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No. 643452

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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DIVISION I
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JAN AHTEN,

Appellant/Plaintiff,
vs.

BRADLEY J. BARNES dba JB BARNES,

Respondent,

and

WESTERN SURETY COMPANY,

Defendant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESPONSE TO ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3

IV. STATEMENT OF THE CASE.....4

V. STANDARD OF REVIEW.....12

VI. AUTHORITY AND ARGUMENT.....13

 A. The Trial Court Correctly Ruled It Had No Personal
 Jurisdiction To Sustain A Default Judgment Because Ms.
 Ahten Failed To Lawfully Serve Mr. Barnes With Process.
 13

 1. *Statutory Construction*.....14

 2. *Construed Appropriately Within the Context of the
 Overall Legislative Scheme, Legislative History,
 and Prior Judicial Decisions, RCW 18.27.040(3)
 Provides For Substituted Service Only Upon the
 Contractor’s Bond, Not Upon the Contractor
 Personally*.....17

 a. *The Purpose of RCW 18.27 is to Require
 Contractors to be Bonded and Insured,
 and to Delineate the Procedures for
 Bringing Suit Against the Contractor’s
 Bond*.....17

 b. *Prior Decisions and the Legislative
 History of RCW 18.27.040(3) Confirm Its
 Substitute Service Provisions Apply Only
 in Suits Against the Contractor’s
 Bond*.....19

 3. *Allowing Substitute Service on the Department Only
 for Suits Against the Bond and Not the Contractor*

	<i>Personally Is Consistent With the Overall Scheme of the Service of Process Statutes.....</i>	28
B.	<u>The Trial Court Did Not Abuse Its Discretion in Vacating the Default Judgment.....</u>	31
C.	<u>Even if the Default Judgment Were Reinstated, This Court Should Remand for Further Proceedings Relating to Ms. Ahten’s Damages.....</u>	35
D.	<u>Mr. Barnes is Entitled to Attorney Fees On Appeal, Pursuant to RAP 18.1 and RCW 18.27.040(6)</u>	36
VII.	CONCLUSION.....	36

TABLE OF AUTHORITIES

Cases

<i>B.A. Van de Grift, Inc. v. Skagit Cty.</i> , 50 Wn. App. 545, 549, 800 P.2d 375 (1990).....	18
<i>Bremmeyer v. Peter Kiewit Sons</i> , 90 Wn.2d 787, 792, 585 P.2d 1174 (1978).....	18
<i>Calhoun v. Meritt</i> , 46 Wn. App. 616, 619, 731 P.2d 1094 (1986).	12, 31, 32
<i>Collection Serv. v. McConnachie</i> , 106 Wn. App. 738, 24 P.2d 1112 (2001).....	16, 20
<i>Cosmopolitan Eng. Group v. Onedo Degremont</i> , 159 Wn.2d 292, 294, 297-303, 300-01, 301, 149 P.3d 666 (2006).....	passim
<i>Cosmopolitan Eng. Group, Inc. v. Onedo Degremont, Inc.</i> , 128 Wn. App. 885, 117 P.3d 1147 (2005).....	22
<i>Custom Track v. Vulcan Mining</i> , 62 Wn. App. 208, 211, 813 P.2d 626 (1991).....	19
<i>Expert Drywall v. Brain</i> , 17 Wn. App. 529, 540, 541, 564 P.2d 803 (1977).....	15, 18
<i>Griggs v. Averbeck Realty, Inc.</i> , 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).....	31
<i>International Comm. Collectors v. Carver</i> , 99 Wn.2d 302, 304, 661 P.2d 976 (1983).....	18
<i>Little v. King</i> , 160 Wn.2d 696, 702, 703, 704, 161 P.3d 345 (2007)	12, 31, 32
<i>Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces</i> , 36 Wn. App. 480, 484, 487, 674 P.2d 1271 (1984).....	13, 14, 19

<i>Murphy v. Campbell Inv. Co.</i> , 79 Wn.2d 417, 421-22, 486 P.2d 1080 (1971).....	18, 19
<i>Pfaff v. State Farm</i> , 103 Wn. App. 829, 834, 14 P.3d 837 (2000)	4
<i>Shepard Ambulance, Inc. v. Helsell</i> , 95 Wn. App. 231, 237-38, 242, 974 P.2d 1275 (1999).....	31, 32, 35
<i>State v. Creegan</i> , 123 Wn. App. 718, 726, 99 P.3d 897 (2004).....	15
<i>Stewart Carpet v. Contractors Bonding</i> , 105 Wn.2d 353, 357, 358, 715 P.2d 115 (1986).....	15, 18
<i>Whatcom County v. Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	16
<i>Woodson v. State</i> , 95 Wn.2d 257, 262, 623 P.3d 683 (1980).....	15, 27

Statutes

RCW 4.28.080.....	28-30
RCW 4.28.100-110.....	29-30
RCW 13.34.080.....	28-30
RCW 18.27.040.....	passim
RCW 23B.15.100.....	29-30
RCW 26.33.310.....	29
RCW 46.64.040.....	29

Other Sources

2A C. Sands, <i>Sutherland Statutes and Statutory Construction</i> 53.01 (4 th ed. 1973).....	15
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I. INTRODUCTION

This Court should affirm the ruling of the trial court vacating the default judgment against Respondent John Bradley Barnes because the trial court correctly concluded that Mr. Barnes had not been properly served and therefore the default judgment was void. To hold otherwise would allow Petitioner Jan Ahten to use the courts to recoup the substantial financial consequences of her own negligence and mismanagement from Mr. Barnes, who did not receive notice of Ms. Ahten's lawsuit before the default judgment was obtained. The default judgment was based solely upon implausible, unsupported allegations, which were not put to the test of a contested proceeding.

The law does not require nor permit this default judgment to stand. The default judgment was per se void as a matter of law as a result of the lack of personal jurisdiction. The trial court must vacate a default judgment when personal jurisdiction is lacking, and has no discretion to do otherwise. However, if the trial court was mistaken regarding personal jurisdiction, the trial court still has full discretion to vacate a default judgment on any and all grounds, legal or equitable. For example, if the trial court's determination that the substitute service provision of RCW 18.27.040(3) applies only to suits against the contractor's bond, and not against the contractor individually, is incorrect, the court still has full

discretion to vacate the default judgment on the ground that the defendant has a strong case, and has made out a prima facie defense. The trial court's ruling on grounds other than the lack of personal jurisdiction should not be overturned unless there has been an abuse of discretion. When the trial court vacated the judgment in this case, Ms. Ahten had ample opportunity to file and server her complaint on Mr. Barnes and to properly adjudicate the dispute. At no time before or after the default judgment did Ms. Ahten lawfully serve Mr. Barnes with her summons and complaint. The trial court correctly ruled it did not have personal jurisdiction over Bradley Barnes because of the lack of service.

The most basic tenets of due process require that the power of the state not be brought to bear against an individual without appropriate safeguards. Notice of the commencement of a proceeding and an opportunity to be heard is one of the most foundational safeguards. Consequently, this due process right has been rigorously protected by the legislature and the courts of this state. Service of process on an individual has almost always required, save for a few well-justified exceptions, that personal service be diligently attempted. Substitute service on individuals is permitted only after diligent efforts to effect service personally.

Ms. Ahten's contention that the legislature chose to single out individuals who do construction work as being entitled to less

foundational due process than any other individuals in this state is incorrect. RCW 18.27.040 has been given considerable attention by both the legislature and the courts. As the courts have consistently held, the changes to the statutory language clarify how service is to be perfected in a suit on the contractor's bond, not the contractor individually. The legislative history and the overall statutory scheme is also consistent with this interpretation.

The trial court was correct when it vacated Ms. Ahten's default judgment against Mr. Barnes for lack of personal jurisdiction. This Court should affirm.

II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

The trial court did not abuse its discretion in entering an order on October 2, 2009, vacating a default judgment against John Bradley Barnes.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court rule correctly when it held that RCW 18.27.040(3) does not authorize substitute service through the Department of Labor and Industries on a contractor for claims against a contractor directly, but only for claims against the contractor's bond?

2. Did the trial court acted within its broad discretion when it vacated the default judgment against Mr. Barnes?

3. In the event that there is a sufficient reason to restore Ms. Ahten's default order, must the default judgment be vacated for failure to produce substantial evidence of damages?

IV. STATEMENT OF THE CASE

A. Facts of the Underlying Dispute¹

John Bradley Barnes has been a construction worker for over 20 years. CP 29. He is a responsible contractor. In his two-plus decades of service, he never had a complaint filed against him, nor had any claims made against his contractor's bond, until the instant lawsuit by Ms. Ahten. *Id.* Mr. Barnes was at all times lawfully registered, bonded and insured. *Id.*

Mr. Barnes first met Ms. Ahten in 2004, when she sought to hire him to install an Aga stove.² CP 31. Three years later, in the summer of 2007, Ms. Ahten began what started as a relatively limited remodeling project on her home in Bellevue. CP 32. She had an architect draw up plans, and hired a general contractor (not Mr. Barnes) who was the builder of record on her permit. *Id.* A permit was issued on August 3, 2007, for a garage addition and bedroom remodel. *Id.*

¹ On a motion to vacate a default judgment, the court is required to construe the facts in the light most favorable to the moving party. *Pfaff v. State Farm*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000). Accordingly, much of this subsection is derived from the Affidavit of Bradley Barnes, submitted in support of his motion to vacate. Ms. Ahten did not submit evidence directly disputing most of these facts.

² Mr. Barnes was one of three certified installers for Aga stoves in Washington. CP 31..

In what was to become an unfortunate pattern, Ms. Ahten soon scrapped her initial plans and substantially expanded the scope of her project. CP 32. Apparently concerned from the outset whether she could finance her ambitions, she terminated her general contractor and took over management of the project herself. *Id.* Ms. Ahten then hired Mr. Barnes to work as a carpenter and general laborer. *Id.* Mr. Barnes also agreed to provide advice on the project and to help Ms. Ahten keep tabs on the multiple contractors she had working for her. *Id.* Ms. Ahten paid Mr. Barnes \$60 per hour for these services. *Id.* By acting as her own general contractor, Ms. Ahten was able to avoid paying the mark-up costs she would have had to pay Mr. Barnes if she hired him as general contractor. *Id.*³

Mr. Barnes began work for Ms. Ahten on August 23, 2007. CP 33. From the time she hired him, Ms. Ahten was aware Mr. Barnes intended to move to Louisiana in December 2007. *Id.*

Part of Ms. Ahten's expanded project involved replacing the roof and upper windows of her home. *Id.* Given the regional climate, everyone understood the importance of completing the roof work before the onset of winter rains. *Id.* Unfortunately, Ms. Ahten frustrated her own

³ Although Ms. Ahten asserted Mr. Barnes asked her for an extra "\$35 a day for supervision," CP 15, her own evidence belied this assertion. CP 83-85. (Invoices attached to Ms. Ahten's declaration showing she paid Barnes only \$60 per hour for all of his services).

interests by repeatedly changing her plans and halting work so she could contemplate further changes. CP 33-34. Ms. Ahten would see some other house she liked and alter her plans to mimic that house. CP 33. She would visit the jobsite (often when Mr. Barnes was not present) and either stop work or redirect it when she could not envision how what was being done fit with her evolving concept of the completed project. CP 33-34. By October, virtually the entire house had been demolished in accordance with Ms. Ahten's orders. *Id.*

Mr. Barnes and Francisco Flores, the roofing/framing contractor, strenuously attempted to impress upon Ms. Ahten the importance of completing the framing before the onset of winter weather, and to suggest to her how her frequent work stoppages were putting that necessity in jeopardy. CP 34. Their efforts were unsuccessful. *Id.*

On December 13, 2007, as planned, Mr. Barnes left Washington to move to Louisiana. *Id.* That same day he received a call from Mr. Flores, informing him that Ms. Ahten had ordered he and his laborers to stop all work and leave the premises. CP 34-35. Ms. Ahten was dissatisfied with the plans she'd been working with and decided the entire second story and roof had to be again dismantled and rebuilt. CP 35. At that point, Mr. Flores had been on track to complete weatherproofing of the structure within a few days. CP 34.

On approximately December 22, 2007, Jen Harrington, Ms. Ahten's sister, called Mr. Barnes in Louisiana on his cell phone. CP 35. She informed him she and Herb Ahten, Jan's brother, had "remove[d] Jan from the loop" and taken over the project.⁴ *Id.* Ms. Harrington told Mr. Barnes they had no issues with his work on the project and that "[e]verything you've done is just fine." *Id.*

A few days later, Mr. Barnes returned to the Northwest to spend Christmas with his mother and stepfather. *Id.* While he was there, Barnes met with Mr. Ahten and Ms. Harrington at their request. *Id.* Ms. Harrington and Mr. Ahten gave Mr. Barnes a letter from Jan Ahten confirming their authority on the project. CP 35-36, 40. Ms. Harrington's and Mr. Ahten's responsibilities were to include:

[A]ll decisions to be made regarding architectural corrections, framing changes, materials required and future contracting and subcontracting bid analysis. To include, but not limited to roofing, siding, windows, plumbing, electrical, sprinkler, HVAC, painting, flooring, finish carpentry and any other necessary changes for completion of the remodel of the Ahten residence. I [Jan Ahten] agree to be responsible for payment of all bills related to such work authorized

CP 40. Mr. Ahten decided once again that the existing plans were not satisfactory and created a revised plan that required demolition of all previously-completed work on the second floor. CP 35-36. Mr. Ahten

⁴ According to Harrington, this was not the first time she and her brother had had to intervene in situations where their sister had "g[otten] in over her head." *Id.*

and Ms. Harrington asked Mr. Barnes to provide labor and supervision for \$60 per hour on the project, a proposal they reduced to writing. CP 35-36, 43.

In her declaration in support of her motion for default judgment, Ms. Ahten asserted, among other things, that Mr. Barnes simply “left the roof off the home for two months”, allowing water intrusion to damage the interior of her home. CP 15. The damage particularly occurred, according to Ms. Ahten, “during the storm of December 2, 2007.” *Id.*

However, on January 1, 2008—a month after Mr. Barnes allegedly caused such extensive damage to Ms. Ahten’s home—Ms. Ahten wrote to Mr. Barnes seeking to hire him to complete the project. CP 43. Her letter begins, “Thank you for assisting in the remodel of the Ahten residence” The letter does not mention water damage, nor any problems with the project nor Mr. Barnes.

Three days earlier, on December 28, 2007, Ms. Ahten wrote Mr. Barnes informing him she had placed her brother and sister in charge of the remodel. CP 40.⁵ If the water intrusion in fact occurred in the fashion Ms. Ahten alleges, the most logical parties to hold responsible would be

⁵ These letters were placed in the record by Mr. Barnes after Ms. Ahten had obtained her default judgment, as exhibits to his declaration in support of his motion to vacate that judgment. CP 40, 43. Notably, although Ms. Ahten’s responsive declaration reiterates the allegations of her previous declaration supporting the default judgment, the allegation regarding damage caused by the December 2, 2007 storm is omitted from the latter declaration. CP 81.

the roofing/framing contractor (Mr. Flores) and/or Ms. Ahten's brother and sister, who had taken over management of the project. Although the judgment against Barnes is based upon the premise that he was contractually obligated to prevent the alleged water intrusion from occurring, Ms. Ahten provided no evidence, via testimony or otherwise, of the actual terms of the alleged contract between her and Barnes (beyond that he would be paid \$60 per hour for carpentry, general labor, and "supervision.") Nor does she state when the alleged water intrusion occurred, other than to state that a substantial part of it happened a month before she solicited Barnes to help her complete her remodel. Ms. Ahten's damages judgment is completely unsupported by evidence, and is inconsistent with her testimony regarding liability.

After meeting with Mr. Ahten and Ms. Harrington, Mr. Barnes agreed to help complete the remodel. CP 36-36. From January 2 to January 10, he and Mr. Flores demolished the second story and roof as directed by Mr. Ahten. CP 36. However, Mr. Ahten, apparently angered by Mr. Barnes' request that the Ahtens pay him for past-due storage costs and labor, suddenly terminated Mr. Barnes on January 10. CP 36-37. Barnes did no further work on the remodel, and returned to Louisiana. *Id.*

Notably, Mr. Barnes had attempted to re-secure some tarps that had come loose after Ms. Harrington and Mr. Ahten took over the project

and left it unattended. CP 36. Ms. Harrington refused Barnes' request to purchase additional tarps. *Id.*

B. Procedural Facts

On June 19, 2008, six months after Mr. Barnes had moved to Louisiana,⁶ Ms. Ahten filed a complaint in King County Superior Court against Mr. Barnes, his sole proprietorship, and his bonding company, Western Surety Company. CP 1-5. The complaint alleged Ms. Ahten and Mr. Barnes had entered into "a series of contracts" to construct improvements to her home; that Mr. Barnes had breached those contracts; and that his breach had caused damage to her property. CP 4. Despite having Mr. Barnes' current cell phone number, and despite knowing his whereabouts, Ms. Ahten made no attempt to serve Mr. Barnes personally. Instead, Ms. Ahten admits she attempted service solely by mailing copies of her summons and complaint to the Washington Department of Labor and Industries (hereinafter "the Department"). Brief of Appellants at p. 3. Because he was not served and had no knowledge of Ms. Ahten's complaint, Mr. Barnes did not appear or answer. On September 4, 2008, Ms. Ahten filed an ex parte motion for a default order and judgment against Mr. Barnes. CP 6-8.

⁶ Ahten admits she was aware Mr. Barnes had left for Louisiana, although she contends she did not know he had permanently changed residence. CP 81.

Ms. Ahten's motion relied upon her declaration to establish liability and damages. CP 14-28. Although she asserts in her declaration that Barnes removed the roof of her house and left it unprotected, she fails to identify who ordered the removal or who was responsible for keeping the structure weatherproofed. CP 15. The declaration does not set forth any of the terms of the alleged contract(s) between Ms. Ahten and Mr. Barnes beyond the following statement: "[Barnes] told me he would charge \$35 a day for supervision and \$60 for carpentry work. I agreed to have Mr. Barnes perform the work" *Id.*

The declaration asserts Ms. Ahten's damages amounted to \$250,496. CP 16. Her sole support for this allegation is a two-page excel spreadsheet, whose author is unidentified but is presumably Ms. Ahten herself. CP 16, 27-28. This spreadsheet lists a number of items that could be associated with a remodeling project, along with dollar figures associated with each item. CP 27-28. Certain of these items are identified as being costs necessitated by Mr. Barnes' alleged breaches of contract. *Id.* It is unclear, and unexplained, how many of the items identified—such as "Footing Drains," "Back Yard," "Furnace/HVAC," and "Landscape," among others—could be associated with water damage to the interior of Ms. Ahten's home. Ms. Ahten did not submit any invoices, canceled checks, letters, or declarations from contractors—nor any other

documentary proof—that she had actually incurred any of these costs. Nor did any of Ms. Ahten’s materials indicate how these costs were associated with the alleged water damage to the interior of her home caused by Mr. Barnes’ alleged breach of contract.

A commissioner signed the order of default and judgment on the day it was presented, September 4, 2008. CP 11-13. Mr. Barnes did not receive notice of Ms. Ahten’s complaint until after she had obtained the default judgment against him. Mr. Barnes filed a motion to vacate the default judgment on August 25, 2009. CP 45. After responsive pleadings were filed and a hearing held, the trial court granted Mr. Barnes’ motion by written order dated October 2, 2009. CP 96. Ms. Ahten’s appeal timely followed.

IV. STANDARD OF REVIEW

The Court of Appeals reviews a trial court’s decision on a motion to set aside a default judgment for abuse of discretion. *Little v. King*, 160 Wn.2d 696, 703, 161 P.3d 345, 349 (2007). The Court of Appeals will not disturb the trial court’s decision on this issue unless it constitutes an abuse of discretion. *Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986). Such an abuse is less likely to be found if the superior court sets aside the default judgment than where it refuses to do so. *Id.*

V. AUTHORITY AND ARGUMENT

The law supports the trial court's ruling below vacating Ms. Ahten's default judgment. The trial court lacked personal jurisdiction over Mr. Barnes because Mr. Barnes was not properly served. As prior judicial decisions, legislative history, the overall statutory scheme, and principles of statutory construction indicate, RCW 18.27.040(3) provides only for substituted service upon the Department in a suit upon the contractor's bond, not upon the contractor personally. In the event that this Court does not affirm the trial court's decision on the grounds of lack of service of process, this Court should remand for further proceedings relating to Ms. Ahten's damages.

A. The Trial Court Correctly Ruled It Had No Personal Jurisdiction To Sustain A Default Judgment Because Ms. Ahten Failed To Lawfully Serve Mr. Barnes With Process.

"In serving resident individuals . . . in personam jurisdiction is customarily obtained by serving 'the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein.'" *Mid-City Materials v. Custom Fireplaces*, 36 Wn. App. 480, 484, 674 P.2d 1271 (1984). Mr. Barnes is an individual, doing business as a sole proprietorship. However, Ms. Ahten admits she made no attempt to personally serve Mr. Barnes. Her appeal is based exclusively on her contention that personal service

was effected upon—and personal jurisdiction was obtained over—Mr. Barnes when she mailed her summons and complaint to the Washington Department of Labor & Industries (“the Department”) pursuant to RCW 18.27.040(3).

Ms. Ahten is wrong. As demonstrated *infra*, the substituted service provision of RCW 18.27.040(3) are not meant to confer personal jurisdiction over an individual contractor for claims against that contractor individually. Rather, section 040(3) only confers personal jurisdiction over suits against the contractor’s bond. Because a default judgment entered without first obtaining personal jurisdiction is void, the trial court correctly vacated the default judgment below. *Mid-City Materials*, 36 Wn. App. at 487.

1. *Statutory Construction*

Applicable rules of statutory construction indicate that 18.27.040(3) confers personal jurisdiction over suit against the bond, not suit against the contractor individually. The rules of statutory construction applicable here are well established:

The primary rule of statutory construction is to give effect to the legislature's intent. Legislative intent is determined primarily from the statutory language *viewed in the context of the overall legislative scheme. Statutory provisions should be read together with others to achieve a harmonious and unified statutory scheme. Statutes relating to the same subject will be read as complementary, rather*

than in conflict with each other. Courts should avoid construing a statute in a manner which results in unlikely, strange, or absurd consequences.

State v. Creegan, 123 Wn. App. 718, 726, 99 P.3d 897 (2004) (emphasis added) (citations and internal quotation marks omitted). In addition, to determine legislative intent, the Court must take account of prior constructions of the statute by the Washington Appellate Courts. *Stewart Carpet v. Contractors Bonding*, 105 Wn.2d 353, 358, 715 P.2d 115 (1986). “[T]he legislature is presumed to know the existing state of the case law in those areas in which it is legislating.” *Woodson v. State*, 95 Wn.2d 257, 262, 623 P.2d 683 (1980). Indeed:

Legislative intent is to be gleaned, if possible, from the language of a statute itself. Legislation is never written on a clean slate, however, nor is it ever read in isolation or applied in a vacuum. Every new enactment takes its place as a component part of what is nowadays in this jurisdiction, as in every other, an extensive and elaborate system of written laws.

As has been aptly expressed, “Harmony and consistency are positive values in a legal system by reason of serving the interests of impartiality and minimizing arbitrariness. The practice of construing statutes by reference to other statutes is based upon the sound public policy of advancing those values.”

Expert Drywall v. Brain, 17 Wn. App. 529, 541, 564 P.2d 803 (1977) (quoting 2A C. Sands, *Sutherland Statutes And Statutory Construction* 53.01 (4th ed. 1973).

Ms. Ahten concedes it is the primary goal of a court interpreting a statute to give effect to the Legislature's intent. However, she contends the language of RCW 18.27.040(3) is so straightforward with regard to personal service and jurisdiction that this Court need not consider the context of the overall statutory scheme, section 040's legislative history, nor the cases interpreting it, to determine that intent. Ms. Ahten ignores the fact that the Courts of this State have always relied upon an examination of the overall statutory scheme to determine the legislative intent of Chapter 18.27 RCW, and in particular, RCW 18.27.040. *See, e.g., Collectors Svcs. v. McConnachie*, 106 Wn. App. 738, 24 P.3d 1112 (2001) (discussed *infra*); and *Cosmopolitan Eng. Group v. Onedo Degremont*, 159 Wn.2d 292, 297-303, 149 P.3d 666 (2006) (discussed *infra*).

Not even the case cited by Ms. Ahten supports her narrow conception of this Court's role here. In *Whatcom County v. Bellingham*, 128 Wn.2d 537, 909 P.2d 1303 (1996) (cited by appellant at p. 8) the Court does indeed state that "[i]n interpreting a statute, we do not construe a statute that is unambiguous." *Id.* at 546. That opinion goes on to state, however:

The purpose of an enactment should prevail over express but inept wording. The court must give effect to legislative intent determined "within the context of the entire statute."

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.

Id. (citations omitted) (emphasis added). The court emphasized: “We have never blindly applied a statute without considering the context of the statute's language or the legislative purpose.” *Id.* at 548 (emphasis added). Accordingly, as the next section will demonstrate, when RCW 18.27.040(3) is viewed in context according to these statutory principles, it provides for substitute service on the Department only for suit against the contractor’s bond, not against the contractor individually.

2. *Construed Appropriately Within the Context of the Overall Legislative Scheme, Legislative History, and Prior Judicial Decisions, RCW 18.27.040(3) Provides For Substituted Service Only Upon the Contractor’s Bond, Not Upon the Contractor Personally.*

a. *The Purpose of RCW 18.27 is to Require Contractors to be Bonded and Insured, and to Delineate the Procedures for Bringing Suit Against the Contractor’s Bond.*

It is true, as Ms. Ahten states, that the purpose of Chapter 18.27 RCW is “to afford protection to the public including all persons . . . furnishing labor, materials, or equipment to a contractor from unreliable, fraudulent, financially irresponsible, or incompetent contractors.” RCW 18.27.140. However, it is well established by numerous Supreme Court and Court of Appeals decisions that “[t]he crucial devices utilized by the legislature” to accomplish this purpose are the bond and insurance

requirements of sections 040 and 050. *Murphy v. Campbell Investment Co.*, 79 Wn.2d 417, 421-22, 486 P.2d 1080 (1971). Numerous cases repeat this conclusion. *See, e.g., Cosmopolitan Eng. Group v. Ondeo Degremont*, 159 Wn.2d 292, 294, 149 P.3d 666, 667 (2006) (“RCW 18.27.040 provides a mechanism for consumers, subcontractors, and other injured parties to recover against the [contractor’s] bond.”) (emphasis added); *Bremmeyer v. Peter Kiewit Sons*, 90 Wn.2d 787, 792, 585 P.2d 1174 (1978) (quoting *Murphy*, 79 Wn.2d at 421-22); *International Comm. Collectors v. Carver*, 99 Wn.2d 302, 304, 661 P.2d 976 (1983) (“RCW 18.27.040 designates the persons and enumerates who may make claims against the bond, the method of making the claims, and the order in which claims shall be satisfied.”) (emphasis added); *Stewart Carpet v. Contractors Bonding*, 105 Wn.2d 353, 357, 715 P.2d 115 (1986) (same); *Expert Drywall v. Brain*, 17 Wn. App. 529, 540, 564 P.2d 803 (1977) (subcontractors who were bonded and insured fulfilled the purpose of the statute and therefore substantially complied with it); *B.A. Van De Grift, Inc. v. Skagit Cty.*, 50 Wn. App. 545, 549, 800 P.2d 375 (1990) (“The legislative purpose underlying RCW 18.27 is satisfied when the contractor . . . has met the bonding and insurance requirements of RCW 18.27, those indicia of minimal financial responsibility required by the statutory enactment to protect the general public against the unreliable, fraudulent

or incompetent contractor.”); *Custom Track v. Vulcan Mining*, 62 Wn. App. 208, 211, 813 P.2d 626 (1991) (“The purpose of the act is to prevent the victimizing of a defenseless public by unreliable, fraudulent and incompetent contractors by requiring the contractor to secure a surety bond and insurance and register with the State.”) (citing *Murphy*, 79 Wn.2d at 421-22) (emphasis added).

b. *Prior Decisions and the Legislative History of RCW 18.27.040(3) Confirm Its Substitute Service Provisions Apply Only in Suits Against the Contractor’s Bond.*

There are several cases which establish that the service provisions of section 040(3) are limited to suits against the construction bond. All are applicable to the present case. Consequently, Ms. Ahten’s interpretation of RCW 18.27.040(3) is not supported by case law.

The first case to confront the application of RCW 18.27.040(3)’s service provisions was *Mid-City Materials v. Custom Fireplaces*, 36 Wn. App. 480, 674 P.2d 1271 (1984). In that case, homeowners obtained a default judgment against the alleged partners of a contractor who, they claimed, negligently installed a fireplace in their home. As Ms. Ahten does here, the homeowners contended they obtained personal jurisdiction over the alleged partners by substitute service on the Department, pursuant to RCW 18.27.040(3). At that time, the statute read:

Any person having a claim against the contractor for any of the items referred to in this section may bring suit upon such bond in the superior court Action upon such bond or deposit shall be commenced by serving and filing of the complaint Three copies of the complaint shall be served by registered or certified mail upon the department at the time suit is started Such service shall constitute service on the registrant and the surety for suit upon the bond and the department shall transmit the complaint or a copy thereof to the registrant at the address listed in his application and to the surety within forty eight hours after it shall have been received.

The court held “[t]he service provisions of that statute are clearly and specifically limited by the language of the statute to suits brought on the bond.” *Id.* at 484.

The next case to examine the service provisions of RCW 18.27.040(3) was *Collectors Svcs. v. McConnachie*, 106 Wn. App. 738, 24 P.3d 1112 (2001). Again, the plaintiffs attempted service on a contractor by serving the Department in accordance with RCW 18.27.040(3). The language of the statute had been amended in the interim between the *Mid-City* and *McConnachie* decisions. At the time of *McConnachie*, the statute read:

Any person . . . having a claim against the contractor for any of the items referred to in this section may bring suit upon the bond or deposit. Action upon the bond or deposit shall be commenced by filing the summons and complaint with the clerk of the appropriate superior court Service of process in an action against the contractor, the contractor's bond, or the deposit shall be exclusively by service upon the department. . . . The service shall

constitute service on the registrant and the surety for suit upon the bond or deposit

There, as here, the plaintiffs argued the court acquired jurisdiction over the contractor “because the clear language of the statute says so: ‘Service of process in an action against the contractor, the contractor’s bond, or the deposit shall be exclusively by service upon the department.’” According to the court, the issue was “whether the Legislature intended to modify the service of process scheme for all lawsuits against contractors by requiring service of process exclusively through RCW 18.27.040, or just those suits on the bond.” *Id.* at 742-73.

The court began by noting RCW 18.27.040 is titled (then as now): “Bond or Other Security Required—Actions Against—Suspension of Registration Upon Impairment.” *Id.* at 743. Examining the statute as a whole, the court concluded “the overall focus” of RCW 18.27.040(3) remained the contractor’s bond and deposit. *Id.* It held that both the purpose and the language of the statute required them to interpret it to mean service on the Department “is for the limited purpose of realizing on a contractor’s bond or deposit.” *Id.*

The Supreme Court analyzed and discussed RCW 18.27.040 at length in a case that is virtually dispositive for purposes of this appeal: *Cosmopolitan Eng. Group v. Ondeo Degremont*, 159 Wn.2d 292, 149 P.3d

666 (2006) (“*Cosmopolitan*”). In that case, *Cosmopolitan*, a subcontractor, sued its general contractor under breach of contract and unjust enrichment theories, seeking to recover payment for its services. It prevailed at trial, then moved for attorney fees pursuant to 18.27.040(6).

That subsection then 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 a 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^[7]

The question for the Court was whether an award of attorney fees pursuant to this subsection was limited to recovery against the contractor's surety bond. The Court of Appeals held it was not so limited, reversing the trial court. *Cosmopolitan Eng. Group, Inc. v. Ondeo Degremont, Inc.*, 128 Wn. App. 885, 117 P.3d 1147 (2005). The Supreme Court reversed the Court of Appeals.

The court again took note of the title of RCW 18.27.040 (“Bond or other security required-Actions against-Suspension of registration upon impairment.”) It stated, “RCW 18.27.040(3) allows parties having a claim to bring suit against the bond. The statute recites filing requirements,

⁷ This was the 2001 version of RCW 18.27.040(6). It has since been amended once, in 2007. The only modification in the 2007 version was to further limit the fee shifting provision, to apply only in suits brought by residential homeowners. Laws of 2007, Ch. 436, § 6.

statutes of limitations, and service requirements specifically for suits against the bond.” *Id.* at 297 (emphasis added). The court addressed the other subsections of Section 040, noting how each related exclusively to bonds and suits against the contractor’s bond. The court noted that it was “in the midst of these subsections regarding the bond” that the Legislature included the fee shifting provision. *Id.* at 298. Applying the rule of statutory construction which mandates that a court consider the statute as a whole to discern the “plain meaning” of the section at issue, “as well as related statutes or other provisions in the same act that disclose legislative intent,” *id.* at 298, the Court reasoned:

Cosmopolitan and the dissent argue that if we interpret the attorney fee provision to authorize recovery of attorney fees only for the action against the bond, then the provision's reference to an action “against the contractor and contractor's bond” would be superfluous. RCW 18.27.040(6) (emphasis added). Yet an action against the bond must also necessarily claim that a contractor breached a contract or failed to pay. This need to establish underlying contractor liability explains the legislature's reference to “an action filed under this section against the contractor and contractor's bond or deposit.” RCW 18.27.040(6) (emphasis added). Had the legislature intended to authorize attorney fees for prevailing parties both in actions against contractors and in actions against the bond, the legislature could have referred to multiple actions or made it clear that fees were warranted either in an action against the contractor or in an action against the contractor's bond.

Id. at 300-01 (emphasis in original).⁸

The Court went on to state:

Both Cosmopolitan and the Court of Appeals discuss the statute's purpose to protect the public, including subcontractors like Cosmopolitan, "from unreliable, fraudulent, financially irresponsible, or incompetent contractors."

...

Interpreting RCW 18.27.040(6) as Cosmopolitan and the dissent suggest would certainly be protective of prevailing homeowners, subcontractors, and suppliers. However, the context of the statutory scheme is important. While contractor registration in general, and bond requirements in particular, are obviously intended to protect the public from irresponsible contractors, this purpose should not necessarily be used to extend the protections beyond the mechanisms expressly provided for in the relevant statute. The dissent simply ignores the placement of the attorney fee provision within RCW 18.27.040, the bonding statute. . . After considering the entire context of RCW 18.27.040, it seems clear that the legislature intended subsection (6)'s attorney fee provision to be limited to actions against the bond.

Id. at 301-02.

Finally, the Court examined the legislative history of the statute. It concluded that history supported its interpretation that subsection 040(6), like the rest of section 040, applied only to suits against the contractor's bond. It reasoned:

⁸ The same language appears in subsection 040(3) ("Service of process in an action filed under this chapter against the contractor and the contractor's bond or the deposit shall be exclusively by service upon the department.") (emphasis added).

Had the legislature intended to depart from the American rule in breach of contract suits against contractors, it could have done so more explicitly, at the very least by removing the attorney fee provision from the statutory section dealing entirely with suits against contractors' bonds.

Id. at 303 (emphasis in original).⁹

Although it focused on a different subsection than the one at issue here, *Cosmopolitan's* holding and reasoning is equally applicable to, and dispositive of, the issues in this appeal.¹⁰ Like RCW 18.27.040(6), 18.27.040(3) is part of a “statutory section dealing entirely with suits against contractors' bonds.” *Id.* at 306. In fact, the *Cosmopolitan* Court specifically stated subsection 040(3) “allows parties having a claim to bring suit against the bond. The statute recites filing requirements, statutes of limitations, and service requirements specifically for suits against the bond.” *Id.* at 297 (emphasis added). Like the plaintiff in *Cosmopolitan*, Ms. Ahten seeks to “extend the protections [of subsection 040] beyond the mechanisms expressly provided for in the relevant

⁹ The history of House Bill 1843, amending RCW 18.27.040, may be found at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1843&year=2007>. Audio of the hearings on that legislation are available at <http://www.tvw.org/media/mediaplayer.cfm?vid=2007021116&TYPE=A&CFID=3513693&CFTOKEN=97168088&bhcp=1>. Nothing in the legislative history of the bill remotely suggests the Legislature intended to permit substitute service against contractors for suits against them individually.

¹⁰ Notably, the *Cosmopolitan* Court relied upon *McConnachie's* interpretation of RCW 18.27.040(3) in interpreting RCW 18.27.040(6): “The *McConnachie* court's reasoning applies equally here; considering the context of the overall legislative scheme, the statute as a whole spells out the requirements and conditions for realizing on a contractor's bond.” *Id.* at 300 (emphasis added).

statute.” *Id.* at 302. And like the dissent in *Cosmopolitan*, Ms. Ahten “simply ignores the placement of the [substituted service] provision within RCW 18.27.040, the bonding statute.” *Id.*

The 2007 amendments to subsection 040(3) are consistent with, rather than “overrule,” the existing judicial interpretations of RCW 18.27.040. The 2007 Legislature amended the subsection as follows:

Any person . . . having a claim against the contractor for any of the items referred to in this section may bring suit ~~((upon))~~ against the contractor and the bond or deposit Service of process in an action filed under this chapter against the contractor~~((;))~~ and the contractor’s bond~~((;))~~ or the deposit shall be exclusively by service upon the department. . . . The service shall constitute service and confer personal jurisdiction on the ~~((registrant))~~ contractor and the surety for suit ~~((upon the))~~ on claimant’s claim against the contractor and the bond or deposit

The previous version of the statute provided: “Service of process in an action against the contractor, the contractor’s bond, or the deposit shall be exclusively by service upon the department.” Laws of 1988, Ch. 139, § 1. By removing the comma between “the contractor” and “the contractor’s bond” and replacing it with “the contractor and the contractor’s bond”, the legislature was in fact making it clear that it was contemplating only suits against the contractor’s bond in subsection 040. Such suits would necessarily require involvement of the contractor as a party. Under the previous version of the statute, the comma between

“contractor” and “contractor’s bond” implied the section could apply to suits against the contractor individually. The legislature, through the 2007 amendments, clarified this issue.

Furthermore, in amending that particular language, the legislature incorporated the identical language of subsection 040(6)—the very language that the *Cosmopolitan* Court had just one year earlier interpreted to denote claims against the contractor’s bond only, as opposed to the contractor personally.¹¹ The legislature is presumed to be aware of such prior interpretations of its laws. *Woodson*, 95 Wn.2d at 262. Thus, it is fair to presume the legislature intended through its amendments of section 040(3) to make clear the subsection, including its substituted service provisions, apply only to claims against the contractor’s bond.

The fact that the subsection was amended to state: “The service shall constitute service and confer personal jurisdiction on the ((registrant)) contractor and the surety for suit ((~~upon the~~)) on claimant’s claim against the contractor and the bond or deposit . . .” However, this is once again consistent with the overall statutory scheme as described by the *Cosmopolitan* Court. The purpose of section 040 is to offer a clear and straightforward “mechanism for consumers, subcontractors, and other

¹¹ Subsection 040(6) provides “The prevailing party in an action filed under this section against the contractor and contractor’s bond . . . is entitled to . . . reasonable attorney fees.”

injured parties to recover against the [contractor's] bond.” *Cosmopolitan*, 159 Wn.2d at 294. As the *Cosmopolitan* Court noted, “an action against the bond must also necessarily claim that a contractor breached a contract or failed to pay. This need to establish underlying contractor liability explains the legislature's reference to ‘an action filed under this section against the contractor and contractor's bond or deposit.” *Id.* at 300-01 (Cf. the virtually identical language of RCW 18.27.040(3): service of process in “an action against the contractor and the contractor’s bond . . . shall be exclusively by service upon the department.”) Thus, by its 2007 amendments, it is clear the Legislature was simply ensuring that a party seeking to make a claim against the contractor’s bond would not be thwarted by a contention that the Court lacked the necessary personal jurisdiction over the contractor to enter judgment on the bond.

3. *Allowing Substitute Service on the Department Only for Suits Against the Bond and Not the Contractor Personally Is Consistent With the Overall Scheme of the Service of Process Statutes.*

Mr. Barnes’ interpretation of RCW 18.27.040(3) is also consistent with the Legislative scheme relating to service of process on individuals. In almost every instance, Washington statutes require that service upon individuals be made personally; substitute service is permitted only after diligent attempts to effect such personal service. *See* RCW 4.28.080(15)

and (16); (personal service); RCW 4.28.100-.110 (service by publication); RCW 13.34.080 (service by publication authorized in juvenile dependency proceedings when, “[a]fter due diligence, the person attempting service of the summons . . . has been unable to make service”); RCW 26.33.310 (in adoption proceedings, service on a parent must be made personally; where it cannot be made personally, it may be given via mail and publication); RCW 46.64.040 (a resident involved in a motor vehicle accident within this state appoints the Secretary of State as his or her lawful agent for service of process if he or she “cannot, after a due and diligent search, be found in this state”) (emphasis added). Even service on foreign corporations may be made by substitute service on the Secretary of State only when the corporation fails to appoint a registered agent within the State of Washington, or that agent cannot, after due diligence, be located. RCW 23B.15.100.¹²

To accept Ms. Ahten’s strained interpretation of RCW 18.27.040(3)’s substitute service provision would be to presume the

¹² The only exception to this approach is RCW 44.64.040’s provision for substitute service on nonresident motorists involved in motor vehicle accidents in this state. This is clearly justified only by the fact that millions of vehicles pass through Washington each year driven by nonresidents, who would not be available to be served in the State should the need arise. Although “transitory” contractors were certainly a concern addressed by the Legislature in enacting Chapter 18.27, it cannot be said that there are millions of nonresident contractors who operate within the State of Washington. In the event that a contractor cannot be found within the state, the substitute service provisions of RCW 4.28.080(15) and (16) and RCW 4.28.100-.110 may be utilized after diligent attempts to effect personal service.

legislature intended to single out contractors, among all other professionals, individuals, and even foreign corporations, as less deserving of basic due process. There is simply no basis, and Ms. Ahten suggests none, to make such an extraordinary assumption. To the contrary, as the *Cosmopolitan* Court points out, RCW 18.27.040 was the product of “intense negotiations among concerned legislators, the Department, suppliers, subcontractors, general contractors, and interest groups.” *Cosmopolitan*, 159 Wn.2d at 304.¹³

An interpretation of RCW 18.27.040(3) that allows substitute service through the Department on the contractor individually would place that statute in conflict with numerous other statutes which address service of process. A plaintiff serving an individual who happened to be a construction worker could ignore RCW 4.28.080(15) (personal service). A plaintiff serving a corporation that did construction work could ignore the service provisions of RCW 4.28.080(9) (domestic corporations) or RCW 23B.15.100 (foreign corporations). Such a strained interpretation flies in the face of established rules of statutory construction. There is no reason to reach such a strained result. The substitute service provisions of

¹³ It is important to recognize that a suit against a contractor’s bond is entirely different than a suit against the contractor personally. A contractor’s liability on a bond claim is limited to the face amount of the bond—typically between \$6,000 and \$12,000. A contractor is far less likely to be vigilant in defending such a claim than when his entire estate is potentially at risk.

RCW 18.27.040(3) are in harmony with the rest of the statutory scheme relating to service of process when the courts interpret it as they have always interpreted it: as applying only to suits upon the contractor's bond.

B. The Trial Court Did Not Abuse Its Discretion in Vacating the Default Judgment.

It is well established that this Court may affirm the trial court's decision on any grounds argued below. *Bock v. Pilotage Commissioners*, 91 Wn.2d 94, 95, n.1, 586 P.2d 1173 (1978). A trial court's decision on a motion to set aside a default judgment is reviewed for abuse of discretion. *Little*, 160 Wn.2d at 702. The Court of Appeals will not disturb the trial court's decision unless it constitutes an abuse of discretion. *Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986). Such an abuse is less likely to be found if the superior court sets aside the default judgment than where it refuses to do so. *Id.* A trial court deciding motions to vacate "should exercise its discretion liberally and equitably, so that substantial rights are preserved and justice between the parties is 'fairly and judiciously done.'" *Shepard Ambulance, Inc. v. Helsell*, 95 Wn. App. 231, 238, 974 P.2d 1275 (1999).

Default judgments are disfavored in the law as "one of the most drastic actions a court may take to punish disobedience to its commands." *Shepard Ambulance*, 95 Wn. App. at 237 (quoting *Griggs v. Averbek*

Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)). It is the policy of the law that controversies be determined on the merits rather than by default. *Calhoun*, 46 Wn. App. at 619. Balanced against this paramount principal is the need for an orderly system of justice. *Id.* The overriding concern in balancing these competing interests is whether justice is being done. *Id.* What is just and equitable must be determined by the facts of each case, not by a hard and fast rule applicable to all situations. *Little*, 160 Wn.2d at 704. Proceedings to vacate default judgments are equitable in nature, and relief should be granted or denied in accordance with equitable principles. *Shepard Ambulance*, 95 Wn. App. at 238.

Four factors are taken into account in deciding a motion to vacate. The two primary factors are (1) whether there is substantial evidence to support at least a prima facie defense to the claim; and (2) the reason for the party's failure to timely appear. *Calhoun*, 46 Wn. App. at 619. The secondary factors are (3) the party's diligence in seeking relief following notice of the entry of default; and (4) the effect of vacating the judgment on the opposing party. *Id.* The two primary factors are given greater weight than the latter two factors. *Shepard Ambulance*, 95 Wn. App. at 238-39. In fact, if a moving party is able to establish a strong defense, "scant time" will be expended inquiring into the secondary issues. *Id.* "In the absence of willful behavior, where a party moving to vacate a default

judgment shows a strong defense and the cause of the error is understandable, the motion to vacate can be granted if it is filed within the one year period of CR 60(b)(1) even where the moving party has been less than totally diligent.” *Id.* at 242-43 (emphasis added).

The instant case involves a prima facie defense on the part of Mr. Barnes and, on closer examination of Ms. Ahten’s allegations—particularly in light of the documents Mr. Barnes produced in his motion to vacate the default—raises serious concerns about the entire basis of Ms. Ahten’s default judgment. Ms. Ahten’s pervasive silence about basic details such as the terms of the alleged agreements between she and Mr. Barnes speaks volumes on its own. But one of the few details she does provide—the dates when the alleged water penetration occurred—is highly suspect, given her own subsequent communications with Barnes (where she attempted to hire him to complete her remodel a month after he allegedly destroyed the interior of her home). Ms. Ahten’s letters were produced, by Mr. Barnes, only after Ms. Ahten obtained her default judgment.

Ms. Ahten’s damage claim calls into question the validity of her default judgment. The supporting documentation for her damage claim is facially inconsistent with her declaration. In her declaration, Ms. Ahten testifies her damages were caused by water penetration through the roof

during construction. The spreadsheet she submitted as “evidence” for her damages included, as part of her damage claim, items such as “Footing Drains,” “Drain Catch Basins,” “Back Yard,” “Furnace/HVAC,” “Landscape,” “Foundation (re-pour porch),” and “Plumbing.”¹⁴ It is impossible to reconcile these damage items with her version of how the damages occurred. She failed to produce a single invoice, receipt, cancelled check, or communication of any kind from any of the contractors she would have had to hire to install these items. Given these facts, to permit Ms. Ahten to obtain a quarter-million dollar judgment against Mr. Barnes would be unjust. Examined closely as a whole, Mr. Barnes has a strong defense in this case. In such cases, the factors of diligence and the effect on Ms. Ahten are entitled to “scant” attention. *Shepard Ambulance*, 95 Wn. App. at 238-39.

The internal inconsistencies in Ms. Ahten’s own testimony demonstrate that the cardinal principal of law in vacating default judgments—that an equitable result be reached—would be violated should Ms. Ahten’s default judgment be reinstated. The trial court acted appropriately within its broad discretion in vacating the default judgment against Mr. Barnes.

¹⁴ The footing drains and drain catch basins—for which Ahten claimed nearly \$10,000 in damages—suggest that another water penetration issue may have existed that had nothing to do with Mr. Barnes: drainage problems.

C. Even if the Default Judgment Were Reinstated, This Court Should Remand for Further Proceedings Relating to Ms. Ahten's Damages.

The order vacating the default judgment against Barnes should be affirmed on both of the grounds discussed *supra*. However, even if the Court found that there were appropriate grounds to reinstate the default judgment, the damages judgment cannot stand.

A default judgment for damages should be vacated if it is not supported by substantial evidence. *Shepard Ambulance*, 95 Wn. App. at 242. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Id.*

In *Shepard Ambulance*, the Court of Appeals found that although the defendant ambulance company had not presented even a prima facie defense to liability, the trial court nevertheless would have properly vacated the plaintiff's default damage award. *Id.* The Court's holding was based on the fact that the evidence presented to the trial court in support of damages, including the plaintiff's own declaration, did not support the alleged injuries upon which his judgment was based. *Id.*

Likewise, here, Ms. Ahten's lack of evidence to support her damages, as well as the internal inconsistencies of the evidence she did submit, plainly was not sufficient to persuade a fair-minded, rational

person of the truth of her damages claim. At the very least, the damages portion of Ms. Ahten's default judgment must be set aside.

D. Mr. Barnes is Entitled to Attorney Fees On Appeal, Pursuant to RAP 18.1 and RCW 18.27.040(6).

RCW 18.27.040(6) provides

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 attorney fees.

Once the trial court correctly ruled Ms. Ahten had failed to properly serve Mr. Barnes and vacated her default judgment against him, Ms. Ahten could have simply properly served and filed her complaint and proceeded in the usual fashion with her lawsuit. Instead, she chose to pursue this appeal, further driving up the costs of litigation for both parties. It is likely she pursued this course of action for the same reason she obtained her initial default judgment by stealth: there is no merit to her allegations against Mr. Barnes. Pursuant to RAP 18.1, Mr. Barnes respectfully requests that he be awarded attorney fees and costs, for having to respond to this appeal by Ms. Ahten.

VI. CONCLUSION

The language, legislative history, overall statutory scheme, and judicial interpretations of RCW 18.27.040 make it clear that section 040 deals with just what its title says it does: contractor's bonds and suits

against those bonds. Section 040 provides the crucial mechanism for fulfilling the purpose of RCW 18.27 by requiring contractors to be bonded, and by providing streamlined procedures for filing claims against those bonds. The recent amendments to section 040 do not change this. In fact, they further clarify that the section deals with actions against contractor's bonds only. Ms. Ahten provides no basis to interpret the Legislature's 2007 amendments to subsection 040(3) as being intended to place that subsection in conflict with the remainder of the section, as well as with the entire statutory scheme relating to service of process.

The trial court did what it was required to do when it vacated Ms. Ahten's default judgment against Mr. Barnes for lack of personal jurisdiction. This Court should affirm.

DATED this 25th day of February, 2010.

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