Supreme Court No. _____

Court of Appeals No. 85824-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

FREDERICK REYNOLDS
Respondent/Plaintiff

v.

JOSANNE B. LOVICK
Petitioner/Defendant

PETITION FOR REVIEW

JOSANNE B. LOVICK, *pro se* Petitioner
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I. IDENTITY OF PETITIONER

Petitioner, Josanne B. Lovick ("Lovick"), a *pro se* litigant who is Appellant/Defendant in the underlying case, seeks review of the Court of Appeals decision described below which denied her request to have a default order and judgment against her vacated and set aside.

II. COURT OF APPEALS DECISION

Lovick asks this Court to accept review of the decision of the Court of Appeals, Division I filed on June 17, 2024 (the "*Opinion*"), a copy of which is attached hereto as Appendix A at pages A-1 through A-18. A copy of the unpublished *Opinion* may also be found at *Reynolds v. Lovick*, No. 85824-6-I (Wash.Ct.App. Jun. 17, 2024).

This Petition seeks review and reversal of the *Opinion* which affirmed the trial court's refusal to set aside and vacate a default order and judgment awarded against Lovick in favour of Respondent/Plaintiff Frederick Reynolds ("Reynolds").

III. INTRODUCTION

In Washington, default judgments are disfavored and instead the law favors determination of controversies on the merits. *Ha v. Signal Elec., Inc.*, 182 Wn.App. 436 (2014); *Little v. King*, 160 Wn.2d 696 (2007); *Griggs v. Averbeck Realty*, 92 Wn.2d 576 (1979). A default judgment has been described as one of the most drastic actions a court may take to punish disobedience to its commands. *Id.* at 581. Yet here, there was no "disobedience", and yet the innocent defendant was "punished" nonetheless by a default judgment awarding damages against her.

Although Lovick appropriately appeared and was *not in default*, at an *ex parte* hearing held without notice to Lovick, the trial court was misled by an affidavit Reynold' presented to the court which falsely stated Lovick had not appeared. Washington law has long dictated that in such circumstance, a defendant is entitled as a matter of right to have the erroneous default order and judgment set aside at any time. However, the trial court below refused to do so, which the Court of Appeals in this case

(the "Appeals Court") affirmed.

This inequity has resulted from confusion in Washington law concerning a defendant's right to have default judgment vacated as void. Both the trial court and the Appeals Court failed to follow *Tiffin v. Hendricks*, 44 Wn.2d 837 (1954), the leading Washington Supreme Court precedent on point; but instead followed the more recent but conflicting lower court decision of *Rabbage v. Lorella*, 5 Wash.App. 2d 289 (2018).

This Court should accept review of this case because the *Opinion* totally contradicts *Tiffin* and its progeny, and also conflicts with *Servatron, Inc. v. Intelligent Wireless Prods., Inc.*, 186 Wash.App. 666 (2015) and numerous published Court of Appeal cases addressing the issue of void versus voidable judgments. The *Opinion* also fails to address Lovick's arguments regarding breach of due process safeguards, and offends the fundamental principle of fairness by affirming a reward to a party who obtained relief he is not by law entitled to.

IV. ISSUES PRESENTED FOR REVIEW

1. Is the Supreme Court *Tiffin* case still good law entitling a non-defaulting defendant to vacation of an erroneous default order?

2. Did the Appeals Court err in failing to distinguish *Rabbage* and *Orate* and in holding that the decision of a court with jurisdiction can never be void?

3. Does *Servatron* still reflect good law that default entered without CR 55(a)(3) notice renders a default order void?

4. Did the Appeals Court err in failing to consider Lovick's due process arguments regarding lack of notice?

5. Did the Appeals Court err in holding that errors in the underlying Default Judgment can be remedied only through direct appeal? Can a motion to vacate on due process grounds challenge the validity of the underlying judgment?

6. Did the Appeals Court err in holding that a motion to set aside a default order can only be made before default judgment?

V. STATEMENT OF THE CASE

The facts and procedural history of this case are succinctly set out in the *Opinion* at 1-4, and certain salient facts are also summarized here:

Lovick, a 72-year-old *pro se* litigant, was romantically involved with Reynolds and borrowed $20,000 from him in 2016 for a surgical procedure, which loan she asserts she repaid via

setoff of $22,500 she invoiced him in January 2018 for work she did for him. *CP51*. Their relationship deteriorated, and on September 6, 2018 Reynolds filed a Complaint claiming $22,000 in damages against Lovick plus interest, attorney fees and costs. The Complaint attached an unauthenticated photocopy of a promissory note from Lovick for $20,000 of the alleged loan. *CP36-43*. On September 12, 2018, Lovick was duly served with the Complaint in Whatcom County. *CP171*.

On October 2, 2018, the last day to file, Lovick filed an appearance and answer at 4:20 p.m. *CP46-54*. The next morning, on October 3, 2018 at 8:34 a.m. without notice to Lovick, Reynold's filed an *ex parte* motion for an order and judgment of default together with his attorney's affidavit swearing (incorrectly) that Lovick had not appeared or answered to the Complaint (evidently having not checked the court registry). *CP55, 60-63*. Simultaneously filed at 8:34 a.m. that morning, was the trial court's order and judgment of default for $22,000, plus interest, costs, and attorney fees, totalling $26,764.02.

CP64-66. Reynolds' pleadings and promissory note photocopy are the only documents ever entered into the record by Reynolds.

Around March 2, 2019, Lovick became aware of Reynolds' default judgment when he emailed her a copy. *CP101*. Lovick quickly sent Reynolds a copy of her filed answer advising him the default was in error. *CP105*. She heard nothing back until receiving an August 26, 2019 letter demanding payment with interest, now totalling "over $32,000". *CP106*. Lovick consulted an attorney, but he failed to inform her that she could move to set aside the default judgment; and because of her dire financial situation, Lovick did not retain a litigator and the debt remained unpaid. *CP94-95*. In mid-2018, Lovick had to sell a property she owned to pay out her debts, but had to pay all of her equity ($10,000) to discharge a lien Reynolds had lodged. *CP67-69, 96*.

In mid-2023, Lovick learned she could represent herself to vacate the Default Judgment. *CP95-96*. On July 27, 2023, with *pro bono* help, she filed a motion requesting vacation of the default judgment under CR 60(b)(4), CR 60(b)(5) and CR

60(b)(11) arguing, among other things, that the judgment was void for the failure to provide notice and because Reynolds misrepresented facts in obtaining the judgment. *CP70-114*. In a declaration in support, Lovick acknowledged the promissory note and $20,000 loan but denied the additional $2,000 advance and claimed set-off of the monies he owed her as a defense. *CP91-92*.

Reynolds opposed the motion. *CP130-140*. At the motion hearing, the trial court concluded that the erroneous entry of default was a serious procedural error but rendered the judgment only voidable, not void. The trial court denied Lovick's motion finding she failed to file within a reasonable time; did not demonstrate a basis to vacate under CR 60(b); and failed to establish a prima facie defense. Reynolds's request for attorney fees under the promissory note was denied. *CP166-167*. On September 28, 2023, Lovick filed a second motion, this time requesting that the initial default *order* be set aside as void due to lack of authority under CR 55(a)(1) ; for "good cause" under

CR 55(c)(1); that the default *judgment* be vacated due to lack of due process; and in the interests of equity and justice. *CP6-22*. On December 13, 2023, the court denied the second motion as "akin" to an untimely motion for reconsideration, ruling that the order of default and judgment were not void; that Lovick failed to move to vacate the judgment within a reasonable time; and that she failed to establish a basis to set aside or vacate under CR 55 or CR 60. This time, the trial court awarded attorney fees to Reynolds under the promissory note and as a sanction under CR 11. *CP219-220*.

VI. WHY REVIEW SHOULD BE ACCEPTED

1. CRITERIA FOR DISCRETIONARY REVIEW

Under RAP 13.4(b), a petition for review will be accepted by this Court where the Appeals Court's decision: (1) is in conflict with a decision of this Court; or (2) is in conflict with a published decision of the Court of Appeals; or (3) involves a significant question of law under the Constitution of the State of Washington or of the United States; or (4) involves an issue of

substantial public interest that should be determined by this Court. Here, review is warranted because the *Opinion* conflicts with this Court's decision in *Tiffin* and its progeny. In addition, the *Opinion* directly conflicts with *Servatron* and numerous other published Court of Appeals' decisions on the issue of failure to provide notice of default. Further, the *Opinion* also raises significant constitutional issues concerning right to due process of law in a default judgment context. Accordingly, the RAP 13.4(b) criteria warranting discretionary review are met in this case.

2. THE *OPINION* CONFLICTS WITH SUPREME COURT *TIFFIN* CASE

One of the grounds argued by Lovick in the trial court proceedings and in her appeal was that the Default Judgment be vacated under CR 60(b)(5) as void due to: (1) lack of notice and (2) lack of statutory authority. However, both the trial court and Appeals Court refused to vacate the Default Judgment holding that it was not void but voidable only.

The determination of whether default should be set aside is a matter of equity generally within the court's discretion. *Morrone v. Nw. Motorsport, Inc.*, No. 55920-0-II, 11-12 (Wash.Ct.App. May. 10, 2022); *Sellers v. Longview* Wn.App.2d 515; *Vanderstoep v. Guthrie*, 200 Wn.App. 507 (2017), review denied, 189 Wash.2d 1041 (2018). Relief is to be afforded in accordance with equitable principles. *Friebe v. Supancheck,* 98 Wn.App. 260 (1999). "What is equitable is determined from the specific facts of each case and is not a fixed rule." *Little*, 160 Wn.2d at 703. The court may exercise its discretion liberally, the fundamental principle being whether justice is done. *Griggs*, 92 Wn.2d at 582.

However, courts have a mandatory, nondiscretionary duty to vacate void judgments. *Ahten v. Barnes*, 158 Wn.App. 343 (2010). Whether a judgment is void is a question of law to be reviewed *de novo*. *Tupper v. Tupper (In re Marriage of Tupper)*, 15 Wash.App.2d 796, 801 (Wash.Ct.App 2020); *Ha,* 182 Wn.App. at 447.

CR 55(a)(1) authorizes a court to order a defendant who "failed to appear" in default. But in this case, Lovick was never in default. Nevertheless, Reynolds obtained a default order at an *ex parte* hearing without giving notice to Lovick by misrepresenting to the trial court that Lovick had not appeared. Consequently, default was wrongfully entered against Lovick ("Default Order") and damages awarded in favor of Reynolds ("Default Judgment").

The *Tiffin* case had long established that where default has been erroneously entered against a non-defaulting defendant, that default order is a void and of no effect. In *Tiffin*, this Court made a clear distinction between cases where a defendant was not in default from those where there was actual default. The Court held that although discretion may be exercised for valid (regularly entered) default judgments, where a defendant appeared before default was taken "the court has no authority to enter a default judgment [and] no discretion to exercise on the question of whether the judgment should be set aside." *Id.* at 847.

As *Tiffin* and subsequent cases confirm, a non-defaulting party is entitled to have an erroneous entry of default set aside "as a matter of right" without need for a showing of a meritorious defense. *See*, for example, *Duryea v. Wilson*, 135 Wn.App. 233, 237-38 (2006); *Shreve v. Chamberlin*, 66 Wn.App. 728, 731-32 (1992) and *Idris v. Genesis Chiropractic*, 9 Wn.App. 2d 1085 (2019) (unpublished) .

Yet, the Appeals Court did not follow *Tiffin* but instead relied on the more recent case of ***Rabbage v. Lorella,*** 5 Wash.App. 2d 289 (2018). But *Rabbage* is not on point (concerns "substantial appearance"), and its comments regarding void versus voidable are in direct conflict with *Tiffin*. *Rabbage* states that a default judgment can be void only if a court lacks personal or subject matter jurisdiction. However, the language in *Tiffin* is clear and to the contrary, holding that the default judgment in that case was void due to a lack of court authority:

> But it is argued that this case is inconsistent with, and is in effect overruled by, our subsequent cases holding that a judgment prematurely entered was not void but

> only voidable. We cannot, however, accept the argument as well founded. … [W]here the court has no authority to enter a default judgment because the defendant is not in default, the court has no discretion to exercise on the question of whether the judgment should be set aside. In the latter instance, the defendant may have such a default judgment set aside as a matter of right and no showing of a meritorious defense is necessary.

Id. at 845-847.

The court in *Rabbage* insufficiently describes the limitations on a court's authority because judgment of a court with jurisdiction may also be void if issued in violation of procedural due process requirements. *Marriage of Ebbighausen,* 42 Wash.App. 102. *Rabbage* also conflicts with numerous appellate court cases which establish that the order of a court with jurisdiction may also be void if the court lacks the inherent power to make that order. *See*, *Dep't of Labor v. Fowler,* 23 Wn.App.2d 509, 516 (2022), review denied, 523 P.3d 1184 (2023); *In re Marriage of Tupper*, 15 Wn.App. 2d 796, 801 (2020) ; *In re Estates of Smaldino*, 151 Wash.App. 356, 366 (2009) ; *Dike v. Dike*, 75 Wash.2d 1, 7 (1968) . In *Ronald*

Wastewater Dist., Mun. Corp. v. Water, 196 Wash.2d 353 (Wash. 2020), this Court stated at 368:

> There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment. For the absence of any one of these elements, when properly apparent, the judgment may be vacated at any time.

The Appeals Court did not properly address the issue argued by Lovick of lack of statutory authority. Instead, relying on *Rabbage*, the Appeals Court dispensed with *Tiffin* as though it had been "overruled" by *Rabbage*. Acknowledging that a trial court lacks authority to enter default judgment without notice against a defendant who is not in default, the Appeals Court held that "judgment entered without authority may be set aside if a motion to vacate is brought within time constraints of CR 60." *Opinion* at 8. However, in *Tiffin*, this Court clearly stated that the right to appear within time allowed, the right to notice of proceedings, and the right to vacate a premature judgment are absolute rights and "[n]either the plaintiff nor the court are

granted power to annex conditions thereto…" *Id.* at 845.

The Appeals Court failed to recognize that CR 55(a) is not just procedural, but expressly dictates *preconditions* that not only define the court's default judgment authority but are clearly intended to ensure minimum due process. An order in contravention of such statutory limitations or protections is void. *Shreve*, 66 Wn.App. 728; *Dike v. Dike*, 75 Wash.2d 1; *Tiffin*. *See* also, *Long v. Harrold*, 76 Wn.App 317, 320 (1994) (since the prerequisites of CR 2A were not met, the court had no authority to enter the agreement as a judgment and so the judgment was void); *Dep't of Labor v. Fowler*, 23 Wn.App.2d at 516 (judgments entered in a proceeding failing to comply with the procedural due process requirements are void). Further, as the Default Order is void, the Default Judgment on which it is based must also be vacated. *Id*. at 516; Idris, 9 Wn.App. 2d 1085; *Servatron*. A void judgment must be vacated regardless of the lapse of time. *See*, e.g., *Allstate Insurance v. Khani*, 75 Wn.App. 317 (1994)

The *Rabbage* court's contradiction of *Tiffin* set the stage for a string of Court of Appeal cases which have significantly undermined *Tiffin*'s important precedential value. *Rabbage* has since been applied too broadly causing *Tiffin* to be overlooked or disregarded with strained interpretations. *See*, *Hendrickson v. Hempzen Enters., Ltd.*, No. 79158-3-I, n.25 (Wash.Ct.App Dec. 16, 2019) (unpublished) opining that "the *Tiffin* court was simply stating that a voidable judgment must be vacated if the other requirements of CR 60 are also satisfied".

If the *Tiffin* case is to be so altered to be ineffective, the authority to do so can be found only in this Court. Until then, the higher court decision in *Tiffin* is the governing precedent and should have been determinative in this case. As the Default Order is void, Lovick is entitled to have the Default Order set aside and the Default Judgment vacated "as a matter of right" without further inquiry or conditions.

3. THE *OPINION* FOLLOWS *RABBAGE* IN CONFLICT WITH NUMEROUS COURT OF APPEAL DECISIONS

Lovick also maintains that the Default Judgment is further rendered void because she was not given the advance notice mandated by CR 55(a)(3) . Lovick relies on *Servatron* which stated at 674:

> Under CR 55(a)(3) , if a party has "appeared" before a motion for default has been filed, that party is entitled to notice of the motion before the trial court may enter a valid default order.

However, the Appeals Court refused to follow *Servatron*, relying again on *Rabbage* and also *In re Marriage of Orate*, 11 Wn.App. 2d 807 (2020). Citing *Rabbage*, the Appeals Court held that because failure to provide notice is not a jurisdictional flaw, that "does not necessarily mean that the judgment is void." *Id.* at 297 (quoting *Morin v. Burris*, 160 Wn.2d 745, 754 (2007)). *Orate* similarly held that "no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith." *Id.* at

813 (quoting *In re Marriage of Ortiz*, 108 Wn.2d 643, 649-50 (1987)). However, the lack of notice in a default proceeding is not simply an "irregularity' nor is it an "error of law". The requirement for notice is a substantive precondition for the court's authority to enter default and is a due process safeguard. Both *Rabbage* and *Orate* fail to recognize that an order is void where entered by a court "which lacks the inherent power to make or enter the particular order involved." *Marriage of Ortiz*, 108 Wn.2d at 649.

A. The Appeals Court erred in ruling that the lack of notice can only justify vacation *if* the requirements of CR 60 are met. The court in *Servatron* expressly rejected this premise, stating:

> [Plaintiff] maintains that failure to provide notice of a motion for default under CR 55 renders the subsequent judgment voidable, rather than void, thereby precluding a court from granting a defendant relief under CR 60(b)(5) . We disagree. The lack of notice rendered the judgment void, and the [defendants] could vacate the judgment at any time.
>
> …
>
> Washington courts have repeatedly and consistently held that, if a party otherwise entitled to notice

> under CR 55 does not receive such notice, the court lacks the authority to enter the judgment.

Id. at 678-679.

Lovick respectfully submits that the Appeals Court erred in refusing to follow *Servatron* and its ruling is in conflict with numerous Court of Appeals cases which held that default judgments of courts with jurisdiction may be void. *See*, *Hous. Auth. v. Newbigging* , 105 Wash.App. 178, 190 (2001); *Azpitarte v. Biscay*, No. 72749-4-I, (Wash.Ct.App. Jun. 27, 2016); *Long v. Harrold*, 76 Wash.App. 317 (1994); *In re Marriage of Daley*, 77 Wash.App. 29, 31 (1994); *Shreve v. Chamberlin*, 66 Wash.App. 728, 731 (1992); *In re Adoption of Hickey*, 18 Wash.App. 259 (1977).

There remains significant uncertainty in Washington law and the conflicting Court of Appeals cases concerning the consequences of failure to provide advance notice of default. It remains for this Court to provide clarity as to if and when a breach of the CR 55(a)(3) notice requirement renders a default

order and resultant judgment void.

4. THE *OPINION* FAILS TO ADDRESS DUE PROCESS ISSUES AND CONFLICTS WITH PRIOR DUE PROCESS COURT DECISIONS

The Appeals Court erred further in failing to give due consideration to Lovick's argument the lack of CR 55(a)(3) notice violated her right to due process of law. The Appeals Court simply summarily dismissed this argument, stating that "describing the error as implicating due process does not change the analysis as to whether the judgment is void." *Opinion* at 7.

However, Lovick's assertion that her due process rights were violated is a valid ground. Lovick presented a defense in her answer but was given no notice of default or opportunity for her case to be heard prior to Default Judgment being awarded against her. Although the Appeals Court posited that Reynolds would be prejudiced if required to relitigate, the fact is that this case has never been litigated. There has been no determination on the merits and the Default Judgment rendered without notice (or any evidence, see s. 5 below) is in clear violation of Lovick's

constitutional right to due process under Article I, section 3 of the Washington Constitution and the Fourth and Fourteenth Amendments to the United States Constitution.

In an action to set aside default judgment entered without proper notice, the United States Supreme Court in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988) stated: "Failure to give notice violates 'the most rudimentary demands of due process of law.'" In *Ware v. Phillips*, 77 Wn.2d 879 (1970), this Court held that a judgment entered without notice and opportunity to be heard denies procedural due process of law in violation of Washington's constitution and is therefore void.

Void judgments lack legal effect. *In re Marriage of Leslie*, 112 Wn.2d 612, 618-20 (1989). A motion to vacate a void judgment may be brought at any time. *Colacurcio v. Burger*, 110 Wn.App. 488 (2002); *In re Marriage of Daley*, 77 Wn.App. 29 (1994). Accordingly, the *Opinion* must be reversed because courts have a mandatory, nondiscretionary duty to vacate void judgments. *Dep't of Labor v. Fowler*, 23 Wn.App.2d at 516;

Ahten v. Barnes, 158 Wn.App. 343.

5. THE *OPINION* VALIDATES JUDGMENT WITHOUT FACTS IN VIOLATION OF DUE PROCESS

The Appeals Court also failed to duly consider Lovick's claim that the Default Judgment violated her right to due process of law because it was decided without evidence and in breach of CR 55 requirements.

A party seeking a default judgment must set forth facts supporting each element of the claim, and must prove his case even in a default proceeding. *Friebe*, 98 Wn.App at 268 and 331. Even in default proceedings, the amount of damages must be proved and "must be supported by substantial evidence". *Vanderstoep*, 200 Wash.App. at 524 (citing *Little*, 160 Wn.2d at 704). Pleadings do not constitute proof. RCW 5.40.010. And complaints are not evidence. *Thomas v. Redmond Police Dep't*, No. 81718-3-I (Wash.Ct.App. Nov. 8, 2021). Rather, the courts are to look to the materials submitted; mere unsupported allegations are insufficient to support a default judgment; and

where a default judgment is "based upon incomplete, incorrect or conclusory factual information," vacation of the judgment is proper. *Caouette v. Martinez,* 71 Wn.App. 69 (1993).

While CR 60 may be said to prescribe certain rules of procedure, CR 55 rules are substantive prerequisites for the issuance of a default order and clearly intended to afford minimum due process protections and as evidentiary safeguards. Substantive law creates, defines, and regulates primary rights, while procedures involve the operations of the courts by which substantive law, rights, and remedies are effectuated. *Putman v. Wenatchee Valley Med. Ctr.*., 166 Wash.2d 974, 984 (2009) . "Judgments entered in a proceeding failing to comply with the procedural due process requirements are void. *Marriage of Ebbighausen,* 42 Wash.App. 102.

Reynolds' Complaint claims two loans, but the record is devoid of any admissible evidence or findings of fact justifying the claim and quantum of damages. Although the Complaint alleges liquidated damages "susceptible to computation, based

upon the Note" (CP57), that "Note" is just an unauthenticated photocopy of a promissory note for only a portion of the alleged loan; and unsworn evidence referenced in pleadings does not meet the standard for admissibility. *Burmeister v. State Farm Ins.*, 92 Wn.App. 359, 366-67 (1998). No affidavit was filed to substantiate damages as required under CR 55(b)(1) , leaving the trial court without basis to award damages under that provision.

Alternatively, if damages are determined under CR 55(b)(2), findings of fact and conclusions of law are expressly required so as to allow "the reviewing court (and others) to evaluate the factual and legal basis for the court's decision." *Little*, 160 Wn.2d at 702. Yet, the record contains no findings of fact or conclusions of law but only unsworn pleading with bare assertions. CP36-43.

CR 52(d) expressly provides that a judgment entered "where findings are required, without findings of fact having been made, is subject to a motion to vacate. In *Little*, 160 Wn.2d at 723, Madsen, J. stated:

> … entry of findings of fact and conclusions of law is an important "safeguard" for defendants, which assures that the court does not act as a "passive bystander" in entering a default judgment, but plays an "active role" in assessing the appropriate award of damages when the amount is uncertain ...

Clearly, here, as evidenced by the time stamps on the Default Judgment (filed at the *exact same time* as the Default Motion), there was no proper assessment of damages claimed.

Courts do not have the authority, inherent or otherwise, to award a default judgment outside of the authority prescribed in CR 55. A default judgment is void if the rendering court lacked the power to grant the relief contained in the judgment. *Kaye v. Lowe's HIW, Inc.*, 158 Wn.App. 320 (2010)). As well, a judgment rendered without proven facts or admissible evidence is in violation of due process of law and therefore void. For, due process includes the right "to have a decision based exclusively on the evidence presented." *Strauss, Peter* (2007-08-06). "*Due Process*", Legal Information Institute. Retrieved 8 March 2013.

The Appeals Court erred in refusing to address Lovick's

argument that the Default Judgment was void due to lack of evidence. Although the court held that errors in the underlying judgment could be remedied only through direct appeal, citing *Burlingame v. Consolidated Mines and Smelting Co., Ltd.*, 106 Wn.2d 328, 336 (1986), there are exceptions to that rule, including issues affecting fundamental constitutional rights; challenges to the trial court's jurisdiction; and as justice may require, within the Court's discretion under RAP 12.2. *Milwaukie Lumber Co. v. Veristone Fund I, LLC*, No. 82052-4-I, (Wash.Ct.App. Mar. 29, 2021); *State v. Santos*, 104 Wn.2d 142 (1985). This case falls within those exceptions as the Default Judgment has been challenged on due process grounds, and Lovick has argued that justice dictates that the erroneous Default Order be set aside because it was obtained in breach of all CR 55 procedural safeguards.

6. UNTENABLE NOT TO VACATE

Even if the Default Judgment were not void but voidable only, the trial court's decision to refuse to vacate Default

Judgment under CR 60(b) solely because Lovick delayed in seeking relief was unreasonable and unjust given the circumstances of this case. Courts review a decision on a motion for default judgment for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds, such as factual findings unsupported by the record (F*owler v. Johnson*, 167 Wn.App. 596, 604 (2012)) or failing to properly weigh the equities (*In re C.E.C.L.*, No. 84156-4-I, 12 (Wash.Ct.App. Apr. 10, 2023)). As there was no default and judgment rendered in breach of court rules, it should not be the innocent defendant burdened with the onus of correcting the wrong of the plaintiff. Time has not erased the wrongs inherent in the Default Judgment, and therefore "finality must give way to the greater value that justice be done." *Shandola v. Henry*, 198 Wn.App. 889, 895 (2017).

The trial court's refusal to set aside the erroneous Default Order under CR 55(c) is also untenable, as surely the facts here

established "good cause" to do so. Further, the Appeals Court erred in holding that a default order can only be set aside *before* default judgment because where the validity of Default Judgment depends on a valid entry of default, a challenge to that decision also brings up any related order that "prejudicially affects" it (meaning it is reliant upon). *See*, *Clark Cnty. Wash. v. W. Wash. Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 145 (2013) (cited in *Idris*, 9 Wn.App. 2d 1085 (unpublished)).

VII. CONCLUSION

Lovick requests review of her argument that the Default Judgment is void (1) on the facts, as dictated by *Tiffin* and its progeny; (2) due to lack of required notice as stipulated in *Servatron*; and (3) because it was rendered in breach of her constitutional right to due process of law. Certainly, justice has not been done if a default judgment on a meritless claim is allowed to stand. *TMT Bear Creek Shopping Center, Inc. v. Petco*, 140 Wn.App. 191, 205 (2007).

Lovick respectfully requests that this Court undertake the review herein requested and reverse the decision of the Appeals Court denying her request to set aside the Default Order and vacate the Default Judgment. Further, Lovick requests reimbursement of the $10,000 she paid in partial satisfaction of the Default Judgment (as per *Marriage of Hardt*, 39 Wn.App. 493 (1985)), plus interest thereon and reimbursement of any costs to which she may be entitled under applicable Court Rules in an amount to be established by a subsequently filed affidavit; or alternatively, to remand with instructions for the trial court to award the same.

Respectfully submitted this 16th day of July, 2024.

I certify that this document contains
4,993 words, in compliance with RAP 18.17.

_____

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DECLARATION OF SERVICE

I, JOSANNE B. LOVICK, *pro se* Petitioner, CERTIFY that on the date below written, I electronically filed with the State of Washington Supreme Court, the foregoing Petition for Review. On the same date, I caused to be emailed a copy of the said document to the following individual at the email address indicated below:

Elizabeth Slattery, WSBA #56349
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing certification is true and correct.

DATED this 16th day of July, 2024.

JOSANNE LOVICK, *pro se* Petitioner
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APPENDIX A

(pages 1 – 18)

Decision of the Court of Appeals, Division I

Reynolds v. Lovick

No. 85824-6-I

Filed on June 17, 2024

FILED
6/17/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FREDERICK REYNOLDS,

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No. 85824-6-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — In 2018, the superior court entered a default order and judgment against Josanne Lovick in favor of Frederick Reynolds. Almost five years later, Lovick filed two motions seeking to vacate the judgment. The trial court denied both motions. The trial court denied Reynolds's request for attorney fees when it denied Lovick's first motion, but awarded fees to Reynolds in connection with the second motion. Both parties appeal. Because the trial court imposed attorney fees under CR 11 without requisite findings to support the sanction, we remand for reconsideration of the award. We otherwise affirm the trial court's orders.

FACTS

On September 6, 2018, Frederick Reynolds filed a complaint for damages against Josanne Lovick seeking to recover amounts allegedly due under a promissory note and a subsequent loan. Reynolds asserted claims of breach of contract and

quantum meruit, and sought damages of $22,000, plus interest. On September 12, 2018, Reynolds served Lovick with the summons and complaint in Whatcom County. Twenty days later, at 4:20 p.m. on October 2, 2018, Lovick filed an "answer" in superior court.[1] See CR 12(a)(1) (defendant must answer within 20 days after service of the summons and complaint).

The next morning, however, on October 3, 2018, Reynolds filed an ex parte motion for an order and judgment of default. Reynolds asserted that Lovick had neither answered the complaint nor appeared in the proceeding. At 8:34 a.m. on the ex parte calendar, the trial court entered an order and judgment of default for a principal amount of $22,000, plus interest, costs, and attorney fees, for a total of $26,764.02.

Lovick became aware of the default judgment against her, at the latest, on March 2, 2019. Upon receipt of Reynolds's demand for payment, Lovick reviewed the court filings, alerted Reynolds to the error, and sent him a copy of the answer filed on October 2, 2018. When Lovick did not hear from Reynolds for several months following this exchange, she assumed he did not intend to collect on the judgment.

However, on August 26, 2020, Lovick received another demand from Reynolds, and decided to seek legal advice. According to Lovick, she consulted an attorney in California who failed to inform her that she could move to set aside the default judgment. With the attorney's assistance, Lovick drafted and sent a letter to Reynolds in September 2020 stating her belief that the default judgment was entered in error. Lovick also informed Reynolds that she was exploring the possibility of "reopening" the

[1] Although Lovick's filing was titled "Letter of Acknowledgement," the substance was clearly responsive to the allegations and claims in Reynolds's complaint.

case by means of a lawsuit and she intended to initial legal action to recover outstanding sums Reynolds owed her. In 2021, Lovick paid Reynolds $10,000, in partial satisfaction of the default judgment. Lovick later explained that she was required to pay that amount to Reynolds to discharge a lien and facilitate the sale of Washington real property.

On July 27, 2023, four years and nine months after entry of the default judgment, Lovick filed a motion to vacate the judgment, arguing, among other things, that the default judgment was void for the failure to provide notice before entering default judgment and because Reynolds misrepresented facts in obtaining the judgment. In Lovick's declaration supporting her motion, she acknowledged the $20,000 loan from Reynolds memorialized in a promissory note. Lovick claimed that Reynolds owed her an approximately equivalent amount in compensation for work she performed related to a home he purchased.

Reynolds opposed the motion to vacate. In support of Reynolds's response, his attorney stated that, on October 3, 2018, he was unaware that Lovick had filed an answer to the complaint in superior court the day before.

At the hearing on the motion to vacate, the trial court explained that it would not have been aware of Lovick's filing at the time it entered the default order and judgment because the document would not have been scanned or accessible to the court at an 8:30 a.m. hearing. The court concluded that although there was a procedural error in the entry of the default order and judgment after Lovick responded to the complaint, the judgment was voidable, but not void. The trial court also denied Lovick's motion

because she failed to file a motion within a reasonable time, did not demonstrate a basis to vacate under CR 60(b), or establish a prima facie defense. The trial court denied Reynolds's request for attorney fees under a provision of the promissory note.

Six weeks after the trial court denied Lovick's motion, Lovick filed a second motion seeking to "set aside the order of default and vacate the default judgment." Lovick again argued, among other things, that the default order was void because she was not in default when the court entered the order and entry of default without notice violated her right to due process.

The trial court denied Lovick's second motion. The court observed that Lovick's second motion was essentially a motion for reconsideration and untimely because it was not asserted within 10 days, as CR 59 requires. The court also ruled that the October 3, 2018 order of default and judgment were not void, Lovick failed to move to vacate the judgment within a reasonable time, and failed to establish a basis to set aside or vacate under CR 55 or CR 60. This time, the trial court awarded attorney fees to Reynolds under the promissory note and as a sanction under CR 11.

Both parties appeal.

DISCUSSION

"Finality of judgments is a central value in the legal system, but circumstances can arise where finality must give way to the greater value that justice be done." Shandola v. Henry, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). CR 60(b) provides a "balance between finality and fairness by listing limited circumstances under which a judgment may be vacated." Id. Relevant here, CR 60(b) provides that "[o]n motion and

upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding" for these reasons:

(4) Fraud [ ], misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

. . . ; or

(11) Any other reason justifying relief from the operation of the judgment.

"[R]eview of a CR 60(b) decision is limited to the trial court's decision, not the underlying order the party seeks to vacate." In re Marriage of Persinger, 188 Wn. App. 606, 609, 355 P.3d 291 (2015). Generally, we will not overturn a trial court's decision on a CR 60(b) motion to vacate unless it plainly appears that the trial court abused its discretion. Luckett v. Boeing Co., 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). But a trial court's ruling under CR 60(b)(5) is reviewed de novo. Ahten v. Barnes, 158 Wn. App. 343, 350, 242 P.3d 35 (2010).

Lovick's first motion to vacate sought relief under CR 60(b)(4), (5), and (11) and she raises arguments on appeal related to subsections (4) and (5).

CR 60(b)(5)

Lovick maintains that, because she was not in default on October 3, 2018, when the court entered the default order and judgment against her, the judgment is void and the trial court was required to vacate.

CR 60(b) requires that a motion to vacate must be made "within a reasonable time" of the judgment, order, or proceeding that the movant seeks to vacate.[2] But courts have a nondiscretionary duty to vacate a void judgment. Rabbage v. Lorella, 5 Wn. App. 2d 289, 297, 426 P.3d 768 (2018). A motion to vacate an order as void under CR 60(b)(5) may be brought at any time, despite the plain language of the rule. In re Marriage of Leslie, 112 Wn.2d 612, 618-19, 772 P.2d 1013 (1989); Allstate Ins. Co. v. Khani, 75 Wn. App. 317, 323, 877 P.2d 724 (1994). Lovick argued that because the default judgment was void, the motion for relief under CR 60(b)(5) was not untimely.

However, Lovick failed to establish that the judgment is void. Although the parties dispute whether Lovick served her answer on Reynolds on October 2, 2018, there is no dispute that Lovick appeared in the case by filing an answer on October 2, 2018.[3] A party who has appeared in an action "shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion." CR 55(a)(3).

Lovick did not receive notice of the motion for default. Nevertheless, the failure to provide notice when required is a serious procedural error that renders the judgment voidable, not void, and justifies vacation only when the requirements of CR 60 are met.

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[2] Motions brought under CR 60(b)(1)-(3), subsections that are not applicable here, must be brought within a year of entry of default. CR 60(b).

[3] According to the declaration of Reynolds's attorney, the attorney's office never received Lovick's answer by mail, service, or email. In reply, Lovick submitted the declaration of a personal friend, who stated that, contrary to the representation of Reynolds's counsel, she delivered a court-stamped copy of Lovick's answer to counsel's law office immediately after filing the document on Lovick's behalf on October 2, 2018. Regardless of this factual dispute, the parties agree that Lovick was entitled to notice under CR 55(a)(3).

Rabbage, 5 Wn. App. 2d at 298; In re Marriage of Orate, 11 Wn. App. 2d 807, 813, 455 P.3d 1158 (2020). Lovick relies on Servatron, Inc. v. Intelligent Wireless Products, Inc., 186 Wn. App. 666, 678-81, 346 P.3d 831 (2015) to argue otherwise. In Servatron, Division Three of this court relied on Tiffin v. Hendricks, 44 Wn.2d 837, 847, 271 P.2d 683 (1954), wherein our Supreme Court stated that a party who did not receive notice of a default "may have such a default judgment set aside as a matter of right." But, as Rabbage persuasively explains, the failure to provide notice of a motion for default does not divest a court of jurisdiction, so a default judgment entered without notice is merely voidable and not void. Rabbage, 5 Wn. App. 2d at 299-300. Division Three later reached the same conclusion in Orate, and recognized that,

> "where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith."

Orate, 11 Wn. App. 2d at 813 (quoting In re Marriage of Ortiz, 108 Wn.2d 643, 649-50, 740 P.2d 843 (1987)). As we have previously observed, Servatron overextended Tiffin. We adhere to our recent decisions in Rabbage and Orate.

Lovick also contends, as she did in her second motion to vacate, that entry of default judgment without notice is more than a procedural error, it is a due process violation. But describing the error as implicating due process does not change the analysis as to whether the judgment is void. As we made clear in Rabbage, when a party does not receive required notice of a hearing to consider a motion for default, that party is "'generally entitled to have judgment set aside without further inquiry.'"

Rabbage, 5 Wn. App. 2d at 297 (quoting Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956 (2007)). "But the right to have a judgment set aside does not necessarily mean that the judgment is void." Id. The failure to provide notice is not a jurisdictional flaw that renders a judgment void—or without legal effect. A trial court lacks authority to enter default judgment without notice against a defendant who is not in default, and judgment entered without authority may be set aside if a motion to vacate is brought within time constraints of CR 60. Id. at 300; see also Orate, 11 Wn. App. 2d at 808-09 ("If a trial court has jurisdiction when a judgment is entered, judgments entered without proper notice are voidable, not void.").

The trial court did not err in concluding that the 2018 default order and judgment are not void and CR 60(b)(5) does not provide a basis for relief.

CR 60(b)(4)

Lovick claims the trial court abused its discretion in denying her motion under CR 60(b)(4) as untimely. A party attacking an order under CR 60(b)(4) is required to establish, by clear and convincing evidence, fraud, misrepresentation, or other misconduct. Hor v. City of Seattle, 18 Wn. App. 2d 900, 912, 493 P.3d 151 (2021). And the trial court has discretion to grant a motion under CR 60(b)(4) only if the motion is filed "within a reasonable time." CR 60(b).

What constitutes a reasonable time for purposes of CR 60(b) depends on the facts and circumstances of each case. Luckett, 98 Wn. App. at 312. When considering the timeline of events, the critical period is the time between when the party seeking vacation became aware of the judgment and the filing of the motion. Ha v. Signal Elec.,

Inc., 182 Wn. App. 436, 454, 332 P.3d 991 (2014). For example, three months may not be within a reasonable time to respond to notice of a default judgment in certain circumstances, while moving to vacate within one month of notice generally satisfies due diligence. Id. "Major considerations" for determining the reasonableness in a particular case include "prejudice" to the nonmoving party and "whether the moving party has good reasons for failing to take appropriate action sooner." Luckett, 98 Wn. App. at 312.

Approximately four years and nine months elapsed between the date of the judgment and Lovick's first motion to vacate. During that time, the judgment was partially satisfied. Reynolds would be prejudiced if required to relitigate events that took place in 2016 and 2017. The prejudice factor weighs slightly against Lovick.

The second factor weighs more heavily against Lovick because she has provided no satisfactory explanation for why she waited more than four years to file a motion to vacate after she learned of the default judgment. Lovick claims the delay was reasonable because she received "misinformation" about her available legal options and had limited financial resources. And, relying on In re Marriage of Gharst, 25 Wn. App. 2d 752, 759, 525 P.3d 250 (2023), Lovick argues that personal difficulties resulting in delay should not be held against her.

But the record demonstrates that when she learned of the default judgment, Lovick immediately understood that it was erroneously based on the failure to appear. The record further reveals that Lovick contacted the court to confirm that her responsive document had been filed and obtained a copy. But then, despite her awareness of what

had occurred and possession of documentary evidence tending to show procedural error, Lovick did not file any motion with the court. Instead, Lovick hoped Reynolds would not attempt to enforce the judgment.

And while Lovick partially attributes the delay to misleading legal advice, the record suggests that she only sought such advice sometime after August 2020, more than a year and a half after she became aware of the judgment. Further, Lovick's suggestion that she did not promptly file a motion to vacate because she was unaware that she could do so on her own behalf is unconvincing, since she had already filed an answer pro se. And finally, Gharst does not advance Lovick's position since the court in that case addressed a motion premised on excusable neglect under CR 60(b)(1) that was filed less than a month after entry of the default judgment. 25 Wn. App. 2d at 760.

Luckett is instructive. Luckett's counsel waited four months before filing a motion to vacate a dismissal order under CR 60(b)(1). Luckett, 98 Wn. App. at 313. Even though the delay did not cause demonstrable prejudice, and the motion was filed within the one-year timeframe prescribed by the rule, the court concluded that Luckett's motion was not filed within a reasonable time because he had not advanced a good reason for the delay. Id. The delay here was far more extensive. And the reasons Lovick provides for failing to file a motion sooner, do not actually explain the more than four-year delay, given her awareness of the procedural error in 2019 and competent pro se filings both before and after entry of the default judgment. As we recognized in Luckett, while there is a preference for resolving cases on their merits, the timely pursuit of available remedies is generally a prerequisite to application of that preference. Id. at

313-14. Accordingly, even assuming Lovick could establish fraud, the trial court did not abuse its discretion in denying the motion to vacate because Lovick failed to act within a reasonable amount of time.[4]

Second Motion

Lovick argues that because her second motion raised different grounds for relief from her first motion, namely CR 55, the trial court erred in concluding that the motion was "akin" to a motion for reconsideration. But the alleged error in describing the motion had no effect. The trial court also denied the motion to vacate on the merits. As to the merits, Lovick contends that the trial court applied the wrong legal standard to determine whether she established good cause to set aside the order of default under CR 55(c)(1).

This argument fails for several reasons. First, the trial court's remark at the hearing on Lovick's first motion to vacate does not establish that the court applied an incorrect standard in deciding Lovick's second motion. Second, excusable neglect

[4] The trial court's determination that Lovick failed to provide substantial evidence to establish a prima facie defense appears to be irrelevant to her motion under CR 60(b)(4). The existence of a meritorious defense, as one of the four factors under White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), is a consideration in determining whether a default judgment should be vacated when the motion to vacate is brought under CR 60(b)(1) or (11). See, e.g., Little v. King, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007) (applying the White factors when motion to vacate was brought pursuant to CR 60(b)(1)); Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 304, 308, 122 P.3d 922 (2005) (applying White factors to motion to vacate brought under CR 60(b)(11)). As we have noted, "White v. Holm [ ] was based on language in former RCW 4.32.240 substantially similar to CR 60(b)(1)." Peoples State Bank v. Hickey, 55 Wn. App. 367, 370 n.2, 777 P.2d 1056 (1989). Therefore, the White factors are generally applicable when the motion to vacate is brought pursuant to CR 60(b)(1). Peoples State Bank, 55 Wn. App. at 370; see, e.g., Little, 160 Wn.2d 696; Haller v. Wallis, 89 Wn.2d 539, 573 P.2d 1302 (1978); TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 165 P.3d 1271 (2007).

remains a "key" component in the analysis of good cause under CR 55, even under the decision in Sellers v. Longview Orthopedic Assoc. PLLC, 11 Wn. App. 2d 515, 525, 455 P.3d 166 (2019) (although excusable neglect will generally be an important factor considered in determining whether to set aside a default order, it is not always required). Third, and fatal to Lovick's argument, CR 55(c)(1) is inapplicable to these circumstances. While CR 55(c)(1) allows a trial court to set aside a default order "[f]or good cause shown and upon such terms as the court deems just," a party seeking this relief must do so prior to the entry of judgment. CR 55(c)(1); Canam Hambro Sys., Inc. v. Horbach, 33 Wn. App. 452, 453, 655 P.2d 1182 (1982). After "a judgment by default has been entered, [the court] may likewise set it aside in accordance with rule 60(b)." CR 55(c)(1). Here, the trial court entered the default order and judgment against Lovick in October 2018 and she filed her motion seeking relief under CR 55 in September 2023. Lovick's motion to vacate was governed by CR 60(b). The trial court had previously denied Lovick's motion under CR 60(b) and did not abuse its discretion in denying her second motion.

Damages and Interest

Lovick challenges the sufficiency and reliability of the evidence supporting the damages awarded and the imposition of interest on the judgment. But errors in the underlying judgment must be remedied through direct appeal. Burlingame v. Consolidated Mines and Smelting Co., Ltd., 106 Wn.2d 328, 336, 722 P.2d 67 (1986). Appeal of a denial of a motion to vacate "is limited to the propriety of the denial[,] not the impropriety of the underlying judgment." Bjurstrom v. Campbell, 27 Wn. App. 449, 450-

51, 618 P.2d 533 (1980). We do not reach Lovick's claims of error that pertain to the underlying judgment.

Attorney Fees

Both parties challenge trial court's attorney fee rulings in connection with each of the orders on the motions to vacate.

"The general rule in Washington is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity." Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). "We review whether there is a legal basis for an award of attorney fees de novo." Allen v. Dan and Bill's RV Park, 6 Wn. App. 2d 349, 372, 428 P.3d 376 (2018).

The underlying promissory note provides, "If this note is in default and is placed for collection, Josanne B. Lovick shall pay all reasonable costs of collection and attorneys' fees."

On cross appeal, Reynolds challenges the trial court's denial of his request for attorney fees incurred in opposing Lovick's first motion to vacate. The trial court explained in its oral ruling that it did not believe it was "appropriate" to award fees because the court agreed that a "significant procedural error" had occurred, even though the circumstances did not warrant vacating the judgment.

Reynolds claims he is entitled to fees under RCW 4.84.330 because (1) the underlying action arose from the promissory note, (2) the note includes a unilateral attorney fee provision, and (3) he was the prevailing party. See Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 859, 158 P.3d 1271 (2007). Reynolds argues that since

RCW 4.84.330 is applicable, it "mandates the award of fees to the prevailing party, with no discretion except as to the amount." Crest Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 772, 115 P.3d 349 (2005).

Lovick claims the trial court did not err in denying the fee request because, among other reasons, the merger rule bars recovery of fees under the promissory note. We agree.

Reynolds points out that Lovick did not object to his fee request on this or any other basis. Reynolds therefore asserts that we are unable to consider the merger rule as grounds to uphold the trial court's ruling. But we may affirm the trial court on any ground supported by the record. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). As we recently observed,

> "[w]here a judgment or order is correct it will not be reversed merely because the trial court gave wrong or insufficient reason [for its rendition.]" Pannell v. Thompson, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979). When the facts and law indicate an appropriate reason for the trial court's decision we must affirm the trial court on the basis of the applicable law.

View Ridge Estates Homeowners Assoc. v. Guetter, No. 85897-1, slip op. at 29 (Wash. April 8, 2024), https://www.courts.wa.gov/opinions/pdf/858971.pdf (alterations in original) (quoting Keogan v. Holy Fam. Hosp., 95 Wn.2d 306, 317, 622 P.2d 1246 (1980)). We are not precluded from considering any basis supported by the record that supports the trial court's decision.

Our courts have recognized that "[a]s a general rule, when a valid final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause of action on the judgment is substituted for it." Woodcraft Const., Inc. v.

Hamilton, 56 Wn. App. 885, 888, 786 P.2d 307 (1990); Caine & Weiner v. Barker, 42 Wn. App. 835, 837, 713 P.2d 1133 (1986). In both Woodcraft and Caine, the court held that because a judgment based upon a promissory note extinguished the note, the note's attorney fee provision merged into the judgment and ceased to exist, providing no basis for an attorney fees award. 56 Wn. App. at 888; 42 Wn. App. at 838-39.

In Caine, a judgment creditor obtained a default judgment for amounts due under a promissory note. 42 Wn. App. at 836. The note provided for attorney fees in the event that a "suit is instituted to collect this note or any portion thereof." Id. Ultimately, the judgment was paid in full, including an award of attorney fees, and a debtor who collected from a jointly-liable party brought a post-judgment motion seeking to recover the costs of collection under the promissory note provision. Id. The Caine court applied the merger rule. Id. at 838. The court reasoned that when the debt was reduced to judgment, the debtors' former joint obligation on the note became an obligation on the judgment and the original claim in the note was extinguished. Id.

A few years later, Division Three of this court reached the same conclusion in Woodcraft. There, the creditor filed its partially satisfied Alaska judgment in Washington and sought to collect the unsatisfied portion from property held by the judgment debtor's wife. The trial court found in favor of the wife and awarded her attorney fees and costs pursuant to the terms of the promissory note underlying the judgment. Woodcraft, 56 Wn. App. at 887. Citing Caine, the appellate court reversed and held that there was no basis for the award because the attorney fee provision in the underlying promissory note "merged into the judgment and ceased to exist." Id. at 888.

Here, the promissory note required Lovick to pay "all reasonable costs of collection and attorneys' fees" and did not provide for recovery of fees associated with collection post-judgment. Reynolds filed suit to collect principal and interest on the note and obtained a default judgment that included attorney fees and costs. Reynolds now seeks to rely on the promissory note as a basis to recover fees incurred in opposing Lovick's post-judgment motion to vacate. But, as in Caine and Woodcraft, the attorney fee provision in the promissory note merged into the 2018 judgment, was extinguished, and does not provide a basis for a further award of fees.

Reynolds acknowledges that contractual attorney fee provisions merge with a final judgment, but observes that contractual attorney fee provisions continue to apply until a judgment is final. Reynolds suggests that the note's attorney fee provision has not yet merged with the judgment in this case since the "Order and Judgment are on appeal." But only the orders denying Lovick's motions to vacate are on appeal. The 2018 order and judgment is long final. The trial court did not err in denying Reynolds's request for fees.

As a final matter, Lovick challenges the trial court's award of attorney fees to Reynolds under the promissory note and CR 11 in the order denying her second motion to vacate. As explained, there is no contractual basis for a post-judgment award of fees under the merger rule. As to CR 11, Lovick contends that her second motion to vacate was not without merit and the trial court failed to provide adequate findings to support the sanctions.

"[CR 11] permits a court to award sanctions, including expenses and attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation." Delany v. Canning, 84 Wn. App. 498, 509-10, 929 P.2d 475 (1997). The rule applies to pro se litigants as well as attorneys. In re Recall of Lindquist, 172 Wn.2d 120, 136, 258 P.3d 9 (2011). We review the imposition of a CR 11 sanction for abuse of discretion. Kilduff v. San Juan County, 194 Wn.2d 859, 874, 453 P.3d 719 (2019).

The trial court's order provides that "pursuant to the promissory note at issue and CR 11, Plaintiff Frederick Reynolds is awarded the attorneys' fees he incurred in responding to the Motion in the amount of $4,482."

While the court also found that Lovick's motion was "akin to a motion for reconsideration," and "untimely," this does not amount to a finding that Lovick brought the motion for an improper purpose, such as harassment. Nor did the court find that Lovick's filing was baseless, and submitted without a reasonable inquiry into law and facts.

The trial court's findings are insufficient to support the CR 11 sanction. "[I]n imposing CR 11 sanctions, it is incumbent upon the court to specify the sanctionable conduct in its order." Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994). "The court must make a finding that either the . . . [pleading, motion, or legal memorandum] is *not* grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." Id.

Because the trial court's findings do not support the sanction under CR 11, we reverse the sanction and remand so that the trial court may consider whether a CR 11

sanction is appropriate in light of the standards discussed. See Id. at 202 (setting forth procedure for remand on CR 11 findings).

Fees on Appeal

Both parties request fees on appeal under RCW 4.84.330 and RAP 18.1. Again, because the promissory note merged with the judgment, its fee provision does not provide a basis for fees on appeal. We deny both parties' requests.

CONCLUSION

The orders denying the motions to vacate are affirmed. The trial court's award of attorney fees under the promissory note and as a sanction under CR 11 is reversed without prejudice and remanded for further proceedings in light of this opinion.

Cobun, J.

WE CONCUR:

Díaz, J.

Dwyer, J.

JOSANNE LOVICK - FILING PRO SE

July 16, 2024 - 1:55 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	85824-6
Appellate Court Case Title:	Frederick Reynolds, Respondent/Cross-App v. Josanne Lovick, Appellant/Cross-Resp
Superior Court Case Number:	18-2-01695-5

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