

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

WILLIAM BUTERBAUGH,	)	NO. 63002-4-1
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
CHARLES BOBO and JANE DOE	)	UNPUBLISHED OPINION
BOBO, and the marital community	)	
therein,	)	
	)	
Respondents.	)	FILED: December 28, 2009
	)	

Leach, J. — A court may set aside an order of default without a showing of a meritorious defense if, at the time a motion to vacate is filed, a default judgment has not yet been entered. In this circumstance, the court may set aside the default under CR 55 upon a showing of good cause. The Department of Labor and Industries of the State of Washington obtained an order of default and default judgment against Charles Bobo. But at the time the judgment was entered, the court was unaware of a pending motion to vacate the default, which Bobo had filed four days earlier. We must decide whether the court abused its discretion when, on reconsideration, it applied the good cause standard under CR 55 to Bobo's motion to vacate the order and vacated both the order and judgment. Because no judgment had been entered at the time Bobo moved to

vacate the order, the superior court correctly applied CR 55(c) and, upon finding good cause, it properly vacated the order and the judgment. We affirm.

#### FACTS

On December 21, 2005, Charles Bobo rear-ended William Buterbaugh's car, causing minor damage to both vehicles and injuries to Buterbaugh's neck and back. Buterbaugh received treatment for his injuries from Dr. Marc Bodow on December 22 and December 29, 2005, and was released to full work. After Buterbaugh experienced significant improvement from subsequent chiropractic treatment, the department closed Buterbaugh's claim. In early 2007, Buterbaugh reported a worsening of symptoms and sought to reopen his claim.

On March 8, 2007, at the department's request, Dr. Mikhail Makovski examined Buterbaugh and found that he had sustained soft tissue injuries, namely, thoracic and lumbosacral sprain. Makovski recommended further treatment and prepared a report stating that Buterbaugh would fully recovery from these injuries: "I do expect the treatment length to be between four and six weeks on a two- to three-times-per-week basis. The prognosis for recovery is excellent. I do not expect any impairment following the treatment period."

The department again closed Buterbaugh's claim, with no disability award. It then pursued Buterbaugh's third party claim with Bobo's insurer.

On September 11, 2008, the department filed a third party action under RCW 51.24.050(1).<sup>1</sup> The department's complaint did not specify the amount of

damages sought, requesting “[a] full award of economic and non-economic damages suffered by the Plaintiff.” On September 29, 2008, plaintiff’s counsel Robert Windes personally served Bobo with a summons and complaint. It does not appear that the order setting case schedule was served on Bobo.

Windes filed a motion for default and noted it for hearing on November 18, 2008, before King County Superior Court Judge Jay White. He did not provide working copies of these pleadings to Judge White. Four days later, Windes filed a supplemental memorandum in support of motion for default, with an attached declaration re servicemembers civil relief act.

The day before the hearing on the motion for default, Windes appeared ex parte before Commissioner Eric Watness, who signed the order granting the motion for default. It does not appear that the commissioner considered the supplemental memorandum and attached declaration.

On November 19, 2008, Windes filed an unnoted motion for judgment after default and the supporting declaration of William Buterbaugh, with a copy of Makovski’s report attached. In his declaration, Buterbaugh stated, “I believe my lower back pain with radiation and numbness is permanent.” He presented no expert testimony to support this lay opinion. The next day, Windes filed another motion for judgment after default and noted it for hearing before Judge

---

<sup>1</sup> RCW 51.24.050(1) provides, “An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.”

White on December 1, 2008. He attached to this motion various Westlaw jury verdict reports and copies of the previously filed Buterbaugh declaration and Makovski report. In this motion for a default judgment, Windes requested \$8,381.75 in medical expenses, \$827.12 in wage loss, and \$120,000.00 in general damages. Windes also stated, "Plaintiff's lower back pain with radiation and numbness is a permanent condition."

Bobo's insurer first learned of the lawsuit in December 2008. On December 3, 2008, the insurer retained Michael Sanders as counsel for Bobo. Sanders filed a notice of appearance and faxed the notice to plaintiff's counsel the next day. He did not provide Judge White with a working copy. The same day, Windes filed by fax a proposed default judgment for \$129,608.87 revised at the court's request to include a judgment summary.

On December 8, 2008, Sanders filed a motion to vacate judgment and a supporting memorandum, noted for hearing before Judge White on December 16, 2008. Although styled as a "motion to vacate judgment," this motion asked the court to set aside the order of default entered by Commissioner Watness on November 17, 2008. The working papers were not delivered to Judge White's courtroom until December 15, 2008, so the judge was unaware of them until December 15 or 16.

On December 12, 2008, Windes filed plaintiff's response to Bobo's motion to vacate judgment. On December 12, 2008, while unaware of any pending

motion to vacate the order of default, Judge White entered a default judgment in the amount of \$129,608.87, which allocated \$8,381.75 for medical expenses, \$827.12 for wage loss, and \$120,000.00 for general damages. The findings of fact included in the judgment state, “The injuries sustained by the plaintiff are permanent and was [sic] caused by Defendant Charles Bobo.”

On December 24, 2008, Judge White entered an order denying Bobo’s motion to vacate judgment. That order states, “Motion is denied. There is insufficient showing of appearance in the action under Morin v. Burns [sic], 160 Wn.2d 745 (2007) and companion cases. Further, there is no showing of a meritorious defense under CR 60(e).” At that time, the judge still understood that the December 8, 2008, motion to vacate judgment addressed the December 12, 2008, default judgment, not the November 17, 2008, order granting motion for default.

Sanders timely filed defendant’s motion for reconsideration and a supporting declaration. On February 9, 2009, Judge White vacated the November 17, 2008, order granting the default motion and the original default judgment. Noting that multiple irregularities had occurred in the proceedings, the court ruled,

It appears to the court that . . . a hearing [under CR 55(b)(2)] should have been ordered and, albeit with the benefit of hindsight, had the court recognized that defendants were attempting to vacate the Commissioner’s November 17, 2008 order prior to this court’s entry of Default Judgment on December 12, 2008, the court likely would have vacated the Commissioner’s November 17, 2008

Order of Default. The court finds good cause to do so. Accordingly, the Default Judgment never should have been entered on December 12, 2008.

The department appeals the court's order vacating the order of default and default judgment.

#### STANDARD OF REVIEW

The decision on a motion to vacate an order of default or a default judgment lies within the sound discretion of the trial court.<sup>2</sup> This decision will not be reversed on appeal unless the trial court abuses its discretion.<sup>3</sup> An abuse of discretion occurs when the trial court exercises its discretion on untenable grounds or for untenable reasons.<sup>4</sup> Default judgments are disfavored because the law favors determination of controversies on their merits.<sup>5</sup> In deciding whether to vacate a default judgment, the fundamental guiding principle is whether justice will be done.<sup>6</sup> An abuse of discretion is less likely to be found when the trial court vacates a default judgment than when it refuses to do so.<sup>7</sup>

#### ANALYSIS

The department argues that the superior court abused its discretion when it "side-stepped the requirements of vacating the default judgment under CR

---

<sup>2</sup> In re Estate of Stevens, 94 Wn. App. 20, 29, 971 P.2d 58 (1999); Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc., 63 Wn. App. 266, 271, 818 P.2d 618 (1991); Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526 (1990).

<sup>3</sup> Stevens, 94 Wn. App. at 29; Lindgren, 58 Wn. App. at 595.

<sup>4</sup> Stevens, 94 Wn. App. at 29; Lindgren, 58 Wn. App. at 595.

<sup>5</sup> Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

<sup>6</sup> Griggs, 92 Wn.2d at 582.

<sup>7</sup> White v. Holm, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968).

60(b) by vacating the underlying default order under CR 55(c) and finding that the vacated default order had the effect of vacating the default judgment.” Bobo asserts that the court correctly applied CR 55 when it vacated the order of default and the default judgment.

In Washington, the default process involves two steps. Under CR 55, “if the defendant fails to appear, the plaintiff first obtains an order finding the defendant to be in default, and then obtains a default judgment.”<sup>8</sup> “An order of default is the official recognition that the party is in default, and is a prerequisite to the entry of judgment on that default.”<sup>9</sup>

Generally, an order of default may be set aside upon a showing of good cause.<sup>10</sup> To show good cause under CR 55, a party may demonstrate excusable neglect and due diligence.<sup>11</sup> In contrast with CR 60, which requires that a party seeking to set aside a default judgment show a meritorious defense to the action, “a party seeking to set aside an order of default under CR 55(c) prior to entry of the judgment need only show good cause.”<sup>12</sup> A motion to vacate an order of default under CR 55(c) must be supported with “affidavits or declarations demonstrating a reasonable excuse or explanation for failing to

---

<sup>8</sup> 14 Karl B. Tegland, Washington Practice: Civil Procedure § 9:23, at 314 (2d ed. 2009).

<sup>9</sup> 4 Karl B. Tegland, Washington Practice: Rules Practice CR 55 author’s cmts. at 334 (5th ed. 2006).

<sup>10</sup> CR 55(c)(1).

<sup>11</sup> Stevens, 94 Wn. App. at 30.

<sup>12</sup> Canam Hambro Sys., Inc. v. Horbach, 33 Wn. App. 452, 453, 655 P.2d 1182 (1982) (emphasis added).

respond in a timely manner to the summons and complaint.”<sup>13</sup>

The department suggests three reasons why the trial court erred.<sup>14</sup> The department first argues that CR 55 does not apply because a judgment had already been entered when the court ruled on Bobo’s motion for reconsideration. This argument fails because the proper focus is whether a judgment had been entered at the time the motion to vacate the order of default was filed.<sup>15</sup> Because Bobo filed his motion to vacate before any judgment was entered, the superior court properly applied the standard for setting aside an order of default under CR 55 to Bobo’s motion to vacate judgment, which was actually a motion to vacate the order of default. In a footnote, the court explained,

Because the Motion to Vacate Judgment was noted for December 16, 2008, consistent with the court’s internal practice, the bailiff did not deliver the working papers to the court until December 15, 2008. At the time defendants’ counsel filed the Motion to Vacate Judgment on December 8, 2008, there was no default judgment. There only was the Order Granting Motion for Default entered by Commissioner Watness on November 17, 2008. The court now understands that the intent of defendants’ motion, albeit styled as a “Motion to Vacate Judgment”, was to vacate the Commissioner’s Order of November 17, 2008.

Significantly, the department conceded in oral argument that it would have been appropriate for the court, had it been aware of Bobo’s pending motion to vacate the order of default, to consider that motion before entering a default judgment.

---

<sup>13</sup> 14 Tegland, at 314.

<sup>14</sup> Resolving whether the superior court correctly applied CR 55 to Bobo’s motion to vacate the default order is dispositive, so we do not reach any of the remaining arguments raised by the department.

<sup>15</sup> Canam, 33 Wn. App. at 453.



The department next argues that even if CR 55 applies, the court erred in finding that Bobo showed good cause. We disagree. The court acted within its discretion in concluding that Bobo demonstrated both excusable neglect and due diligence under the good cause standard. Sanders stated that Bobo's insurer first contacted him about the lawsuit on December 3, 2008. He then spoke with Kristie Hansen, the assigned claims adjuster, who told him that she did not learn of a lawsuit until December 2008 even though Bobo's insurer had negotiated extensively with representatives from both the department and Windes's firm. Sanders thus claimed that "the failure to timely answer the complaint in this matter was obviously an honest mistake" and further emphasized that after learning of the default judgment, he promptly entered an appearance on December 4, 2008, and filed the December 8, 2008, motion to vacate judgment. Under these circumstances, the superior court acted within its discretion in concluding that Bobo's neglect was excusable and that he exercised due diligence.

Finally, the department challenges the court's conclusion that vacation of the default order warranted the subsequent vacation of the default judgment. The department claims, "In effect then, the trial court vacated the default judgment based on CR 55(c) rather than under CR 60(b). There is no case in Washington in which a court has vacated a judgment, by default or otherwise, on the basis of a good cause standard under CR 55(c)."

But in Canam Hambro Systems, Inc. v. Horbach,<sup>16</sup> this court vacated a judgment after concluding that the trial court should have set aside the underlying order of default under CR 55. In Canam, Joyce Horbach issued two checks to Canam Hambro Systems in payment for structural steel to be used in the construction of an office building.<sup>17</sup> The bank dishonored the checks and sent a notice of dishonor to Horbach.<sup>18</sup> A summons and complaint were served on Horbach, and Canam obtained an order of default.<sup>19</sup> When Horbach moved to set aside the default, the trial court denied the motion and entered a judgment against her.<sup>20</sup> On appeal, Horbach sought vacation of the order of default, alleging that the steel furnished by Canam was defective.<sup>21</sup> Applying the good cause standard under CR 55, this court held that Horbach should have been allowed to present her side of the case and concluded, “The order of default and the judgment thereon is accordingly stricken.”<sup>22</sup>

In light of Canam, the department’s reliance on Okazaki v. Sussman<sup>23</sup> is unpersuasive. The Okazaki court addressed whether the trial court had erred in granting a motion for judgment notwithstanding the verdict that was filed too late under the procedures applicable in 1914.<sup>24</sup> It did not consider a motion to

---

<sup>16</sup> 33 Wn. App. 452, 655 P.2d 1182 (1982).

<sup>17</sup> Canam, 33 Wn. App. at 453.

<sup>18</sup> Canam, 33 Wn. App. at 453.

<sup>19</sup> Canam, 33 Wn. App. at 453.

<sup>20</sup> Canam, 33 Wn. App. at 453.

<sup>21</sup> Canam, 33 Wn. App. at 455.

<sup>22</sup> Canam, 33 Wn. App. at 456.

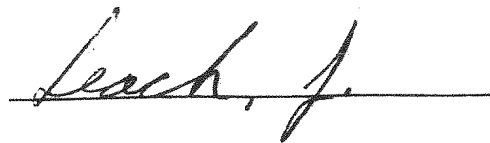
<sup>23</sup> 79 Wash. 622, 140 P. 904 (1914).

vacate a default order under CR 55 filed before the entry of judgment.

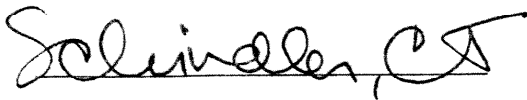
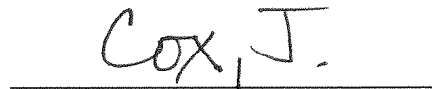
CONCLUSION

The superior court correctly applied CR 55 to vacate the order of default because at the time Bobo filed his motion to vacate the default, no judgment had yet been entered against him. Upon finding that Bobo had shown good cause, the court also properly vacated the underlying order and subsequent judgment.

Affirmed.

A handwritten signature in cursive script, appearing to read "Leach, J.", written above a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schneider, CT", written above a horizontal line.A handwritten signature in cursive script, appearing to read "Cox, J.", written above a horizontal line.

---

<sup>24</sup> Okazaki, 79 Wash. at 623.