

No. 67818-3-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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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

BRIEF OF APPELLANT COLUMBIA RECOVERY GROUP

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I. ASSIGNMENTS OF ERROR

1. The trial court erred and abused its discretion in granting the Baileys' motion to vacate.
2. The trial court erred and abused its discretion in awarding the Baileys \$4,125.00 in attorney's fees.

II. ISSUES PRESENTED

1. Did the trial error and court abuse its discretion when it found Mr. McCormick's neglect to be excusable?
(Assignment of Error No. 1)
2. Did the trial court error and abuse its discretion when it ruled that "good cause" existed to vacate CRG's judgment?
(Assignment of Error No. 1)
3. Did the trial court error and court abuse its discretion when it failed to apply the four factor test established in the *White* case to the Baileys' motion to vacate?
(Assignment of Error No. 1)
4. Did the trial court error and court abuse its discretion in awarding attorney's fees to the Baileys?
(Assignment of Error No. 2)
5. Did the trial court error and court abuse its discretion in the amount of attorney's fees it awarded to the Baileys?
(Assignment of Error No. 2)

III. STATEMENT OF THE CASE

On February 20, 2011, Deborah and Ronald Bailey, herein after “Baileys,” were served with Columbia Recovery Group’s, herein after “CRG,” summons and complaint for breach of a residential lease agreement (CP 1-4). Proof of such service was provided to the trial court (CP5-6). On February 26, 2011, the Baileys’ counsel, Jeremiah McCormick, made an appearance in the matter (CP 9-11). No answer was served or filed by the Baileys or Mr. McCormick in the matter.

On April 7, 2011, CRG noted a motion for default, set for April 29, 2011. The motion was set without oral argument (CP 12-29). Notice of the hearing was mailed to Mr. McCormick’s law office on April 8, 2011 (CP 32-33).

On April 9 and 14, 2011, the United States Postal Service attempted delivery of CRG’s notice at Mr. McCormick’s law office. Both times, notice of the attempted delivery was left at Mr. McCormick’s law office. Both notices contained instructions for retrieving the undelivered mail at the post office or setting up a new delivery time. Any question as to whether or not Mr. McCormick actually received this notice can be

alleviated by the inclusion of said notices, by Mr. McCormick, as exhibits H & I in the Baileys' motion to vacate (CP 38-109).

Despite receiving the notices, Mr. McCormick did not retrieve the mail or attempt to set up a time for redelivery. When asked by the trial court why he did not collect the mail, Mr. McCormick told the court that the post office was too far away.

On May 3, 2011, 5 days after the hearing on CRG's motion for default was set to be heard by the trial court, the United States Postal Service returned CRG's unclaimed mailing to Mr. Schneider's satellite law office (CP 38-109). Mr. Schneider testified at oral argument that the mailing was thrown away by support staff and never brought to his attention. On May 6, 2011, the trial court granted CRG's motion for default and entered an order to that effect, having re-noted the hearing to a later date unbeknownst to the parties (CP 34-35). On May 11, 2011, CRG's order of default was converted into judgment by a King County Superior Court Commissioner (CP 36-37).

On August 22, 2011, the Baileys noted a motion to vacate and personally served CRG with the motion (CP 122-123). On September 12, 2011, Mr. Schneider mailed Mr. McCormick a copy of CRG's response to the Baileys' motion to vacate. Delivery was unsuccessfully attempted on September 13th, 2011 (CP 135-136). As a result, an additional copy of

CRG's response was also sent to Mr. McCormick as an attachment to an electronic mailing, aka "e-mail," at 9:45 am on September 14th, 2011 (CP 137-140). No rebuttal to CRG's response was made by the Baileys.

Unfortunately, no electronic recording or written transcripts were made of the September 16, 2011, oral arguments on the Baileys' motion to vacate. However, there are some general facts that should not be in dispute by either party.

At the start of the hearing, the trial court notified both parties that it did not require oral arguments. However, the trial court did allow brief oral arguments at the request of Mr. Schneider. The scope of such arguments was narrow, and focused mainly on the issues of notice, CR 11 sanctions, and RPC 3.3.

None of the other issues raised in CRG's response, such as the Baileys' failure to show a prima facie defense to CRG's claims, were heard by the trial court (CP 124-132).

In addressing notice, Mr. Schneider greatly expanded on the points outlined in CRG's written response to the Baileys' motion to vacate. Mr. Schneider repeatedly emphasized to the trial court that Mr. McCormick did receive the notices from the postal service, but simply refused to pick up the mail or set up a time for redelivery by the postal service.

The other arguments heard by the trial court were those based on RPC 3.3 and CR 11. While the trial court ruled that CRG and its counsel should read and review RPC 3.3, it did not expressly find that CRG or Mr. Schneider had violated RPC 3.3 or CR 11 (CP 141-143).

Yet, it awarded “terms” the Baileys of \$ 4,125.00 in attorney’s fees. When Mr. Schneider asked the trial court to clarify the basis for such an award, the trial court responded that it had, “considerable authority based on equity,” to do so.

Mr. Schneider objected to the award, both in CRG’s response and verbally during oral arguments. Mr. Schneider objected to the basis for the fees, their amount, and Mr. McCormick’s declaration in support of them. Mr. Schneider also requested a supplemental hearing be held to address reasonableness of the amount being requested, based on the insufficiency of Mr. McCormick’s declaration. The trial court refused to hold that hearing, stating that a final order would be signed the next week.

On September 19, 2011, the trial court entered an order vacating CRG’s default judgment against the Baileys and awarding them “terms” of \$4,125.00. While the court appears to have vacated the judgment and awarded terms based on CRG’s failure to inform the court that Mr. McCormick failed to accept and pick up his mail, the handwriting on the order makes it extremely difficult to discern the actual legal basis for the

trial court's decision. However, it is clear that the trial court did not find that either CRG or Mr. Schneider violated CR 11 or RPC 3.3 (CP 141-143).

IV. 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 Littlejield*, 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).

V. ARGUMENT

1. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING THE BAILEYS' MOTION TO VACATE.

- a. The Baileys' failure to receive actual notice of CRG's motion for default was a result of their counsel's own negligence.

To be entitled to relief from a judgment due to excusable neglect, a party must show that the neglect was actually excused by some factor, and was not the result of mere failure to act. *Johnson v. Cash Store*, 116 Wn. App. 833, 1107-1108, 68 P.3d 1099 (2003).

It is not abuse of discretion for a trial court to deny a defendant's motion to vacate judgment when affidavits in support of motion show only want of attention to case by counsel and clients. *Myers v. Landrum*, 4 Wn. 762, 763, 31 P. 33 (1892).

An attorney's negligence or neglect to respond to a complaint or motion does not constitute grounds for vacating a judgment under CR 60(b). *Haller*, 89 Wn.2d at 547, P.2d 1302; *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App. 819, 970 P.2d 803 (1999), *affirmed*, 140 Wn.2d 568, 998 P.2d 305 (2000) (also rejecting arguments that attorney negligence constitutes a "mistake" or "irregularity" under CR 60(b)(1)).

For example, Washington courts have found no “excusable neglect” when (1) an insurer failed to answer the complaint because the insurer misplaced a copy of the legal process sent by the insurance commissioner when the person designated to receive process was reassigned to other duties, *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995); (2) an employee at an attorney general’s office failed to timely route documents to the responsible attorney because of inadequate office procedures to “catch” administrative errors, *Beckman v. Dep’t of Soc. & Health Servs.*, 102 Wn. App. 687, 695-96, 11 P.3d 313 (2000); (3) someone other than general counsel accepted service of process and then neglected to forward the complaint, *Johnson*, 116 Wn. App. at 848-49, 68 P.3d 1099; (4) a legal assistant responsible for entering the deadline into the calendaring system did so before she left on an extended vacation, but failed to ensure that employees hired to replace her were trained on the calendaring system and competent in operating it and failed to institute any other procedures necessary to ensure that general counsel received notice of the dispute. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 213, 165 P.3d 1271 (2007).

Notice of CRG's motion for default was mailed to Mr. McCormick's law office on April 8, 2011. Delivery was attempted by the United States Postal Service on April 9 and 14, 2011.

On both occasions, notice of attempted delivery was left at the office of Mr. McCormick. Both notices instructed Mr. McCormick to either retrieve his mail from the post office, or set up a time for redelivery. Instructions for setting up redelivery were located on the notices. Based on the date of the first notice, Mr. McCormick had more than 28 days to take action to collect the mail or set up redelivery prior to the order of default being entered by the trial court. He did not.

Each notice he received from the post office had a tracking number that would have alerted Mr. McCormick to the identity of the sender, CRG. Given that no answer to CRG's complaint had been served or filed, the only reasonable conclusion Mr. McCormick could have drawn from the notices, was that CRG was moving for a default judgment against the Baileys. Thus, Mr. McCormick had constructive notice of CRG's motion for default.

In light of the nature and reasoning for Mr. McCormick's failure to receive actual notice of CRG's motion for default, it cannot be said that the trial court was within the bounds of permissible discretion to conclude that Mr. McCormick's neglect was excusable. The facts were clear, Mr.

McCormick refused to take any action, be it going to the post office or setting up a time for redelivery of the mail. Thus, unlike the attorneys from the previously mentioned cases, Mr. McCormick had constructive notice of CRG's motion, and failed to receive actual notice only because of his refusal to act, not because of any oversight or failure in office procedures. Given that such oversights were all deemed inexcusable in the previous cases, there was simply no basis for the trial court to find that Mr. McCormick's willful failure to take action was excusable.

Mr. McCormick's refusal to accept two attempted deliveries of mail, and later refusals to pick it up or set up a time for redelivery were willful. The facts of the case supported this. Mr. McCormick never denied that he received the notices from the post office. Washington case law is clear, willful neglect is not excusable. Because of this, the trial court acted well beyond its discretion in ruling that Mr. McCormick's acts were excusable and thus also abused its discretion in granting the Baileys' motion to vacate. No reasonable person would have drawn that same conclusion.

- b. Nothing in CR 55, CR 5, RPC 3.3 or case law requires a plaintiff, or its counsel, to notify the court that a defendant has refused to pick up its mail.

In their motion to vacate, the Baileys failed to advance any legal theory requiring CRG to inform the court of Mr. McCormick's refusal to accept his mail. Instead, the Baileys devoted little more than one paragraph outlining the failure of CRG's notice to reach their counsel. This fact was totally undisputed by both parties. CRG had previously acknowledged that Mr. McCormick never received actual notice. CRG also clearly established that this failure was due entirely to the willful neglect on their attorney's part. This position by CRG was not rebutted by the Baileys in any way.

Nowhere in their motion did the Baileys argue that CRG was somehow legally or ethically required to notify the court of their counsel's refusal to accept his mail. Instead, the Baileys argued that CRG's entire lawsuit was frivolous and thus subject to CR 11 sanctions. The trial court rejected this argument, as nothing on the record indicated that CRG's lawsuit lacked merit.

However, the Baileys introduced an additional argument for such a duty, based on RPC 3.3, for the first time during the September 16 oral arguments on their motion to vacate. No such argument appears anywhere

in the Baileys 8 page motion to vacate. Because of this, Mr. Schneider was unable to research the appropriate case law to properly rebut the assertions being made by the Baileys in respect to RPC 3.3.

However, upon review of RPC 3.3(1), it is clear that neither CRG, nor Mr. Schneider, made false statements to the tribunal regarding the mailing of notice to Mr. McCormick. Per the declaration of Crystal Bennett, notice was mailed to Mr. McCormick's law office, via United States Postal Service Certified First Class Mail, on April 8, 2011 (CR 32-33).

Upon review of RPC 3.3(2), it is clear that neither CRG, nor Mr. Schneider, engaged in any criminal or fraudulent actions. There is no evidence that anyone lied about the mailing or intercepted the mail to ensure it was not delivered. To the contrary, records actually confirm that notice was properly mailed by CRG.

Also, upon review of RPC 3.3(3), it is clear that neither CRG, nor Mr. Schneider, offered evidence to the tribunal known to be false. CRG never told the tribunal the Baileys has actually received notice of the hearing. Such a disclosure is would have been unnecessary, as no rule requires it.

The only section of RPC 3.3 which might have required CRG to inform the court of Mr. McCormick's failure to accept its mailing is RPC

3.3(4)(f). That section of the rule states in pertinent part, “In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”

However, the rule only requires such disclosures in ex parte proceedings. CRG’s motion for default was not an ex parte proceeding. Because the rule only pertains to ex parte proceedings, issues of service are clearly outside the scope of the rule. Ex parte proceedings, by virtue of being ex parte, never require notice to a party. Thus, this specific section of the rule can’t possibly apply to the issue of notice in this case.

The trial court erred and abused its discretion in two instances when it granted the Baileys’ motion to vacate. First, the Baileys failed to establish a proper foundation in law that would require a plaintiff to inform the court of another party’s failure to accept mailings. The trial court erred when it ruled RPC 3.3 somehow created that duty. The court also erred when it allowed an argument in support of RPC 3.3 during oral argument, as CRG was not afforded a proper opportunity to research case law on the matter and formulate a proper rebuttal to the assertions of the trial court and the Baileys. It is not equitable to allow one party to introduce new issues at oral argument.

- c. The trial court erred by failing to apply the four factor test established in the *White* case to the Baileys' motion to vacate

A trial court should only vacate a judgment under CR 60(b)(11) when circumstances do not permit moving under another subsection of CR 60(b). *In re Marriage of Thurston*, 92 Wn .App. 494, 499, 963 P.2d 947 (1998); *Shum v. Dep't of Labor & Industries*, 63 Wn .App. 405, 408, 819 P.2d 399 (1991).

When deciding a motion to vacate a default judgment, the court considers two primary and two secondary factors which must be shown by the moving party. *White v. Holm*, 73 Wn.2d 348, 352, 438P.2d521 (1968). The primary factors are: (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action and answer the opponent's claim was occasioned by mistake, inadvertence, surprise or excusable neglect. The secondary factors are (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *Id.*

The court in *White* further held that the four elements vary in dispositive significance as the circumstances of the particular case dictate. The court further elaborated:

[W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reason as which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was *not willful*. On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be **scrutinized with greater care**, as will the seasonability of his application and the element of potential hardship on the opposing party.

White, 73 Wn.2d at 352, 438 P.2d 581.

Where a party fails to provide evidence of a prima facie defense, and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. *Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345 (2007); see also *Johnson*, 116 Wn. App. at 847-49, 68 P.3d 1099 (where party did not meet primary *White* factors, trial court did not abuse its discretion in denying their motion to vacate).

Because there was no duty on CRG's part to notify the court of Mr. McCormick's failure to accept its mail, there were no circumstances that did not permit the Baileys from moving under another subsection of CR

60(b). Because of this, the Baileys motion should have been scrutinized under the *White* standard.

In their motion to vacate, the Baileys failed to even address three out of the four factors required by the *White* case. No argument was made for a prima facie defense to the CRG's claims in the matter. Even after CRG raised these issues in its response to the Baileys' motion to vacate, no rebuttal was submitted by the Baileys resolving these omissions.

While the declaration of Deborah Bailey was included as an attachment to the Baileys' motion, no testimony within it was cited in the Baileys' actual motion to vacate. None of that testimony was used to support the existence of a prima facie defense to the CRG's claims.

Establishing a prima facie defense is the most important element for a trial court to consider in a motion to vacate. Absent a prima facie defense, being shown by "substantial evidence," a party cannot be afforded relief from judgment under CR 60(b).

Even taken on its face, the only defense raised in Deborah Bailey's declaration is that an employee of the landlord gave her verbal permission to move out whenever she pleased 18 months prior to the Baileys actual vacation of the unit. CRG's filing of proof in support of its motion to vacate clearly shows that the Baileys entered into a new six month lease agreement, ending in December of 2010, in July of 2010 (CP 12-29). That

lease agreement clearly required them to stay through the end of December. If Baileys wanted to continue to lease the unit on a month to month basis, why would they have entered into a new lease in July of 2010? The previous lease allowed for such a month to month tenancy by its own terms. Because of this, nothing in Deborah Bailey's declaration could be construed as a prima facie defense to CRG's claims.

The Baileys also failed advance any argument that their motion to vacate was timely, or that CRG would not be harmed if the Baileys judgment was vacated.

Instead, the Baileys made only a nominal argument in support of the second factor of the *White* test, arguing "excusable neglect" for their failure to defend the lawsuit based on Mr. McCormick's failure to accept CRG's notice of its motion to vacate.

The trial court erred in granting the Baileys' motion to vacate because the Baileys failed to plead in support of any "extraordinary circumstances" that would have merited deviation from a analysis under the *White* factors. In addition, the trial court did not appear explicitly note the existence of such "extraordinary circumstances," in its order granting the Baileys motion to vacate.

Because of this, the trial court erred when it did not properly apply the four factor test outlined in the *White* case to the Bailey's motion to

vacate. Because the Baileys failed to rebut these issues, raised in CRG's response, the court should have denied the Baileys' motion outright and instructed them to re-note the motion with a proper *White* analysis

2. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT AWARDED THE BAILEYS ATTORNEY'S FEES.

In Washington, attorney fees may be awarded when authorized by a private agreement, a statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn .2d 826, 849–50, 726 P.2d 8 (1986).

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).

It is also well settled that the trial court has the discretionary power to limit attorneys' fees to a reasonable amount. *Merrick v. Peterson*, 25 Wn .App. 248, 256, 606 P.2d 700 (1980).

An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. *Griggs v. Averbek Realty, Inc.*, 92 Wn .2d 576, 584, 599 P.2d 1289 (1979).

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).

The lodestar methodology is setup to afford trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made. Under this methodology the party seeking fees bears the burden of proving the reasonableness of the fees. *Id at 151*.

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).

Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. *Smith v. Dalton*, 58 Wn. App. 876, 795 P.2d 706 (1990); *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 798 P.2d 1155 (1990); *Bentzen v. Demmons*, 68 Wn. App. 339, 842 P.2d 1015 (1993); *State Farm Mut. Auto. Ins. Co. v. Johnson*, 72 Wn. App. 580, 871 P.2d 1066, *review denied*, 124 Wn. 2d 1018, 881 P.2d 254 (1994).

- a. The trial court erred and abused its discretion when it awarded fees to the Baileys, as there was no bad faith or wantonness by CRG or Mr. Schneider.

Washington case law is clear that a trial court has discretion to award reasonable attorney's fees, to either party, on motion to vacate. However, an award requires the court to find bad faith or wantonness on the party bringing or resisting the motion. For the reasons already outlined in pages 15-17 of this brief, the trial court abused its discretion when it granted the Baileys' motion to vacate.

There was no basis for the trial court to rule that CRG's behavior was in bad faith or wanton any more than the actions of the Baileys and Mr. McCormick. No reasonable person would have reached this conclusion.

In addition, the trial court failed to also factor the willful neglect on Mr. McCormick's part in the operation of his law office and his representation of the Baileys. Equity alone should have disqualified the Baileys from any recovery of attorney's fees based on their counsel's own willful actions. Because of this, the trial court abused its discretion when it awarded \$ 4,125.00 in attorney's fees to the Bailey's for their motion to vacate.

- b. Attorney's fees awarded to the Baileys were excessive, punitive in nature, and not properly documented.

In CRG's response to the Baileys' motion to vacate, CRG objected to total amount of attorney's fees being requested by the Baileys based on the lack of complexity of the underlying issues in the case. CRG also objected to Mr. McCormick's lack of a foundation for such a large request based on a 8 page motion to vacate.

Mr. Schneider also verbally requested that the trial court hold a supplemental proceeding to determine the award of attorney's fees. Such a request was made so that Mr. McCormick could better document the 30 hours he allegedly spent on the motion in compliance with the loadstar method. The trial court refused to schedule such a hearing.

Of the Baileys 8 page motion to vacate, more than 4 pages contain nothing more than a timeline of events in the matter (i.e. the date

summons and complaint were served, dates of e-mail exchanges between the parties, etc.).

This is not substantive legal work and should not be afforded attorney's fees at 275.00 an hour. Compiling lists of e-mails between two parties requires only a few clicks of a button on any e-mail manager or client. Such a task could not have taken more than one hour of time for even a novice computer user. No legal skill is required for such a task.

Almost 2 pages of the motion are devoted to CR 11 sanctions, which were ultimately not awarded by the court. Washington case law is clear that any hours pertaining to unsuccessful theories or claims must be excluded from an award of attorney's fees.

In addition, much of the motion is comprised of needless reiteration of civil rules, such as the almost complete recitation of CR 11 on pages 7 and 8 of the Baileys' motion to vacate. This is not substantive legal analysis, but rather most likely a result of a simple "cut and paste" of the online recitation of CR 11 on the Washington court's website. Almost a full page was taken up by this recitation.

Only two cases are cited within the Baileys' entire motion to vacate. Each contains only one sentence of legal analysis. Thus, the actual time devoted to "legal research" for the motion could not have reasonably exceeded more than a half hour at most.

Finally, the loadstar method does not allow fees to be awarded for unproductive time. Much of Mr. McCormick's time spent trying to obtain a voluntary vacation of the order of default, was unnecessary and unproductive.

For instance, prior to noting his motion for default, Mr. McCormick tried to set up a deposition of Mr. Schneider to determine if Mr. Schneider has actually received his March 7, 2011, letter. Mr. McCormick then invited Mr. Schneider to perform a forensic analysis of his computer so that Mr. Schneider could ascertain that he had in fact drafted such a letter. All these things were not necessary and should not be factored into an award of fees at \$275.00 an hour.

Clearly the trial court did not properly apply the loadstar method in assessing the reasonableness of the requested attorney's fees in the matter. There is simply no way an attorney with as much experience as Mr. McCormick could have spent thirty, fifteen, or even ten hours on the motion to vacate he submitted to the court. The motion itself briefly sets out a timeline, outlines issues with CRG's notice, requests CR 11 sanctions, and that's it.

In addition, the hourly rate of \$275.00 was not reasonable based on the lack of complexity of the issue at hand. Given this lack of complexity,

\$275.00 is not a fair market rate for the services Mr. McCormick provided.

In addition, oral arguments on the matter should have never taken place. Mr. McCormick specifically requested the motion be heard with oral argument. The trial court itself told both parties that it did not require oral argument at the start of the hearing. Thus any time awarded for Mr. McCormick's appearance at oral arguments was self imposed and should not be factored into any award.

It is clear that the trial courts award of attorney's fees was arbitrary and capricious. The trial court ultimately awarded exactly half of the hours the Baileys requested. This is further proof that the trial court did not properly apply the loadstar system in assessing the reasonableness of the award. Instead, it simply cut the total hours requested by the Baileys in half. At \$ 4,125.00, the award is almost eighty percent of the total amount in controversy in the matter. As such, the award was clearly punitive in nature in spite of the fact that the trial court found no violations of CR 11 by CRG or Mr. Schneider.

VI. REQUEST FOR ATTORNEY'S FEES

Per RAP 18.1, Appellant request attorney's fees associated for time spent researching and drafting this brief, and any additional hours in

the future associated with a rebuttal brief and appearance for oral arguments.

Section 21 of the residential lease agreement between the parties in the underlying case, allows for reimbursement of all costs and expenses incurred as a result of a tenant's breach of the lease agreement.

Should this Court overturn the trial court's decision vacating the Appellant's default judgment, Appellant would ask to be reimbursed by the Respondents for all cost associated with this appeal and the time originally requested in defense of the Baileys' motion to vacate.

VII. CONCLUSION

As set forth above, the trial court erred and abused its discretion when it vacated the CRG's default judgment against the Baileys and awarded the Baileys \$4,125.00 in attorney's fees. One of the greatest strengths of our judicial system is giving a party the ability to resolve disputes through it.

While the system must put in place measures that protect against this privilege being abused, those measures must not also stifle a party's ability to exercise its right to disagree.

The facts of this case are admittedly murky. It is exactly because of this that CRG had a right to defend its default judgment against the Baileys. CRG, in good faith, did not believe it to have a duty to inform

the court of Mr. McCormick's failure to accept its mail. Taking this position should not have resulted in the trial court effectively sanctioning CRG. If such a result is upheld, it would serve only to have a chilling effect on justice within our court system.

The Baileys did not properly plead for relief under CR 60's catch all provision. Instead they briefly pleading in support of only "excusable neglect" under the four factor *White* test. While it certainly was within the trial courts discretion to rule on that factor alone, the trial court abused its discretion when it failed to properly apply decades of Washington case law that would treat Mr. McCormick's neglect in collecting his mail as inexcusable.

The Baileys' total lack of an analysis of three the other four factors of the *White* test, should have resulted in the trial court denying the Baileys' motion outright. Nothing would have prevented the Baileys from noting a second motion with a proper analysis. Instead the trial court abused its discretion in finding "good cause" to vacate the judgment based on CRG's failure to notify the court of Mr. McCormick's failure to accept his mail. There is zero legal basis for such a duty on CRG.

The trial court's award of \$ 4,125.00 was also arbitrary and capricious and an abuse of discretion. There was no factual basis for such an award, as neither CRG nor Mr. Schneider acted in bad faith in

obtaining the default judgment against the Baileys. Mr. Schneider even testified at the hearing that neither he nor his client received actual notice of the return of mailing. Appellant cannot understand why the court would disbelieve this, but whole heartedly ignore Mr. McCormick's failure to accept or retrieve the very same mail, solely because the post office was too far away. The notices left instructions to set up a time for redelivery using both the phone and the internet.

The trial court also abused its discretion in awarding exactly half of the requested fees to the Baileys. The Baileys' motion to vacate was only eight pages long and is almost completely devoid of any actual legal analysis. Originally the Baileys were asking for over eight thousand dollars in fees. The assertion that the Baileys would agree to pay three thousand dollars more than the actual value of the judgment, just to get it vacated, is absurd. These hours were clearly manufactured. Clearly the trial court failed to tailor the attorney's fee award to the loadstar method.

Appellant respectfully asks this Court to overturn the trial court's ruling entirely. The Baileys failed to properly plead for relief under CR 60 and should be required re-note a second motion to that end.

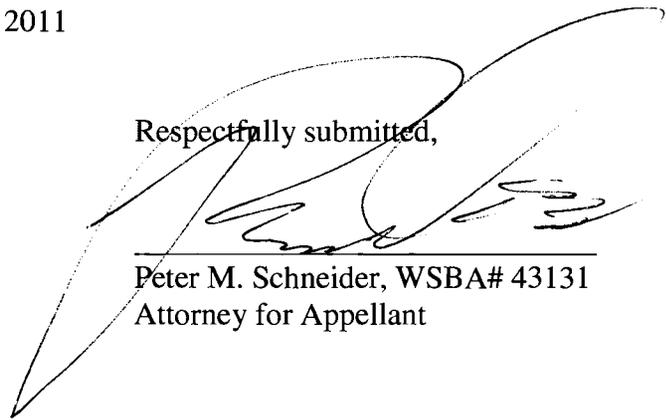
In the event that this Court deems such an action untenable, the Appellant would respectfully ask the Court to remand the case back to the trial court for an analysis which utilizes the four factors established in the

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. Baseless and punitive awards of attorney's fees do nothing more than and create more of an incentive to litigate, and also hinder the ability of both parties to settle a case prior to trial.

Finally, if this Court finds that the trial court's vacation of Appellant's default judgment was proper, Appellant respectfully asks this Court to reduce the award of attorney's fees to the Baileys, under the loadstar method, to a number that accurately reflects the time and rate of compensation commensurate with the scope of their motion to vacate, or remand to the trial court with instructions to do the same.

Dated this December 31st, 2011

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Peter M. Schneider', is written over the typed name and title.

Peter M. Schneider, WSBA# 43131
Attorney for Appellant

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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**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.: **67818-3-1**

DECLARATION OF MAILING

I, Peter M. Schneider, declare as follows:

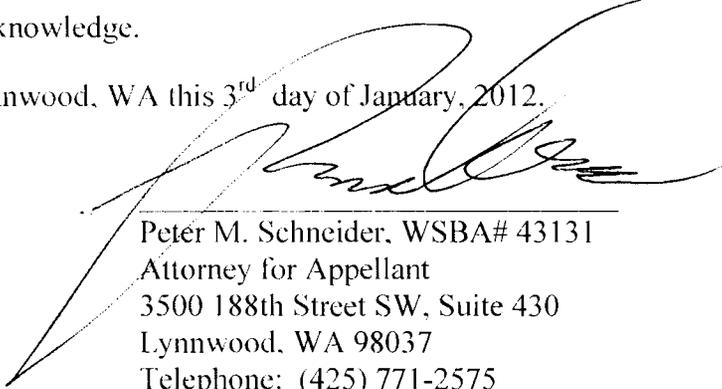
1. I am a resident of the State of Washington, over the age of 18 and competent to make this declaration herein.
2. On the 3rd day of January, 2012, I deposited in the United States mail in

Lynnwood Washington, a copy of Appellant's Brief to:

Jeremiah McCormick
652 NW 85th St
Seattle, WA 98117-3143

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 3rd day of January, 2012.



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