

64345-2

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NO. 64345-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JAN AHTEN,

Appellant,

v.

BRADLEY J. BARNES dba JB BARNES,

Respondent,

and

WESTERN SURETY COMPANY,

Defendant.

2010 MAR 26 PM 4:49
COURT OF APPEALS
DIVISION I
CLERK

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY..... 2

A. The Standard of Review is “de novo”, not “Abuse of Discretion” 2

B. The First Rule of Statutory Construction is to Give Effect to the Language of the Statute 3

C. Mr. Barnes does not Meet the Requirements for Setting Aside a Judgment Under CR 60..... 8

 1. *Is there substantial evidence of at least a prima facie defense?*.....10

 2. *Was the failure to timely appear in the action, and answer the opponent’s claim occasioned by mistake, inadvertence, surprise or excusable neglect?*.....11

 3. *Did the moving party act with due diligence After notice of entry of the default judgment*.....12

 4. *No substantial hardship to the opposing party*.....13

D. The Judgment was Supported by Sufficient Factual Evidence.....14

E. Attorney’s Fees.....16

III. CONCLUSION.....18

TABLE OF AUTHORITIES

Table of Cases

Calhoun v. Merit, 46 Wn. App. 616, 731 P.2d 1094 (1986).....2

Collection Services v. McConnachie, 106 Wn. App 738,
24 P.3d 1112 (2001).....passim

Cosmopolitan Eng'g Group v. Ondeo Degremont, 159 Wn.2d 292,
149 P.3d 666 (2006).....8, 17, 18

Estate of Stevens, 94 Wn. App. 20, 971 P.2d 58 (1999)13

Gutz v. Johnson, 128 Wn. App. 901, 919, 117 P3d 390 (2004).....13

Homestreet, Inc. v. Department of Revenue, 166 Wn 2d 444,
210 P. 3d 297 (2009).....3

Johnson v. Cash Store, 116 Wn. App. 833, 68 P. 3d 1099 (2003).....10

Linblad v. Boeing Co., 108 Wn. App. 198, 31 P.3d 1 (2001).....14

Little v. King, 160 Wn.2d 696, 704, 161 P.3d 345 (2007).....2,15

Mid City Materials v. Heater Beaters, 36 Wn. App. 480,
674 P. 2d 1271 (1984)..... 4

Pierce County v. State, 144 Wn. App 783, 806,
185 P.3d 594 (2008).....3

Shepard Ambulance, Inc v. Helsell, 95 Wn. App. 231,
974 P.2d 1275 (1999).....15

State ex rel. Citizens Against Tolls v. Murphy,
151 Wn.2d 226, 88 P.3d 375 (2004).....2, 3

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).....1, 10

Woodson v. State, 95 Wn. 2d. 257, 262, 623 P. 2d 683 (1980).....5

Statutes

RCW 18.27.010.6
RCW 18.27.010(11).6, 11
RCW 18.27.040.....7
RCW 18.27.040(3).passim
RCW 18.27.040(6).....6, 10, 11

Regulations and Rules

WAC 296-200A-025.....11
WAC 296-200A-080.7
WAC 296-200A-080(3) and (4).....7

Court Rules

CR 55.....15
CR 60.....2, 9, 13, 18
CR 60(b)(1).....2

Other Authorities

Laws of 2007, Ch. 436.....6
Laws of 2007, Ch. 436 § 1.....6

I. INTRODUCTION

In his brief, Mr. Barnes does not dispute that the issue in this case is purely a matter of statutory construction. He argues, however, that “overall legislative scheme”, “legislative history” and “prior judicial decisions” are such that no meaning should be given to language employed by the legislature when it revised the subject statute in 2007.

The analysis is simple, even if Mr. Barnes’ attempt at it is not. What possible alternative meaning can be ascribed to the plain reading of these words?

The service [substituted service through the Department] shall constitute service **and confer personal jurisdiction on the contractor** and the surety **for suit on claimant’s claim against the contractor and the bond** or deposit...

RCW 18.27.040(3) (Emphasis added)

Mr. Barnes also devotes much of his brief to arguing “the facts of underlying dispute” from his perspective, which would only be marginally relevant if the trial court decided the case on equitable grounds¹. However, this case was decided below as a matter of law on the basis of lack of personal jurisdiction. And, while the trial court chose not to decide the case on

¹ A “prima facie” defense is one of four factors a court considers in deciding whether to set aside a default judgment on equitable grounds. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

equitable grounds², Mr. Barnes does not meet the burden for setting aside the judgment under CR 60.

II. REPLY

A. The Standard of Review is “de Novo”, not “Abuse of Discretion”, as Erroneously Argued by Mr. Barnes.

Mr. Barnes contends that this court should overturn the trial court only if it finds an “abuse of discretion.” However, the trial court’s decision was based entirely on its interpretation of a statute. It did not weigh the testimony submitted by the parties, but rather it decided the case as a matter of law. An appellate court reviews a trial court’s interpretation of a statute de novo. *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004).

The cases cited by Mr. Barnes are inapplicable because, in each instance, the trial court exercised discretion under CR 60(b)(1) in deciding whether to set aside a default judgment. See *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007) (trial court refused to vacate default judgment under CR 60(b)(1), finding no prima facie defense) and *Calhoun v. Merit*, 46 Wn. App. 616, 619-622, 731 P.2d 1094 (1986) (trial court exercised its discretion and refused to vacate default judgment).

² The record does not establish whether the trial court rejected the equitable arguments or whether it simply determined that having decided the case on jurisdictional grounds, it did not need to reach the other arguments. See Memorandum Decision, CP 96 and Appendix A to Appellant’s brief.

“We review a trial court’s interpretation of a statute de novo.”
Pierce County v. State, 144 Wn. App 783, 806, 185 P.3d 594 (2008)
(citing *State ex rel. Citizens Against Tolls v. Murphy*, supra). The correct
standard of review is de novo.

**B. The First Rule of Statutory Construction is to Give Effect to
the Language of the Statute.**

Mr. Barnes would like the court to jump over the first rule of
statutory construction, namely that a statute that is clear on its face and not
ambiguous is not subject to judicial construction:

When interpreting a statute, we first look to its plain language. If
the plain language is subject to only one interpretation, our inquiry
ends because plain language does not require construction. Where
statutory language is plain and unambiguous, a statute's meaning
must be derived from the wording of the statute itself. Absent
ambiguity or a statutory definition, we give the words in a statute
their common and ordinary meaning. ... A statute is ambiguous if
susceptible to two or more reasonable interpretations, but a statute
is not ambiguous merely because different interpretations are
conceivable.

Homestreet, Inc. v. Department of Revenue, 166 Wn 2d 444,451, 210 P.
3d 297 (2009) (citations and internal quotation marks omitted)

Mr. Barnes does not even allege that the new service language of
the statute is ambiguous before launching into eighteen page convoluted
analysis of a single sentence based upon cases that were decided before the
changes to the subject statute, two of which were legislatively overruled by

the 2007 changes - *Mid City Materials v. Heater Beaters*, 36 Wn. App. 480, 674 P. 2d 1271 (1984) and *Collection Services v. McConnachie*, 106 Wn. App 738, 24 P.3d 1112 (2001).

In *McConnachie*, the court found that *Mid City* [service through Department not effective as against contractor's parents] was still "good law." *McConnachie*, 106 Wn. App. at 743. The court went on and broadened the *Mid City* holding, finding that service through the Department did not confer jurisdiction over the contractor, notwithstanding revisions that had been made to the statute after *Mid City* was decided. *Id.* In doing so, the court relied upon the title and, more principally, on the language of the statute as it existed at the time:

Next, the opening language of RCW 18.27.040(3) limits it to suits against the contractor's bond or deposit:

Any person...may bring suit upon the bond or deposit....Action upon the bond or deposit shall be commenced by filing....The service shall constitute service on the registrant and the surety *for suit upon the bond or deposit.*

(Emphasis added)

Both the purpose of the statute and its language support the notion that service on the Department is for the limited purpose of realizing on a contractor's bond or deposit....

McConnachie, 106 Wn. App at 743

Look at how the language of the statute relied upon by the

McConnachie court has changed. Instead of saying, “The service shall constitute service on the registrant and the surety for suit upon the bond or deposit...”, it now says: “The service shall constitute service and confer personal jurisdiction on the contractor and the surety for suit on claimant’s claim against the contractor and the bond or deposit...”

To say that the legislature did not intend by this language to confer personal jurisdiction over a contractor by service through the Department of Labor & Industries is to say that the legislature did not mean to say what it clearly said. Put differently, if the legislature intended that substituted service be only effective against the bond as is argued by Mr. Barnes, why did it modify the statute in the way that it did?

Mr. Barnes is absolutely correct when he notes that “The legislature is presumed to know the existing state of the case law in those areas in which it is legislating.” Respondent’s Brief at page 15, citing *Woodson v. State*, 95 Wn. 2d. 257, 262, 623 P. 2d 683 (1980). The fact is, as was noted in *McConnachie*, the post-*Mid City* 1988 amendments to RCW 18.27.040(3) were confusing and presented the court with a difficult question. (“The question is straightforward, even if the answer is not”) *McConnachie*, 106 Wn. App. at 740. However, the emphatic 2007 revisions cleared up any such confusion and should logically be viewed as legislatively overruling *McConnachie*.

Mr. Barnes is also correct in noting that the 2007 changes were made at the request of the Department of Labor & Industries. Laws of 2007, Ch. 436. But he fails to note that, as part of the same bill proposed by the Department, the legislature added a specific paragraph to the definitions section of RCW 18.27.010 regarding service:

“Service,” except as otherwise provided in RCW 18.27.225 and 18.27.370, means posting in the United States mail, properly addressed, postage prepaid, return receipt requested, or personal service. Service by mail is complete upon deposit in the United States mail to the last known address provided to the department.

RCW 18.27.010(11), Laws of 2007, Ch. 436 § 1 (emphasis added) .

The legislature recognized a distinction between substituted service and personal service for purposes of the overall statute and said that each is effective. It specifically said that “service” as provided elsewhere in the statute – i.e. RCW 18.27.040(3) – means mailing by certified mail or personal service.

Further, it is clear from the regulations promulgated by the Department that it believes that substituted service by a claimant against a contractor is to be made through the Department. WAC 296-200A-080 is the Department’s regulation regarding suits against contractors. As an initial matter, note that the regulation has different requirements for suits that are solely against a contractor and those where a bonding company is

joined. See WAC 296-200A-080(3) and (4)³. Why would this be the case if service was only intended to be effective against the bond?

Additionally, the Department's regulations regarding the effect of substituted service tie directly back to the 2007 revisions to RCW 18.27.010 and RCW 18.27.040:

(7) Within two days of receiving a summons and complaint, the department must transmit a copy of the summons and complaint to the registrant at the address listed on the registrant's application or at their last known address provided to the department and to the registrant's surety. **Under the definition for "service" as described in RCW 18.27.010(11) as related to mailing of summons and complaints under RCW 18.27.040 the requirement of "return receipt" will be fulfilled by use of the United States Postal Service "tracking and confirming" web site data.**

WAC 296-200A-080 (2008 revisions emphasized).

It is clear that the Department, which drafted and promoted the statute, believed that service on the Department is effective as to the contractor and not merely the bond as is argued by Mr. Barnes.

Mr. Barnes also places great reliance on another case decided *before*

³ WAC 296-200A-080 ...

(3) The summons and complaint against a contractor must include the following information:

- (a) The name of the contractor exactly as it appears in the contractor's registration file;
- (b) The contractor's business address;
- (c) The names of the owners, partners or officers of the contractor if known; and
- (d) The contractor's registration number.

(4) If the suit joins a bonding company, the summons and complaint should also include:

- (a) The name of the bonding company that issued the contractor's bond;
- (b) The bond number; and
- (c) The effective date of the bond.

(Emphasis added)

the 2007 revisions – *Cosmopolitan Eng’g Group v. Ondeo Degremont*, 159 Wn.2d 292, 149 P.3d 666 (2006). The issue in *Ondeo* was whether a party that prevailed in an action against a contractor and its bond was entitled to attorney’s fees under RCW 18.27.040(6). *Id* at 296. To answer this question, the court looked at RCW 18.27.040 as a whole, particularly RCW 18.27.040(3) – (5), and concluded that, “[n]othing in these surrounding subsections suggests that the legislature intended to discuss actions against contractors.” *Id* at 299. The court also relied on *McConnachie*. *Id* at 300.

At the time *Ondeo* was decided, there may not have been a clear statement by the legislature “intended to discuss actions against contractors.” *Ondeo*, 159 Wn.2d at 299. But, **now there is such a clear statement**. The 2007 revisions specifically and clearly state that service in accordance with RCW 18.27.040(3) “confer[s] personal jurisdiction on the contractor and the surety for claimant’s claim against the contractor and the bond.” A clearer statement of legislative intent is difficult to imagine.

Ms. Ahten submits that the legislature “meant what it said”, that *McConnachie* has been legislatively overruled and that the trial court erred when it found that it lacked jurisdiction over Mr. Barnes.

C. Mr. Barnes Does not Meet the Requirements for Setting Aside a Judgment Under CR 60.

Mr. Barnes next argues that this court should do what the trial court

did not; decide the case based upon CR 60 and the equitable considerations associated with this rule. To understand the CR 60 argument and why the trial court may not have decided the case on this basis, the chronology is important. These are the relevant dates:

Action filed.	June 19, 2008 CP 3.
Mr. Barnes served through Department.	June 24, 2008 CP 9.
Default judgment entered.	September 4, 2008 CP 11-13.
Mr. Barnes becomes aware of the lawsuit against him ⁴ .	October, 2008 CP 30.
Mr. Barnes files motion to set aside default judgment.	August 25, 2009 CP 45

A party moving to set aside a default judgment must show four things:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

⁴ In his declaration, Mr. Barnes states, "Sometime in October, 2008, I learned for the first time that Jan Ahten had filed suit on June 19, 2008, against me personally and against my bonding company, Western Surety Company, claiming that I had breached a construction contract causing damages of at least \$50,000.00." CP 30. In his Memorandum to the trial court, Mr. Barnes states that he became aware of the judgment in November, 2008. CP 65. He then waited at least ten months to file the motion to set aside the judgment. CP 45

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

1. Is there substantial evidence of at least a prima facie defense?

A party moving to vacate a default judgment must, at minimum, show a prima facie defense. Where the defense is, “strong or virtually conclusive”, less scrutiny is applied to the other factors, provided that the motion to vacate is timely. *Johnson v. Cash Store*, 116 Wn. App. 833, 841-2, 68 P. 3d 1099 (2003). However, when a mere prima facie defense is alleged, the reasons for failure to timely appear will be subject to greater scrutiny.

If a "strong or virtually conclusive defense" is demonstrated, the court will spend little time inquiring into the reasons for the failure to appear and answer, **provided the moving party timely moved to vacate** and the failure to appear was not willful. However, when the moving party's evidence supports no more than a prima facie defense, the reasons for the failure to timely appear will be scrutinized with greater care.

Johnson, 116 Wn App. at 841-2 (emphasis added)

In his argument to the trial court, Mr. Barnes relied primarily on the contention that the judgment was void for lack of personal service. He did, however, relate a prima facie defense in his declaration. So, the analysis turns on the remaining three factors.

2. Was failure to timely appear in the action, and answer the opponent's claim occasioned by mistake, inadvertence, surprise or excusable neglect?

Mr. Barnes' argument on this issue is that he was not personally served and that he did not receive the notice sent by the Department of Labor & Industries because he had moved out of state. First, it must be noted that Mr. Barnes is required to notify the Department of Labor & Industries of any change in address: "It is the responsibility of the contractor to notify the department **in writing** of a change in address" WAC 296-200A-025 (Emphasis in original) Further, service is complete, "... upon deposit in the United States mail to the last known address provided to the department. RCW 18.27.010(11)." If Mr. Barnes did not receive the summons and complaint, it was due to his failure to comply with the law rather than excusable neglect.

But more importantly, while Mr. Barnes conspicuously fails to state how he came to know of the lawsuit⁵, he does acknowledge awareness of it as early as October, 2008. CP 30. This was *within 30 days of when judgment was entered*. How can it be excusable not have appeared at that time or to have taken any action whatsoever in regards to either defending the lawsuit or moving to set the judgment aside over the ensuing *ten months?*

⁵ It's reasonable to assume that Mr. Barnes eventually received the certified mailing from the Department or, at minimum, notice from the surety as he admits that in October 2008 he knew the exact nature of the lawsuit and that damages were sought in excess of \$50,000.00. CP 30

As an aside, Mr. Barnes makes much of the fact that he had moved to Louisiana and that Ms. Ahten could have called him on his cell phone. First, Mr. Barnes only related that his wife's family had a home in Louisiana and that after this project was done he was going to work on the Louisiana house. CP 81. He made no mention that he intended to take up permanent residence there. *Id.* Secondly, by the time the lawsuit was filed, the damage had been done. Ms. Ahten's home was virtually destroyed. *Id.* There would not have been much point in calling Mr. Barnes then.

3. Did the moving party act with due diligence after notice of entry of the default judgment?

A party moving to vacate a default judgment is required to act with reasonable diligence after becoming aware that judgment has been entered. Here, Mr. Barnes waited at least ten months after becoming aware of the lawsuit before he took any action. In fact, despite knowledge of the actual judgment, Mr. Barnes took no action whatsoever – i.e. no appearance, no motion, no attempt to contact counsel, etc – for nine months.

Plaintiff can find no reported case anywhere where a judgment was set aside under circumstances where the moving party was so grossly dilatory in taking action as Mr. Barnes was here. In one case, the court found that waiting three months was not sufficient diligence:

Nevertheless, it is apparent that Curtis fails to demonstrate due diligence. Here, Curtis **did nothing to set aside the order of default**

until almost three months after its entry. (Emphasis added)

Estate of Stevens, 94 Wn. App. 20, 35, 971 P.2d 58 (1999)

A more recent case states that doing nothing for three months after being aware of entry of default shows lack of due diligence as a matter of law:

A party must use diligence 'in asking for relief following notice of the entry of the default.' Thus, a party that has received notice of a default judgment and does nothing for three months has failed to demonstrate due diligence. In *Re Stevens*, 94 Wn. App. at 35. Conversely, a party that moves to vacate a default judgment within one month of notice satisfies CR 60(b)'s diligence prong. *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099, review denied, 150 Wn.2d 1020 (2003).

Gutz v. Johnson, 128 Wn. App. 901, 919, 117 P3d 390 (2004)

Again, Mr. Barnes sat on his hands for at least nine months. Ms. Ahten submits that the “due diligence” standard would have to be ignored altogether to grant the relief he requests – i.e. that the court uphold the decision of the trial court on the alternate basis of CR 60.

4. No substantial hardship to the opposing party.

While Mr. Barnes has the burden of establishing no hardship to the opposing party – Ms. Ahten – he makes no effort whatsoever to do so. The fact that eleven months elapsed between entry of the judgment and the motion to set it aside – ten of which passed after Mr. Barnes *actually knew* that a lawsuit had been filed against him – is itself highly prejudicial to Ms.

Ahten. Moreover, Ms. Ahten reasonably believed that the case had been concluded nearly a year prior to the motion to vacate. In reliance on this belief, she went forward with making repairs to the house at a cost of several hundred thousand dollars, with no thought towards preserving or maintaining evidence that would support a damage claim against Mr. Barnes. CP 81. Re-opening the case and requiring that Ms. Ahten reconstruct evidence that would have otherwise been readily available is patently unreasonable, particularly given that the situation could have been easily avoided if Mr. Barnes had acted in a timely manner after becoming aware of the lawsuit.

D. The Judgment was Supported by Sufficient Factual Evidence

Mr. Barnes contends that this court should vacate the damage portion of the judgment. This is an argument that was not made to the trial court and, thus, has been waived. *Linblad v. Boeing Co.*, 108 Wn. App. 198, 31 P.3d 1 (2001).

Moreover, the record shows substantial evidence to support the judgment. Ms. Ahten submitted an extensive sworn declaration in support of Motion for Default Judgment, detailing the basis for the contract, the problems that developed with the work, and the damages to her house. CP 14-28. The declaration included extensive photographs showing the exterior

of the house when Mr. Barnes left the project as well as the destruction of the interior from water damage. *Id.* At the time of the judgment, Ms. Ahten had already paid \$386,716.00 for follow on work and faced nearly \$200,000.00 in additional costs to make her house livable. CP 27-8. From this total of nearly \$600,000.00, she segregated out the amount that was attributable to Mr. Barnes breach of contract, \$250,496.00. *Id.* Based upon this evidence, the trial court found that the amount was a “sum certain” pursuant to CR 55. CP 12.

In determining whether to set aside the damage portion of a default judgment, Washington has adapted the “Indiana rule”, which provides for review of default judgment damages on the same standard as review of damage awards from trials – i.e. the amount will be set aside only if it is not supported by substantial evidence:

Because the Indiana rule and precedents are similar to Washington's, we adopt Indiana's rule that the standard for vacating awards of damages from default judgments is the same as the standard for setting aside awards of damages from trials. Thus, the default award here could be vacated if there was not substantial evidence to support the award of damages. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.

Shepard Ambulance, Inc v. Helsell, 95 Wn. App. 231,242, 974 P.2d 1275 (1999) See also, *Little v. King*, 160 Wn. 2d 696, 161 P. 3d 345 (2007)

In attacking the judgment, Mr. Barnes simply engages in an *ex post facto* and untoward attack on Ms. Ahten and her credibility. Mr. Barnes' brief to this court reads like a trial brief but it does not address what was before the trial court when it entered the default judgment. The only question on this issue is whether a fair minded, rational person could have made the decision as to damages that the trial court did here based upon the evidence before it. The trial court had before it testimony as to the nature and existence of the contract, the breach, an explanation of the extent of damages (with photographs) and the repair costs, as segregated out from the total construction costs.

While it is quite easy to come in after the fact and argue a theory of the case that might have been presented at trial, this does not in any way establish that there was insufficient evidence to support the amount of the judgment at the time it was entered. At best, it establishes a *prima facie* defense which, in this matter, could have and should have been brought ten months earlier.

E. Attorney's Fees

Mr. Barnes argues for attorney's fees under RCW 18.27.040(6). The problem with this request is that it runs directly against the holding in

the *Ondeo* case. As noted above, the issue in *Ondeo* was whether the attorney's fee section of RCW 18.27.040(6) applied solely to claims against the bond. The Supreme Court specifically held that the purpose of the statute was to allow for recovery against the bond only. *Cosmopolitan Eng'g Group v. Ondeo Degremont*, 159 Wn.2d at 306. In *Ondeo* the statute read:

The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond is not liable in an aggregate amount in excess of the amount named in the bond nor for any monetary penalty assessed pursuant to this chapter for an infraction.

Former RCW 18.27.040(6)

In 2007 this statute was revised to state as follows:

The prevailing party in an action filed under this section against the contractor and contractor's bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys' fees. The surety upon the bond or deposit is not liable in an aggregate amount in excess of the amount named in the bond or deposit nor for any monetary penalty assessed pursuant to this chapter for an infraction.

RCW 18.27040(6)

The changes do not modify the holding in *Ondeo* but, rather, limit it to residential contracts. Thus, in the absence of an agreement otherwise, a residential homeowner is entitled to recover attorney's fees

only from the bond. Mr. Barnes is defending a claim brought by a residential homeowner and is not entitled to an award of fees under the express holding in *Ondeo*.

III. CONCLUSION

When the legislature modified RCW 18.27.040(3) to state that service upon the Department of Labor & Industries, "... confer[s] personal jurisdiction on the contractor and the surety for suit on claimant's claim against the contractor and the bond...", it meant to confer personal jurisdiction over a contractor by substituted service.

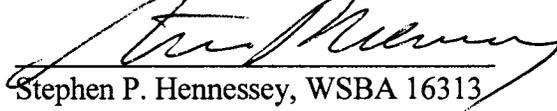
The trial court erred when it found that it lacked personal jurisdiction over Mr. Barnes as a matter of law and, accordingly, the order vacating the default judgment against Mr. Barnes should be reversed.

Mr. Barnes waited ten months after becoming aware of the lawsuit and nine months after having knowledge that a judgment had been taken against him before deciding to bring the motion to vacate. The reason for the "due diligence" requirement is two-fold; first a motion to vacate is an action in equity, which mandates that a person seeking relief act with reasonable promptness; and second, the interests of justice are prejudiced by undue and unnecessary delay. Mr. Barnes has failed to meet the requirements of CR 60 and, therefore, the trial court's order should not be upheld on this alternative

basis

DATED this 25 day of March, 2010

DURKEE & HENNESSEY



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