***any*** "tenable grounds and is within the bounds of reasonableness, it ***must be upheld***." *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009, 805 P.2d 813 (1991) (emphasis added). The trial court's decision is to be evaluated "considering the unique facts and circumstances of the case before the court." *Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867 (2004). Again, the Court is not looking to simply apply a pre-established rule to the letter, but, rather, reviews the facts of the case at hand to ensure that a just end is reached. *Griggs*, 92 Wn.2d at 582. If the request to set-aside is anything short of "manifestly insufficient or groundless," the Court's job is to allow the case to be heard on its merits. *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). Therefore, if the trial

court could have any reasonable belief that litigation of the merits would produce a more just end, that belief must be endorsed by this Court, and the order to vacate affirmed.

C. Appellant misapplies the standard of review, thereby disregarding the proper equitable considerations.

In applying the abuse of discretion standard, this Court reviews any and all bases upon which the trial court's decision could rest. Appellant seeks to limit this Court's review to her few curated potential bases for the decision, those where rigid rules can be applied to deny the relief. Appellant seeks to exploit the lack of a specifically-articulated basis in the order by filling in the blanks with the most vulnerable potential findings available. Such is not the proper application of an abuse of discretion standard. The proper application is to consider all potential bases upon which the Court could have based its decision, and if any "tenable grounds" exist, to uphold the ruling. *See, e.g.*, *State v. Streepy*, 199 Wn. App. 487, 500, 400 P.3d 339 (2017) ("[W]e may affirm the trial court's ruling on any grounds supported by the record.")

As a result of this misapplication, Appellant spends the

majority of her brief discussing rigid doctrines that the Court could not have possibly used as a basis for its decision.

First, Appellant focuses the majority of her attention on the "substantial compliance" doctrine discussed in the *Morin* and *Matia* holdings of *Morin v. Burris*, which is applied when a defendant that is ***aware of litigation*** argues that they substantially complied with the notice of appearance rule, and thereby should have received notice of the default proceedings. Strict consideration of this doctrine is wholly irrelevant in this case. Dollar Tree does not claim it was aware of litigation and appeared, but claims that it was not aware of the litigation and equitable considerations merit vacating the default. In applying this doctrine strictly, Appellant does not properly analyze the ethical considerations set forth by the *Morin* court in the *Gutz v. Johnson* holding. In looking at *Gutz*, the Supreme Court found that the defendant's insurance adjuster who, like Dollar Tree, testified that it had not received notice of the litigation, might have been misled by the efforts of plaintiff's counsel to conceal the litigation. As set forth in detail below, Dollar Tree's case for equitable relief under these considerations is far stronger

than even those endorsed in *Gutz*.

Second, the latter portion of Appellant's argument obfuscates the equitable nature of the Court's analysis of a default judgment under *White* by shoehorning the analysis into CR 60(b)(1), so that she can apply the rigid one-year time-limitation applicable to that provision. However, the principles of equity and justice do not have an expiration date. Courts have never applied a one-year time-limitation to equitable relief under *White*. Given proper consideration of ethical principles, the record below shows that Dollar Tree is clearly entitled to its relief under the *White* test.

D. The Court had reasonable grounds to vacate the default judgment under the *Gutz v. Johnson* holding of *Morin*.

1. <u>*Morin* sets forth an equitable avenue for obtaining relief from a default judgment when a failure to appear is induced by the conduct of plaintiff's counsel.</u>

In reviewing three cases in *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), the Supreme Court appreciated a clear difference between two of the cases, *Morin v. Burris* and *Matia Investment Fund, Inc. v. City of Tacoma*, and a third,

Gutz v. Johnson. *See, generally, id.* *Morin* and *Matia* were instances where the defendant or representative was aware of litigation having been filed, yet did not formally appear in the action. *Id*. at 750-52. In both instances, after defaulting, the defendant sought to set aside the default judgment on the basis of having made an "informal appearance," a doctrine the Supreme Court ultimately rejected. *Id.* at 750-53.

But the Supreme Court found that the *Gutz* case was different. In *Gutz*, the defendant's insurance adjuster had been the lead contact for plaintiff throughout years of pre-litigation communication. *Id.* at 751. She testified that she was not aware that litigation was filed. *Id.* Despite the same, the adjuster continued to reach out to plaintiff's counsel, not purporting to make any appearance as to litigation, but to continue to discuss and negotiate the open claim. *Id.* Plaintiff's counsel, despite knowing an action had been filed and default proceedings were imminent, engaged the adjuster but did not mention the litigation or potential default. Only after actual default did Plaintiff's counsel's paralegal inform the adjuster of suit. *Id.*

Faced with these facts, the Supreme Court determined that more than just strict consideration of the appearance rule was necessary to decide *Gutz*. The default process exists to afford relief to those facing an "adversary process [that] has been halted because of an ***essentially unresponsive*** party." *Colacurcio v. Burger*, 110 Wn. App. 488, 495, 41 P.3d 506, *review denied*, 148 Wn.2d 1003 (2002) (emphasis added). However, as Washington courts substantially value seeing cases decided on the merits, the Supreme Court could not countenance an outcome in *Gutz* where the plaintiff's attorney effected the "halt" to the adversary process by concealing litigation from an otherwise responsive and diligent party.

As a result, the Supreme Court set forth a distinct, two-pronged equitable test for vacating a default judgment in these "limited circumstances," *i.e.*, when counsel does not "disclose the fact that the case had been filed and that a default judgment was pending" to a defendant or a representative thereof "calling and trying to resolve matters, and at a time when the time for

filing an appearance was running." *Morin*, 160 Wn.2d. at 759.[4] The Supreme Court remanded to the trial court with the instruction that: "If the [defendant's] representative acted with diligence, and the failure to appear was induced by [plaintiff's] counsel's efforts to conceal the existence of litigation…then the [defendant's] failure to appear was excusable under equity *and* CR 60." *Id.* (emphasis added).[5]

2. Dollar Tree acted with diligence and opposing counsel's conduct induced the failure to appear,

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[4] The Court acknowledged that, generally, a plaintiff's attorney does not have a duty to inform an insurer of litigation—a premise Appellant goes to great lengths to emphasize in her brief. However, with *Gutz*, the Court created an exception to that general rule that prevents "inequitable attempt[s] to conceal the litigation."

[5] The Court also makes specific reference to *State ex. rel. Trickel v. Superior Court of Clallam County*, 52 Wash. 13, 100 P. 155 (1909), and its discussion of setting aside a judgment under CR 60(b)(4) for "fraud, misrepresentation, or other misconduct." Accordingly, should this equitable test relate to any specific provision of CR 60(b), it notably is related to CR 60(b)(4), which does not have a one-year time limitation. Further, this citation supports that the trial court, here, could have duly considered the *Gutz* test in granting relief on the basis of Dollar Tree's second argument, specifically brought under CR 60(b)(4).

allowing for vacation under the *Gutz* test.

The *Gutz* test has two steps. First, the Court must determine whether a case fits the limited circumstances of *Gutz* to which the test applies. If so, then the Court applies the two-pronged equitable test: (1) did the representative act with diligence; and (2) did counsel's efforts to conceal the litigation induce the failure to appear.

This case fits squarely within the limited circumstances of *Gutz*. The test applies when defendant's representative is contacting plaintiff's counsel to attempt to resolve the claim "at a time when the time for filing an appearance was running," and the plaintiff's attorney does not disclose the fact that litigation has been filed or that a default is pending." *Id.* This case indisputably fits that scenario.

During the period of time between filing suit and the default judgment, Dollar Tree representatives reached out to Ms. Hanes's counsel ***thirty-four times*** seeking to discuss the settlement of the claim. The representative twice spoke with plaintiff's counsel and eleven times to counsel's staff, not to mention fifteen voice mails and six emails that went

unreturned. The time to appear was running during each communication, and a default pending for thirty-two of the thirty-four contacts. Accordingly, Dollar Tree's situation merits application of the two-part test.

In light of the facts from *Gutz* that the Supreme Court believed could satisfy the test, relief for Dollar Tree under the test is absolutely justified. The Supreme Court considered that: (1) the pre-litigation communications were with the defendant representative; (2) the representative reached out to try to settle the case twice in the month following filing of suit; (3) counsel had communications about settlement with the representative; (4) counsel did not reveal that litigation was filed and that default was pending during those communications; and (5) representative acted quickly upon learning of the default. *Morin*, 160 Wn.2d at 751.

As to the diligence prong, Dollar Tree was undeniably even more diligent than the representative in *Gutz*. Dollar Tree did not reach out twice in a month, but thirty-four times in the seven months after suit was filed. And Dollar Tree was equally as quick as the adjuster in *Gutz* to take action after learning of

the default, retaining counsel, gathering information, and bringing the motion all in less than thirty days. Moreover, in *Gutz* the Court considered the adjuster diligent despite the fact that, after losing a motion to set aside the default order, the defendant in *Gutz* did not respond to a filed motion for default judgment. *Morin*, 160 Wn.2d at 751. Considering that Dollar Tree was more diligent than the *Gutz* adjuster in reaching out after suit-filing, at least equally diligent in responding after learning of the default judgment, and adding that Dollar Tree does not have the strike against it of missing a default judgment motion when it knew about the default, Dollar Tree clearly meets the diligence prong of the test.

As to the inducement prong, this case provides an even clearer equitable basis than *Gutz*. In the present case: (1) Counsel was aware of the role of Sedgwick, as seen in pre-litigation communication; (2) the representative reached out to counsel continuously throughout the time that litigation was filed and default was pending; (3) Counsel never disclosed the filing of suit or default; and (4) Counsel deceived the representative by engaging in settlement discussion without

disclosing the litigation.

The only differences between the two cases are differences that further support the equitable relief granted to Dollar Tree. First, in this case, Mr. Kent was not a representative of a separate insurance entity but an agent that Dollar Tree specifically authorizes to handle its claims. With an insurer, a plaintiff's attorney could at least conceivably believe that an adjuster's unawareness of a lawsuit stems from the defendant's choice not to inform their insurer. *See Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 422, 191 P.3d 866 (2008) ("An insured may choose not to tender a claim to its insurer for a variety of reasons.").[6] Here, Sedgwick undoubtedly was Dollar Tree's representative both as to pre-

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[6] In *USF*, the Court is discussing the policies underlying the "selective tender" rule. The "selective tender" rule states that an insurer is not obligated to provide an insurance benefit, such as defending a lawsuit, until the insured actually asks. The Court notes a number of reasons why an insured might choose not to inform the insurers, such as avoiding premium increases or preserving policy limits for other claims. For these same reasons, a plaintiff's attorney could reasonably believe that even an insurance adjuster seeking to settle an indemnity claim may not necessarily be the contact when it comes to defense of a lawsuit. *Id.* at 421-22.

litigation settlement and defense of a lawsuit. Second, Ms. Hanes's counsel was given ***seventeen times*** as many opportunities to reveal the lawsuit and default. In *Gutz*, counsel received two phone calls and even revealed the fact of suit during the second call. Here, counsel's office did not reveal suit in the thirteen times a call connected, nor did counsel return the other twenty-one communications.

Appellant fails in her attempts to distinguish this case from *Gutz*.[7] Appellant first suggests that the key distinguishing fact in *Gutz* is that the defendant had notified his insurer of the suit, suggesting, perhaps, that the relative innocence of the actual named defendant was a primary consideration. However, there is no support for this premise. The equitable analysis dictated by the Court had nothing to do with the innocence of the named defendant. The Court focused on the actions of the plaintiff's

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[7] Appellant's general concept of distinguishing the present case from *Gutz* so as to render it "much more like *Matia* and *Morin*," App. Brief, at 17, misses the important distinction made by the Supreme Court that *Gutz* was not to be decided on the basis of whether there was substantial compliance with the notice of appearance rule, but rather on other, equitable grounds.

attorney to conceal the litigation and default from a diligent representative at or near to the time suit was filed and/or default was pending.

Appellant next argues that key distinguishing facts in *Gutz* were the existence of ongoing settlement negotiations and the adjuster specifically asking about litigation, citing *Aecon Bldgs., Inc. v. Vandenmolen Constr. Co.*, 155 Wn. App. 733, 230 P.3d 594 (2009). Appellant then repeatedly points out how Ms. Hanes's attorney's intent in this case was to conceal the litigation by ignoring the diligent defendant while the default was pending. This argument fails for four reasons.

First, Appellant's reference to the discussion of litigation conflates the *Gutz* equitable test with the "substantial compliance" ruling from the *Morin* and *Matia* cases. When discussing the substantial compliance rule as it pertains to a notice of appearance, the Supreme Court specifically rejected the "informal appearance" doctrine, stating that substantial compliance with the notice of appearance rule requires specific "action acknowledging that the dispute is in court." *Morin*, 160 Wn.2d at 757. The Court does not make any such statement

regarding the equitable *Gutz* test. In fact, to the contrary, the Court specifically discounts the significance of whether or not litigation was mentioned in the discussion between counsel and the defense representative:

> Gutzes' counsel denies having any discussion about litigation, but he certainly knew that litigation had been commenced and that Allstate was still trying to settle the claim.

Id. at 758.

Second, *Aecon* is distinguishable and does not support Appellant's argument. In *Aecon*, Aecon's attorney engaged in discussion with the defendant's insurer, Hartford. However, those discussions were not about the claim made against Hartford's insured, later-named defendant, Chinook. Rather, the discussions were about a tender for defense and indemnity that Aecon made directly to Hartford as an Additional Insured. *Aecon Bldgs., Inc.*, 155 Wn. App. at 740. The *Aecon* court's focus on the settlement negotiations and mention of the lawsuit is not to imply that the Supreme Court specifically dictated the content of a call needed for the *Gutz* test to apply, but to emphasize a distinction between *Aecon* and *Gutz*, *i.e.*, that in

Aecon, the insurer's and plaintiff attorney's communications were about a wholly different topic, the additional insured claim. Moreover, the communications in *Aecon* took place *before* the lawsuit was filed. *Id.* ("Therefore Aecon did not act inequitably by failing to disclose a suit it had yet to file against Chinook.").

Third, even if the existence of "ongoing settlement negotiations" was vital to the application of the *Gutz* test, Dollar Tree presented evidence of the same. Mr. Kent averred not only that the thirty-four communications were in an effort to continue settlement negotiations, but also that twice Mr. Barash engaged Mr. Kent on negotiations. According to Mr. Kent, on April 1, 2020, Mr. Barash stated "he did not have a counter offer *at this time*" and would "follow up." CP 109. On April 27, Mr. Barash stated "the Sedgwick offer has not been accepted yet and he is unsure if they would accept." CP 110. Mr. Barash denies engaging in such communications. However, the trial court could reasonably have believed Mr. Kent, particularly since Mr. Kent's declaration is made with use of reference to contemporaneous notes in the claim file.

Finally, even if the *Gutz* holding could be seen to leave room for a plaintiff's attorney to think they should dodge calls in an effort to avoid saying the magic words that lead to a *Gutz* set-aside, this Court should act quickly to close that door.[8] An endorsement of the "lesser evil" approach forwarded by Appellant would fly in the face of two overarching Washington policies: the much-discussed, *supra,* priority of deciding cases on the merits; and the "express public policy" of "strongly encourag[ing] settlement." *Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198 (2007). There is no way the Supreme Court of this State could have intended to advise plaintiff's attorneys to dodge settlement efforts so that they could secure a judgment on less than the merits.

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[8] This Court has already, in an unpublished opinion, rebutted Appellant's argument that dodging and failing to return calls is different than concealing litigation while answering the phone, but such has not dissuaded attorneys from continuing to attempt the tactic. *Baxter v. Ah Loo*, No. 49511-2-II, 200 Wn. App. 1029, 2017 WL 3601891 (Div. II, Aug. 22, 2017) (unpublished). For this reason, Dollar Tree believes it would be appropriate to publish this opinion, in whole or in part, to forward the policy of encouraging ongoing settlement communication.

Under the *Gutz* test from *Morin*, the trial court had more than ample reason to vacate the default. Therefore, this Court should affirm the ruling.

E. The Court had reasonable grounds to vacate the default judgment under the *White* test.

1. The *White* test is not subject to a one-year limitation.

Appellant's primary effort to rebut Dollar Tree's basis for relief under *White* is to argue it is time-barred. That is untrue. Appellant attempts to shoehorn the *White* test within CR 60(b)(1), which allows any judgment to be set aside due to "Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." However, *White* is not a test that lives within CR 60(b)(1), a rule that applies to all judgments; the *White* test is a separate equitable test that applies to only default judgments, in which "mistake, inadvertence, or excusable neglect" is only one consideration. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies Inc.*, 140 Wn. App. 191, 200, 165 P.3d 1271 (2007). Moreover, the test has its own different timing standard: the diligence with which the defendant in default acts after

receiving notice of the default judgment. *White*, 73 Wn.2d at 352. Correspondingly, Washington courts do not subject *White* arguments to the one-year time-limitation. The test is regularly applied outside of that window.[9] *See, e.g.*, *Morin*, 160 Wn.2d at 753-58 (considering application of *White* to the *Matia* case, where motion was filed more than one year after default judgment); *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922 (2005).

Washington courts recognize the *White* test as a distinct equitable standard applicable to *default* judgments, separate and apart from the time limitations in CR 60(b).

2. Dollar Tree satisfied the *White* test.

When evaluating whether a defendant is entitled to relief under *White*, the Court looks at four factors. *Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867 (2004).[10] The first

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[9] Moreover, reading a one-year limitation into *White* would frustrate applications of the *White* test where a party seeking vacation of the default has a virtually conclusive defense. *See, e.g.*, *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202-09 (2007) (citing *White v. Holm*, 73 Wn.2d 348 (1968)).

[10] The omission of the *Showalter* case from Appellant's brief is telling, considering that not only is *Showalter* a directly on-

two factors are primary: (1) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; and (2) the reason for the failure to appear, *i.e.*, whether it was the result of mistake, inadvertence, surprise or excusable neglect. *Id.* The secondary factors are: (3) the party's diligence in asking for relief following notice of the entry of the default; and (4) prejudice to the opposing party. *Id.* Dollar Tree provided sufficient evidence to satisfy all four factors.

a. Dollar Tree established multiple prima facie defenses.

In determining whether a defendant has a valid defense, the court does not weigh the facts, but views them in the light most favorable to the moving party, and the moving party must only make a prima facie showing of a valid defense. *Pfaff v. State Farm Mutual Auto. Ins. Co.*, 103 Wn. App. 829, 840-41, 14 P.3d 837 (2000). "[T]he defendant satisfies its burden of demonstrating the existence of a prima facie defense if it is able

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point published opinion of this Court, but it was also the lead case discussed in Dollar Tree's motion in the lower court on both of the primary *White* factors.

to produce evidence which, if later believed by the trier of fact, would constitute a defense to the claims presented." *Id.* at 835-36.

Dollar Tree submitted evidence with its motion to support prima facie defenses as to liability, contributory negligence, and damages.

The sufficiency of Dollar Tree's proffer of defense is easily seen through the eerily analogous case of *Showalter*, decided by this Court, which also involved a slip-and-fall in a retail store. 124 Wn. App. 506. In *Showalter*, the defendant store demonstrated its liability defense via a declaration from the manager of its safety and risk department, who noted store policies regarding cleaning and safety that rebutted the plaintiff's element of notice. *Id.* at 513. The manager noted that the regular sweeping of the area meant the pea pod, upon which the plaintiff slipped, would have fallen in between sweeps and that there was no report of a hazard. *Id.* Similarly, here, Dollar Tree's store manager averred as to established policies such that no pile of pegs could have been sitting, unattended in the middle of an aisle. Accordingly, the Court

could reasonably infer that any such pile of pegs was not placed on the ground by Dollar Tree but the result of an unforeseen accident of which Dollar Tree would need to have notice in order to be found liable.

Going even beyond the defense in *Showalter*, Dollar Tree also established the defense of contributory negligence. Dollar Tree's manager recreated the seen to display the obviousness of the hazard, using the description of Ms. Hanes. Moreover, the noted Dollar Tree policies support that, if the pegs were not on the floor by a spill or accident requiring notice, they were there in use by a Dollar Tree employee and thus accompanied by at least a large cardboard box, if not also a U-boat cart and Dollar Tree employee. This increased obviousness of the hazard further establishes a prima facie contributory negligence affirmative defense.

Finally, Dollar Tree also established defenses to damages. Dollar Tree showed from Ms. Hanes's own narrative that she is claiming injuries and treatment related to body parts that she does not describe as implicated in the fall. Further, Dollar Tree presented a persuasive case against the noneconomic damages

award. *See Showalter*, 124 Wn. App. at 513 (noting Wild Oats' "persuasively challeng[ing] the amount of damages for past and future noneconomic loss" as an additional basis to find prima facie defense shown).

Appellant argues that Dollar Tree fails to satisfy this factor because it did not provide eye witness testimony or video, but rather had a declaration from a manager that was not present on the day of incident. This argument has no merit. Dollar Tree provided the knowledgeable testimony of a store manager on protocols and procedures. This testimony is directly parallel to the evidence approved of by this Court in *Showalter*, and is adequate to establish a prima facie defense.

Appellant then argues that Dollar Tree does not have a defense because a pile of pegs is a hazard. However, Dollar Tree has never disputed that as part of its defense. Dollar Tree's defenses regard notice, contributory negligence, and damages.

b. Dollar Tree's non-appearance was occasioned by mistake or inadvertence.

Dollar Tree's satisfaction of the second factor can be seen

by again looking at the *Showalter* case. In *Showalter*, Wild Oats failed to appear due to a lapse in the transfer of the suit papers from the original recipient to the claim administrator, specifically, a miscommunication between a paralegal and manager in Wild Oats' office. *Id.* at 514. This Court found that this one-time error was "more akin to a mistake than inexcusable neglect." *Id.* at 515.

As in *Showalter*, Dollar Tree's failure to appear resulted from a one-off error in transferring the suit from the recipient (a registered agent) to the claims administrator, Sedgwick. In this case, the same process worked smoothly with regard to the notice of the default judgment, further evidencing the inadvertent nature of the initial mistake. Accordingly, the trial court could reasonably find Dollar Tree's non-appearance to be akin to mistake, just as in Showalter.

Appellant makes two arguments to rebut Dollar Tree on this element, but neither renders a court unreasonable to side with Dollar Tree.

First, Appellant argues that the summons and complaint not making it to the Sedgwick claims adjuster evidences

inexcusable neglect. However, such could not possibly be solely sufficient to render the neglect inexcusable, when that is exactly what happened in *Showalter*. As above, the "mistake" in *Showalter* was a lapse in getting the summons and complaint from Wild Oats to its claims administrator.

Second, Appellant argues that Dollar Tree's not knowing exactly what happened means the "only inference" is that "Dollar Tree experienced some breakdown in its internal procedures." App. Brief at 29. However, Appellant is wrong that hers is the only conceivable inference. The trial court was entitled to make any reasonable inference it deemed appropriate. An equally reasonable inference here is that the summons and complaint never made it from the unaffiliated registered agent, CSC, to Dollar Tree. Moreover, even if it was an issue somewhere within Dollar Tree's office, a one-time mistake within the office is exactly what happened in *Showalter*.

To rebut, Appellant cites *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (2007). In *TMT*, Defendant PETCO's explanation

for not answering was that it knew of the lawsuit, but a legal assistant in counsel's office failed to track the case on the office's system before going on a vacation where she was then injured, and PETCO went her entire time off only hiring replacements that were not competent to use the case-management system. *Id.* at 198.

To see why *TMT* is distinguishable here, one must merely look at how *TMT* distinguished itself from *Showalter*. *Id.* at fn 11. First, the *TMT* court was reviewing a trial court decision to *deny* a motion to set aside, whereas the *Showalter* court was reviewing a decision to *grant* the motion, as is this Court. As the *TMT* court notes, the abuse of discretion standard is such that both cases can rightfully uphold the lower court's decision even if the two trial court rulings appear somewhat inconsistent. *Id.*

Second, the *TMT* court noted that the failure in its case was more egregious than a "single omission" like *Showalter* or with Dollar Tree. *Id.* *White* is an equitable test, and so the Court must balance the equitable factors. For instance, if the defendant presents a "strong or virtually conclusive

defense…the court will spend little time inquiring into the reasons for the failure to appear and answer…." *TMT*, 140 Wn. App. at 205, *quoting Johnson v. Cash Store*, 116 Wn. App. 833, 841-42, 68 P.3d 1099 (2003). Thus, even if the excuses for non-appearance in *TMT, Showalter*, and this case were all identical, different decisions could result based upon the balancing of equities. In *TMT*, the Court did not just question the strength of PETCO's purported contractual defenses, but, rather, disagreed as to whether the law supported the defenses, at all. 140 Wn. App. at 207-12.[11] In light of what were, at best, exceedingly tenuous defenses, the Court would certainly put a lot of weight on PETCO's explanation for its non-appearance.

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[11] *TMT* concerns a dispute related to PETCO's desire to terminate its lease from TMT Bear Creek Shopping Center early. In looking at PETCO's claimed defenses, Division One found all four to be legally insufficient: (1) PETCO's forwarded restatement provision did not support a waiver defense based upon TMT accepting a termination fee check; (2) PETCO's second waiver claim was improperly based upon "silence" without the corresponding showing of an "obligation to speak"; (3) TMT's lawsuit did not require PETCO to have materially breached; and (4) PETCO's characterization of TMT's damages, upon which PETCO based its set-off argument, was incorrect.

In contrast, the *Showalter* court and the lower court in this case were reasonable in finding the prima-facie defenses to be well-established, and could reasonably devote less scrutiny to the second factor. 124 Wn. App. at 515 (noting that in other cases where an in-office issue led to default, courts that did not vacate the default judgment stressed the weakness of the defense proffered or strong evidence that the in-office error constituted inexcusable neglect).

Finally, even if the cases could not be reconciled, *Showalter* is the law of this Court, which takes precedence. *TMT*, to the contrary, is a Division I case, which although persuasive, is not entitled to stare decisis. *Matter of Arnold*, 190 Wn.2d 136, 148-49, 410 P.3d 1133 (2018) (rejecting "horizontal stare decisis" between Divisions of the Courts of Appeals).

Because Dollar Tree's issue arises from a one-off mistake in the process of transferring the lawsuit from the unaffiliated service recipient to the claims administrator, the trial court could reasonably have found that Dollar Tree's failure to appear was occasioned by mistake. Not to mention that the fact that

the failure to appear was induced by counsel's concealment of the lawsuit provides even more reason to find this factor established.

c. Dollar Tree satisfied the secondary factors.

The record below establishes that the secondary factors support vacation of the default. Dollar Tree was reasonably diligent, bringing its motion in less than thirty days, a time period endorsed by Washington courts as sufficient. *Johnson*, 116 Wn. App. at 842. Neither has Appellant established any hardship that would come as a result. Appellant cites only the inconvenience of her own choice to appeal the lower court, as well as having to litigate the case on the merits, grounds squarely rejected by Washington courts in regard to establishing hardship within the fourth *White* factor. *See, e.g., Johnson*, 116 Wn. App. at 842. ("[V]acation of a default judgment inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits.")

With all four factors weighing in Dollar Tree's favor, the trial court's vacation of the default judgment under *White* was

clearly reasonable.

VI. Conclusion

The trial court abuses its discretion only if there are no tenable grounds upon which its ruling could be based. Such is not determined by reviewing certain vulnerable potential grounds selected by an Appellant, but by reviewing all possible grounds for the decision. For the foregoing reasons, the trial court's ruling in this case is readily justifiable on equitable grounds, under both the *Gutz* test and the *White* test. Therefore, the trial court did not abuse its discretion in vacating the default judgment, and this Court should affirm the decision.

I certify the foregoing documents consists of 8,602 words in compliance with RAP 18.17.

Respectfully submitted this 17th day of June, 2022.

DAVIS ROTHWELL
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this date she filed the foregoing document with the Court of Appeals, Division II, via its e-filing portal, which portal will automatically serve a copy of same to the following parties:

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