

No. 67818-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

COLUMBIA RECOVERY GROUP, Plaintiff, Appellant

v.

DEBORAH & RONALD BAILEY, Defendants, Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

HONORABLE JIM RODGERS, JUDGE

KING COUNTY SUPERIOR COURT CAUSE NO. 11-2-11689-1 SEA

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REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. RESTATEMENT OF THE CASE

Neither Columbia Recovery Group, “CRG,” nor its attorney, “Schneider,” knew that Jeremiah McCormick had failed to pick up his mail prior to the entry of the order of default and subsequent entry of that order as a judgment. The first notice that CRG and its counsel received that McCormick had failed to pick up his mail was from McCormick himself on June 17, 2011. (CP 124-132).

The trial court did not impose CR 11 sanctions against either the CRG or Schneider at anytime during this case. In fact, the trial court expressly crossed out the CR 11 language in the Baileys’ proposed order.

Nor did the trial court find that Schneider or CRG violated RPC 3.3. Instead, terms were awarded to the Baileys based on “equitable principles.” (CP 141-143).

II. STANDARD OF REVIEW

A trial court's decision to vacate a judgment under CR 60 is reviewed under an abuse of discretion standard. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978). Discretion is abused when the court bases its decision on unreasonable or untenable grounds. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). A decision is unreasonable if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

While a court has considerable discretion in ruling on a motion to vacate, a court must also act upon sound legal and impartial discretion, not arbitrarily, capriciously, or without regard to fixed principles, and, in particular cases, circumstances may be such as to leave no room for exercise of discretion. *Roth v. Nash*, 19 Wn.2d 731, 739, 144 P.2d 271 (1943).

III. ARGUMENTS IN REPLY

1. CRG COMPLIED WITH THE CIVIL RULES IN OBTAINING THE DEFAULT JUDGMENT AGAINST THE BAILEYS.

The Baileys' responsive brief correctly outlines the relevant section of CR 55 prescribing proper notice of a motion for default. Pursuant to CR 55, such notice shall be served on opposing parties at least five days prior to such a hearing.

CR 5(b)(2) allows service of such notice on a party's attorney by, "deposit[ing] [the papers] in the post office addressed to the person whom they are being served, with postage prepaid." Under this rule, service is deemed to have occurred three days after the papers are placed in the mail.

The Baileys' brief suggests that an additional third requirement compels a moving party to verify actual delivery of the mail under both CR 55 and CR 5. However, the Baileys have cited no language in the rules themselves, or case law, to support this position.

As such, CRG did actually serve the Baileys when it mailed their counsel notice of its motion for default, via United States Postal Service Certified First Class Mail, 28 days prior to the order of default being entered.

CRG did not “end-around” any requirement in doing so. To the contrary, it transcended the requirements of CR 55 by sending out notice to the Baileys’ counsel well in advance of the five day prescribed time period.

The Baileys also takes the position that if a Defendant does not receive actual notice of a hearing, then a court has no jurisdiction to enter an order during that hearing. If the Washington courts and legislation had intended this to be the case, they would have expressly indicated such in wording of CR 55 and CR 5. Clearly both entities recognized the potential for abuse of such a requirement. Taken to its logical conclusion, a party could simply refuse to accept mail, creating a de facto stay in any matter.

It is undisputed that the McCormick received notice of the CRG’s motion well in advance of the hearing. This is established by his retention of the USPS notices, and their inclusion as exhibits in this matter. He did not ignore them or throw them away, but instead kept them for his records.

CRG cited a litany of case law in its opening brief supporting its position that a party’s failure to respond to a motion, based on inaction by a Defendant or its counsel, is not a basis to vacate a default judgment. This is not a “novel legal theory” as the Baileys would content in their response. This is clear and un-refuted case law. Concrete examples of such were provided on pages 12 and 13 of CRG’s opening brief. The

Baileys did address the underlying law of those cases, or distinguish their fact patterns from the facts of this case.

The facts of those cases were almost identical to the facts of this case. In all those cases, an attorney or his staff received notice of a hearing or complaint, but failed to act on such notice because of “administrative errors” or “proper calendaring systems.” The only real factual point of departure between those cases and this one, is that in this case McCormick received notice, but simply refused to pick up the mail or set up a time for redelivery.

2. THE TRIAL COURT DID NOT AWARD “TERMS”
PURSUANT TO RPC 3.3, NOR DID IT FIND THAT
PLAINTIFF OR ITS COUNSEL VIOLATED THE RULE.

The Baileys’ assertion that CRG was required to notify the trial court of the returned mailing lacks a legal foundation as RPC 3.3 simply did not require it in this case. In addition, CRG and Schneider have repeatedly indicated they had no such notice prior to June 17, 2011.

The Baileys also assert that CRG’s analysis of 3.3(f) was purely “tautological.” This position ignores an important distinction between an order of default and entry of that order as a judgment. A motion for entry of judgment, pursuant to RCW 4.64.030, is purely administrative in nature. No questions of fact are resolved and no new issues are

entertained by the court. When party moves for entry of a default judgment, every substantive issue in the case has been previously resolved by the trial court.

Furthermore, King County Superior Court Local Rule 55(b) actually requires that, "Upon entry of an Order of Default, a party shall move for entry of judgment against the party in default from the Ex Parte and Probate Department." When CRG moved for entry of judgment Ex parte, it was simply complying with the local rules of King County Superior Court.

Finally, the Baileys' argument that CRG failed to properly object to arguments predicated on RPC 3.3, via a motion for reconsideration, is without merit. CRG objected on the day of the hearing. The trial court erred when it allowed the argument to proceed. As such, asking the same trial court to reconsider its decision on the matter would have been redundant. Timely appealing the trial court's error was the appropriate procedural step.

3. EVERY MOTION TO VACATE MUST BE ANALYZED UNDER THE FOUR FACTOR TEST ESTABLISHED IN THE WHITE CASE.

In proceedings to set aside default judgment moving party *must* show (1) that there is substantial evidence extant to support, at least prima facie, defense to claim asserted by opposing party, (2) that its failure to timely appear in action and answer opponent's claim was occasioned by mistake, inadvertence, surprise or excusable neglect, (3) that it acted with due diligence after notice of entry of default judgment, and (4) that no substantial hardship will result to opposing party. *See White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

The *White* case requires every moving party to address each of its four elements. If party that fails to plead properly under *White*, let alone mention it, it has clearly pled improperly for any relief pursuant to CR 60.

The Baileys' motion to vacate neither complied with, nor cited the *White* case. This point was raised in the CRG's response to the Baileys' motion to vacate and at oral arguments.

Because of this deficiency, the Baileys did not provide "substantial evidence" of a prima facie defense to the CRG's claims. They also failed to show "excusable neglect" in failing to respond to the CRG's motion to vacate. CRG has proven that the Baileys failure to act was willful. Such

“willful” actions are expressly disallowed by the *White* case. *See White* at 352.

4. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING “TERMS” TO THE RESPONDENTS

The Baileys assert that, “though the court’s order suggests it acted pursuant to CR 11, the court’s imposition of terms against CRG is justifiable under either CR 11 or CR 60(B).”

Again, the trial court did not find that either CRG or Schneider violated CR 11. The trial court expressly crossed out the CR 11 language on the order. No reasonable person, upon review of the order, could have determined otherwise. It is a borderline violation of the rule itself for the Baileys’ to repeatedly assert that CR 11 sanctions were imposed on either of CRG or Schneider. Such repeated assertions are clearly a rueful attempt by Baileys to influence the Appellate Court.

Nor did the trial court find that either the CRG or Schneider violated RPC 3.3. The court expressly stated that both parties should review the rule, not that either of them had violated it. The actual basis for the award of “terms” to the Baileys was pursuant to the trial court’s authority based in “equity” in ruling on a motion to vacate.

In order to base an award in equity, the losing party's conduct must constitute bad faith or wantonness. *PUD 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976).

In assessing the reasonableness of an award, courts should be guided by the lodestar method in calculating fee awards by determining an award of attorney fees as costs. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993).

Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Id at 151*.

A trial court must only award a reasonable fee by calculating the lodestar figure, which is the market value of the attorney's services calculated by multiplying the hours reasonably expended in the litigation by the reasonable rate of compensation. *Perry v. Costco Wholesale, Inc*, 123 Wn. App. 783, 808, 98 P.3d 1264 (2004).

The trial court erred in awarding terms to the Baileys. CRG and Schneider's actions in obtaining the default judgment, and subsequently defending it, were not grounded in "bad faith or wantonness." Both CRG

and Schneider simply defended the default judgment by citing clear and relevant case law supporting its position on the issue of notice.

The Baileys have failed to address most of CRG's arguments in terms the wrongful award and calibration of lodestar attorney's fees. The Baileys did not refute CRG's assertion that McCormick's motion to vacate was comprised mainly of needless timelines, e-mails, and rule recitation. The Baileys did not refute CRG's assertion that a large part of the motion was comprised of their unsuccessful argument for CR 11 sanctions against CRG and Schneider. Nor did the Baileys address whether the hours spent at oral argument were duplicative and unnecessary and a sole result of their own insistence that the hearing be held with oral argument.

The Baileys have also failed to adequately address lodestar's requirement that awarded attorney's fees represent a fair "market value" for attorney services. Their only response was to list McCormick's WSBA number and reference his years of practice. However, the Baileys' motion to vacate was neither long nor complex. Thus, McCormick's \$275.00 billable hour rate does not reflect a reasonable "market rate" for the work product submitted to the trial court

From a policy standpoint it is important to for attorneys and the courts to recognize that the "old way" of billing no longer applies to the current economy. The current (post recession) market now demands that

fees be predicated on merit and the complexity of the underlying case, not years of practice alone. The conception that an attorney should be entitled to a higher hourly fee based solely on years of practice is a vestige of an early era.

IV. CONCLUSION

The Baileys contend that they did not receive notice of CRG's motion to vacate. CRG disagrees. CRG has cited multiple Washington cases which would support its position

The Baileys contend that CRG should have given the court notice of McCormick's failure to accept or pick up his mail. CRG disagrees. The Baileys have cited no authority that would create this duty. Furthermore, neither CRG nor Schneider received notice of McCormick's failure to pick up his mail until June 17, 2011.

Finally, both CRG and Schneider question how this very appeal could be the basis for CR 11 sanctions, as the Baileys have failed to even acknowledge a majority of the relevant case law cited in CRG's opening brief.

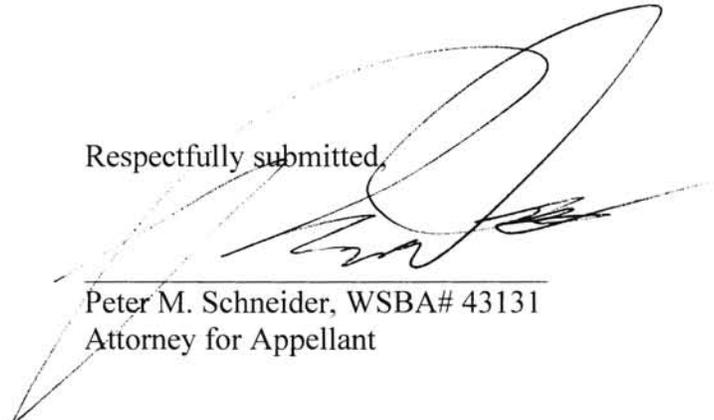
CRG respectfully asks this Court to overturn the trial court's ruling entirely and award CRG attorney's fees associated with this appeal. In the event that this Court deems such an action untenable, CRG respectfully

asks that the matter be remanded back to the trial court for an analysis which utilizes the four factors established in the *White* case, and which instructs the trial court to weigh the actions of both parties with equal force in its decision to award attorney's fees based on bad faith or wantonness.

Finally, if this Court finds that the trial court's vacation of Appellant's default judgment was proper, CRG asks that this Court adjust the award of attorney's fees to the Baileys, using the loadstar method, to a number that accurately reflects the time and rate of compensation commensurate with the scope of their motion to vacate, and award no such fees to any party for their time spent on this appeal.

Dated this April 2nd, 2012

Respectfully submitted,



Peter M. Schneider, WSBA# 43131
Attorney for Appellant

**COURT OF APPEALS DIVISION I
STATE OF WASHINGTON**

COLUMBIA RECOVERY GROUP, L.L.C., a
Washington limited liability company,

Appellant,

vs.,

DEBORAH A. BAILEY & RONALD BAILEY,
Individually and the Marital Community
Comprised Thereof,

Respondents.

COURT OF APPEALS NO.: 67818-1

DECLARATION OF MAILING

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STATE OF WASHINGTON
2012 APR -5 AM 11:07

I, Peter M. Schneider, declare as follows:

1. I am a resident of the State of Washington, over the age of 18 and competent to make this declaration herein.
2. On the 4th day of April, 2012, I deposited in the United States mail in Lynnwood

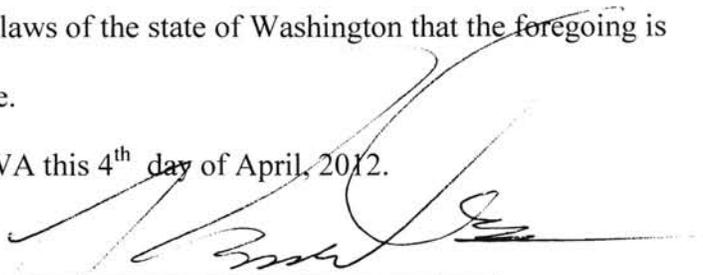
Washington, One copy of the Appellant's Reply Brief to:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge.

DATED and signed in Lynnwood, WA this 4th day of April, 2012.

A handwritten signature in black ink, appearing to read 'Peter M. Schneider', written over a horizontal line.

Peter M. Schneider, WSBA# 43131
Attorney for Appellant