Supreme Court No. 1030096

COA NO. 852051

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

VP ELITE CONSTRUCTION, LLC,

Petitioner,

v.

2400 ELLIOTT, LLC,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Petition for Review ("Petition") is the latest attempt by Appellant VP Elite Construction, Inc., LLC ("VP Elite") to avoid the consequences of its decision to ignore a lawsuit brought by Respondent 2400 Elliott, Inc. ("2400 Elliott"). After VP Elite failed to appear, 2400 Elliott secured a default judgment and award of attorneys' fees. Instead of appearing and moving to vacate the judgment, VP Elite tried to coerce 2400 Elliott into compromising its rights. After its strategy failed, VP Elite belatedly moved to vacate. The trial court denied the motion as untimely and baseless. VP Elite then sought review of the trial court's ruling, which the Court of Appeals rejected and found frivolous. VP Elite then moved for reconsideration, which the Court of Appeals denied. Now, VP Elite exercises its last procedural option to delay accountability, petitioning this Court for discretionary review. However, none of its arguments has merit. The trial court did not abuse its discretion, and VP Elite offers no reason under RAP 13.4(b) for the Supreme Court to accept review.

II. IDENTITY OF THE ANSWERING PARTY

2400 Elliott respectfully submits this Answer in opposition to VP Elite's Petition.

III. STATEMENT OF THE CASE

2400 Elliott is the owner of the Griffis Belltown apartments in Seattle (the "Property"). Neither 2400 Elliott nor Griffis contracted with, or owed any debt to, VP Elite. However, due to a dispute between VP Elite and another contractor, on September 27, 2021, VP Elite recorded a construction lien against 2400 Elliott's property. Clerk's Papers ("CP") at 3; CP at 178. CP at 113. Seven months later, out-of-state debt collection representatives contacted 2400 Elliott on behalf of VP Elite and threatened legal action. CP at 215. Counsel for 2400 Elliott corresponded with the debt collectors to seek further information. CP at 21, 114. Unable to substantiate the lien or any debt, the debt collectors eventually backed off, and VP Elite allowed its lien to expire. CP at 21, 114.

The expired lien remained as a cloud on title, so 2400 Elliott requested that VP Elite deliver or record a release of lien to clear title. CP at 4, 48, 56-61, 114, 63-64; 114, 122-23, 119-20. VP Elite did not respond or provide a lien release. CP at 4, 48, 114.

With little choice but to seek judicial intervention, 2400 Elliott filed an action to declare the claim of lien expired and compel deliverance of a release that could be recorded in the chain of title. 2400 Elliott personally served process on VP Elite's registered agent. CP at 73, 219. However, VP Elite did not appear or respond to the lawsuit. CP at 27-28; 31. More than

two months later, 2400 Elliott moved for default. CP at 26-29. Although VP Elite, as a defendant in default, was no longer entitled to service, 2400 Elliott continued to serve VP Elite with courtesy copies of the papers by mail. CP at 30; 46; 104; 137; 215. The trial court granted the Order of Default on October 5, 2022. CP at 75-77. 2400 Elliott then moved for default judgment, which the court entered on November 21, 2022. CP at 97-103, 126-28. The judgment declared that VP Elite's lien had expired and ordered VP Elite to deliver or record a lien release within 30 days of entry—*i.e.*, by December 21, 2022. CP at 128, 130.

On December 1, 2022, 2400 Elliott followed the default judgment with a motion for an award of attorneys' fees, costs, and expenses under Washington's lien statutes. CP at 131-36. 2400 Elliott again served courtesy copies of the papers on VP Elite. CP at 137, 155. VP Elite did not appear to challenge the motion. The court granted the motion, awarding 2400 Elliott its reasonable attorneys' fees, costs, and expenses incurred. CP at 156-60.

On December 12, 2022, 2400 Elliott's counsel received an email from Boris Davidovskiy stating that VP Elite was "in the process of retaining [his] firm." CP at 185. The email acknowledged receipt of the default judgment entered on November 21, 2022. *Id.* Yet, despite acknowledging the judgment, VP Elite chose not to comply with the

judgment; make any effort to vacate, stay, or appeal it; or even appear in the action. VP Elite did not deliver or record a lien release by December 21, 2022, as required by the trial court's order.[1]

More than a month after the December 21 deadline to deliver or record a release, VP Elite's counsel contacted 2400 Elliott's counsel again. CP at 185. 2400 Elliott's counsel then attempted to call VP Elite's counsel to discuss the matter but was unable to reach him. CP at 215. After waiting another month for compliance or further correspondence, 2400 Elliott sent VP Elite a letter asking whether it intended to comply with the judgment. CP at 215, 223-24. VP Elite's counsel then called 2400 Elliott's counsel and threatened to move to vacate the judgment if 2400 Elliott did not agree to compromise its attorneys' fees award. CP at 216. 2400 Elliott's counsel requested the bases for the threatened motion to vacate, but VP Elite's counsel declined to provide any. CP at 216, 226-29. With no knowledge of any legitimate grounds for vacatur, and months after the deadline for compliance had passed, 2400 Elliott did not agree to compromise the judgment. CP at 226-29.

On March 20, 2023—three months after the deadline for compliance with the judgment—VP Elite appeared in the matter. CP at 161-62. It then

[1] To date, VP Elite has refused to deliver or record a lien release.

belatedly moved to set aside the order of default, default judgment, and order awarding attorneys' fees. CP at 164-74. The trial court denied VP Elite's motion and found VP Elite (1) did not bring its motion within a reasonable time and (2) did not show any grounds for vacatur under CR 60(b). CP at 239-241.

VP Elite filed a Notice of Appeal purporting to seek review of the order denying vacatur along with the underlying orders and judgment, including the attorneys' fees award. Because the time for appealing the underlying orders and judgments had long since passed, 2400 Elliott moved to dismiss the appeal with respect to those underlying orders and judgments. In a reasoned notation ruling, the commissioner granted 2400 Elliott's motion, dismissing VP Elite's appeal of the order of default, default judgment, and attorneys' fees order. App'x at 1-2. VP Elite did not move to modify this ruling and did not seek discretionary review from this Court. Instead, it delayed resolution of the appeal by repeatedly seeking extensions of time to file its briefing.

In its appeal briefing, VP Elite ignored the commissioner's ruling dismissing the appeal of the order awarding attorneys' fees. VP Elite attempted to assign error to the trial court's issuance of that order and improperly argued for its reversal. Br. of Appellant at 10, 48-52. 2400 Elliott sought sanctions under RAP 18.9 for VP Elite's disregard of the

commissioner's order and the proper scope of review. Br. of Resp't at 42-44.

In an unpublished, unanimous decision, the Court of Appeals affirmed the trial court and found that VP Elite's appeal was frivolous. The court found no abuse of discretion by the trial court and determined that the record "amply supports" the trial court's finding that VP Elite failed to move for vacatur within a "reasonable time" as required by CR 60(b) because it knowingly waited until months after the deadline for compliance with the judgment. App'x at 6-7. The court further determined that VP Elite's concession that its lien was expired was not a defense to the action since "2400 Elliott sought equitable and declaratory relief because VP Elite's recorded lien notice remained a potential cloud on title even if the underlying lien was clearly invalid." App'x at 8-9.

VP Elite proceeded to delay resolution of its frivolous appeal. It moved for reconsideration of the Court of Appeals' decision, which the court denied. It opposed 2400 Elliott's motion to set the amount of the attorneys' fees award. After the commissioner set the amount of the award, VP Elite then moved to modify the commissioner's decision. That motion remains pending before the Court of Appeals.

IV. ISSUES PRESENTED

1. Whether the Court of Appeals' decision conflicts with prior decisions when:

A. VP Elite's motion to vacate was untimely, and *White v. Holm* and its progeny require timely application?

B. Applying *Robinson v. Khan*, an expired lien is a cloud on title even if it is no longer enforceable?

C. VP Elite did not raise any issue with *Barstad v. Stewart Title Guaranty*, and the decision does not implicate it?

2. Whether the appeal presents an issue of substantial public interest when it involves the discretionary decision to deny an untimely and meritless motion to vacate a default judgment?

3. Whether the Court of Appeals' decision conflicts with cases regarding frivolity when the appellant disregarded a ruling dismissing its appeal in part and raised no debatable issues under the applicable law?

V. ARGUMENT: WHY REVIEW SHOULD BE DENIED

VP Elite has utilized all procedural devices to delay resolution of this matter and increase cost to 2400 Elliott. The relevant law is settled, and the Court of Appeals' decision does not conflict with any other decisions. There are no issues of substantial public importance. This Court should

reject the Petition and award 2400 Elliott its attorneys' fees and expenses incurred preparing this Answer.

A. Standard for Acceptance of Review

This Court's consideration of the Petition is governed by RAP 13.4(b), which provides:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

VP Elite principally invokes the first two of these grounds: alleged conflict with decisions of this Court and the Court of Appeals. But there is no conflict where the Court of Appeals applies prior case law and merely disagrees with the appellant's *argument* regarding application of that case law. *See, e.g., In re Dependency of P.H.V.S.*, 184 Wn.2d 1017, 389 P.3d 460 (2015), *denying review*. Instead, RAP 13.4(b)(1) and (2) are intended to allow this Court to resolve direct conflicts of authority. *See Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017). VP Elite also argues that the case presents issues of "substantial public interest" under RAP

13.4(b)(4) but only identifies issues that have already been resolved by the courts.

B. VP Elite's Motion to Vacate Was Untimely, and the Court of Appeals' Decision Does Not Conflict with *White v. Holm*.

The trial court found that VP Elite's motion to vacate was untimely because VP Elite failed to bring its motion within a reasonable time when it knowingly ignored the deadline in the judgment and chose not to take any action for months. CP at 240. The Court of Appeals properly held that the trial court did not abuse its discretion in denying vacatur on this basis. VP Elite argues that the decision conflicts with *White v. Holm,* 73 Wn.2d 348, 438 P.2d 581 (1968), and/or *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 205, 165 P.3d 1271, 1280 (2007), contending that those cases require a court to determine that the defendant has no strong defenses before even considering the timeliness of the motion to vacate. This is not the holding of *White* or *TMT* and ignores long-settled law. There is no conflict to resolve, and the Court of Appeals correctly affirmed.

1. VP Elite's Motion to Vacate Was Untimely.

CR60(b) requires that a motion to vacate "shall be made within a reasonable time" but, in certain cases, "not more than 1 year after the

judgment, order, or proceeding was entered or taken."[2] *Luckett v. Boeing Co.*, 98 Wn. App. 307, 310, 989 P.2d 1144 (1999). "What constitutes a reasonable time depends on the facts and circumstances of each case." *Id*. at 312. "The critical period in the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion." *Id.*

VP Elite knew of the judgment well in advance of the December 21, 2022 deadline for compliance but chose to neither comply nor move to vacate by that date. It then attempted to coerce 2400 Elliott into compromising its rights for months before finally appearing and moving to vacate. The trial court was well within its discretion to find that, on those facts, VP Elite did not move within a reasonable time. The Court of Appeals properly affirmed because the record "amply supports" the finding. App'x at 6. VP Elite does not challenge this, and it is independently dispositive.

[2] VP Elite appears to argue that a CR 60(b) motion need only be brought within a year, not within a "reasonable time." But it is well settled that the motion must *both* be brought within a reasonable time *and* within one year of judgment. *Ha v. Signal Elec., Inc*., 182 Wn. App. 436, 454, 332 P.3d 991 (2014).

2. *White* and *TMT* Support the Court of Appeals' Decision.

VP Elite contends that the Court of Appeals' decision conflicts with *White* and *TMT* based on a selective quotation that omits dispositive language. When read in full and in context, it is clear that VP Elite's contention is meritless and there is no conflict with *White*. What VP Elite is really asking this Court to do is bless VP Elite's willful disregard of its procedural obligations under CR 55(c) and CR 60(b) in hopes of further prolonging this case.

VP Elite misreads or misrepresents *White*, arguing that it "requires that, in determining whether a party is entitled to vacation of a default judgment, the court *first determine* whether a party can demonstrate the existence of a strong or virtually conclusive defense *before engaging in any further inquiry*." Petition at 8 (emphases added). This is not what *White* says. Rather, *White* recognized a multi-factor balancing test that "revolves about two primary and two secondary factors which must be shown by the moving party." 73 Wn.2d at 352. "These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors." *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (2000).

Notably, the court in *White* explained that application of this multi-factor test *also* requires a timely motion to vacate:

> [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 reasons 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.

Id. (emphasis added). Later cases, including *TMT*, have agreed:

> [A]s the court in *White* explained, a trial court may grant vacation of a default judgment when (1) the movant is able to demonstrate that it has a strong or virtually conclusive defense to the claim asserted against it; (2) *the movant has timely moved to vacate the default judgment*; *and* (3) the movant's failure to timely appear was not willful.

TMT, 140 Wn. App. at 205 (emphasis added); *accord, e.g., Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099, 1104 (2003); *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 242, 974 P.2d 1275 (1999).

Far from prescribing that courts must inquire into the strength of potential defenses *before* looking at the timeliness of the motion (or any other factor), *White* provides that the timeliness of the motion *must be considered* to grant vacatur even where there is a "virtually conclusive" defense. Such a defense weighs heavily under the *White* test *only if the defendant timely moved vacate*.[3] Were it otherwise, the procedural

[3] Note the distinction between the *timeliness of the defendant's motion to vacate* and the justification for the defendant's *untimely appearance in the case*.

requirements of CR 55(c) and CR 60(b) would be optional, and a defendant could simply choose not to appear in a case and then present defenses at any time after entry of default judgment with no regard for timeliness. This is not the holding of *White* or *TMT* and would upend the Civil Rules.

VP Elite focuses on *TMT* which, quoted out of context, appears to interpret *White* as imposing a strict sequence by which the strength of defenses is the initial inquiry. However, as quoted above, *TMT* separates the two inquiries, stating that even where there is a "virtually conclusive" defense, vacatur is warranted *only if the motion also was timely*. 140 Wn. App. at 205. Regardless, reading the *TMT* opinion in context, it is clear the court understood that *White* requires an interdependent multi-factor test rather than a strictly sequential test.

Because the record "amply supports" the trial court's finding that VP Elite's motion to vacate was untimely, the trial court properly denied VP Elite's motion under CR 60(b) and the Court of Appeals properly affirmed. *White* and *TMT* do not conflict with the lower courts' rulings; they confirm them. By asking this Court to review on grounds that the *sequence of inquiry* was incorrect, VP Elite is asking the Court to depart from this long-settled law and hold that timeliness under CR 60(b) is an afterthought even where, as here, the defendant knowingly disregards a deadline in the judgment.

C. The Court of Appeals Correctly Determined that VP Elite's Expired Lien Was a Cloud on Title Subject to Relief.

Even if the motion to vacate had been timely, the trial court determined that VP Elite failed to meet its burden to show grounds for vacatur. CP at 240. The Court of Appeals agreed, concluding that VP Elite did not have a potentially meritorious, much less "virtually conclusive," defense to 2400 Elliott's claims. App'x at 8-9. VP Elite disagrees, arguing that an expired lien cannot create a cloud on title because it "does not encumber the property or diminish its value." Petition at 29. But that is not the applicable standard, and nothing in the Court of Appeals' decision conflicts with, or even departs from, its prior decisions or the decisions of this Court.

1. The Court of Appeals Correctly Applied the Case Law Regarding Clouds on Title.

The law on this issue is settled:

> The word "cloud" does not denote a hard-edged limitation. It is more appropriate to focus on whether the recorded document has *any tendency to impair* the fee owner's ability to exercise the rights of ownership.

Robinson v. Khan, 89 Wn. App. 418, 422–23, 948 P.2d 1347 (1998) (emphasis added). "Cloud upon title has also been defined to include *an 'encumbrance which is actually invalid or inoperative*, but which may *nevertheless impair the title* to property.'" *Id*. (quoting 65 Am.Jur.2d *Quieting Title* § 9 (1972)) (emphasis added).

> A cloud upon a title is *but an apparent defect* in it. If the title, sole and absolute in fee, is really in the person moving against the cloud, the density of the cloud can make no difference in the right to have it removed. Anything of this kind that has *a tendency, even in a slight degree, to cast doubt upon the owner's title*, and *to stand in the way of a full and free exercise of his ownership*, is, in my judgment, a cloud upon his title which the law should recognize and remove.

Id. (quoting *Whitney v. City of Port Huron*, 88 Mich. 268, 272, 50 N.W. 316, 317–18, (1891)) (emphases added).

2400 Elliott was forced to initiate the lawsuit because VP Elite's expired lien was an apparent defect in the title. After recordation, a lien is discoverable in the chain of title. When the owner wants to sell, refinance, or otherwise voluntarily transfer or encumber the property, title examiners and other non-lawyers may see the lien and treat it as an actual or potential encumbrance on the property. *See* CP at 183, 217. This creates obstacles to the owner exercising its rights. *Id*. When the lien expires by operation of law, nothing is added to the chain of title to show the expiration. Instead, it continues to appear as an encumbrance unless the lien claimant records a release or the owner secures judgment declaring the lien expired or otherwise quieting title and then records that judgment.

After VP Elite ignored repeated requests for a lien release, 2400 Elliott was forced to commence this lawsuit to address the cloud on title created by VP Elite's expired lien. To that end, 2400 Elliott sought

declaratory judgment and delivery of a release. VP Elite now admits that its lien expired when it failed to commence foreclosure within eight months as required by RCW 60.04.141. As such, VP Elite *concedes* the basis for 2400 Elliott's claims.[4] Yet it contends that this concession establishes a "virtually conclusive" defense against 2400 Elliott's lawsuit because it asserts that the expired lien did not create a cloud on title.

VP Elite confuses the distinction between a valid *encumbrance on property* and a *cloud on title*, then proceeds from the invalid premise that they are synonymous. VP Elite's argument is directly at odds with *Robinson*, which specifically states that an "invalid or inoperative" encumbrance that has "any tendency" to impair the property owner's ability to exercise its rights constitutes a cloud on title. A construction lien under Ch. 60.04 RCW is an encumbrance on property and may be recorded in the chain of title. *See* RCW 60.04.021, .091; *Sullins v. Sullins*, 65 Wn.2d 283, 285, 396 P.2d 886 (1964). An expired construction lien can no longer be enforced by foreclosure. RCW 60.04.141. As such, it is an "invalid or

[4] VP Elite argues that there was no justiciable controversy subject to declaratory judgment because it conceded that its lien was expired. But VP Elite only conceded that point *after judgment had been entered*. The record shows that VP Elite ignored 2400 Elliott's repeated attempts to resolve the controversy prior to litigation. *See* CP at 57-58, 63-64, 223-24.

inoperative" encumbrance, which, under *Robinson*, creates a cloud on title if it has any tendency "to cast doubt upon the owner's title."

The record shows, and the Court of Appeals agreed, that the expired lien at issue here has a tendency to impair 2400 Elliott's ability to exercise its rights. This tendency arises because title examiners and others are unable to tell from the recorded lien whether and when it expires. CP at 183, 217. Confusion among title examiners and others can cause problems when the owner wishes to exercise its property rights to alienate or voluntarily encumber the property via transfer, conveyance, or financing transactions. *Id*. This confusion can impair the exercise of those rights and, as a practical matter, force the owner to incur substantial legal fees untangling the mess. This tendency to impair the owner's rights is a cloud on title.

Were VP Elite correct that an expired lien does not cloud title because it is not a *valid* encumbrance, there would be no such thing as a cloud on title at all. The only relevant inquiry would be whether a recorded encumbrance was valid or not. This is precisely what *Robinson* rejected. Far from conflicting with precedent, the Court of Appeals' decision was bound by it. VP Elite offers no grounds for this Court to overturn *Robinson*, which owners, their counsel, and the courts have relied on for years.

2. VP Elite Never Raised Any Issue Regarding *Barstad*, Which Does Not Apply.

VP Elite tries to recast its argument as one potentially more interesting to this Court, stating that the Court of Appeals somehow "equat[ed] a title company's underwriting decision as the equivalent of the legal determination that a matter constitutes a cloud on title," and that this conflicts with *Barstad v. Stewart Title Guar. Co., Inc*., 145 Wn.2d 528 (2002), regarding the legal effect of a title insurance policy.

As a threshold matter, VP Elite waived any right to raise this argument in the Petition by failing to raise it below. RAP 2.5(a) provides that an appellate court may refuse to review issues not raised below, except in specified circumstances, and RAP 13.7(c) applies this rule to petitions for discretionary review. Accordingly, "[t]his court does not generally consider issues raised for the first time in a petition for review." *Fisher v. Allstate Ins. Co*., 136 Wn.2d 240, 252, 961 P.2d 350 (1998). VP Elite did not even cite *Barstad* in its briefing below, much less raise this argument. Because neither the trial court nor the Court of Appeals had occasion to address the question, this Court should decline to review it.

Regardless, nothing in the Court of Appeals' decision conflicts with, or even relates to, *Barstad*. The effect of a *title insurance policy* is immaterial; what matters here is that that the expired lien created an

apparent defect that had a tendency to impair 2400 Elliott's ability to exercise its property rights. Under *Robinson*, this was a cloud on title.

D. This Appeal Does Not Present an Issue of Substantial Public Interest.

VP Elite also argues that this Court should accept review of an appeal found *frivolous* by the Court of Appeals because it presents issues of *substantial public interest*. Although there is no precise test for what qualifies as an issue of substantial public interest under RAP 13.4(b)(4), in other contexts "[c]riteria to be considered in determining the 'requisite degree of public interest are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.'" *In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 736, 214 P.3d 141 (2009) (quoting *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622, 104 N.E.2d 769 (1952)); *accord Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 152, 437 P.3d 677 (2019).

This appeal concerns VP Elite's improper decision to ignore the proceedings and applicable rules in moving to vacate. These are not issues of public importance likely to recur. The trial court's decision is reviewed for an abuse of discretion, *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000), and it properly exercised its discretion under applicable law.

VP Elite's attempt to confuse that law and conflate the issues after the fact does not create an issue of substantial public importance.

E. The Court of Appeals' Decision Does Not Conflict with Decisions Regarding Frivolity.

VP Elite argues that the Court of Appeals' decision also conflicts with case law regarding the standard for frivolous appeals because it presented at least debatable issues. But an issue is not debatable merely because a party attempts to debate it.

As noted above, VP Elite's appeal does not present debatable issues because it is fundamentally based on VP Elite's disregard of applicable law. There must be grounds in law and fact for reasonable minds to disagree on the issues presented. *See, e.g.*, *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 581, 754 P.2d 1243 (1988). There are no such grounds here because the record supports the trial court's finding that VP Elite's motion to vacate was untimely and meritless, and because VP Elite did not timely appeal from any underlying orders and therefore cannot seek review of those orders.

With respect to the latter issue, VP Elite continues to incorrectly argue that its appeal brings up for review the orders it sought to vacate, including the order awarding attorneys' fees. This argument was rejected long ago:

> An appeal from denial of a CR 60(b) motion is limited to the propriety of the denial not the impropriety of the underlying judgment. The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion.

Bjurstrom v. Campbell, 27 Wn. App. 449, 450–51, 618 P.2d 533 (1980). VP Elite refuses to accept this is the law, arguing it was justified in seeking *remand with instructions to vacate* those orders despite not timely filing a notice of appeal. The commissioner applied *Bjurstrom* and dismissed the appeal of those orders. VP Elite never moved to modify the ruling, choosing instead to ignore it and seek relief anyway. The Court of Appeals properly viewed this as frivolous and sanctionable under RAP 18.9.

F. The Court Should Award 2400 Elliott Its Attorneys' Fees and Expenses under RAP 18.1(j) and RAP 18.9.

2400 Elliott respectfully requests that the Court award 2400 Elliott its attorneys' fees and expenses under RAP 18.1(j) and RAP 18.9. The Court below awarded 2400 Elliott its attorneys' fees and expenses on grounds that VP Elite's appeal was frivolous. App'x at 9-10. Because this Petition is similarly frivolous and 2400 Elliott has incurred significant legal fees preparing this Answer, this Court should award fees on the same basis and/or under RCW 60.04.181(3) or RCW 60.04.071.

VI. CONCLUSION

2400 Elliott asks that this Court deny the Petition and put an end to this frivolous appeal. VP Elite raises no legitimate basis for review under

RAP 13.4(b), and the Court of Appeals' decision is correct under applicable law. There is no conflict with prior decisions for the Court to resolve, and no issue of substantial public interest is in play. The Court of Appeals' decision should stand, and the Court should award 2400 Elliott its reasonable attorneys' fees and expenses incurred.

I certify that this document contains 4,999 words, pursuant to RAP 18.17(c)(10).

DATED: June 3, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2024, I caused the foregoing document to be efiled with the Supreme Court, which will send notification to all counsel of record.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED at Seattle, Washington, this 3rd day of June, 2024.

s/Karrie Fielder
Karrie Fielder, Legal Practice Assistant

APPENDIX

LEA ENNIS
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Case #: 852051
2400 Elliott LLC, Respondent v. VP Elite Construction LLC, Appellant
King County Superior Court No. 22-2-12197-1

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on June 21, 2023, regarding Respondent's Motion to Dismiss:

On April 10, 2023, defendant VP Elite Construction, LLC filed a notice of appeal of (1) an October 5, 2022 order of default, (2) a November 21, 2022 order granting a default judgment, (3) a December 14, 2022 order awarding attorney fees, costs, and expenses, and (4) an April 10, 2023 order denying a motion to vacate the order of default and the default judgment. Plaintiff 2400 Elliott, LLC filed a motion to dismiss as untimely with respect to the October 5, 2022 order of default, the November 21, 2022 default judgment, and the December 14, 2022 order awarding attorney fees, costs, and expenses. In response, VP Elite argues these orders are "part of decision which the party wants reviewed" under RAP 5.3(a)(3). VP Elite suggests these orders are properly within the scope of review under RAP 2.4(b). VP Elite also argues the motion to dismiss is premature because 2400 Elliott may address the scope of review in its merits brief.

To the extent VP Elite argues the October 5, 2022 order of default, the November 21, 2022 default judgment, and the December 14, 2022 order awarding attorney fees, costs, and expenses are within the scope of review under RAP 2.4(b), it is incorrect. Under RAP 2.4(b), this Court "will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review." But this rule does not revive a final order or

judgment not timely appealed. Under the rule, an appeal from a final judgment brings up for review all interlocutory decisions made in the course of trial so long as they prejudicially affect the final judgment. The rule includes an "appealable order" in order to eliminate a trap for the unwary, which existed under the prior rule where a party's failure to appeal an appealable order could prevent its review upon an appeal from the final judgment. See RAP 2.4 cmt. (b) ("What is an appealable order is not always clear. The rule solves the problem by including prior appealable orders within the scope of review."); 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE, RAP 2.4, at 193 (8th ed. 2014) ("By changing the rue, RAP 2.4 was designed to encourage appeals only from final judgment, and to eliminate the procedural trap."). The rule is not intended to revive a final order or judgment not timely appealed.

24 Elliott's motion to dismiss is granted as to the October 5, 2022 order of default, the November 21, 2022 default judgment, and the December 14, 2022 order awarding attorney fees, costs, and expenses. These orders and judgment are not properly within the scope of review in this appeal from the April 10, 2023 order denying a motion to vacate. If VP Elite prevails in this appeal from the April 10, 2023 order denying a motion to vacate, the ultimate result of the appeal may be vacation of the order of default and the default judgment. But VP Elite may not challenge the order of default, the default judgment, or the attorney fee order it failed to timely appeal by appealing from the order denying a motion to vacate.

24 Elliott's request for attorney fees as sanctions under RAP 18.9(a) is denied at this time.

Sincerely,

Lea Ennis
Court Administrator/Clerk

jh

FILED
3/4/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

2400 ELLIOTT, LLC, a Washington limited liability company, Respondent, v. VP ELITE CONSTRUCTION, LLC, a Washington limited liability company, Appellant.	No. 85205-1-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — VP Elite Construction LLC appeals an order that denied its motion to set aside an order of default, default judgment, and attorney fee award in favor of 2400 Elliott LLC. Finding no abuse of discretion in the trial court's denial of the motion to vacate, we affirm.

FACTS

On September 27, 2021, VP Elite Construction LLC recorded a notice claiming a lien against property owned by 2400 Elliott LLC under RCW chapter 60.04, mechanics' and materialmen's liens. A lien under that statute expires eight months after recording if the claimant does not sue to enforce it within that time. RCW 60.04.141. It is undisputed that VP Elite did not timely file an action to enforce its lien.

In August 2022, after unsuccessfully attempting to persuade VP Elite to file or deliver a lien release, 2400 Elliott filed the underlying action that sought a

declaratory judgment stating that VP Elite's lien had expired, an order compelling VP Elite to deliver a lien release, and an award of attorney fees and costs. On October 5, the trial court found that VP Elite had been properly served but had not timely "appeared, answered, pleaded, or otherwise defended," and it declared VP Elite in default.

On November 21, 2400 Elliott filed a motion for default judgment against VP Elite. The trial court granted the motion, declared VP Elite's lien claim "expired and unenforceable," ordered VP Elite to deliver an executed lien release within 30 days, and awarded 2400 Elliott its reasonable attorney fees and costs in an amount to be determined.

On December 1, 2400 Elliott moved to set the amount of the fee award and noted the matter for a hearing on December 14. The record reflects that 2400 Elliott mailed courtesy copies of its fee motion and the hearing notice to VP Elite's principal, Andrey Miroshnik, at the same address where VP Elite was initially served.[1] VP Elite did not oppose the fee motion and the trial court entered an order awarding 2400 Elliott attorney fees and costs totaling $28,414.51 at the conclusion of the hearing.

The record establishes that, by early December 2022, VP Elite was aware of the default judgment and its significance based on unspecified documents Miroshnik received in the mail and his consultations with counsel. More than three months later, on March 20, 2023, VP Elite's counsel filed a notice of appearance.

[1] 2400 Elliott was not required to serve its attorney fee motion on VP Elite given that it was in default. *See* CR 5(a) ("No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons.").

The next day, VP Elite filed a motion to set aside the order of default, the default judgment, and the order on attorney fees and costs under CR 60. The trial court denied the motion to vacate, and VP Elite timely appealed.[2]

ANALYSIS

I. CR 60 Motion To Vacate

VP Elite contends that the trial court erred by denying the motion to vacate. We disagree.

CR 60(b) sets forth the limited circumstances under which a trial court may vacate a final judgment or order. Under CR 60(b)(1), the court may do so based on "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining [the] judgment or order."[3] A motion to vacate under this rule "shall be made within a reasonable time and . . . not more than 1 year after the judgment [or] order . . . was entered." CR 60(b).

We review a trial court's denial of a CR 60(b) motion to vacate for abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A trial

[2] VP Elite's notice of appeal designated not only the trial court's order denying the motion to vacate but also the order of default, the default judgment, and the order on attorney fees and costs. A commissioner of this court dismissed the appeal with regard to these latter three orders, ruling that "[t]hese orders and judgment are not properly within the scope of review in this appeal" and "VP Elite may not challenge the order of default, the default judgment, or the attorney fee order it failed to timely appeal by appealing from the order denying a motion to vacate."

VP Elite did not move to modify the commissioner's ruling but nevertheless assigns error to the attorney fee order. We do not consider this assignment of error or the argument in support thereof. *See Hough v. Ballard*, 108 Wn. App. 272, 277 n.3, 31 P.3d 6 (2001) ("If an aggrieved party fails to seek modification of a commissioner's ruling within the time permitted by RAP 17.7, the ruling becomes a final decision of the court.").

[3] VP Elite also cites CR 60(b)(4) (fraud, misrepresentation, or other misconduct) and CR 60(b)(11) (any other reason justifying relief) in its opening brief. But, because VP Elite provides no argument related to these distinct sections of the rule, we do not address them further. *See Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) ("We will not consider an inadequately briefed argument.").

court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *Noble v. Safe Harbor Fam. Pres. Tr.*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). The trial court here was well within its discretion to deny VP Elite's motion to vacate.

First, the record amply supports the trial court's finding that VP Elite failed to file its motion to vacate within a "reasonable time."[4] VP Elite was aware no later than early December 2022 that the trial court had entered judgment by default based on paperwork that 2400 Elliott mailed to Miroshnik. Additionally, Miroshnik did not deny receiving the earlier documents that the record shows were also mailed to him by 2400 Elliott, including 2400 Elliott's motion for default judgment explaining that VP Elite had been found in default. Miroshnik declared that he did not act on any previous documents he received because he did not understand them. But, he did not explain why VP Elite waited another three months to seek relief once it understood that the court had entered a default judgment, particularly given that, by the time it did so, the deadline for compliance with the judgment had already passed by more than 60 days. While VP Elite suggested that its duty to act under CR 60 was not "trigger[ed]" until 2400 Elliott responded to VP Elite's

[4] 2400 Elliott asserts that this finding and a separate finding that VP Elite failed to show grounds to vacate are verities on appeal because VP Elite did not assign error to them. Although VP Elite did not formally assign error to these findings as required by RAP 10.3(a)(4), it clearly challenged them in its opening brief, and 2400 Elliott fully responded to those challenges. Accordingly, we reach the merits of the argument. *See Goehle v. Fred Hutchinson Cancer Rsch. Ctr.*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000) ("The appellate court will review the merits of the appeal where the nature of the challenge is perfectly clear and the challenged ruling is set forth in the appellate brief."); *see also* RAP 1.2(a) ("[The RAPs] will be liberally interpreted to . . . facilitate the decision of cases on the merits.").

To the extent that VP Elite argues that its motion to vacate was timely so long as it was filed within a year, it is incorrect. *See Ha v. Signal Elec.*, 182 Wn. App. 436, 454, 332 P.3d 991 (2014) ("A motion to vacate under CR 60(b)(1) must be filed within a reasonable time *and* within one year from the judgment." (emphasis added)).

request to voluntarily set aside the default, the trial court was well within its discretion to reject this attempt to place the burden to act on 2400 Elliott. *See Ha v. Signal Elec.*, 182 Wn. App., 436, 454, 332 P.3d 991 (2014) ("The critical period is between *when the moving party became aware of the judgment* and when it filed the motion to vacate." (emphasis added)).

As to the attorney fee order, Miroshnik similarly did not deny receiving a copy of 2400 Elliott's attorney fee motion or the corresponding hearing notice. And, even though that motion was still pending at the time VP Elite's counsel began corresponding with counsel for 2400 Elliott, VP Elite took no action to oppose it and instead waited until three months after its entry to seek relief. Furthermore, VP Elite's request to vacate the fee order focused on the reasonableness of certain fees. But, in this appeal from the denial of the motion to vacate, we review only the propriety of the denial, not the alleged impropriety of the underlying order. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980). Because Miroshnik's declaration did not address, much less explain, VP Elite's delay in challenging the fee order, the trial court did not abuse its discretion by declining to vacate it on the basis that VP Elite did not file its motion within a reasonable time.

Finally, and with regard to the default judgment in particular, VP Elite was required to show that (1) there was substantial evidence supporting a prima facie defense, (2) its failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect, (3) it acted with due diligence after notice of the default judgment, and (4) 2400 Elliott would not suffer a substantial hardship if the court vacated the default judgment. *Ha*, 182 Wn. App. at 448-49.

"Factors (1) and (2) are primary; factors (3) and (4) are secondary." *Id.* Also, the "factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors." *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999). Consequently, if the moving party shows a "'strong or virtually conclusive defense,'" then "'the court will spend little time inquiring into the reasons for the failure to appear and answer, provided the party timely moved to vacate and the failure to appear was not willful.'" *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 205, 165 P.3d 1271 (2007) (internal quotation marks omitted) (quoting *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003)). Conversely, because the primary purpose for requiring a meritorious defense is to avoid a useless trial, a default judgment should stand if the party seeking to vacate it can present no defense. *See Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000) ("If a CR 60 movant cannot produce substantial evidence with which to oppose the claim, there is no point to setting aside the judgment and conducting further proceedings.").

Here, VP Elite conceded that its lien had expired and "was absolutely *void* and no longer bound" 2400 Elliott's property. Throughout its briefs in this court, VP Elite characterizes this concession as a "virtually conclusive defense" to 2400 Elliott's lawsuit. This characterization is not reasonable. Although VP Elite is correct that its lien had clearly expired under RCW 60.04.141, which imposes no obligation to provide a lien release, 2400 Elliott's lawsuit was not premised on a statutory obligation to deliver a lien release. Instead, 2400 Elliott sought equitable

and declaratory relief because VP Elite's recorded lien notice remained a potential cloud on title even if the underlying lien was clearly invalid. To this end, VP Elite's own counsel confirmed in a declaration submitted in support of the motion to vacate that at least one title company has incorrectly construed a recorded lien notice as valid even when it was not, thus requiring his intervention. Far from establishing a conclusive defense, the record shows that VP Elite had *no defense*. *See Robinson v. Khan*, 89 Wn. App. 418, 423, 948 P.2d 1347 (1998) (cloud on title is anything "'that has a tendency, *even in a slight degree*, to cast doubt upon the owner's title'" and includes an "'encumbrance which is actually invalid or inoperative, but which may nevertheless impair the title to property'" (emphasis added) (quoting *Whitney v. City of Port Huron*, 88 Mich. 268, 272, 50 N.W. 316 (1891); 65 AM. JUR. 2D *Quieting Title* § 9, at 148 (1972)). This was an independent reason for the trial court to deny VP Elite's motion to vacate as it pertained to the default judgment. The trial court did not abuse its discretion.

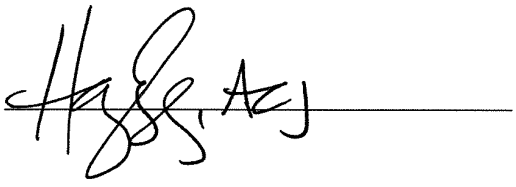
II. Fees on Appeal

Both parties request fees on appeal. VP Elite included one sentence in its brief requesting attorney fees, without citing any authority for its request. Moreover, VP Elite does not prevail on appeal. Accordingly, we deny its request for fees. *See Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996) (RAP 18.1(b) "requires more than a bald request for attorney fees on appeal. Argument and citation to authority are required under the rule." (citation omitted)).

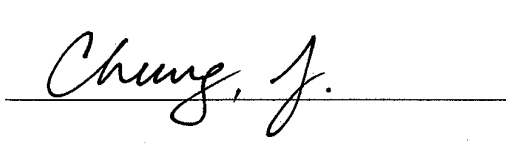
2400 Elliott requests fees on appeal under RAP 18.9 as a sanction for a frivolous appeal. "An appeal is frivolous if, considering the entire record, the court

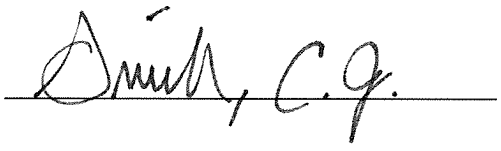
is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal." *Advocs. for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010). We agree with 2400 Elliott that VP Elite's appeal is frivolous: VP Elite assigned error to and disputed an order that this court had already ruled was not within the scope of this appeal. As to its remaining assignment of error, VP Elite challenged a discretionary ruling that the record amply supported, relying largely on a frivolous argument that recharacterized what was in fact was a concession as a defense to the underlying action in an attempt to satisfy the requirements of CR 60. Accordingly, we grant 2400 Elliott's request for fees on appeal,[5] subject to its compliance with the procedural requirements of RAP 18.1.

Affirmed.



WE CONCUR:





[5] Because we grant 2400 Elliott's request under RAP 18.9, we do not address its argument that it is also entitled to appellate fees under RCW 60.04.071 or RCW 60.04.181(3).

STOEL RIVES LLP

June 03, 2024 - 3:11 PM

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