

No. 69234-8-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DANA AND HASAN AKHAVUZ,

Appellants.

v.

TRACY ARNOLD MOODY, SEVEN ENTERTAINMENT INC.,

Respondent,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Mary Yu)

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

It is settled under *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), and *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007), that a defendant must promptly seek to vacate a default judgment on notice of it. Appellants Dana and Hasan Akhavuz asks the court to reinstate the default judgment erroneously vacated 13 months after it was entered because Respondents waited over seven months to seek vacation.

Dana was seriously injured October 31, 2010, at the Respondents' business premises. She tried to resolve her claim in December informally, then served a complaint, but got no response. In November 2011, five months after the default judgment was entered, a Lane Powell attorney newly hired by Respondents' insurer called Dana's attorney and acknowledged the default judgment. But the firm took no action to try to vacate it for over seven months.

The trial court erred by refusing to impute the insurer's knowledge of the default to the insured and by failing to address the attorney's knowledge of the default seven months before the motion. The trial court must be reversed because moving to vacate seven months after notice of the default is not prompt or a reasonable time.

II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL

A. Assignments of Error.

1. The trial court erred in vacating the default judgment.

B. Statement of Issues.

1. Must the default judgment be reinstated because the trial court misapplied the test for vacating defaults under the facts of the case?

2. Must the default judgment be reinstated under the 2007 decisions of *Little v. King* and *Morin v. Burris* because appearing -- but still failing to answer the complaint -- more than one year after being served with the lawsuit fails the second prong of the *White v. Holm* test because there is no reason or excuse given for the failure to appear so late and because of the still uncured failure to answer?

3. Must the default judgment be reinstated under the 2007 decisions of *Little v. King* and *Morin v. Burris* because bringing a motion to vacate a default judgment more than seven months after learning of the default judgment fails the third prong of the *White v. Holm* test that requires acting “promptly” and with due diligence upon learning of the default judgment?

4. Must the default judgment be reinstated because the trial court’s conclusion that the Defendants were not deemed to know of the default judgment until June, 2012, seven months after their attorneys learned of it in November, 2011, is contrary to longstanding Washington law that the attorney’s knowledge about the litigation is imputed to the client?

III. STATEMENT OF THE CASE

A. The Parties.

Appellants Dana and Hasan Akhavuz (collectively “Plaintiffs”) are a married couple. CP 1. Respondents Tracy Moody and Seven Entertainment, Inc., (collectively “Defendants” or “Studio Seven” unless the context indicates otherwise) own a music and entertainment venue known as “Studio Seven” in the SODO district of Seattle. CP 1-2. Plaintiffs sued Moody and Studio Seven in King County Superior Court in May, 2011, for injuries that Dana sustained on Studio Seven’s premises seven months earlier. CP 2.

B. The October 2010 Injury and Plaintiffs’ Counsel’s January 20, 2011 Letter to Defendants Studio Seven.

On October 31, 2010, Dana attended a Halloween party at Studio Seven. CP 40. The Halloween party included musical performances, a costume contest, a “bloody t-shirt contest,” as well as a burlesque show. *Id.* At certain points during the night, the performers squirted fake blood (liquid) into the area occupied by the spectators. *Id.* Audience members were also allowed to get onto the stage with the performers, thereby allowing fake blood to transfer from the stage to the floor. CP 41. In the early morning of October

31, 2010, Dana slipped and fell on fake blood located on the floor between the performance stage and the stairs to the upper level of Studio Seven's premises. *Id.*

As a result of this fall, Dana sustained fractures of several bones in her left ankle, including her proximal fibula and distal tibia bones. CP 41-42. Dana underwent an invasive open reduction and internal fixation surgery under general anesthesia to stabilize these fractures. CP 42. Following the surgery, she endured a grueling recovery process that included wearing a full leg plaster cast, being on full bed rest for approximately two weeks, and being unable to leave her home for approximately four months. *Id.* Dana incurred medical expenses totaling \$14,732.10 and lost wages totaling \$17,200. CP 28-29. In addition, she was left with residual pain, weakness and inflammation in her left ankle, along with a large, unsightly scar at the site of the surgical incision. CP 43-44.

Dana diligently pursued her case by calling Studio Seven in December, 2010, because she felt it was responsible. CP 448 (Dana Dec.). After basically being told to take a hike, Dana and her husband retained the Certa Law Group to pursue their claims against

Studio Seven, which Certa did by writing Studio Seven on January 20, 2011. CP 333-34, App. B hereto.

Although Studio Seven staff apparently faxed the letter to its insurer Founders Insurance Company (“Founders”) on February 4, 2011 (CP 332, App. B), Dana’s attorneys never heard back until they filed suit. *See* CP 424-25, Pelligrino Certa Dec., ¶¶2-3 (App. A hereto). The declaration of Founders’ claims adjuster Carlos Ortiz is silent about any contacts he had with Studio Seven or Plaintiffs’ counsel before June 17, 2011, the date he gives for receipt of the demand letter from Plaintiffs’ counsel. *See* CP 466-67, App. C hereto. Mr. Ortiz’s declaration also is silent on why there was a six-month delay in retaining counsel from May, 2011 to November, 2011, when he said he “promptly retained Lane Powell to serve as defense counsel” on learning of the default judgment that had been entered against his insured. CP 467, ¶7.¹

C. Plaintiffs’ Lawsuit and the Default Order and Judgment Which Were Entered June 17 and June 28, 2011.

¹¹ “[T]he acts or omissions of an insurer can be imputed to the insured defendant” unless, as is *not* the case here, “the insured has no reason to believe his interests are not being protected.” *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987).

Plaintiffs filed a complaint against Defendants in King County Superior Court on May 6, 2011. CP 1-3. They served Tracy Moody (who was doing business as Studio Seven), with the summons and complaint on May 24, 2012, CP 6, then served them on Seven Entertainment, Inc., on May 26, 2011. CP 8. On May 25, 2011, Moody faxed the summons and complaint to Mr. Ortiz at Founders, noting on the cover sheet “the rest of the packet” would be mailed separately. CP 335-40. “Nicole” of Studio Seven then sent the rest of the “packet” to Mr. Ortiz certified mail on May 26, 2011, addressing the cover note to “Carlos.” CP 341 (cover note).

On May 27, 2011, Mr. Ortiz, as the adjustor handling this file for Founders, contacted Plaintiffs’ attorney, Pellegrino Certa. CP 425 (Certa Dec.). Mr. Ortiz acknowledged that the lawsuit had been commenced and requested that the Plaintiffs submit a demand package so that Founders could evaluate the claim. CP 431 (transcript of voice mail from Mr. Ortiz).² Neither Moody or Studio Seven, nor Founders, requested an extension to file an answer to Appellants’ complaint, nor were they granted one. CP 425.

On June 13, 2011, as requested by Mr. Ortiz on behalf of Founders and Studio Seven, Plaintiffs provided Founders Insurance

² The transcript states in part: “Mr. Certa, good morning Carlos Ortiz here with Founders Insurance Company. . . . Wanted to discuss with you regarding this lawsuit that was filed.”

with a settlement demand via e-mail and regular mail, CP 425 (Certa Dec); CP 469-74 (demand letter), which Mr. Ortiz's declaration states he received "on or about June 17, 2011." CP 466.³ Plaintiffs never received a response from Studio Seven's insurer. Mr. Ortiz's declaration states that on receipt of the demand letter, "[a]t this point, and based on my experience with other plaintiff's counsel throughout the country, I assumed we were in the process of settlement negotiations." CP 467. Despite this claimed assumption, Plaintiffs got no response to their settlement letter of June 17, nor any further communication from Studio Seven or their attorneys until nearly five months later, in November 2011. CP 425.

In the meantime, on June 17, 2011, Plaintiffs obtained a default order against Studio Seven due to its failure to file a notice of appearance, or to enter an answer to the complaint, or to respond to the settlement demand. *Id.* Ten days later on June 28, 2011, still having heard nothing from Founders or from any counsel engaged on behalf of Studio Seven, Plaintiffs obtained a default judgment against Studio Seven and Moody for \$431,932.10, including costs and statutory attorney's fees. CP 248-249. As part of the submission, Plaintiffs submitted Dana Akhavuz's declaration that

³ Mr. Ortiz's declaration is on the pleading paper of Williams Kastner & Gibbs, PLLC, not the pleading paper of either Lane Powell or Certa Law Group.

contained as attachments the medical records and photos documenting her treatment, surgery, and recovery to that date. *See* CP 48 – 238, exhibits 2 – 5 to her declaration.

Mr. Ortiz testified by his declaration that he “did not receive notice that an order for default had been entered until November 2011 when I was checking the trial docket online.” CP 467, ¶6. His declaration gives no reason why the docket had not been checked earlier, nor why he had not contacted counsel to represent Moody and Studio Seven at the outset in late May, 2011, after receiving the complaint; or in mid-June, 2011, after receiving the demand letter. Mr. Ortiz’s letter also does not give any reason why he had not contacted Plaintiffs with a response or counter to the June 13 demand letter if, indeed, the parties “were in the process of settlement negotiations.”

D. The Law Firm Lane Powell’s Knowledge of the Default Judgment in November, 2011, and Lane Powell’s Failure to Act for Seven Months.

The Lane Powell law firm was retained to represent Respondents in this action in November 2011.⁴ CP 407-08 (Lane Powel attorney Baker Supp. Dec.); CP 467, ¶7 (Ortiz Dec.) (“I

⁴ Defendants’ counsel initially asserted by declaration that Mr. Mesher and Lane Powell was not retained until March 2012. CP 358 (Lane Powell attorney Baker Dec.). However, apparently based on the testimony from Mr. Ortiz that Lane Powell was retained in November, 2011, Defendants’ counsel conceded that Lane Powell was actually retained four months earlier, in November 2011. CP 407-08 (Baker Dec.).

promptly retained Lane Powell to serve as defense counsel” after seeing the notice of default judgment on the online docket). On November 16, 2011, approximately five months after the default judgment was entered, Mr. Barry Mesher of Lane Powell contacted Plaintiffs’ lead attorney, Mr. Certa, to advise that Lane Powell had been retained to represent the Defendants in this action, that the Defendants were aware of the default judgment,⁵ and that discussions were to be had regarding whether settlement was feasible or whether the Defendants would move to vacate the default judgment. CP 425-426, ¶6. Mr. Certa had no reason to doubt Mr. Mesher’s representation as an officer of the court that the Defendants were aware of the default. Mr. Certa memorialized the fact of the phone conversation in an email to Mr. Mesher dated November 25, 2011. CP 439 (email).

Defendants’ attorneys at Lane Powell did not follow-up or respond in any way to the November 16, 2011 telephone call or to the November 25, 2011 e-mail to Mr. Mesher until approximately March 8, 2012. On that day nearly four months after the first contact, Mr. Mesher contacted Mr. Certa to request a settlement

⁵ An attorney’s knowledge regarding a client’s case is generally imputed to that client. *Hill v. Department of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978). See § IV.C, *infra*. Similarly, the knowledge of one attorney in a law firm is imputed to the other members of the firm, *see, e.g.*, RPC 1.10 and comments, and the lawyer is charged with both diligence in pursuing the representation and prompt communication with the client. See RPC 1.3 (diligence) and RPC 1.4 (prompt communication with client).

conference. CP 426 Messrs. Mesher and Certa agreed to meet at Mr. Certa's office a week later, on March 14, 2012. *Id.* However, on the morning of March 14, 2012, Mr. Mesher's assistant contacted Mr. Certa to advise that "something had come up" and that Mr. Mesher would not be able to attend the meeting. *Id.* Neither Defendants nor their attorneys made any further attempt to contact Plaintiffs or their counsel until approximately three months later. *Id.*

Then, on June 13, 2012, Mr. Gabriel Baker, a different attorney at the Lane Powell firm, contacted Mr. Certa to request that Plaintiffs vacate the default judgment. CP 426 ¶8. During this conversation, Mr. Certa proposed that Defendants assign to Plaintiffs their claims against their carrier Founders for failing to defend. *Id.* In exchange, Plaintiffs offered to enter into a covenant not to execute the judgment against Defendants personally. *Id.* After reviewing this option with his client, Mr. Baker advised Mr. Certa that Founders had agreed to indemnify the Defendants even if the default judgment was upheld. *Id.*⁶

⁶ "Subsequently, Plaintiffs were advised that Founders Insurance Company would indemnify the Defendants no matter what the outcome, and as a result, the Defendants (or Founders) would not agree to the Plaintiffs' proposal" for Defendants to assign their rights against Founders for failing to defend. CP 426.

E. Defendants' Law Firm Lane Powell's Appearance and Motion to Vacate on June 25 and 27, 2012, Seven Months After the Firm Learned of the Default Judgment Entered One Year Earlier, and Failure to Answer the Complaint.

On June 25, 2012, Lane Powell filed a Notice of Appearance with the trial court, CP 273-275, but not an answer to the complaint. On June 27, 2012, one year after entry of the default judgment on June 28, 2011, Defendants filed a motion to vacate the default judgment. CP 313-324. In support of this motion, Defendants offered declarations from Mr. Baker (CP 358-361) and Studio Seven's manager, Nicole Russell. CP 327-329. Mr. Baker's declaration did not provide any explanation for Lane Powell's seven month delay in seeking to overturn the default judgment or its total failure to answer the complaint. *See* CP 358-361.

Defendants requested that their motion to vacate the default judgment be heard a month after filing, on July 25, 2012, at 4:00 p.m. with oral argument. CP 504. Under KCLCR 7(b)(4), Plaintiffs' opposition papers were due by noon on July 23, 2012, and Defendants' strict reply was due by noon on July 24, 2012. *Id.*

On July 23, 2012, Plaintiffs timely filed and served their opposition papers. CP 410-423. These included the declaration of Dana in which she detailed the event and her injuries. CP 447-49. She also described the harm from the continuing delays in getting

any response from the Defendants' insurer or attorneys, then "preparing for a settlement conference with Defendants' attorneys in March 2012 that was cancelled at the last minute." CP 449. The prejudice from this delay has been substantial since she cannot pay her medical bills (some of which were referred to collection) and the injury has affected her ability to work. *Id.*

On July 24, 2012, Plaintiffs received Defendants' reply. CP 504. Along with their reply brief, Defendants submitted three new declarations. *Id.* Jonathan Silva, Defendants' front door security person, submitted a declaration dated June 27, 2012. CP 463-465. Carlos Ortiz, the claims representative for Defendants' carrier, Founders, submitted a declaration dated July 23, 2012. CP 466-468. And Defendant Tracy Moody submitted a declaration dated July 24, 2012. CP 459-462. Because these declarations were submitted less than 24 hours before the hearing, Plaintiffs filed a motion to strike the declarations, on shortened time. CP 483-488. The trial court refused to consider Plaintiffs' motion "based on the time of filing and this court's inability to review it before oral argument." CP 501-502.

Defendants have still never filed an answer to Plaintiff's complaint.

F. July 25, 2012 Hearing and Trial Court Decision Vacating Default Judgment.⁷

On July 25, 2012, the trial court heard argument on Defendants' motion to vacate the default judgment. CP 494. A key part of Studio Seven's argument presented by the Lane Powell firm was that the excusable neglect criterion of *White v. Holm* was met. The defense attorneys' arguments focused on the actions of Founders and the Defendants. The Lane Powell attorneys argued the judgment should be vacated "*so that Studio Seven is not unfairly penalized for its insurer's handling of this matter.*" CP 541, ¶22 (emphasis added).

Citing several cases, and apparently ignoring the statements made by Mr. Mesher to Mr. Certa in November 2011 that Defendants knew of the default, the Lane Powell attorneys argued the Defendants themselves (*i.e.*, Moody and Studio Seven) were not personally aware of the default until June, 2012, nearly a year after it was entered and, because they thought their carrier had engaged counsel to handle the claim, they should be excused for not appearing earlier as they should not be imputed with the knowledge of their insurer. *See* CP 539-41. Defense counsel specifically argued that the Defendants themselves "did not know of the default

⁷ The record of the hearing is in the form of an Agreed Report of Proceedings which is at CP 532-545.

judgment prior to being informed of the judgment in June 2012 by Studio Seven’s counsel.” CP 541, ¶21. They contended the Defendants were left unawares because “[n]either the insurer nor plaintiffs informed Studio Seven about the default judgment.” *Id.*

Plaintiffs’ arguments in response included that there was no reason or explanation given by either the insurer or the attorneys why there was over seven months’ delay in seeking to vacate the default when both the insurer and Lane Powell knew no later than November 16, 2011 that the default judgment had been entered in June, 2011. *See* CP 541-44, esp. ¶24.

At the close of the hearing the trial court granted Defendants’ motion to vacate. CP 545. The trial court’s rationale was that Moody and Studio Seven were “innocent insureds” like the party in *White v. Holm* and, therefore, the acts or omissions of the insurer Founders could not be imputed to Defendants for purposes of a default judgment. CP 545, ¶29. The test that the court used was that the “Defendants only needed to show that they acted with diligence once they were personally made aware of the default judgment.” *Id.* The trial court’s decision rested on its belief that the motion to vacate was made only three weeks after the Defendants personally learned of the default judgment in June, 2012, and was therefore

timely, despite the fact both Founders Insurance and the Lane Powell firm knew of the default over seven months earlier. *Id.*

The Agreed Narrative Report of Proceedings confirms that when making this ruling the trial court did not expressly factor in the knowledge, actions, or inactions of Defendants' attorneys at Lane Powell beginning with their first involvement in November, 2011. CP 545, ¶29.⁸ The final written order simply recounts the documents and argument of counsel the trial court considered, then states the motion to vacate is granted.

Plaintiffs timely moved for reconsideration of both the order denying Plaintiffs' motion to strike, and of the order vacating the default judgment. CP 503-521. The trial court denied both motions, CP 522-525, and this appeal followed.⁹

⁸ The entirety of Paragraph 29 of the Agreed Report of Proceedings at CP 545 states:

The Honorable Mary Yu determined that the Defendants were "innocent insureds" similar to the defendants in *White v. Holm*, 73 Wn.2d 348 (1968). Judge Yu held that the negligence of an insurer cannot be imputed to innocent insureds. Judge Yu further held that it did not matter that the Defendants' insurer knew about the default judgment as early as November, 2011. Instead, Judge Yu held that the Defendants only needed to show that they acted with diligence once they were personally made aware of the default judgment. Because Studio Seven did not learn of the default judgment until June, 2012, Judge Yu held that the Defendants acted in a timely fashion by moving to vacate the default judgment approximately three weeks later.

⁹ Although Plaintiffs contend the trial court erred by denying their motion to strike the new evidence contained in Defendants' reply materials, and then considering the new materials on reply for the reasons stated in their motions to strike and for reconsideration, *see* CP 483-88 (motion to strike) and CP 503-08 (motion to reconsider motion to strike), that issue need not be reached because Defendants failed to meet the required criteria for vacating the default judgment regardless of those reply materials.

IV. ARGUMENT

A. Standard of Review.

Trial court rulings on a motion to vacate a judgment are reviewed for an abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007) (reversing two trial courts that vacated default judgments and affirming one trial court that vacated the default); *Little v. King*, 160 Wn.2d 696, 702-03, 161 P.3d 345 (2007) (affirming the Court of Appeals' reversal of the trial court's vacation of a default judgment and remanding for reinstatement of the default judgment); *White v. Holm*, 73 Wn.2d 348 (1968) (reversing trial court for refusing to vacate the default when the motion to vacate was brought "promptly" on learning of it and filed 10 days after the default judgment was entered).

A trial court abuses its discretion when its decision is based on untenable grounds or for untenable reasons, *Morin*, 160 Wn.2d at 753, or for no reason, since then there is no exercise of discretion. *See Coggle v. Snow*, 56 Wn. App. 499, 505-07, 784 P.2d 554 (1990) (vacating discretionary decision). Review of discretionary decisions employs a three-part analytical test:

A court's decision is manifestly unreasonable if it is [1] outside the range of acceptable choices, given the facts and the applicable legal standard; [2] it is based on untenable grounds if the factual findings are unsupported by the record; [or 3] it is based on untenable reasons 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, 47, 940 P.2d 1362 (1997) (emphasized numbers added) (reversing because the test was not met).¹⁰ “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (footnotes omitted) (reversing trial court).

The abuse of discretion standard is thus both substantive and well established: discretionary rulings must be grounded in **both** the correct legal rules **and** the actual facts, or they are an abuse of discretion. *See Coggle v. Snow*, 56 Wn. App. at 505-07.

¹⁰ *Accord, In re Marriage of Wicklund*, 84 Wn. App. 763, 770 n. 1, 932 P.2d 652 (1996) (reversing the trial court).

B. The Default Judgment Must be Reinstated Because the Record Demonstrates That Defendants Do Not Meet Three of the Four *White v. Holm* Criteria for Vacating a Default Judgment. Since the Supreme Court Made Abundantly Clear in 2007 in *Little v. King* and *Morin v. Burriss* That it is an Abuse of Discretion to Vacate a Default Where Critical *White v. Holm* Criteria are not Met, the Default Judgment Must be Reinstated.

1. The four *White v. Holm* criteria that must be met to vacate a default judgment and the close scrutiny required of the “seasonability” of the moving party’s motion to vacate the default.

The test that the trial court used to vacate the default judgment was that the “Defendants only needed to show that they acted with diligence once they were personally made aware of the default judgment.” CP 545. Because this test is inconsistent with the actual legal test specified and enforced by the Supreme Court -- and thus means the decision was based on “an erroneous view of the law” (*Fisons, supra*), the trial court abused its discretion and its decision must be reversed.

In 1968 the Supreme Court reviewed the law on vacating default judgments and synthesized the decisions into four criteria to guide trial courts’ discretion when confronted with a motion to vacate a default judgment. *White v. Holm*, 73 Wn.2d 348, 438 P.2d

581 (1968). Citing Washington and foreign decisions from 1897 to 1955, the Court stated the four factors which the moving party has the burden to establish:

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

White v. Holm, 73 Wn.2d at 352 (emphasis added).

The Court also emphasized that the factors are not applied either rigidly or in a void. Their relative importance varies depending on the facts of the case. Thus, in the circumstances here where the moving party has shown a *prima facie* defense to take the case to a trier of fact, the moving party's actions must be scrutinized closely since it was that party's failures that led to the default:

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 v. Holm, 73 Wn.2d at 353 (emphasis added).

Here that means examining whether Defendants' failure to appear for over a year or to *ever* answer the complaint, "was occasioned by mistake, inadvertence, surprise or excusable neglect," and whether the Defendants "acted with due diligence after notice of entry of the default judgment." *Id.*, at 352. The facts set out *supra* demonstrate that neither of these factors was met by Defendants here¹¹ so that, as discussed in more detail *infra*, vacation of the default judgment was an abuse of discretion which itself must be vacated under *White v. Holm*, *Morin* and *Little v. King*.

2. The Supreme Court's 2007 decisions in *Morin* and *Little* emphasize that defaults are only to be vacated where the *White v. Holm* criteria are actually met and the equities require it. Moreover, the failure of the moving party to establish mistake, surprise, or excusable neglect, or inequitable conduct by the plaintiff, requires denial of the motion to vacate a default judgment.

The Supreme Court's decisions in *Little v. King* and *Morin v. Burris* in 2007 are the most recent Supreme Court treatments of the law governing vacation of default judgments, both reaffirming and applying the *White v. Holm* criteria.¹² They actually covered four

¹¹ Nor was the third factor met, since the delay to the case has been a serious hardship on Plaintiffs, putting them into debt, collection, and potential garnishment.

¹² See *Morin*, 160 Wn.2d at 755; *Little*, 160 Wn.2d at 703-04.

different default judgment cases, as *Morin* involved three cases consolidated on appeal addressing whether pre-litigation contacts constituted “informal appearances” entitling the defendant to notice of a motion for default judgment.

The Supreme Court held in *Morin* that, absent inequitable conduct by the plaintiff’s attorneys, the informal contacts (arguably for settlement discussion purposes) were inadequate and a proper appearance in the litigation was required. *Morin*, 160 Wn.2d at 749, 757 (rejecting substantial compliance with the appearance requirement). In *Little*, the Court held the insurer’s failure to appear despite ample notice of the pendency of the proceedings prior to entry of the default judgment amounted to a decision not to participate which “fails to satisfy [the second element in] *White*.” *Little*, 160 Wn.2d at 705-06. The insurer’s appearance and motion to vacate the default judgment made only *two weeks after entry of the default* was therefore not timely under those circumstances, *id.*, as the Defendants’ motion to vacate also is not timely here.

Together these decisions are a powerful illustration that a party or insurer who sleeps on their rights after notice of the default

is *not* entitled to relief from the default under CR 60 and *White v. Holm*.

The Court held in *Morin* that “Parties formally served by a summons and complaint must respond to the summons and complaint *or suffer the consequences of a default judgment.*” *Id.*, 160 Wn.2d at 757 (emphasis added). Application of these principles to the cases reinforced that this is not empty rhetoric. Defaults will not easily be vacated, so long as the legal requirements are followed.

Consequently, the Court affirmed Division I’s *reversal* of a vacation of the default judgment in the *Morin* case and itself *reversed* Division II’s affirmance in the *Matia* case of the trial court’s grant of a motion to vacate. *Id.* at 758. The Court went out of its way to point out that where the moving party has not appeared and then did not establish “mistake, surprise, or excusable neglect as required by *White [v. Holm]*, or inequitable conduct . . . then the court “*need go no further,*” *id.*, 160 Wn.2d at 758 (emphasis added), effectively shortening the *White v. Holm* test when that criterion cannot be met.

Applied here, the trial court also should have “gone no further” once it was apparent from the silence in the evidence that there was no basis for a finding of mistake, surprise, or excusable neglect in the delay of Defendants to appear and to seek vacation of the default after their insurer and attorneys had notice of it in November, 2011, and for failing to ever answer the complaint. Tellingly, the trial court failed to make any such finding in the final order. Even the oral decision in the Agreed Report of Proceedings contains no explicit finding the Defendants’ neglect was excusable. Nor could such a finding have been made on the facts here.

While the trial court (erroneously) ruled that Defendants were “innocent insureds” like those in *White v. Holm*, the facts in *White* are not comparable to those in this case. In *White* the defendant learned of the default judgment, got counsel from his insurance company, and had a motion to vacate the judgment filed and served ***all within 12 days***, between entry of the default on May 5 and service of the motion to vacate on May 18 of the same year. 73 Wn.2d at 350. There is no such prompt response here, which would have required filing the motion by early December, 2011, to be at all

comparable to *White*. The facts in *Little* demonstrate even a motion to vacate within two weeks of entry can be too late where, as here, the facts show a decision not to participate by not appearing, not answering, and not moving promptly to vacate the default. In such cases, *Little* instructs that the default must be reinstated and any dispute over the delay be resolved between the insurer and law firm.

As for *White*, in that case the Supreme Court did not have to address whether there was excusable neglect under facts not even remotely comparable to those alleged by Defendants here: that the Defendants here sent the complaint and answer to the insurer immediately in May, 2011; that they heard nothing back from the insurer, either immediately or for the next year plus; and they assumed for over one year that the insurance company had taken care of the problem without communicating with them for over a year, until contacted by the Lane Powell attorneys on June 13, 2012.¹³ Rather, in following *Morin* and *Little*, the appellate courts

¹³ It strains credulity to believe that an insured who was sued and tendered immediately would not themselves check on the status of the case in the courts, or with the carrier, in the 12-plus months following service of the suit. That is just the sort of lack of follow-up that Division I has found does *not* constitute excusable neglect. See *Aecon Bldgs. Inc. v. Vandermolen Const. Co.*, 155 Wn. App. 733, 738-41, 230 P.3d 594 (2009) (counsel's failures to be diligent did not excuse party).

are taking to heart the diligence and excusable neglect requirements. *See, e.g., Aecon Bldgs. Inc. v. Vandermolen Const. Co.*, 155 Wn. App. 733, 738-41, 230 P.3d 594 (2009) (counsel’s failure to be diligent and make inquiries about the status of lawsuit did not excuse the party, affirming default judgment of over \$1 million).¹⁴

When all these cases are taken into account, there is no proper basis for a determination that, even if the knowledge of the individual defendants is separate and apart from that of the insurer or the defendants’ attorneys (which it is not, *see Berger v. Dishman Dodge, Inc.*, *supra*, 50 Wn. App. at 312; § IV.C, *infra*), on these facts and the established case law one could not make a determination of excusable neglect. As in *Aecon Bldgs.*, there

¹⁴ In addition to *Aecon Bldgs. Inc.*, *see also Puget Sound Medical Supply v. D.S.H.S.*, 156 Wn. App. 364, 374 ¶ 21, 234 P.3d 246 (2010) (collecting cases where claims of excusable neglect were rejected both for insurers and attorneys). *See also Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 303-04, 310, 863 P.2d 1377 (1993), *review denied*, 124 Wn.2d 1006 (1994) (default judgment vacated under CR 60(b)(4) some 17 months after entry because the motion was made “promptly” after notice of the default where failure to participate earlier was based on the “knowing silence” of the plaintiff’s attorney and his belief he was “entitled if not obligated to try to take advantage of” the defendant’s counsel’s “obvious misunderstanding of the lawsuit”).

Here the facts are the opposite – plaintiff’s counsel diligently and repeatedly tried to engage in conversation with Defendants, the insurer, and Defendants’ counsel once appointed, only to be repeatedly ignored or stiff-armed by all of them and **never** an answer filed. Such continuous inequitable conduct eviscerates any equitable claim they could have to vacate the default judgment. *See Little*, 160 Wn.2d at 349-50: “we also value an organized, responsive judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.”

remain responsibilities on the insured. Turning a deaf ear for over a year is not excusable.

The Supreme Court is making at least two points in *Morin* and *Little*. First, default judgments will not be vacated except when they meet the *White v. Holm* criteria and the equities also require it. Second, long delays in litigation are not tolerated absent inequitable conduct by the plaintiff's attorney, such as possibly hiding the fact of the litigation as in the *Gutz* case in the *Morin* decision.

As discussed *infra*, parties may not game the system and then get a free pass by vacating a default, especially when, as here, this harms the opposing party. *Morin* reminds us that the underlying concerns are equitable. With the Defendants, their attorneys, and their insurer here all giving no reason or excuse for failing to appear for 13 months after service, or for waiting seven months after knowledge of the default to move to vacate, Defendants have no equities in their favor. Rather, they have unclean hands, especially compared to the diligent Plaintiffs who have done everything they could to bring the case to issue as quickly as possible.

3. **The trial court abused its discretion in vacating the default judgment because it used incorrect legal standards and the extremely long, unexplained and unexcused delays in appearing and moving to vacate the default, and never answering the complaint, fail to meet the *White v. Holm* criteria.**

Defendants' untimely appearance and motion to vacate the default judgment failed to meet the second and third *White v. Holm* criteria. *First*, there is no reason or excuse for the failure to appear and answer right away, in early June 2011, and to **never** answer the complaint. Nor is any reason offered. There is no excusable neglect.

Second, there is no reason or excuse for the seven months delay in bringing the motion to vacate. Again, no mistake; no inadvertence; no excusable neglect. The due diligence – or reasonable time - to move to vacate the default judgment on knowledge of it was not met. Defendants slept on their rights for seven months due to the inaction of and failure to communicate by their attorneys at the law firm and the insurer, and/or by their own failure to inquire after months of silence following tender.

Defendants thus do not seek equitable relief with clean hands, as noted *supra*, esp.in fn. 14. They unjustifiably delayed to Plaintiff's detriment, frustrating if not defying the Civil Rules.

Moreover, the Defendants themselves have no need of a vacated judgment and are not prejudiced by any vacation since their insurer is indemnifying them from that judgment. In contrast, during the period of over a year there was no progress on the case and Plaintiffs' financial situation got worse and worse, now living under the threat of garnishment. This means that Defendants also failed the fourth *White v. Holm* criterion of assuring no substantial hardship to the opposing party, here Plaintiffs. Vacation of the default judgment in this case was an abuse of discretion because it is inconsistent with the governing principles of *White v. Holm*, *Morin*, and *Little*.

Defendants' own moving papers agree that diligence and promptness, a key criterion under the *White v. Holm* test, require that the motion to vacate the default is made within a "reasonable time", and that "one month of notice" of the default meets that requirement. *See* CP 455, lines 8-20, citing *Gutz v. Johnson*, 128 Wn. App. 901, 919, 117 P.3d 390 (2005), *affirmed sub nom Morin v. Burris*, 160 Wn.2d 745 (2007). But nowhere do the Defendants' attorneys argue or contend that filing for vacation over seven months after notice of a default judgment meets the "reasonable time" test, and for good

reason -- there are no such cases. They side-step the fact that the Defendants' law firm, which still represents Defendants on appeal, *failed* to bring the default motion in the one-month window they themselves say meets the test.

Defendants' law firm carefully makes its arguments only in terms of the insurer's knowledge and an alleged lack of actual notice by their clients. *See* CP 455, line 8 through CP 456, line 4. But when the facts are viewed in conjunction with applicable law and the fact that the knowledge of the attorneys *is* imputed to the client, the distinction the Defendants' law firm tries to draw with numerous cases disappears. For example, they acknowledge that *Luckett v. Boeing Co.*, 98 Wn. App. 307, 989 P.2d 1144 (1999), held that waiting four months after notice of the default judgment to bring the motion to vacate was fatal, but argue it does not apply because only the insurer knew of the default judgment in November, 2011, conveniently forgetting the undisputed knowledge that the law firm had of that fact in November 2011 when it was retained by Founders Insurance and contacted Mr. Certa.

Rather than being consistent with the established requirements and equitable principles, vacating the default judgment here subverts CR 1 and King County's case management system's effort to live up to CR 1 and get cases to trial in a year. Affirming the vacation of this default undercuts the fundamental purpose of the rules under CR 1, which includes the just and speedy resolution of the action -- and this in a case where the Plaintiffs were seeking resolution right away rather than waiting to file close to the statute of limitations. Affirming reinstatement of the case here would mean insurers and defense counsel could drag out a case for a year before doing anything and suffer no genuine consequences. Plus, there is no prejudice to the actual Defendants since the carrier has said it will indemnify them if the default is reinstated. Defendants fail the *White v. Holm* criteria.

4. **The default must be reinstated to prevent the subversion of the public policies underlying the Civil Rules and lawyers' obligations to their clients and the courts.**

If this court were to let the trial court's decision stand, it will send the message that defense attorneys, and especially insurers, can ignore default judgments with impunity for up to a year. If this case

is affirmed, defense counsel and insurers would know that, instead of answering complaints within 20 days from service, they could instead refuse to do anything for 20 days, plus the time it takes for the plaintiff to get a default judgment, plus another 364 days – all without consequence.

For an insurer who is, by definition, the deep pocket, this result gives an incentive for an improper strategy to impose extra time and expense on cases at the front end. Some plaintiffs may give up, or make mistakes allowing for dismissals on statute of limitation or other grounds, or run out of money to pursue the claims. Adding the extra costs of time and money to the front of the case is a plus for defendants, a detriment for plaintiffs. Defendants or insurers could stiff-arm and stonewall a plaintiff with impunity and so gain leverage in later settlement discussions (if not killing a case earlier) by imposing both delay and unnecessary legal costs on the plaintiff. In short, it shifts the current balance established by the Civil Rules and gives the wrong incentives to defense counsel and insurers to delay and avoid their responsibilities under the Civil Rules, which some (but not all) would do.

Such a result would be contrary to the basic premise of the Civil Rules that the rules are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action.” CR 1. It also would render CR 55 judgments virtually useless. Letting this decision stand would also neuter CR 4(a)(2), which sets a 20 day deadline for responding to a summons and complaint. The result would be unnecessary time for the courts, unnecessary expense for the parties, and further delays for all concerned in resolving cases. It also would eviscerate King County’s goal to move cases from filing to trial in a year and likely also create an unnecessary backlog in the court system.

As is apparent, the real issue is the law firm’s failure to do its job of acting diligently and keeping its client informed, and the insurer’s similar failures in not employing counsel immediately and not informing its insured. The fact the law firm and insurer are arguing over who is responsible for what part of failing to defend and inform the Defendants does not change the operative facts, which require reversal. Rather, they reinforce why vacating the default was inequitable. The equitable result is to reinstate the

let the Plaintiffs be made whole and go on their way and leave the fight over who is responsible for what part of the payment to the law firm's and the insurer's separate litigation.

C. The Representation of Defendants By Their Attorneys at Lane Powell in November, 2011, Bound Moody and Studio Seven And Subjected Them to “The Sins of the Lawyers,” Which is Not Justification to Vacate the Default Judgment.

It has long been the rule that “[a]bsent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity.[fn 11] Thus the ‘sins of the lawyer’ are visited upon the client. [fn12]” *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn. 2d 674, 679, 41 P.3d 1175, 1178 (2002). This pithy statement in *Rivers* included footnote citations to core decisions and principles, including *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978), 3 A.C. Freeman, A TREATISE OF THE LAW OF JUDGMENTS § 1252 (Edward W. Tuttle ed., 5th rev. ed. 1925), and RCW 2.44.010 in footnote 11, and *Taylor v. Illinois*, 484 U.S. 400, 433, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (Brennan, J., dissenting) in footnote 12.

In the touchstone case of *Haller v. Wallis*, the Supreme Court laid out the settled reasons why attorneys' knowledge is imputed to their clients. Those core principles discussed in *Haller* show why the trial court's vacation of the default was an abuse of discretion and error. They demonstrate that, by ignoring the legal construction of the relation between attorney and client, contrary to Washington law, Judge Yu's decision is an abuse of discretion that must be reversed.¹⁵

Under these circumstances, the inexcusable period of delay in seeking to vacate the default cannot begin in June, 2012, on the alleged actual knowledge of the defendants themselves, but must begin no later than in November, 2011, when the first Lane Powell attorney was informed of the default judgment against Studio Seven and necessarily was apprised that immediate action had to be taken.

The Court explained in *Haller*:

¹⁵ It is basic that "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." *State v. Quismundo*, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008). Thus, the Court held that "[t]he abuse of discretion standard does not allow us to excuse an order based on an erroneous view of the law because the court considered and rejected an equally erroneous argument." *Id.*, 164 Wn.2d at 343. *Accord, Optimer Intern, Inc. v. RP Bellevue, LLC*, 151 Wn. App. 954, 962, 214 P.3d 954 (2009) (appellate court has "an obligation to see that the law is correctly applied"), *affirmed*, 170 Wn.2d 768, 246 P.3d 785 (2011).

With respect to the contention that the guardian was not notified of the hearing on the proposed settlement, the court found that the notice was sent to her. Furthermore, . . . notice to a client that his attorney is making application to the court for some action on its part, is not a requirement of court rule and there has been no showing that it is a requirement of due process.

In 3 E. Tuttle, A TREATISE OF THE LAW OF JUDGMENTS § 1252 (5th ed. rev. 1925) at 2608, it is said:

If an attorney is authorized to appear, the jurisdiction over the defendant is perfect, and the subsequent action of the attorney, not induced by the fraud of the adverse party, is binding on the client at law and in equity. According to Lord Hardwicke, “when a decree is made by consent of counsel, there lies not an appeal or rehearing, though a party did not really give his consent, but his remedy is against his counsel; but if such decree was by fraud and covin, it may be relieved against, not by rehearing or appeal, but by original bill,” and such beyond doubt is still the rule. **The rule that a party cannot in equity find relief from the consequence of his own negligence or of a mistake of the law is equally applicable where the mistake or neglect is that of his attorney employed in the management of the case.**

(Footnotes omitted.)

The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf. As between attorney and client, there is a duty to keep the client informed of material developments in the matters being handled for the client “to avoid misunderstanding.” [citing disciplinary rules] But once a party has designated an attorney to represent him in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their

attention, as provided in RCW 2.44.040-. 050, . . . [statutes' text included in footnote]¹⁶

Haller v. Wallis, supra, 89 Wn. 2d at 547-48 (emphasis added)

(some citations and statutory quotes omitted).

While at first blush it may appear application of this settled law yields a harsh result to the Defendants Moody and Studio Seven, as noted *supra* that is not the case. Their insurer Founders has already stated it will indemnify Defendants should the default be reinstated, eliminating any possible prejudice to Defendants. Rather, the issue is clearly between the insurer and the law firm it hired, Lane Powell, as to who is ultimately or mostly responsible for failing to appear timely or to promptly seek vacation of the default judgment. Especially under these facts the default should be reinstated so that Plaintiffs can be compensated for their injuries and

¹⁶ RCW 2.44.040 provided in 1978:

The attorney in an action or special proceeding, may be changed at any time before judgment or final determination as follows:

- (1) Upon his own consent, filed with the clerk or entered upon the minutes; or
- (2) Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made.

RCW 2.44.050 provided in 1978:

When an attorney is changed, as provided in RCW 2.44.040, written notice of the change, and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he shall be bound to recognize the former attorney.

be done with the legal process while the insurer and the law firm engage in their litigation to resolve responsibility as between themselves.

V. CONCLUSION

The trial court applied an incorrect legal standard when it vacated the default judgment and therefore abused its discretion. The established test for vacating a default judgment was not and could not be met under the undisputed facts because, as in *Morin* and *Little* and the other cases discussed *supra*, the Defendants could not establish mistake or excusable neglect. Critically, their attorneys failed to act promptly upon notice of the default, whatever were the failings of Defendants themselves or their insurer. Since the knowledge of the attorney and his or her agents is imputed to the client, and the Defendants have no excuse for the delay from (at minimum) November, 2011, until the very end of June, 2012, to appear and then move to vacate the default, they cannot meet the *White v. Holm* criteria. As a matter of law, over seven months from the date of notice of the default to the date of filing the motion to vacate is not “prompt” or duly diligent.

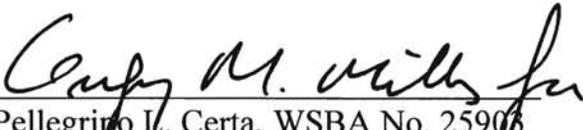
The trial court must be reversed and the matter remanded for reinstatement of the default judgment. The Plaintiffs can then be promptly compensated and the insurer and the law firm can proceed with their litigation to determine responsibility as between themselves. Only in this way can the litigation process fulfill the mandate for the just and speedy resolution of every action. CR 1.

Dated this 31st day of March, 2013.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459

CERTA LAW GROUP, INC., P.S.

By 
Pellegrino L. Certa, WSBA No. 25903
Cheryl J. Farrish, WSBA No. 41698

Attorneys for Appellants

APPENDICES

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STATE OF WASHINGTON
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APPENDIX A

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HONORABLE JUDGE MARY YU
KING COUNTY
HEARING DATE AND TIME: July 25, 2012 at 4pm
SUPERIOR COURT CLERK
ORAL ARGUMENT REQUESTED

CASE NUMBER: 11-2-16823-9 SEA

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

DANA AKHAVUZ and HASAN AKHAVUZ,
a Married Couple,

PLAINTIFFS,

VS.

TRACY ARNOLD MOODY and JOHN DOE
MOODY d/b/a STUDIO 7, and SEVEN
ENTERTAINMENT, INC., a Washington
corporation,

Defendants.

NO. 11-2-16823-9 SEA

**DECLARATION OF PELLEGRINO L.
CERTA IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION TO VACATE**

I, Pellegrino L. Certa, make the following Declaration certified to be true under penalty of perjury pursuant to RCW 9A.72.085:

1. I am one of the attorneys for the Plaintiffs, Dana Akhavuz and Hasan Akhavuz, in the above-referenced matter. I am over 18 years of age. I have personal knowledge of the facts and pleadings contained in this Declaration. I am licensed to practice law in the State of Washington.

2. On May 6, 2011 Plaintiffs filed a complaint for negligence against the Defendants, Tracy Moody and 7 Entertainment, Inc. The summons and complaint were served on Defendant, Tracy Moody, on May 24, 2012, and on Defendant, 7 Entertainment, Inc., on May 26, 2011.

DECLARATION OF PLC ISO PLAINTIFF'S
OPPOSITION TO DEFENDANTS' MOTION TO
VACATE- 1

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3. Shortly after being served with the lawsuit, the Defendants' insurer, Founders Insurance Company, contacted Cheryl Farrish, one of the attorneys representing the Plaintiffs, to discuss the facts of the claim. See Farrish Decl. Thereafter, on May 27, 2011, Founders Insurance contacted me and acknowledging that the lawsuit had been commenced. In addition, Founders Insurance Company requested that the Plaintiffs submit a demand package so that Founders could evaluate the claim before "going forward" in litigation. Attached hereto as exhibit a is a true and correct copy of the voicemail left for me from Founders Insurance Company as well as a transcription of that audio recording.

4. On June 13, 2011, Plaintiffs provided Founders with a settlement demand via e-mail and regular mail.

5. Not having received a response to the settlement demand, nor a notice of appearance, nor an answer to Plaintiffs' complaint the Plaintiffs obtained a default order on June 17, 2011. Thereafter, still not having received a response to the settlement demand, nor a notice of appearance, nor an answer to Plaintiffs' complaint on June 28, 2011 the Plaintiffs obtained a default judgment.

6. On November 16, 2011, approximately five months after the default judgment was entered, I received a voicemail from attorney Barry Mesher, who advised that he had been retained to represent the Defendants in this matter. I returned Mr. Mesher's phone call almost immediately. Since I was out of the office the phone call to Mr. Mesher was placed from my cell phone, which kept a contemporaneous record of the call. Attached here as Exhibit 2 is a true and correct copy of my cell phone bill, showing that an 8 min. phone call was placed to phone number (206) 223 - 7961 at 9:19 PM EST on November 16, 2011. Also, attached hereto as Exhibit 3 is a reverse phone number search showing that this number is registered to Mr. Mesher and Lane Powell. During this phone call with Mr. Mesher, I was again apprised of the fact that

DECLARATION OF PLC ISO PLAINTIFF'S
OPPOSITION TO DEFENDANTS' MOTION TO
VACATE- 2

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1 Lane Powell had been retained to represent the Defendants in this action, that the Defendants
2 were aware of the default judgment, and that discussions were to be had regarding whether
3 settlement was feasible or whether the Defendants would move to vacate the default judgment. I
4 memorialized this phone conversation in an email to Mr. Mesher dated November 25, 2011.
5 Attached as Exhibit 4 is a true and correct copy of my e-mail to Mr. Mesher dated November 25,
6 2011.

7 7. I did not receive any communication from the defendants following my
8 November 16, 2011 phone call with Mr. Mesher and my November 25, 2011 e-mail to Mr.
9 Mesher until March 8, 2012 when Mr. Mesher contacted me to discuss settlement. As a result of
10 this phone call, Mr. Mesher and I agreed to meet in my office on March 14, 2012 at 10:00 AM to
11 discuss settlement. Attached as Exhibit 5 to my declaration is a true and correct copy of my
12 calendar for March 14, 2012. However, on the morning of March 14, 2012, I received a phone
13 call from Mr. Mesher's assistant advising me that "something had come up" and that Mr. Mesher
14 would not be able to attend the meeting.

15 8. Defendants made no further contact with my office until June 13, 2012 when
16 attorney Gabriel Baker called me to request that the Plaintiffs vacate the default judgment.
17 During this conversation there was also brief discussion about Founders Insurance Company not
18 indemnifying the Defendants if the Plaintiffs refused to vacate the default. To alleviate any
19 possibility that the Defendants would have judgment against them that would not be satisfied by
20 Founders, I proposed that the Defendants assign their rights against Founders for failing to
21 defend them in return for a covenant not to execute on the outstanding judgment. In response,
22 Mr. Baker advised that he would discuss this option with his clients and get back to me.
23 Subsequently, the Plaintiffs were advised that Founders Insurance Company would indemnify
24 the Defendants no matter what the outcome, and as a result, the Defendants (or Founders) would
25 not agree to the Plaintiffs' proposal. On June 25, 2012, Defendants finally filed a Notice of
26

27 DECLARATION OF PLC ISO PLAINTIFF'S
28 OPPOSITION TO DEFENDANTS' MOTION TO
VACATE- 3

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1 Appearance. On June 27, 2012, just one day before the one year anniversary of the default
2 judgment, Defendants filed the instant motion to vacate.

3 9. In support of their motion to vacate, the defendants rely upon the case of *Berger*
4 *v. Dishman Dodge*, 50 Wn.App 309, 748 P.2d 241 (1987) for the proposition that the defendant
5 is entitled to a vacation of default judgment when the insured had no reason to believe its interest
6 were not be protected after forwarding the documents to the insurer. However, *Berger v.*
7 *Dishman Dodge*, does not stand for such a blanket statement and is distinguishable.
8

9 10. *Berger v. Dishman Dodge, Inc.* is distinguishable in that (1) the insurer provided a
10 declaration that he sent the wrong case file to the law firm and that the mistake was not
11 discovered until June, 26, 1986; two days after the default judgment was entered. Moreover, in
12 *Berger*, that same day that the mistake was discovered a notice of appearance was filed on behalf
13 of the defendant, **and less than one month later the defendant moved to set aside the default**
14 **judgment.** In this case, there is no declaration provided by the insurer to demonstrate to the court
15 why an answer was not filed even though the adjuster was aware of the lawsuit. Moreover, even
16 though the Defendants' attorney was retained in November, 2011 there is no explanation as to
17 why a notice of appearance was not filed until June 2012, and why a motion to vacate was not
18 made until one year after the default judgment was obtained even though it has conclusively
19 been shown that the Defendants were aware of the default as early as November, 2011.
20

21 11. In *White v. Holm*, 73 Wn.2d 348 (1968) (which predates the *Berger v. Dishman*
22 *Dodge, Inc.*) **the defendant relied upon the assurance from the insurer that it would furnish**
23 **counsel.** However, when the insurance adjuster forwarded the summons and complaint to the
24 insurance carrier's San Francisco, California office there was a note from the insurance adjuster
25

26
27 DECLARATION OF PLC ISO PLAINTIFF'S
28 OPPOSITION TO DEFENDANTS' MOTION TO
VACATE- 4

CERTA LAW GROUP
403 COLUMBIA HOUSE, SUITE 500
SEATTLE, WA 98104
Telephone Number: (206) 838-2500
Fax Number: (206) 838-2502

1 stating that the defendant would be represented by his own attorney until such time as insurance
2 coverage was determined. Because of the misunderstanding as to who would provide legal counsel
3 for the defendant, no appearance or answer were filed or served on behalf of the defendants. On
4 May 5, 1966 a default judgment was entered. **Ten days later the motion to vacate the default
5 judgment was filed.**
6

7 12. Another case relied upon the Defendants, *Leavitt v. DeYoung*, 43 Wn.2d 701, 263
8 P.2d 592 (1953) is also distinguishable. In *Leavitt*, the Defendants filed a motion to vacate the
9 default judgment approximately 3 weeks after it was entered. 43 Wn.2d. at 705. Also, the
10 accompanying affidavit from the attorney for the defendant stated that the insurance company's
11 attorney was in Honolulu at the time the default judgment was entered and that although
12 arrangements had been made with another attorney to put in any necessary appearances.
13 However, during this time the office of the attorney for the defendants was being packed to move
14 to another location and for some reason the file relating to the case had been mislaid and was not
15 covered until after the default judgment had been taken. The affidavit further alleged that
16 respondents had a good and meritorious defense to the action and set forth the facts upon which
17 the defense would be based. Based upon these facts, the court vacated the default judgment. The
18 Court of Appeals determined that vacating the default judgment was not an abuse of discretion
19 under these facts.
20
21

22 13. In in the vast majority of the cases, both published and unpublished opinions,
23 when the issue of excusable neglect is discussed in the context of a misunderstanding between
24 the insured and insurer as to who was going to defend a lawsuit, a declaration or evidence from
25 the insurer explaining the misunderstanding or excusable neglect, has almost always been
26

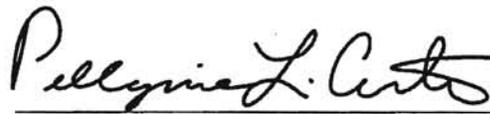
27 DECLARATION OF PLC ISO PLAINTIFF'S
28 OPPOSITION TO DEFENDANTS' MOTION TO
VACATE- 5

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provided to establish that there was an actual misunderstanding or that the neglect was excusable. In this case, there is no such declaration or evidence.

DATED this 23rd day of July, 2012.



Pellegrino L. Certa

APPENDIX B

CERTA LAW GROUP
Attorneys & Counselors at Law
A PROFESSIONAL SERVICES CORPORATION

701 Fifth Avenue, Suite 4770
Seattle, WA 98104-7035

Telephone Number: (206) 838-2500
Toll Free Number: (866) 440-0260
Fax Number: (206) 838-2502

January 20, 2011

Tracy A. Moody
Seven Entertainment
7349 California Ave. SW
Seattle, WA, 98136-2112

RE: Slip and Fall Accident
Our Client : Dana Akhavuz
Date of Loss : 10/31/10
Our File No : 11-251

Dear Ms. Moody:

Please be advised that we represent Dana Akhavuz regarding injuries she sustained in the slip and fall accident at Studio 7 on October 31, 2010. Please direct any and all future correspondence and telephonic communication to the undersigned.

Please provide our office with written verification acknowledging receipt of this letter. We also respectfully request that you tender this claim to your insurance carrier and provide the undersigned with the name of your liability insurer, their address and telephone number, and your policy number. Once this information is provided, we will deal directly with your insurer regarding this claim.

Our initial investigation reveals that as business owner of Studio 7, you are solely responsible for the slip and fall accident occurring at 110 S. Horton St., Seattle, WA.. Please be advised that Mrs. Akhavuz sustained serious injuries, requiring surgical intervention and to date, she is still confined to a wheelchair. As such, she is intent on pursuing a claim against you and your insurance company.

We look forward to hearing from you within seven (7) days of the date of this correspondence. If we do not hear from you within that time frame, we will have no choice but to file suit against your business and you personally.

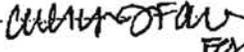
CERTA LAW GROUP
Attorneys & Counselors at Law

Dana Ashavuz
January 20, 2011
Page 2

Thank you for your cooperation in this matter. Please do not hesitate to contact the undersigned should you have any questions or concerns.

Sincerely,

CERTA LAW GROUP, INC., P.S.


Pellegrino L. Certa

cc: Clients

STUDIO SEVEN

110 South Horton St.
Seattle WA 98136

Phone: 206-286-1312 Fax 206-260-3990

Fax

To: <u>Dan</u>	From: <u>Studio Seven/Tanya Moore</u>
Fax: <u>947-768-0080</u>	Pages: _____
Phone: _____	Date: <u>2/4/11</u>
Rec: _____	cc: _____
<input type="checkbox"/> Urgent <input type="checkbox"/> For Review <input type="checkbox"/> Please Comment <input type="checkbox"/> Please Reply <input type="checkbox"/> Please Recycle	

Dan -
Here is letter we got from the
Attorney -
Please contact me if you have questions
Nikole
206-380-1756

APPENDIX C

FILED

12 JUL 24 AM 10:24

KING COUNTY
SUPERIOR COURT CLERK

E-FILED
CASE NUMBER: 11-2-16823-9 SEA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DANA AKHAVUZ and HASAN AKHAVUZ,
a married couple,

Plaintiffs,

NO. 11-2-16823-9 SEA

DECLARATION OF CARLOS ORTIZ

TRACY ARNOLD MOODY and JOHN DOE
MOODY, d/b/a STUDIO 7, and SEVEN
ENTERTAINMENT, INC., a Washington
corporation,

Defendants.

I, Carlos Ortiz, make the following declaration based upon personal knowledge:

1. I am and at all times material hereto have been employed by Founders Insurance Company as a claims adjuster. I am over the age of eighteen, have personal knowledge of the matters set forth below, and am competent to testify.

2. Founders insures the defendant, Tracy Moody d/b/a Studio 7. I was the claims adjuster for Founders, assigned to the claim at issue in this lawsuit. Dana Akhavuz's alleged loss on October 11, 2010.

3. On or about June 17, 2011, I received a letter, dated June 13, 2011, from Certa Law Group ("Certa"), counsel for plaintiff Akhavuz. This was a settlement demand letter sent to Founders. Certa claimed that their client, Dana Akhavuz, sustained injuries due to the

DECLARATION OF CARLOS ORTIZ

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-3100
(206) 628-6600

54711003

1 negligence of our insured. Plaintiff offered to settle this matter in the amount of \$195,000.00.
2 Certa noted that the settlement demand would remain "open for acceptance for thirty (30) days
3 from the date of this letter." A true and correct copy of this June 17, 2011 settlement demand
4 letter is attached hereto as Exhibit A.

5 4. At this point, and based on my experience with other plaintiff's counsel
6 throughout the country, I assumed we were in the process of settlement negotiations.

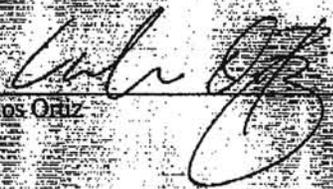
7 5. Unbeknownst to me, only days after Certa sent a settlement demand letter, they
8 filed a motion for default judgment against our insured. I never received notice of this motion
9 for default.

10 6. In fact, I did not receive notice that an order for default had been entered until
11 November 2011 when I was checking the trial docket online.

12 7. At this point, I promptly retained Lane Powell to serve as defense counsel.

13 The foregoing statement is made under penalty of perjury under the laws of the State of
14 Washington and is true and correct.

15 Signed at Des Plaines, Illinois, this 27th day of July, 2012.

16
17 
18 Carlos Ortiz

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DECLARATION OF CARLOS ORTIZ

Williams, Karmel & Gibb PLLC
601 Union Street, Suite 1100
Seattle, Washington 98101-2350
206.465.5600

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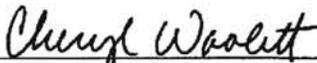
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CERTIFICATE OF SERVICE

I, Cheryl Woolett, hereby certify under penalty of perjury of the laws of the State of Washington that on July 24, 2012, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address:

Pellegrino L. Certa
Certa Law Group, P.S.
403 Columbia Street, Suite 500
Seattle, WA 98104-1625
Telephone: (206) 838-2500
Facsimile: (206) 838-2502

- by CM/ECF
- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Hand Delivery
- by Overnight Delivery



Cheryl Woolett

DECLARATION OF CARLOS ORTIZ - 3

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

3477100.1

No. 69234-8
WASHINGTON STATE COURT OF APPEALS, DIVISION ONE

DANA AND HASAN
AKHAVUZ,
Appellants,
vs.

CERTIFICATE OF SERVICE

TRACEY ARNOLD MOODY,
SEVEN ENTERTAINMENT,
INC.,
Respondents.

I declare under penalty of perjury that I caused copies of the
Opening Brief of Appellant, Motion to Accept Opening Brief of Appellant
as Filed, and this Certificate of Service by serving a true copy thereof to
be filed with the court clerk and served to counsel of record on

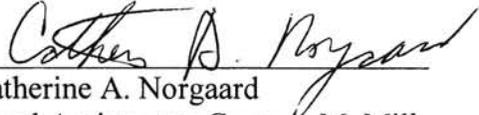
April 1, 2013, as follows:

Gabriel Baker Lane Powell 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338 Phone: (206) 223-7000 Fax: (206) 223-7107 Email: bakerg@lanepowell.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other _____
Jennifer Kali Davis 1420 5th Ave., Ste. 4100 Seattle, WA 98101-2375 Office: 206-223-6114 Fax: 206-223-6114 Office: 206-223-7000 Email: davis.jk@lanepowell.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other _____

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2013 APR - 1 AM 10: 01

Pellegrino Certa Cheryl J. Farrish Certa Law Group, Inc., P.S. 403 Columbia Street, Suite 500 Seattle, WA 98104-1625 Phone: 206.838.2500 Fax: 206.838.2502 Email: pcerta@certalaw.com cfarrish@certalaw.com	<input type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other _____
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DATED this 1st day of April, 2013.



Catherine A. Norgaard
Legal Assistant to Gregory M. Miller