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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290778

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

OB-1, L.L.C.,

Appellant,

v.

**JONATHAN PINSON, an individual; and
STAN VINSON, an individual,**

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Counsel for Defendants was not involved in any of the underlying actions. Defendants now place a great deal of emphasis on the Order dated September 5, 2006. (Note, there is some confusion in the record. The judge signed the Order on 9/5/06, but it was not filed until 9/7/06. Thus, it is sometimes referred to as the 9/5/06 Order and sometimes as the 9/7/06 Order). However, that Order was insignificant at the time of entry. The defendants in the Cascades case had obtained a partial summary judgment. It was their belief that the Partial Summary Judgment Order, and subsequent Order, devastated the plaintiff's claim in the Cascades action and that the plaintiff would not proceed. Defendants in the Cascades action had no intent or reason to pursue the claim further against Cascades nor did they intend to pursue any claims against the Defendants herein. It was only after the plaintiff indicated in the Cascades matter, which was many months later, that it intended to proceed with that action that a decision was made to proceed with this action.

Defendants are attempting to complicate this matter and detract attention from the true issue in this case. The true issue in this matter is simple. Defendants ignored a Summons and Complaint properly served upon them. The Defendants essentially admit this. "In fact, both Pinson and Vinson

erroneously believed the papers to be related to the Cascades case, not a new different lawsuit.” (Respondents’ Brief at 7). The Defendants’ unilateral error does not constitute a basis to vacate a default judgment.

II. REPLY TO RESPONDENT’S STATEMENT OF THE CASE

Defendants contend that Plaintiff has asserted a number of factual inaccuracies. A review of the record reveals that this is not correct. A review of the record demonstrates Plaintiff has accurately reflected the true record in this case. Moreover, the alleged inaccuracies are mostly irrelevant. Thus, Plaintiff will not devote a substantial amount of time demonstrating the inaccuracy of Defendants’ statements. However, there are four key factual issues that need to be emphasized. Plaintiff submits that there can be no disagreement regarding these facts because there is no evidence to refute them. The four facts are as follows:

1. Vinson and Pinson were never made parties to the underlying Cascades action. The defendants in the Cascades action never perfected the third-party action against the plaintiff. (CP 162). This is irrefutably established by the fact that there are no affidavits of service filed in the Cascades action demonstrating that Vinson and Pinson were served in that action. Plaintiff cannot prove a negative. If there were any affidavits of service on file in the Cascades action indicating that Vinson and Pinson were

served, Defendants surely would have designated such documents as Clerk's Papers and would have cited them to the Court. They did not because no such documents exist. Thus, it is fundamental law that the action against Vinson and Pinson was never perfected and they were not parties in the Cascades action. This is reflected by the Order signed 9/5/06 that does not contain Vinson and Pinson in the caption.

2. All attorneys for the plaintiff in the Cascades action were notified of the intent that Plaintiff in this action was going to commence a new action against the Defendants herein. (CP 121, 126). As a professional courtesy, all the attorneys were asked if they were going to represent Vinson and Pinson, and if so, would they accept service on behalf of Vinson and Pinson. Counsel for the plaintiff in Cascades would not accept service and unequivocally stated they would not be representing Mr. Vinson and Mr. Pinson in the new action. (CP 122).

3. Defendants contend that the trial judge in the Cascades case "concluded that OB-1's potentially much larger liabilities to CFG on the primary claims made collection of the debt deemed due to OB-1 under the counterclaim inequitable until the entire dispute was fully resolved." (Respondents' Brief at 5, 32). This contention is entirely wrong. Defendants have cited no facts to support this contention. As noted above, counsel for

Defendants herein were not involved in those proceedings and has no idea why the court added that language. In fact, the court added that language solely because the plaintiff in the Cascades action repeatedly contended it had a valid defense to a claim for money due. The trial court gave Plaintiff more time to present evidence of that defense. That is all the language was intended to accomplish. Despite being provided more time, neither the Defendants herein nor Cascades has established any evidence to support any defense or argument to the claim that Cascades wrongfully refused to pay a substantial amount of money that was due and owing.

4. Plaintiff in this case did not attempt to conceal the fact that the Cascades case was pending. In fact, the Plaintiff in this case specifically informed the court that the Cascades case was pending. Judge Sperline indicated that he reviewed those pleadings and therefore was aware of that fact. The Complaint filed by the Plaintiff in this action contains several references to the Cascades matter filed in Grant County. This fact is explained in detail in Paragraph 11 of the Complaint. It is also referred to in Paragraphs 12 and 18 of the Complaint and Paragraph 2 of the Prayer for Relief. (CP 6-8). The Default Judgment entered by Judge Sperline dated October 8, 2007 specifically states: "The court reviewed the files and records herein." (CP 21). This would include the Complaint that has specific

reference and explanation of the Cascades action. (The trial judge erroneously concluded that Judge Sperline had not been informed of the Cascades action. (CP 152-53)).

III. ARGUMENT

A. **THE TRIAL COURT ABUSED ITS DISCRETION BY VACATING THE DEFAULT JUDGMENT WHEN THE EVIDENCE DID NOT SUPPORT A FINDING OF FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT BY CLEAR AND CONVINCING EVIDENCE**

Defendants' lengthy *Brief of Respondent* demonstrates a fundamental misunderstanding of the issue on appeal. The issue before the Court is whether the trial court erred in vacating the October 8, 2007 default judgment pursuant to CR 60(b)(4) on the grounds that OB-1 had engaged in fraud, misrepresentation, or other misconduct. Defendants' entire approach to this simple issue is flawed. Defendants' arguments presuppose a "preponderance of the evidence" standard of proof. This is incorrect. The law is clear that to vacate a default judgment for one of the grounds enumerated in CR 60(b)(4), a party must establish by clear, cogent, and convincing evidence that the alleged fraud, misrepresentation, or misconduct prevented the defendant from "fully and fairly presenting its case or defense." Peoples State Bank v. Hickey, 55 Wn. App. 367, 373, 777 P.2d 1056 (1989), rev. denied 113 Wn.2d 1029.

This higher, more onerous burden of proof requires something akin to “certainty.” The *Brief of Respondents* completely disregards this higher burden of proof and assumes that the mere allegation of misconduct is an adequate justification to vacate. In doing so, Defendants ignore binding precedent and needlessly complicate an otherwise straightforward issue.

1. Vacation of a Default Judgment for Fraud, Misrepresentation, or Other Misconduct Requires Clear and Convincing Evidence

Plaintiff has previously briefed the Court on the appropriate standard for vacating default judgments for fraud, misrepresentation, or other misconduct pursuant to CR 60(b)(4), but it bears emphasizing in response to the Respondents’ memorandum which grossly mischaracterizes and misstates the law.

A party attacking a judgment under CR 60(b)(4) must establish by clear and convincing evidence that the alleged fraud, misrepresentation, or other misconduct caused the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense. Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990). See also ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 828, 959 P.2d 651 (1998); Hickey, 55 Wn. App. at 372.

To prove fraud, misrepresentation, or misconduct, there must be “specific knowledge and intent by the wrongdoer.” Sarvis v. Land Res., Inc., 62 Wn. App. 888, 893, 815 P.2d 840 (1991). The party attacking a judgment under CR 60(b)(4) must show that wrongdoer made a *knowing* and false representation of material fact; that the party seeking vacation was ignorant of that falsity; that he reasonably relied on that representation; and that he suffered damage. See N. Pac. Plywood, Inc. v. Access Rd. Builders, Inc., 29 Wn. App. 228, 232, 628 P.2d 482 (1981). Fraud is never presumed. Beckendorf v. Beckendorf, 76 Wn.2d 457, 462, 457 P.2d 603 (1969). Here, it is undisputed any alleged misrepresentation was unknown. Suspicion and speculation are not substitutes for clear and convincing evidence. Hageny v. U. S., 215 Ct. Cl. 412, 570 F.2d 924 (1978).

In Hickey, the court refused to vacate a default judgment against the defendant, Hickey, despite the fact that the attorney for the plaintiff bank had misrepresented the status of Hickey’s lien on a parcel of property in relation to the bank’s lien, which was in fact subordinate. Hickey, 55 Wn. App. at 372. The court stated that the rule under CR 60(b)(4) “is aimed at judgments which were unfairly obtained, not at those which are factually incorrect.” Id. The court found “no connection” between Hickey’s failure to respond to the complaint and the bank’s later misrepresentation about the liens and thus

concluded that Hickey was unable to meet the requirement of proving that the misrepresentation prevented her from fully and fairly presenting her case. Id. The relevant portion of the court's holding is significant and is quoted in full as follows:

Although Peoples misrepresented the status of Hickey's lien, there is no connection between the bank's misrepresentation and Hickey's failure to respond to the complaint or employ an attorney. There is no evidence that Hickey relied on the misrepresentation or was misled by Peoples' statements in the complaint. Her affidavit asserts that she did not even know what "subordinate" meant. *The misrepresentation having nothing to do with her failure to respond to the summons and complaint, Hickey cannot meet the requirement that the misrepresentation must have operated to prevent her from fully and fairly presenting her case.*

Id. at 372 (emphasis added).

Hickey is binding precedent. It speaks directly to the issues raised in this action. Its opinion is clear, its analysis unambiguous. Its holding has never been overturned, limited, or modified. It has been upheld several times. See, e.g., Dalton, 130 Wn. App. at 665. Its analysis holds true here.

2. The Trial Judge's Memorandum Opinion Conclusively Demonstrates an Abuse of Discretion

The above argument establishes that in order for a party to obtain vacation of a default judgment pursuant to CR 60(b)(4), the moving party must demonstrate that the alleged wrongdoer's actions were done with specific knowledge and intent. The trial judge's memorandum opinion in this

matter conclusively demonstrates the trial judge found no willful or intentional conduct. “. . . I do not find this misconduct to be willful or intentional. I suspect it was merely an oversight.” (CP 153). Thus, the trial court’s own memorandum opinion demonstrates that there was an abuse of discretion in vacating the default judgment on the grounds specified in CR 60(b)(4).

3. There Is No Clear, Cogent, and Convincing Evidence That OB-1 or Its Counsel Engaged in Misconduct, Intentional or Otherwise, That Caused the Entry of the Judgment

Applying the rules set forth above, vacation of the default judgment was not warranted. Defendants must prove fraud, misrepresentation, or misconduct by clear and convincing evidence. They have failed to do so. Defendants have never provided any evidence that the alleged misconduct *caused* the entry of the judgment and prevented them from “fairly and fully” presenting their case. Lindgren, 58 Wn. App. at 596. The record shows that both Pinson and Vinson were properly served with the Summons and Complaint. (CP 9-12). Neither Pinson nor Vinson alleges he did not receive any of these documents. (CP 36-41). They both concede they read the Complaint. (CP 36, 39). They merely allege that they did not respond because they mistakenly assumed the pleadings related to the Cascades case. (CP 36, 39). As they both admit, they “erroneously believed” the pleadings related to

the other case and were moot. (CP 36, 39). They thus chose to simply ignore them.¹

Responding to OB-1's arguments, Defendants attempt to causally link their error to the alleged misconduct by claiming that they would never have made an error if OB-1 had disclosed the September 2006 order to the trial court. (Respondents' Brief at 31-32). They similarly attempt to establish reliance by arguing that they "were relying on the same order that OB-1 allegedly improperly hid from the trial court when presenting the default papers." (Id. at 32).² How this establishes reliance is unclear, and, in fact, both arguments are tenuous, unconvincing, and contrary to the rule set forth in Hickey.

Defendants have never explained how their misunderstandings supposedly rose to the level of fraud, misrepresentation, or misconduct on the part of OB-1. Simply asserting that they believed the Summons and Complaint were moot does not prove by clear and convincing evidence that

¹ Yet the Summons and Complaint do not mention Cascades in the caption. (CP 1, 4). Moreover, neither Pinson nor Vinson ever bothered to inquire about the service, or ask their counsel whether they ought to respond.

² In support of this position, Pinson and Vinson cite Suburban Janitorial Services v. Clarke American, 72 Wn. App. 302, 308-309, 863 P.2d 1377, 1381 (1993) on the ground that the court there found that the fraud had prevented the defendants from "fully and fairly presenting their case." Clarke American involved two intentional misrepresentations made by the plaintiff's counsel to the defendant's counsel after the default judgment had already been entered. That case is inapplicable and does not even remotely support Defendants' position.

OB-1 or its counsel were engaged in fraud, misrepresentation, or misconduct. Even assuming OB-1 misrepresented the Complaint to Judge Sperline when it sought the default judgment and failed to put the trial court judge on notice of the September 2006 Order, there is no connection between the alleged misconduct and Defendants' failure to respond to the Complaint. There is no evidence that Defendants relied on the alleged misconduct, or were misled by any misrepresentation in the Complaint.

Under the clear rule stated in Hickey, for Defendants to prevail they had to submit clear and convincing evidence that counsel for OB-1 intentionally engaged in misconduct. Plaintiff must prove by clear and convincing evidence that: (1) Mr. Aiken believed at the time he filed the Complaint herein that the order signed 9/5/06 prevented him from filing the Complaint yet he chose to proceed anyway; (2) that Mr. Aiken intentionally concealed the fact of the pending Cascades action (The Complaint specifically refers to it); (3) that in mailing the default judgment for entry with the court, that Mr. Aiken believed the court should be provided a copy of the Order signed 9/5/06 and intentionally and knowingly did not send it; and (4) that Judge Sperline would not have signed the default judgment if he would have been provided a copy of his signed Order of 9/5/06. Yet, there is no evidence of this. Defendants never sought to depose the undersigned

counsel or request an in camera inspection of his file. (CP 120-24). It is ludicrous to suggest this was Mr. Aiken's intent. One would hope that if this was his devious plan, he would be smart enough to have the default judgment presented to a Grant County judge other than Judge Sperline.

Moreover, OB-1 did not misrepresent facts to Vinson and Vinson, refuse to answer inquires made by their counsel, or mislead them as to the nature and scope of the pleadings served upon them. Defendants' affidavits show that the alleged misconduct had nothing to do to with their failure to respond, and thus did not prevent them from "fairly and fully presenting their case." Hickey, 55 Wn. App. at 373. The only thing that prevented Vinson and Pinson from presenting their case was their own mistake the pleading properly served upon them related to the Cascades case even though the captions of the two cases are entirely different. Yet, curiously, they never state they contacted their attorneys regarding the pleadings, or attempted to establish the truth of their assumptions. There is also no evidence their attorneys in the Cascades action provided any explanation of the impact of the September 2006 Order. (CP 36-41). A simple phone call to inquire would have sufficed.

The fact is that Vinson and Pinson chose to do nothing based upon their own assumptions. This is a not a valid basis for vacating a default

judgment. This is not “highly probable” evidence of OB-1’s misconduct. A defendant’s failure to appreciate the significance of a summons and complaint is insufficient to justify vacating a default judgment. See, e.g., Hickey, 55 Wn. App. 367 (court rejected defendant’s argument that default judgment should have been vacated because she was an unsophisticated person who did not understand the significance of the complaint when she received a copy of it). See also Johnson v. Cash Store, 116 Wn. App. 833, 68 P.3d 1099 (2003); Hwang v. McMahill, 103 Wn. App. 945, 15 P.3d 172 (2000).

In short, the evidence shows that the trial court abused its discretion in vacating the judgment, because Defendants did not meet the higher burden of proof prerequisite to vacating a judgment on the grounds of fraud, misrepresentation or other misconduct. Defendants have not presented any clear, cogent and convincing evidence that they were prevented from fully and fairly presenting their case or defense.

The above-cited authority is also consistent with the conclusions reached in other jurisdictions. For example, the Idaho Supreme Court has also held: “The party asserting a claim of fraud on the court must establish that an unconscionable plan or scheme was used to improperly influence the court’s decision and that such acts prevented the losing party from fully and fairly

presenting its case or defense.” Rae v. Bunce, 145 Idaho 798, 801, 186 P.3d 654, 657 (2008) (find no evidence of fraud) (citing Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246, 64 S.Ct. 997, 1001 (1944)).

Similarly, the law in Indiana is that to prove fraud on the court, it is not enough to show a possibility that the trial court was misled Rather, there must be a showing that the trial court’s decision was actually influenced. Stonger v. Sorrell, 776 N.E.2d 353, 357 (2002). The Stonger court also held that “[f]raud on the court has been narrowly applied and is limited to the most egregious of circumstances involving the courts, and observed that “[r]egardless of which procedural avenue a party selects to assert a claim of fraud on the court, the party must establish that an unconscionable plan or scheme was used to improperly influence the court’s decision and that such acts prevented the losing party from fully and fairly presenting its case or defense.” Id.

4. Defendants Attempt to Distinguish Hickey Is Unpersuasive

Defendants attempt to distinguish Hickey is flawed and mischaracterizes the court’s opinion. Defendants argue that Hickey does not apply because “the alleged misconduct on this case goes directly to the process, not the underlying merits, and accordingly is distinguishable from Hickey.” (Respondents’ Brief at 28). This is because Hickey held that CR

60(b)(4) only protects judgments where the *process* was flawed, not where the judgments were simply factually incorrect. To make this argument, Defendants assume that the court in Hickey found that the judgment there was factually incorrect and not unfairly obtained. This assumption makes no sense in light of the court's ruling.

In Hickey, the misconduct involved a misrepresentation by the bank of the defendant's lien. Hickey, 55 Wn. App. at 370-373. The bank's counsel knowingly presented erroneous findings of fact which stated that the defendant's lien was inferior or subordinate. Id. These findings provided the legal basis for entry of the default judgment. Id. This plainly went to the *process* of obtaining the judgment. There is no evidence any member of the court considered the misrepresentation a mere factual error. As the sole dissenting member, Judge Webster observed, "Had the trial court known that Carol Hickey's lien was superior to Peoples' lien, it would have, no doubt, refused to enter judgment against Carol Hickey without conducting a hearing to determine whether the lien had been satisfied. CR 55(b) (2). Thus, the misrepresentation by Peoples' counsel subverted the integrity of the court itself." Id. at 373 (Webster, J., dissenting). Even the dissenting judge plainly believed the misconduct was procedural.

Moreover, the court's analysis confirms that the misconduct concerned the default judgment process. In its analysis, quoted in full, the court noted as follows:

Courts interpreting the federal rule state that one who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense. *Applying the above authorities to the facts at bar, we find vacation of the default judgment is not warranted.* Although Peoples misrepresented the status of Hickey's lien, there is no connection between the bank's misrepresentation and Hickey's failure to respond to the complaint or employ an attorney. There is no evidence that Hickey relied on the misrepresentation or was misled by Peoples' statements in the complaint. Her affidavit asserts that she did not even know what "subordinate" meant. The misrepresentation having nothing to do with her failure to respond to the summons and complaint, Hickey cannot meet the requirement that the misrepresentation must have operated to prevent her from fully and fairly presenting her case.

Id. at 372 (internal citations omitted) (emphasis added).

This paragraph is revealing. If, as Defendants claim, the court had concluded the judgment was factually incorrect and thus CR 60(b)(4) did not even apply to the case, it makes no sense for it to have devoted its *entire* analysis to determine that vacation was not warranted under CR 60(b)(4). Indeed, the court applied *all* of the authorities Defendants claim the court

determined did not apply. Hickey plainly applies and its ruling is controlling here.

5. Defendants' Case Law Is Unpersuasive

Defendants rely on three primary cases to argue that the trial court properly vacated the default judgment: Kennewick Irrigation Dist. v. 51 Parcels of Real Property, 70 Wn. App. 368, 853 P.2d 488 (1993), Wingard v. Heinkel, 1 Wn. App. 822, 464 P.2d 446 (1970), and Mosbrucker v. Greenfield Implement, Inc., 54 Wn. App. 647, 774 P.2d 1267 (1989).

Kennewick Irrigation Dist., the most recent case, has no relevance to the issue before the Court. In that case, this Court based its opinion on CR 60(b)(1), which allows vacation of a judgment for “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” Kennewick Irrigation Dist., 70 Wn. App. at 370. This Court did not rely on, or even cite, CR 60(b)(4). Defendants have explicitly conceded that they have no basis for seeking vacation of the judgment under CR 60(b)(1). (CP 129). Thus, Kennewick provides no support for their position.

Mosbrucker is also entirely irrelevant to the issue before the Court. The court in Mosbrucker ruled there was no evidence of fraud on the part of the plaintiffs. Mosbrucker, 54 Wn. App. at 652. Rather, the court focused entirely on whether *irregularity*—an entirely different basis for vacating

default judgments—provided a basis for vacating the default judgment. See Id. This is a remedy solely authorized under the auspices of *CR 60(b)(1)*. Defendants have made no claim of irregularity. (CP 129). Mosbrucker is inapplicable.

Lastly, Wingard is inapplicable. Defendants treat Wingard as the touchstone case on vacating default judgments under *CR 60(b)(4)*. Any reliance on Wingard is highly questionable, as it was decided 19 years before Hickey, and provides no substantive analysis supporting his conclusion. The court's sole mention of *CR 60* is as follows: "The default judgment was open to vacation under *CR 55(c)* and *60(b)*." Wingard, 1 Wn. App. at 823. The case is also easy to distinguish factually, as the plaintiff in that case attempted to bypass a ruling by the Supreme Court by seeking quiet title to a foreclosed property based upon a treasurer's deed which the court had recently found *invalid*, and named the exact same parties who were defendants in his previous lawsuit. These facts are not present here.

In short, Defendants have no legal authority superseding, limiting, or modifying Hickey's clear-cut standard for vacating judgments under *CR 60(b)(4)*. Hickey should be followed.

B. OB-1'S ARGUMENTS WERE PROPERLY RAISED

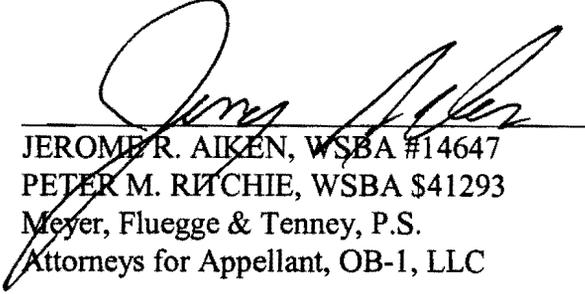
Defendants' claim that OB-1 failed to raise its arguments that (1) the trial court's opinion vacating the default judgment was based upon impermissible speculation, and (2) Pinson and Vinson failed to show that the alleged misconduct prevented them from fully and fairly presenting their case and caused the entry of the judgment.

It is difficult to understand the Defendants' position related to the first issue. The trial court's opinion did not become known until the trial court issued the opinion. (CP 149-53). The Defendants' contention is also erroneous. The Plaintiff did raise this issue with the trial court. (CP 107, lines 6-19).

IV. CONCLUSION

For the aforementioned reason, OB-1 respectfully asks the Court to reverse the trial court's Order of April 23, 2010.

Respectfully submitted this 5 day of January, 2011.


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CERTIFICATE OF SERVICE

I, SHERYL JONES, declare under penalty of perjury of the laws of the state of Washington, that on the 5th day of January, 2011, I sent via facsimile and deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing the REPLY BRIEF OF APPELLANT to the following:

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