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COURT OF APPEALS  
DIVISION I  
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No. 66153-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ADAM MESSIER, a single man

Plaintiff/Appellant,

v.

KITO AUTO SPORT, INC., a Washington corporation; KITO E.  
BRIELMAIER and JANE DOE BRIELMAIER, husband and wife  
and the martial community composed thereof

Defendants/Respondents.

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**APPELLANT'S OPENING APPELLATE BRIEF**

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## I. INTRODUCTION

Adam Messier was fraudulently induced to invest \$80,000 in a corporation by Kito Brielmaier. When Messier<sup>1</sup> sued Brielmaier to get his investment back, Brielmaier was served with the summons and complaint and case scheduling order but ignored the summon's plain directions that he "must respond" by "stating his defense in writing" "within 20 days" or "a default judgment may be entered against you," and ignored the deadlines in the case scheduling order. Brielmaier never denied the central allegations in the complaint. Brielmaier's statement that "I had never been sued before in my life and I did not know or understand that I needed to do anything regarding the lawsuit before I would eventually have my day in court" directly contradicts the simple directions in the summons.<sup>2</sup> Brielmaier also had an attorney but never consulted him until a year later.

A default judgment will not be vacated where no excuse for non-compliance is offered and no defense is shown. On his own initiative, Brielmaier did not comply with the summons. That is willful non-compliance. The default judgment should be reinstated.

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<sup>1</sup> This brief will use "Brielmaier" and "Messier" to refer to the parties. "Brielmaier" will include defendant Kito Auto Sport Inc. ("KAS") as well unless the context shows otherwise.

<sup>2</sup> Clerk's Papers ("CP") 44 Brielmaier Decl. at ¶ 20.

## II. ASSIGNMENT OF ERROR

Assignment of Error No. 1: The trial court erred by entering its Order Granting Motion to Vacate Default Judgment and Imposing Attorneys Fees.<sup>3</sup>

## III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court commit error by vacating a default judgment where Brielmaier provided no grounds to support vacation of the default judgment?

2. Did Brielmaier fail to show an excuse for his failure to timely answer the summons and complaint where the principal defendant, a college-educated individual with an attorney, admitted receiving service of the summons and complaint and case scheduling order but provided no excuse of any kind for failing to answer the complaint, to appear, or to meet any court-ordered deadlines?

3. Is the trial court's ruling an abuse of discretion and based upon an untenable ground because Brielmaier failed to explain why he did not answer or appear timely and provided no evidence of a *prima facie* defense?

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<sup>3</sup> CP 124.

#### IV. STATEMENT OF THE CASE

##### A. Relevant Factual Background

In the fall of 2005, Adam Messier was a staff employee at Firestone Complete Auto Care.<sup>4</sup> Kito Brielmaier was a friend of Messier who was starting a new company to provide auto care services. Messier was induced to leave Firestone and invest \$80,000 in KAS based upon Brielmaier's representations that Messier would not simply be a staff employee as he was at Firestone, but that Messier and Brielmaier would jointly manage the business as partners. *Id.* The opportunity to leave a position as a staff employee and become a partner in management of a business was a powerful inducement to Messier to leave his job at Firestone and to invest \$80,000 in the business. *Id.* In addition to investing \$80,000, Brielmaier induced Messier to devote numerous hours in building out a warehouse<sup>5</sup> to house the KAS business.<sup>6</sup>

In particular, Brielmaier represented to Messier (1) that he and Messier would make decisions jointly; (2) that he and Messier would

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<sup>4</sup> CP 26 Declaration of Adam Messier in Support of Default Judgment (Messier Default Decl.) at ¶ 6.

<sup>5</sup> CP 120 Declaration of Adam Messier in Opposition to Motion to Vacate Default Judgment (Messier Opp. Decl.).

<sup>6</sup> CP 120 at ¶ 5.

manage the business as partners; and (3) that Messier would receive any benefits provided by the business that Brielmaier received.<sup>7</sup>

Brielmaier never denied that he made these promises and representations to Messier. CP 44 Brielmaier Decl. at ¶¶ 18, 19.<sup>8</sup>

In or about February 2006, Messier quit his job at Firestone and went to work at KAS, which opened for business in March 2006. CP 26 at ¶¶ 7, 8.

Contrary to Brielmaier's promises, Brielmaier made himself the sole boss and did not make joint decisions with Messier about the management of the business as partners. *Id.*; CP 122 at ¶¶ 15, 16, 17.

KAS's business records identified Brielmaier as an "officer" and Messier as "staff."<sup>9</sup> CP 46, *et seq.* Brielmaier's own declaration shows

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<sup>7</sup> 5. I was induced to enter into the agreement based upon representations made to me by Kito Brielmaier. Mr. Brielmaier represented that he and I would jointly make decisions about the operation of the business as partners; that I would be part of the management of the business; and that I would receive any benefits provided by the business that Brielmaier received.

6. At the time I entered into this agreement I was employed at Firestone Complete Auto Care. The promises that Mr. Brielmaier and I would manage the business as partners and that I would receive any benefits that Mr. Brielmaier received were material to me in deciding to leave my job at Firestone and to invest \$80,000 in KAS.

CP 26 at ¶¶ 5, 6.

<sup>8</sup> In fact, most of Brielmaier's declaration is devoted, not to addressing Messier's claims, but to unrelated facts and circumstances evidently intended to impugn Messier to the Court. Messier firmly denied these pejorative allegations, but they are irrelevant to the resolution of the issues.

that Messier did not jointly manage the business with Brielmaier. For example, Brielmaier fails to identify a single joint management decision Messier and Brielmaier made together in the 20 months Messier worked at KAS (February 2006-October 2007). Brielmaier does not identify a single instance where Messier made any management decisions on his own, as would naturally happen over the course of 20 months when partners were managing a business together.

Instead, Brielmaier's declaration confirms that he made the management decisions. Brielmaier testified that Messier "agreed to every decision that I made about operating our business. I also agreed with many of the recommendations he made regarding the operation of our business." CP 45 Brielmaier Decl. at ¶ 21 (emphasis added).<sup>10</sup> In short, in KAS's business records and in practice, Brielmaier was the boss and

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<sup>9</sup> Brielmaier claims that he made sure he was paid the same as Messier, but the pay records he provides do not appear to support that allegation. CP 122 at ¶ 14. Because Messier was classified as "staff," KAS was obligated to comply with Washington State's minimum wage statutes. RCW 49.46.130, 49.52.070 (double damages statute). While Messier opted not to pursue these claims in the context of obtaining a default judgment, the wage payment records do not reflect payment for the 54-hour weeks that Messier put in.

<sup>10</sup> Mr. Messier explained how Mr. Brielmaier treated his suggestions. See CP 122 at ¶¶ 16, 17 ("In response, Mr. Brielmaier told me that it was his shop, not mine.") ("My recommendation was ignored, bookkeeping practices remained the same, and as stated in Mr. Shahla's declaration, we held only 2 or 3 formal meetings.").

Messier was just another staff employee, no different than he had been at his previous position with Firestone.

**B. Relevant Procedural Background**

Brielmaier is a college graduate (University of Washington 1995). CP 40. Brielmaier had previously employed an attorney, Jerry Herman,<sup>11</sup> on two prior occasions, who had drafted documents for Brielmaier for the KAS transactions. CP 45 at ¶ 20.

Brielmaier was served with the summons, complaint, and case scheduling order. CP 13, 40 at ¶ 20. The summons expressly told him that he “must respond” by “stating his defense in writing” “within 20 days” or “a default judgment may be entered against you.”

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons (or 60 days if served outside the State of Washington), excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded.

CP 1 Summons (emphasis added).

The complaint Brielmaier received, entitled “Complaint for Rescission, Fraud, Misrepresentation, Unpaid Wages, and Double

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<sup>11</sup> Mr. Herman is apparently now retired. He appears to be a former partner of Brielmaier’s present attorney.

Damages” notified him of substantial and serious claims against him and KAS. CP 3. The complaint, only 3 1/2 pages long, demanded repayment of Messier’s original investment of \$80,000, \$8,000 for medical expenses, and unpaid wages and double damages.

The case scheduling order Brielmaier received contained, in large, bold type, 12 “DEADLINES” and the term “ORDER” and the threat of “penalties,” all of which appeared on the page Brielmaier says he read, and the following statement:

Pursuant to King County Local Civil Rule 4 (KCLCR 4) IT IS ORDERED that the parties shall comply with the schedule listed above. Penalties, including but not limited to sanctions set forth in Local Civil Rule 4(g) and Rule 37 of the Superior Court Civil Rules, may be imposed for non-compliance.

CP 9 Case Scheduling Order.

Messier obtained a default judgment on August 14, 2009. CP 28. Brielmaier filed his motion to vacate on August 11, 2010. CP 31. The trial court granted the motion to vacate on September 28, 2010. CP 124.

## V. ARGUMENT

### A. Introduction and Summary of the Argument

A defendant must provide some grounds upon which the trial court can base its exercise of discretion. A defendant must offer some explanation for failing to answer and provide specific facts evidencing a defense to justify the vacation of a default judgment.

Brielmaier did neither. On his own initiative Brielmaier did not comply with the summons. No case in Washington has permitted a default judgment to be vacated where no excuse for ignoring the summons is offered and no defense is shown.<sup>12</sup>

Brielmaier provided no excuse or explanation why he did not comply with either the summons or the case scheduling order. Brielmaier's statement that "I had never been sued before in my life and I did not know or understand that I needed to do anything regarding the lawsuit before I would eventually have my day in court[]" (CP 44 Brielmaier Decl. at ¶ 20) directly contradicts the simple directions in the summons. Washington courts have long held that allowing a defendant to ignore judicial process would "seriously impair, if not destroy, the effectiveness of all judicial process."<sup>13</sup>

Brielmaier also failed to show that he had any defense that would require a trial.<sup>14</sup> A trial would be useless because Brielmaier never denied the misrepresentations and identified no facts that would establish a

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<sup>12</sup> *Bishop v. Illman*, 14 Wn.2d 13,17, 126 P.2d 582 (1942); *Commercial Courier Serv. v. Miller*, 13 Wn. App. 98, 533 P.2d 852 (1975); *Johnson v. The Cash Store*, 116 Wn. App. 833, 841-42, 68 P.3d 1099 (2003), *rev. denied*, 150 Wn.2d 1020.

<sup>13</sup> *Bishop*, 14 Wn.2d at 17.

<sup>14</sup> *Farmers Ins. v. Waxman Indus.*, 132 Wn. App. 142, 145-56, 130 P.3d 874 (2006).

defense. Brielmaier failed to carry his burden of establishing a basis to vacate the judgment, and the trial court's order was an abuse of discretion.

**B. Brielmaier's Failure to Comply with the Directions in the Summons and Case Scheduling Order Constitutes "Willful Disregard"**

An order granting a motion to vacate will be reversed if the trial court exercises its discretion on untenable grounds. *See Farmers Ins.*, 132 Wn. App. 142; *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 97-99, 900 P.2d 595 (1995).<sup>15</sup> Brielmaier provided the trial court with no facts upon which to base its decision to vacate the default judgment.

A party moving to vacate a default judgment must show (1) that there is substantial evidence supporting a *prima facie* defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). Factors (1) and (2) are considered primary, and factors (3) and (4) secondary. *Id.* at 352-53. When the moving party's evidence supports no more than a *prima facie*

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<sup>15</sup> A motion to vacate or set aside a default judgment is addressed to the sound discretion of the trial court. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991).

defense, the reasons for the failure to timely appear will be scrutinized with greater care. *The Cash Store*, 116 Wn. App. at 841-42. The purpose of default judgments is to prevent an unresponsive party from halting the adversarial process. *Gage v. Boeing Co.*, 55 Wn. App. 157, 160-61, 776 P.2d 991 (1989). Brielmaier's willful disregard of the summons has halted the judicial process of this case since early 2009.

Three Washington cases provide clear precedent for this case. The closest case to the present facts is *Commercial Courier Service*, 13 Wn. App. 98, where the defendant, as here, was personally served in Washington on a stock transaction of which he had knowledge, and the complaint, as here, alleged fraud and sought substantial damages. The *Commercial Courier* court noted especially the defendant's failure to follow the plain language of the summons:

The plain language of the summons required that the defendant appear within 20 days. This he did not do.

*Id.* at 105. The court refused to vacate the default judgment.

The process issued in the present case meant what it said.

*Id.* at 105.

In reviewing the record before us, it is difficult to conclude other than that defendant's noncompliance with that process was likely willful, and if not, was at least due to inexcusable neglect. This court will not relieve a defendant from a judgment taken against him due to his willful disregard of process, or due to his inattention or neglect in a

case such as this where there has been no more than a prima facie showing of a defense on the merits.

*Id.* (internal citations omitted; emphasis added).

Brielmaier offers no excuse for not complying with the summons. For example, Brielmaier does not claim he could not read, or that he misplaced the papers, or that he was out of the country, or that he thought someone else was filing an answer or an appearance. The sum total of an explanation of why he did not comply with the summons is Brielmaier's statement that "I had never been sued before in my life and I did not know or understand that I needed to do anything regarding the lawsuit before I would eventually have my day in court." CP 44 at ¶ 20.

But most people have not been sued before. That is not a basis for a college graduate not to follow the directions in a summons. Brielmaier does not identify a single thing that prevented him from doing what the summons told him to do. And it simply is not true that Brielmaier "did not know or understand what [he] needed to do." The summons told Brielmaier – a college educated adult with an attorney – what to do, and what would happen if he didn't comply.

you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons (or 60 days if served outside the State of Washington), excluding the day of service, or a default judgment may be entered against you without notice.

CP 1 (emphases added).<sup>16</sup> The very point of a summons is that it tells a person who may “never have been sued before in his life” what he must do, and what would happen if he did not comply.

Brielmaier’s statement does not provide an excuse for failing to follow the simple directions of the summons. As in *Commercial Courier*, “it is difficult to conclude other than that defendant’s noncompliance with that process was likely willful, and if not, was at least due to inexcusable neglect.” 13 Wn. App. at 106.

*Commercial Courier* confirmed the fundamental principle that requires a defendant to follow the plain language of a summons. Allowing a defendant on his own initiative to ignore a summons would defeat the very purpose of the form of summons issued in hundreds of cases throughout Washington every day. To allow a college educated adult with an attorney to ignore a summons is contrary to established Washington law:

To countenance such an attitude as the garnishee defendant in this case manifested towards the writ of garnishment, would soon seriously impair, if not destroy, the effectiveness of all judicial process.

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<sup>16</sup> *United States v. Nalls*, 177 F.R.D. 696, 698 (S.D. Fla. 1997) (“The Court finds that defendant’s claim of ignorance is contradicted by the plain language of the summons, which directs him to answer the summons. Accordingly, this Court finds that defendant’s failure to answer the complaint is culpable.”).

*Commercial Courier*, 13 Wn. App. at 106 (quoting *Bishop* (emphasis added)).

Brielmaier had a lawyer who had drafted documents related to the transactions that were the subject of the lawsuit. CP 45. Yet Brielmaier, who states that he had never been sued, never contacted the attorney about what he should do. CP 45. A party's failure to forward the summons and complaint to their lawyer is further evidence of willful noncompliance and inexcusable neglect.

Ms. Fish's failure to forward the summons and complaint to corporate counsel or to the Cottonwood administration – and her unexplained failure to forward the notice of a default hearing – constituted at least inexcusable neglect, if not willful noncompliance.

*The Cash Store*, 116 Wn. App. at 848-49 (emphasis added (citing *Commercial Carrier*)).<sup>17</sup>

Finally, Brielmaier's conduct here is even more egregious and willful than the conduct of the defendants in *Commercial Courier* and *The Cash Store* because he also ignored the deadlines in the case scheduling order. The case scheduling order Brielmaier received contained multiple

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<sup>17</sup> Washington courts have "repeatedly held that if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable." *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 212, 165 P.3d 1271 (2007); *Beckman v. Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 695-96, 11 P.3d 313 (2000).

case deadlines for action by Brielmaier as a defendant. CP 9. Brielmaier necessarily saw the 12 “DEADLINES” and the term “ORDER” (set out in large print calculated to get the attention of a defendant) and the threat of “penalties,” all appearing on the same page as the trial date.<sup>18</sup> Yet Brielmaier took no steps of any kind to comply with any of the “deadlines” in the case scheduling order.

Brielmaier’s conduct is more egregious than the conduct found wanting in *Commercial Courier* or *The Cash Store*. In the face of straightforward and clear directions, Brielmaier provides no explanation why a college graduate did not follow the directions in the summons “to respond to the complaint by stating his defense in writing,” or the case scheduling order, which clearly “ORDERED” Brielmaier to meet 12 “DEADLINES” before trial or be penalized. CP 9. Brielmaier’s conduct is willful, because he ignored the summons and case scheduling order without excuse.

This conclusion follows Washington law, the law in other jurisdictions, and the law in federal courts. *E.g., Postal Film v. McMurtry*, 317 N.E.2d 375 (Ill. App. Ct. 1974) (“This court cannot and will not hold

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<sup>18</sup> Brielmaier stated that he read over the case schedule, found the trial date, and decided he needed only to comply with that date, and not with any of the 11 deadlines listed directly above the trial date. CP 44 at ¶ 20.

that because a defendant did not read or did not seek counsel to read a summons constitutes excusable neglect, mistake or absence of fault.”<sup>19</sup> *Boatmen’s First Nat’l v. Krider*, 844 S.W.2d 10, 12 (Mo. Ct. App. 1992) (“The default was a direct result of negligence and her careless attitude toward the petition and summons. Mrs. Adams’ reasons for not appearing do not constitute good cause. She simply ignored the summons and refused to appear. Her conduct was intentionally, or at least recklessly, designed to impede the judicial process.”); *McDavid v. United Mercantile Agencies, Inc.*, 27 So. 2d 499, 503 (Ala. 1946);<sup>20</sup> *Rogers v Lockard*, 767

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<sup>19</sup> “The facts of this case are too closely analogous to the *Johnson-Olson Floor Coverings* case for precedent to be ignored. Indeed, as stated in that case, at page 399: ‘Defendant has cited no case, and we know of none, when a defendant was granted relief under section 72 after ignoring the proceedings on his own initiative.’ (Emphasis ours.) Likewise, we do not feel that a great injustice is done to the defendant.

‘Defendant here asks this court to excuse his conduct prior to the judgment, and hold that he acted reasonably under the circumstances. This we cannot do. The defendant is untrained in the law, and had no right to conclude, as a matter of law that he was immune from plaintiff’s claim by virtue of the pending bankruptcy proceeding. To hold otherwise would be to give license to all future defendants to make a preliminary self-determination as to their legal rights, and then ignore the proceedings if they believe the complaint is without merit. Obviously the proper administration of justice could not condone such a practice.’ 94 Ill. App. 2d at 400.”

*Postal Film*, 317 N.E.2d at 298 (second emphasis added).

<sup>20</sup> “It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of

N.E.2d 982, 987 (Ind. Ct. App. 2002) (“A person of mature years and judgment and this we will assume of appellant in the absence of any evidence to the contrary, may not idly ignore a summons to defend an action.” (internal quotation marks and citations omitted)).

In the federal courts, a defendant’s conduct is “culpable” for purposes of vacating a default judgment if he has received actual or constructive notice of the filing of the action and failed to answer. *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985); *Hunt v. Kling Motor Co.*, 841 F. Supp. 1098, 1106-07 (D. Kan. 1993).

In sum, Brielmaier, a college-educated man with a lawyer, ignored a summons, a complaint, and a case scheduling order without excuse “on his own initiative.” Brielmaier’s failure to comply with the summons or case scheduling order was “willful disregard” of the judicial process. *Bishop*, 14 Wn.2d 13; *Commercial Courier*, 13 Wn. App. 98; *The Cash Store*, 116 Wn. App. 833.

**C. Brielmaier Failed to Show a *Prima Facie* Defense Under CR 60(e)(1)**

A party seeking to set aside a default judgment “must precisely set out the facts or errors constituting a defense and cannot rely merely on

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ordinary prudence usually bestows upon important business, his motion to set aside a judgment for default should be denied.” *McDavid*, 27 So. 2d at 503.

allegations and conclusions.” *The Cash Store*, 116 Wn. App. at 847 (emphasis added).<sup>21</sup> A motion to vacate a default must be supported by an affidavit setting forth “the facts constituting a defense to the action or proceeding.” CR 60(e)(1).

The burden on a party seeking to vacate a default judgment is to present either evidence of a “strong or virtually conclusive defense” or a *prima facie* case. *The Cash Store* 116 Wn. App. at 841. The prime purpose of the rule is to prove to the court that there exists, at least *prima facie*, a defense to the claim. This avoids a useless trial if the defaulted defendant cannot bring forth facts to make such a showing when seeking to vacate the default. *Griggs v. Averbek Realty*, 92 Wn.2d 576, 583, 599 P.2d 1289 (1979).

But Brielmaier failed to present any specific facts supporting a defense to Messier’s claims. In fact, much of what Brielmaier submitted supported Messier’s claims.

Brielmaier submitted KAS’s business records showing Messier was a “staff” employee of KAS and that Brielmaier was an “officer.” CP 46, *et seq.* Brielmaier’s declarations did not dispute that he made

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<sup>21</sup> *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 239-40, 974 P.2d 1275 (1999), *rev. denied*, 140 Wn.2d 1007 (2000).

promises and representations that Messier would jointly manage the business with Brielmaier as a partner. Brielmaier submitted no evidence that showed a single instance where Messier made a management decision or where Messier and Brielmaier made a management decision together in the 20 months Messier worked at KAS. Brielmaier asserted that Messier agreed with the decisions that Brielmaier made. (Messier “agreed to every decision that I made about operating our business.” CP 45 at ¶ 21 (emphasis added).)

The most Brielmaier can offer is that he, as the boss, listened to suggestions and recommendations from Messier as he did from any other employee.<sup>22</sup> But that testimony does not show that Messier was managing the business. Being permitted to offer suggestions and recommendations is no different than any other staff employee, and is not evidence that Messier was a partner managing the business. The false inducement to Messier to invest \$80,000 and leave his previous staff job was Brielmaier’s promise that Messier and Brielmaier would jointly manage the business as partners, not that Messier could make suggestions like any other staff employee.

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<sup>22</sup> CP 44 Brielmaier Decl. ¶¶ 18, 19. Brielmaier points to vague statements by other employees/declarants that Messier was allowed to make suggestions and recommendations to Brielmaier, his boss.

Brielmaier's declarations do not even amount to a general denial of Messier's claims. *Commercial Courier*, 13 Wn. App. at 104 (defendant's affidavit amounted to general denial that raised, at most, *prima facie* defense).

Instead of denying Messier's claims, Brielmaier refers to the declarations of Kian Shahla and Zia Qadir. (CP 44 Brielmaier Decl. ¶¶ 18, 19.) But neither Shahla nor Qadir had any personal knowledge of the meetings between Messier and Brielmaier where Brielmaier made the promises and representations that led to Messier's \$80,000 investment in the corporation.

And none of these other declarations satisfy the requirement to provide "precise facts" evidencing a defense. *The Cash Store* 116 Wn. App. at 847. Qadir offers only vague and conclusory opinions. CP 86. Moreover, Qadir's declaration identifies Brielmaier as the boss, a statement that supports Messier's claims: "Kito always had the attitude of encouraging all the employees to perform at their best." CP 87 at ¶ 7.

Shahla's declaration also provides no "precise facts" that show Messier was a partner in management of the business. Instead, Shahla describes friendly board meetings, and the fact that suggestions and

recommendations were discussed and sometimes accepted.<sup>23</sup> CP 82-83. But Messier was promised that he would manage the business jointly with Brielmaier, not simply be permitted to make suggestions and recommendations.

In short, Brielmaier's declarations fall far short of providing "precise facts" showing a "strong or virtually conclusive defense" or a *prima facie* case. *The Cash Store*, 116 Wn. App. at 841. Where the defendant admits the material claims and offers no facts upon which a defense could be based, a subsequent trial would be useless. *Griggs*, 92 Wn.2d at 583.

## VI. CONCLUSION

Messier was induced to invest \$80,000 based upon a promise that he would be part of the management, not just a staff employee as he had been at Firestone. Instead, Brielmaier took his money but treated him as a staff employee. When he sued to get his money back, Brielmaier, a college graduate, willfully ignored the summons, complaint, and case scheduling order on his own initiative and never consulted his attorney. Brielmaier did not deny that he made the promises and representations that

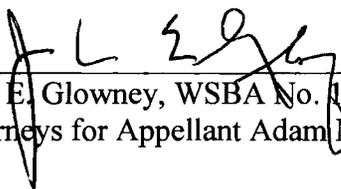
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<sup>23</sup> Mike Stark's declaration relates his memory of an alleged incident when Messier came to the shop. But these facts are unrelated to any of the claims that formed the basis of Messier's complaint. CP 84. Messier disputes the allegations (CP 122 at ¶ 10-13), but in any case they do not prove or disprove any of the claims in the complaint.

Messier would jointly manage the business, and offered no facts showing that Messier ever made a management decision, jointly or independently, in the 20 months Messier worked at KAS. Brielmaier offered no excuse for not responding to the summons and provided no precise facts showing a prima facie defense. Brielmaier provided no grounds to vacate the default judgment and the trial court abused its discretion. Messier respectfully requests that this Court reverse the order vacating the default judgment and reinstate the default judgment.

Dated this 19<sup>th</sup> day of January, 2011.

STOEL RIVES LLP

  
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**CERTIFICATE OF SERVICE**

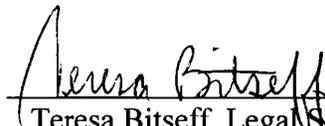
I hereby declare under penalty of perjury of the laws of Washington state that I caused a true and correct copy of the foregoing **APPELLANT'S OPENING APPELLATE BRIEF**, to be served on the following:

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**Via Email/PDF and U. S. Mail**

Dated: January 19, 2011 @ Seattle, WA

  
\_\_\_\_\_  
Teresa Bitseff, Legal Secretary  
STOEL RIVES