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No. 101771-5
SUPREME COURT
OF THE STATE OF WASHINGTON

No. 383644
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MADISON EVANS, individually, and as guardian ad litem of
R.A.C., a minor child,

Petitioners,

v.

ZACHARY M. FIRL and JANE DOE FIRL, and the marital
community composed thereof,

Respondents.

PETITION FOR REVIEW

DAVIS LAW GROUP, PS

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TABLE OF CONTENTS

I. INTRODUCTION & IDENTITY OF PETITIONERS 1

II. COURT OF APPEALS’ DECISION 4

III. ISSUES PRESENTED FOR REVIEW..... 4

IV. STATEMENT OF THE CASE..... 5

A. R.A.C. suffered serious injuries after a dog attack. 5

B. Negotiations failed, and Plaintiffs filed suit. 6

C. After Firl failed to appear, Plaintiffs moved for an order of default and eventually a default judgment. 6

D. The trial court entered a default judgment..... 9

E. The trial court denied Defendant’s motion to vacate the judgment. 9

F. Division III held the trial court abused its discretion in denying the Defendant’s motion to vacate. 11

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED..... 12

A. The Court of Appeals’ decision to use the substantial evidence standard from CR 50

and its application of that standard have implications far beyond this case. 15

B. The Court of Appeals’ published opinion also imposes a higher burden on plaintiffs seeking a default judgment, which this Court should disavow..... 25

VI. CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases

<i>Evans v. Firl</i> , ___ Wn. App. 2d ___, 523 P.3d 869 (2023) ..passim	
<i>Fannin v. Roe</i> , 62 Wn.2d 239, 382 P.2d 264 (1963)	23
<i>Little v. King</i> , 160 Wn.2d 696, 161 P.3d 345 (2007)	16, 27
<i>Miller v. Payless Drug Stores of Wash., Inc.</i> , 61 Wn.2d 651, 653, 379 P.2d 932 (1963)	19, 20
<i>Rasor v. Retail Credit Co.</i> , 87 Wn.2d 516, 554 P.2d 1041 (1976)	15, 28
<i>Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson</i> , 95 Wn. App. 231, 974 P.2d 1275 (1999)	17
<i>Smith v. Behr Process Corp.</i> , 113 Wn. App. 306, 333, 54 P.3d 665 (2002)	20
<i>State v. Ainslie</i> , 103 Wn. App. 1, 11 P.3d 318 (2000)	21
<i>State v. Jameison</i> , 4 Wn. App. 2d 184, 421 P.3d 463 (2018)	23, 24
<i>Stevens v. Gordon</i> , 118 Wn. App. 43, 74 P.3d 653 (2003)	28
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968)	16, 17

Rules

CR 50	passim
-------------	--------

CR 55.....	3, 13
CR 60(b)(1)	passim
CR 60(b)(11)	9, 10
CR 60(b)(5)	9
RAP 13.4(b).....	13
RAP 13.4(b)(1).....	13, 14
RAP 13.4(b)(4).....	13, 14

Treatises

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 30.06 (7th ed.)	25
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I. INTRODUCTION & IDENTITY OF PETITIONERS

Petitioners Madison Evans individually and as guardian ad litem for her son, R.A.C., a minor, were Respondents at the Court of Appeals and Plaintiffs at the trial court. They ask this Court to review the Court of Appeals, Division III, published opinion holding the trial court abused its discretion when it denied Defendant Zachary Firl's CR 60(b)(1) motion to vacate entry of the noneconomic damages portion of default judgment. Division III held that while Firl did not present substantial evidence of a fact-based prima facie defense to damages, he did present a legal defense to the judgment because Plaintiffs failed to support the default judgment with substantial evidence of their own.

Courts rightly favor decisions on the merits, rather than by default. And CR 60(b)(1) must be administered using equitable principles, which depend on the circumstances of each case. The flexibility of the remedy, however, is a double-edged sword and can result in binding court opinions with

confusing and contradictory analyses in the name of reaching the preferred result of vacating the judgment. Such is the case here.

Division III's decision muddies the waters of the proper analysis courts should use when judging whether substantial evidence supports a default judgment. It purported to import the analysis used in CR 50 motions for judgment as a matter of law after a jury verdict but then did not apply it in the same fashion. The court failed to consider all the evidence and the inferences most strongly in favor of Plaintiffs as required by the substantial evidence standard.

The opinion also imposed a higher evidentiary burden for noneconomic damages in a default judgment than is required. Division III concluded the evidence did not support the noneconomic damages amount, at least in part because "no witness provided an explanation" for why the amount of noneconomic damages was a "reasonable measure" of R.A.C.

and Madison Evans' damages.¹ This reasoning contradicts cases holding that because noneconomic damages cannot be fixed with mathematical certainty, evidence of an actual dollar value for general damages is not required.

This Court should accept review for two reasons: (1) to provide guidance about whether and to what extent the CR 50 substantial evidence standard is appropriate for the CR 55/CR 60(b)(1) analysis to judge the sufficiency of the evidence of the noneconomic damages portion of a default judgment; and (2) to specifically clarify what evidence is substantial evidence to support an award of noneconomic damages for CR 50, CR 55, and CR 60(b)(1), including disavowing Division III's statement that testimony about the amount of noneconomic damages is required.

¹ *Evans v. Firl*, ___ Wn. App. 2d ___, 523 P.3d 869, 883 (2023).

II. COURT OF APPEALS' DECISION

The Court of Appeals, Division III, filed its published opinion on January 31, 2023. A copy of that opinion can be found in the Appendix at 2-16. It is also published at 523 P.3d 869.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in using the CR 50 substantial evidence analysis to decide if a trial court abused its discretion in denying a CR 60(b)(1) motion to vacate the noneconomic damages portion of a default judgment for lack of sufficient evidence?

2. Did the Court of Appeals err in holding the noneconomic damages portion of the default judgment should be vacated because Plaintiffs provided no direct testimony about the appropriate amount of Plaintiffs' noneconomic damages?

IV. STATEMENT OF THE CASE

A. R.A.C. suffered serious injuries after a dog attack.

In January 2019 Petitioners Madison Evans and her two-year-old son, R.A.C., visited Zachary Firl in South Cle Elum, WA for a playdate. CP at 2; CP 46 ¶4.² While R.A.C. was on the bed watching a movie, Firl's German Shepard Dog "Grizzly" jumped on the bed and "attacked" R.A.C., biting his face and pulling him from the bed. CP 2; CP 46 ¶4; CP 34 ¶5. Police were called. CP 45 ¶4; CP 46 ¶3. R.A.C. suffered significant face wounds requiring emergency care, hospitalization, and likely future scar revision surgery. CP 2, 22, 46-47.

² In the Findings of Fact and Conclusions of Law in Support of Entry of Default Judgment, the trial court found that all of the allegations in Plaintiffs' Complaint were true. CP 45, ¶7.

B. Negotiations failed, and Plaintiffs filed suit.

In the beginning of 2020, Plaintiffs and Allstate, Firl’s insurer, exchanged settlement offers. The offers were far apart, and negotiations quickly stalled. *See* CP 82.

Plaintiffs sued and sent it out for service on Firl.³ On July 25, 2020, the process server affirmed under penalty of perjury he personally served Firl at home on Saturday July 25, 2020 at 3:28 pm. CP 9-10; *see also* CP 45 ¶3; RP at 29: 8-10. Plaintiffs then filed the lawsuit in Kittitas County Superior Court on August 11, 2020. CP 1, 45 ¶1.

C. After Firl failed to appear, Plaintiffs moved for an order of default and eventually a default judgment.

Plaintiffs moved for an order of default, and on September 28, the trial court granted Plaintiffs’ motion. CP 11-15, 19, 46. Three months later, Plaintiff moved for entry of default judgment. CP 21-24. In support of that motion,

³ RCW 4.28.020 allows a lawsuit to be initiated in multiple ways, including “by service of summons.”

Plaintiffs provided the declarations of two physicians: (1) plastic surgeon Bradley Remington, MD, regarding the future scar revision surgery needed by R.A.C., CP 31-32, and (2) Lynne Freeman, M.D., a board-certified Internal Medicine physician who discussed R.A.C.'s injuries and how they were received, and opined all R.A.C.'s injuries, treatment, and medical bills were reasonable and related to the dog attack, CP 33-36.

Dr. Freeman testified that R.A.C.'s injuries resulted from a dog bite to his face, including "substantial facial laceration[s]," "Cellulitis of Face," "Open bite of Nose," "Open bite of right cheek and temporomandibular area," "Open bite of lip," "Open bite of other part of head," and "Localized swelling, mass and lump, head." CP 34-35. Dr. Freeman noted that the injuries required two days of care at Kittitas Valley Hospital and another four days at Seattle Children's Hospital. CP 34 ¶5, 35:13-19.

Dr. Remington testified that R.A.C. will likely need scar revision surgery, but even still he would have permanent scarring on his face. CP 32 ¶7.

Plaintiffs also provided information about six other settlements in dog attack cases, including a brief description of the facts, medical care received, medical expenses, and settlement amount. CP 27-30. Those settlements ranged from \$180,000 to \$1,000,000. CP 28-29.

Given the severity of his injuries, treatment required, and his young age, the value of R.A.C.'s injuries was estimated to be on the high side of the range provided. CP 29 ¶11.

Though the hearing on the motion for entry of default judgment was set for January 27, 2021, the judge struck the hearing when Plaintiff's counsel did not show. CP 41, RP at 5. The superior court issued no order that day, other than to strike the hearing, nor did it enter any judgment. *See* CP 41.

There are several documents noted elsewhere in the pleadings but are not in the record: the Declaration of Madison

Evans, the exhibits to the Declaration of Maridith Ramsey, the exhibits to the Declaration of Dr. Remington, and the exhibits to the Declaration of Dr. Freeman. CP 23:1-7.

D. The trial court entered a default judgment.

The court entered judgment on February 1, 2021 for \$834,567.54 plus statutory attorney fees and costs. CP 42-43, 48 ¶¶ 14, 16. The trial court also entered Findings of Fact and Conclusions of Law. CP 44-48.

Of the amount, \$50,000 was for Madison Evans, R.A.C.'s mother, for her past and future loss of consortium claim, CP 47-48 ¶13, \$500,000 was for R.A.C.'s past noneconomic damages, CP 47 ¶11, and \$250,000 for future noneconomic damages over his 78.43-year life expectancy, CP 47 ¶12. The remaining amount was for R.A.C.'s past and future medical expenses. CP 47 ¶¶ 9-10.

E. The trial court denied Defendant's motion to vacate the judgment.

On June 23, 2021, Defendant moved to vacate the judgment under CR 60(b)(1), (b)(5), and (b)(11). CP 52-59.

Defendant argued the default judgment was void because he was not personally served. CP 56. Defendant also argued the judgment should be set aside under either CR 60(b)(1) due to mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order, or CR 60(b)(11) for another “reason justifying relief from the operation of the judgment.” CP 56-58. Finally, Defendant argued that the court should vacate the damages portion to allow a jury to determine damages. CP 58.

At the evidentiary hearing, the trial court heard evidence from Defendant and argument from both counsel. RP at 6-32. The court ultimately denied the Defendant’s motion, ruling the Defendant did not show he was not served by clear and convincing evidence. RP at 29-30. The court also noted the Firl’s problem with timeliness:

Plus, if he found out about it right away, why didn't they file it immediately even if they couldn't get to court? Just file something saying, you know, motion -- some kind of a motion and then try to work with

the court administrator to see what [hearing date] you can get.

RP 30:2-6.

In the written order, the court ruled: “The defendant has not proved that service did not occur by any burden of proof. The court finds no other equitable grounds on which to vacate the default or void the judgment.” CP 123.

F. Division III held the trial court abused its discretion in denying the Defendant’s motion to vacate.

Firl appealed, and in a published opinion, Division III held the trial court abused its discretion in denying Defendant’s CR 60(b)(1) motion to vacate as to noneconomic damages because Plaintiffs’ evidence supporting the noneconomic damages portion of the default judgment was legally insufficient. App’x, at 12 ¶66. It reversed the award of noneconomic damages and affirmed the trial court in all other respects, including the judgment as to liability and special damages. App’x, at 12 ¶67.

Noting the burden was on the Plaintiffs to present sufficient evidence to support a damages award, Division III held that Plaintiffs failed to provide substantial evidence supporting the noneconomic damages amount. App’x, at 11 ¶64. It characterized the evidence—incorrectly —this way:

The only evidence presented in support of the \$800,000 noneconomic damages award was evidence that R.A.C. incurred \$26,067.79 in medical expenses, the toddler was a candidate for scar revision surgery at a cost of \$8,500.00 to \$10,000.00, and skeletal hearsay information about six settlements allegedly negotiated by R.A.C.’s lawyers for other clients with dog bit injuries.

Id. Division III specifically noted that “No witness provided an explanation why \$750,000 and \$50,000 would be reasonable measures of R.A.C.’s and Ms. Evans’s noneconomic damages.” App’x, at 12 ¶65.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court will accept a petition for review in these narrow circumstances relevant here: “If the decision of the Court of Appeals is in conflict with a decision of the Supreme

Court,” or “If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(1), RAP 13.4(b)(4). This Court could accept review under either prong of RAP 13.4(b).

This case touches on issues of substantial public interest. Division III decided the appropriate analysis to use was the CR 50 substantial evidence standard ordinarily used by courts for motions for judgment as a matter of law following a jury verdict. Yet practically speaking, it applied a more rigorous test. It did not credit all the evidence presented and did not take inferences most strongly in favor of Plaintiffs. It found notable that no witness testified about why the noneconomic damages amount was a reasonable measure of the Plaintiffs’ damages.

As a result, Division III’s analysis sows confusion with the substantial evidence analysis, including for purposes of CR 50, CR 55, and CR 60(b)(1). Those rules implicate how courts analyze whether a jury verdict should be taken away and the entry of default judgments, which are issues of “substantial

public interest” that this Court should determine. RAP 13.4(b)(4).

Further, Division III’s discussion of the evidence required to meet the substantial evidence standard conflicts with this Court’s statements about what is required to prove noneconomic damages. It focused on the lack of witness testimony to “provide[] an explanation why \$750,000 and \$50,000 would be reasonable measures of [Plaintiffs’] noneconomic damages” as a reason to reverse. *Evans*, 523 P.3d at 883 ¶65. This assertion contradicts this Court’s statements that general damages cannot be fixed with mathematical certainty and “there need be no evidence which assigns an actual dollar value to the injury.” *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 3012, 41 L. Ed. 2d 789 (1974)). Review is appropriate under RAP 13.4(b)(1) to clarify witness testimony about the amount of noneconomic damages is not a requirement.

This Court should accept review, reverse the Court of Appeals, and reinstate the default judgment.

A. The Court of Appeals’ decision to use the substantial evidence standard from CR 50 and its application of that standard have implications far beyond this case.

Under CR 60(b)(1), a party may move for relief from judgment for “[m]istake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order.” This Court developed a four-part test to determine whether a defendant is entitled to relief of the judgment:

- (1) that there is substantial evidence supporting a prima facie defense;
- (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect;
- (3) that the defendant acted with due diligence after notice of the default judgment; and
- (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Little v. King, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007) .

Factors (1) and (2) are the most important, while factors (3) and (4) are secondary. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). If the defendant “is able to demonstrate a strong or

virtually conclusive defense” to the plaintiff’s claims, then factors (3) and (4) become unimportant. *Id.* An important caveat to that statement, though, is that the moving party “is timely with his application.” *Id.*

In looking at the first factor, the prima facie defense, the Court of Appeals noted that when a defaulting party can demonstrate legally insufficient evidence to support the award of noneconomic damages in the default judgment, “its defense can be fairly characterized as conclusive,” and “[t]he more conclusively a defense can be shown, the more readily the court will vacate the default judgment.” *Evans*, 523 P.3d at 881 ¶50. Division III characterized Firl’s challenge to the sufficiency of the evidence supporting the default judgment as “a conclusive defense.” *Evans*, 523 P.3d at 883 ¶66.

In its analysis, Division III looked to Division I’s decision in *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 974 P.2d 1275 (1999). That case was the first that applied the substantial

evidence standard to an argument that default judgment damages were excessive. *See Evans*, 523 P.3d at 879-80. As Division III explained it, the court in *Shepard Ambulance* looked to out of state case law and then analogized back to CR 50's standard for setting aside trial verdicts as the appropriate analysis for a CR 60(b)(1) challenge to the sufficiency of the evidence supporting a default judgment amount. *Id.* at 880. Thus, Division III incorporated into its analysis the substantial evidence standard used in other contexts.

The Court of Appeals then noted that substantial evidence is evidence “sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.* at 880 (internal citation and quotations omitted). As for damages, evidence “is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture.” *Id.* (internal citation and quotations omitted). Finally—and only in passing—the court observed that

courts must “view the evidence and all inferences in favor of the nonmoving party.” *Id.* at 880-81.

The problem here is that in reality CR 50 is much more protective of jury verdicts than Division III was with this default judgment, so while Division III paid lip service to some of the CR 50 standards, it did not follow them all and it failed to account for others.

For example, under CR 50, a motion “admits the truth of the evidence, and all inferences arising therefrom.” *Miller v. Payless Drug Stores of Wash., Inc.*, 61 Wn.2d 651, 653, 379 P.2d 932 (1963). Similarly, while a default judgment does not admit any conclusions of law in the complaint or the amount of damages, the default “constitutes an admission of all factual allegations necessary to establish the plaintiff’s claim for relief.” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333, 54 P.3d 665 (2002). Further, under CR 50 the evidence must be “interpreted most strongly against the moving party and most favorably to the opposing party.” *Miller*, 61 Wn.2d at 653.

The court's opinion briefly discusses some of the appropriate standards, but then does not appear to apply them. The Court of Appeals did not explain why it discussed only some of the evidence. It did not discuss any inferences and why or why they were not reasonable.

There are other important parts of the CR 50 analysis not mentioned by Division III here. For instance, "circumstantial evidence and direct evidence are equally reliable." *State v. Ainslie*, 103 Wn. App. 1, 6, 11 P.3d 318 (2000). And the appellate courts "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Id.*

The world of evidence considered by Division III in its opinion is much smaller than what was actually provided, which is contrary to the CR 50 analysis. The trial judge considered more than the court acknowledged. For example, a defendant admits the truth of all factual allegations from the complaint, CP 2, so we know:

- Firl owned Grizzly;
- Madison Evans and R.A.C. were at Firl's house.
- Grizzly got up on the bed where R.A.C was laying while watching a movie;
- Grizzly suddenly and without warning bit R.A.C. on his face and pulled him off the bed.
- Grizzly repeatedly bit R.A.C. on the face, causing him severe injuries.

From Dr. Freeman's declaration, CP 34-35, we know:

- R.A.C. was taken to the emergency room at Kittitas Valley Hospital where he received two days of treatment.
- He was transferred to Seattle Children's Hospital, where he received four days of treatment.
- R.A.C. had substantial facial lacerations.

According to Dr. Freeman, CP 34-35, R.A.C.'s injuries were:

- "Cellulitis of Face,"

- “Open bite of Nose,”
- “Open bite of right cheek and temporomandibular area,”
- “Open bite of lip,”
- “Open bite of other part of head,” and
- “Localized swelling, mass and lump, head.”

Dr. Remington testified that even though scar revision surgery should provide significant improvement to his facial scarring, “some scarring will likely remain on the child’s face,” something he said was “permanent.” CP 32.

Finally, the inferences that can reasonably be drawn from this evidence is more than Division III acknowledges. This Court has defined an inference “as a logical deduction or conclusion from an established fact.” *Fannin v. Roe*, 62 Wn.2d 239, 242, 382 P.2d 264 (1963). Inferences should be drawn “after viewing the evidence as a whole.” *State v. Jameison*, 4 Wn. App. 2d 184, 198, 421 P.3d 463 (2018). Division III has previously noted that to determine reasonable inferences, courts

should use “logic, common sense, and experience in surmising additional or circumstantial facts from already established or direct facts.” *Id.* at 197.

Logical conclusions can be drawn from the undisputed facts here:

- R.A.C. was about two years old at the time of this incident.
- Being bitten on the face by a large German Shepard Dog is a painful, scary, and traumatic experience for a small child.
- Being bitten multiple times makes it worse.
- He suffered injuries serious enough he needed several days in the hospital, including something more specialized because he was sent to Seattle Children’s Hospital, rather than stay at the local hospital.

- His face had multiple open wounds on it affecting his nose, right cheek, right jaw, lip, and other parts of his face.
- His scars are bad enough now that he is considered a candidate for scar revision surgery.
- Even if scar revision surgery goes well, he will still have permanent scarring on his face.
- Permanent means he must deal with visible scarring for the rest of his 78-year life expectancy.
- Noticeable scarring makes people self-conscious.
- R.A.C. is at an increased risk of bullying by peers at school or other places.
- Recovering from trauma experienced at such a young age is difficult.

Further, we know that Madison Evans was at the house when R.A.C was attacked by Grizzly. It is an easy inference that it would be traumatic for a mother to see her son with multiple open wounds on his face and it would bring up

unpleasant memories every time she looked at his face and saw the scarring.

There is substantial evidence from which the trial court could conclude Plaintiffs' noneconomic damages would be significant. The facts and the inferences therefrom show that Plaintiffs are entitled to significant non-economic damages. The trial court found R.A.C was entitled to noneconomic damages for permanent, partial disability, pain, suffering, disfigurement, inconvenience, and loss of ability to enjoy life. CP 47. The court also found that Madison Evans is entitled to noneconomic damages for past and future loss of consortium of her son, including loss of fellowship emotional support, love, affection, companionship. *Id.*

Because the Division III ignored much of the evidence and inferences therefrom discussed above, its analysis creates confusion about what the substantial evidence analysis should look like. Had this judgment been a jury verdict, the result would have likely been different, and Division III would have

focused more on the appropriate standards deferring to the jury as the finder of fact, rather than the amount of general damages. As this Court has said before, it is not enough that a default judgment seems high: “[i]t is not a prima facie defense to damages that a defendant is surprised by the amount or that damages might have been less in a contested hearing.” *Little*, 160 Wn.2d at 704.

B. The Court of Appeals’ published opinion also imposes a higher burden on plaintiffs seeking a default judgment, which this Court should disavow.

The Court of Appeals here faulted Plaintiffs for not providing a witness to give “an explanation why \$750,000 and \$50,000 would be reasonable measures” of Plaintiffs’ noneconomic damages. *Evans*, 523 P.3d at 883. This seemingly new requirement has never been required of plaintiffs in jury trials.

Noneconomic damages, unlike economic damages, “are not susceptible of precise measurement.” 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. Comment to WPI 30.06 (7th ed.). This

Court has previously noted that noneconomic damages like suffering and humiliation that are personal to each individual does not require “evidence which assigns an actual dollar value to the injury” given the difficulty of proof. *Rasor*, 87 Wn.2d at 531.

This is not a controversial take. The Court of Appeals, including Division III, has recognized this principle: “Pain and suffering are not susceptible to precise measurement and cannot be fixed with mathematical certainty by proof.” *Stevens v. Gordon*, 118 Wn. App. 43, 59, 74 P.3d 653 (2003).

Yet Division III required not only proof of a specific amount for general damages, but also a witness to testify why the amount is a reasonable measure of a person’s noneconomic damages. This requirement is the antithesis of what this Court has said is necessary proof for noneconomic damages. Either the Court of Appeals intended to require additional evidence for purposes of noneconomic damages in a default judgment, but

did not say so; or the court contradicted longstanding case law about the level of proof required for noneconomic damages.

Further, it is unclear how a plaintiff would prove entitlement to a specific amount of general damages. Who would testify about it? What kind of calculation would be performed? Wouldn't this testimony be speculative? Noneconomic damages are individual to each person, which is why a specific amount cannot be required.

This statement—while seemingly made offhand—requires a new level of proof for those seeking default judgments. There simply is no support for this contention. Because the substantial evidence test is used for so many other issues—and because this is a published decision—the Court should accept review to provide guidance to the trial courts about what evidence is or is not sufficient to support noneconomic damages in a default judgment. And this Court should specifically disavow Division III's requirement that a witness needs to testify about why a specific amount of

noneconomic damages is an appropriate measure of a plaintiff's damages.

VI. CONCLUSION

This Court should accept review to provide guidance to the trial courts about what evidence—and the reasonable inferences that can and should be drawn from the evidence—to support a general damages award in a default judgment. Further, it should clarify that proof of a specific amount for noneconomic damages is not required and is antithetical to the concept of noneconomic damages.

I certify this document contains 4,245 words in compliance with RAP 18.17(b).

DATED: March 2, 2023.

**STRITMATTER KESSLER KOEHLER
MOORE**

s/Shannon Kilpatrick

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Proof of Service

I certify that on the date below I served a copy of the Petition for Review on ~~the following parties~~ these parties by the method(s) listed below:

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Dated: March 2, 2023.

s/Shannon M. Kilpatrick
Shannon Kilpatrick, WSBA #41495

Appendix

523 P.3d 869

Court of Appeals of Washington, Division 3.

Madison EVANS, individually, and as parent and guardian of R.A.C., a minor child, Respondents,

v.

Zachary M. FIRL, and Jane Doe Firl, husband and wife, individually and the marital community composed thereof, Appellants.

No. 38364-4-III

Filed January 31, 2023

Synopsis

Background: Action was brought by and on behalf of minor child against dog owner for injuries sustained by child as result of dog bite. The Superior Court, Kittitas County, Candace Hooper, J., granted plaintiffs' motion for entry of default, and then denied owner's subsequent motion for relief from default judgment for reasons of mistake, inadvertence, surprise, excusable neglect or irregularity. Owner appealed.

Holdings: The Court of Appeals, [Siddoway](#), C.J., held that:

dog owner did not present sufficient fact-based defense to plaintiffs' claim for \$800,000 in noneconomic damages, on motion to set aside damages award entered by default judgment;

owner did not make sufficient excuse-based showing for obtaining relief from noneconomic damages award, on motion for relief from default judgment; but

owner was entitled to relief from default judgment due to legal insufficiency of evidence to support noneconomic damages award.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Set Aside or Vacate Default Judgment.

*872 Appeal from Kittitas Superior Court, Docket No: 20-2-00210-3, Honorable L. Candace Hooper, Judge.

Attorneys and Law Firms

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OPINION PUBLISHED IN PART

[Siddoway](#), C.J.

¶1 Zachary Firl appeals the denial of his motion to vacate an \$834,567.54 default judgment entered against him for a personal injury claim he had tendered to his homeowner's insurer. He claims he was never served with process, that his insurer and *873 lawyer had appeared but were not given required notice, and that equitable grounds supported vacating the \$800,000.00 awarded as noneconomic damages.

¶2 The only evidence presented in support of the sizeable noneconomic damage award was evidence that R.A.C.¹ incurred \$26,067.79 in medical expenses after being bitten by Mr. Firl's dog, that the toddler was a candidate for scar revision surgery at a cost of \$8,500.00 to \$10,000.00, and skeletal hearsay information about six settlements allegedly negotiated by R.A.C.'s lawyers for other clients with dog bite injuries. No hearing was held.

¶3 One of the ways Washington law permits a defaulting party to demonstrate a prima facie defense to a large noneconomic damage award is by showing that the trial court was presented with legally insufficient evidence to support the award. The plaintiffs' evidence was insufficient here. In the published portion of this opinion, we hold that applying equitable principles and [CR 55\(b\)\(2\)](#), the clear

deficiency in that evidence overcomes even marginal demonstrations of excusable neglect and diligence. In the unpublished portion of the opinion, we affirm the trial court's rejection of Mr. Firl's arguments that he overcame the plaintiffs' proof of service and that he had appeared and was entitled to notice before default.

¶4 We affirm the judgment as to liability, the \$34,567.54 awarded as special damages, and the \$701.95 awarded as statutory costs. We reverse the award of noneconomic damages and remand for a trial on that element of the plaintiffs' damages.

FACTS AND PROCEDURAL BACKGROUND

¶5 On a January 2019 play date at a home owned by Zachary Firl, Madison Evans's then two-year-old son, R.A.C., was bit in the face by Mr. Firl's dog. The injuries and a resulting infection allegedly required five days of in-patient hospitalization.

¶6 When Mr. Firl was contacted months later by a lawyer representing Ms. Evans and her son, Mr. Firl referred the lawyer to his homeowner's insurer, Allstate Insurance Company, where Mr. Firl had dealt with adjuster Craig Peters. In July 2019, R.A.C.'s lawyers wrote to Allstate's claims department, informing it of their representation and that they would compile a settlement letter with supporting documentation when R.A.C. attained maximum medical improvement. Mr. Peters promptly responded, requesting, among other information and documentation, medical records, the identification of all medical care providers, and a signed medical authorization.

¶7 Over the next six months, Mr. Peters followed up twice requesting information on R.A.C.'s injuries and treatment, receiving no response until a settlement demand letter was provided on January 15, 2020. The letter made a total demand of \$335,718.54—materially more than Mr. Firl's \$250,000.00 insurance limits. Mr. Peters made a counteroffer of \$66,731.49 three weeks later, proposing to pay \$18,231.49 toward medical specials, \$8,500.00 for future surgery, and \$40,000.00 in noneconomic damages.

¶8 Mr. Peters claims to have followed up by letter or phone call to R.A.C.'s lawyers monthly thereafter through June 2020, largely without response, but contends he spoke with a case manager at the law firm on May 12, 2020. The case manager allegedly said she would try to reach the client and get back to him. Instead, in late June 2020, R.A.C.'s lawyers prepared a summons and complaint on behalf of R.A.C. and his mother that were allegedly served on Mr. Firl at 3:28 p.m. on July 25, 2020. They filed the summons and complaint in August 2020 and obtained an order of default on September 28, 2020.

¶9 Mr. Peters, having no knowledge of the lawsuit, claims he sent a follow-up letter to the law firm on November 2, 2020, and left a phone message on January 6, 2021, again *874 requesting contact. His contacts went unanswered.

¶10 On January 20, 2021, R.A.C.'s and his mother's lawyers filed a motion for default judgment, seeking \$784,567.54 in damages for R.A.C. and \$50,000.00 for his mother. They noted it for hearing on the afternoon of January 27, 2021.

¶11 The plaintiffs' lawyers' first acknowledgment of Mr. Peters's post-May 2020 contacts was received by him on February 1, 2021, when he received a letter from attorney Maridith Ramsey dated January 28, 2021. Ms. Ramsay's letter stated that “[a]s indicated at the time of the initial offer in this case, my client is not willing to negotiate with the carrier due to the insistence that it take improper reductions and avail itself to the benefit of collateral source payments. ... As a result, we opted to initiate litigation ... I do not have the authority to proceed with further settlement discussions at this time.” Clerk's Papers (CP) at 82. The letter attached a “courtesy copy” of the summons and complaint. *Id.* The letter did not disclose, and the attachment did not reveal, that Mr. Firl had already been served or that an order of default, and possibly a judgment, had already been entered.

¶12 Court records indicate that R.A.C.'s and Ms. Evans's lawyers failed to appear for the January 27 hearing, which was struck. Nevertheless, on February 1, 2021, and apparently without conducting a hearing, the trial court entered the plaintiffs' proposed findings, conclusions, and judgment, awarding the \$834,567.54 in total damages and \$701.95 in costs they had requested.

¶13 Having learned on February 1 that a lawsuit had been filed, Mr. Peters called Mr. Firl on February 3, 2021, to see if he had received a copy of the complaint. Mr. Firl stated he had not. He agreed to notify Mr. Peters if and when he was served. Mr. Peters then arranged for Allstate to retain an attorney to represent Mr. Firl.

¶14 Several weeks after defense counsel was retained, he discovered the default judgment entered on February 1. According to the defense lawyer, he made the discovery on March 26, 2021, and immediately wrote, faxed and attempted to phone Ms. Ramsey to inform her the default had been taken improperly. The only response he received was a notice of unavailability filed on April 19, 2021, stating that the firm and its lawyers would be unavailable from April 28, 2021 through May 7, 2021.

¶15 Defense counsel filed a motion for relief from the judgment on June 23, 2021. Mr. Firl's lead argument was that he had never been served, and that under [CR 60\(b\)\(5\)](#) the judgment was void. Alternatively, he sought relief on equitable grounds under [CR 60\(b\)\(1\)](#). He argued that R.A.C.'s lawyers' failures to respond to Mr. Peters's contacts were deceptive, particularly Ms. Ramsey's failure to disclose in her January 28, 2021 letter that Mr. Firl had already been served and that an order of default, and possibly judgment, had already been entered. He argued that the damages attributable to the claim were "much closer to [Allstate's] \$66,731.49 offer than the \$834,567.54 judgment entered," and no substantial hardship would result if the judgment were vacated, "since the reasonable amount of damages will be either agreed upon or determined by a jury." CP at 58. Even if the judgment's finding of liability was not set aside, Mr. Firl argued that the money judgment should be, relying on this court's 1999 decision in *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wash. App. 231, 241-42, 974 P.2d 1275.

¶16 Mr. Firl's motion was supported by declarations from his lawyer, Mr. Firl and Mr. Peters. Mr. Firl testified that he had never been served and the description of the person served on the return of service did not fit him, as he was 23 years old at the time of the alleged service, not 27. The return of service had described the person served as "Age: 27, Sex: M, Race/Skin Color: WHITE, Height: 5'9, Weight 180, Hair: BROWN, Glasses: N." CP at 9. Mr. Firl testified that the

description of the person served "appears to match a former renter ... who was 27 years old at the time" and who he believed moved out of the residence "in late summer of 2020." CP at 64. Defense counsel argued in Mr. Firl's briefing that "a temporary renter ... would not be a person *875 of 'suitable discretion' sufficient for [RCW 4.28.080\(16\)](#)." CP at 57.

¶17 Mr. Peters's and defense counsel's declarations addressed their actions taken on Mr. Firl's behalf and their belated discovery of the lawsuit, order of default, and default judgment. Mr. Peters testified to the \$335,718.54 settlement demand he had received from plaintiffs' counsel and testified that after reviewing the information provided to him, he had offered \$66,731.49, which he believed to be a reasonable amount of damages.

¶18 Mr. Firl appeared and testified at the hearing on the motion to vacate the default judgment. He testified that his birth date was July 9, 1996, making him 24 on the day of alleged service rather than 23. He denied being served. He testified that in July 2020, there were five others of about his age living with him in his home, and that visitors and friends were "always ... coming in and out." Report of Proceedings (RP) at 17. He testified that his housemates had no responsibility other than to pay rent and implied they were irresponsible. *E.g.*, RP at 18 ("[i]t was always a mess and they never did anything anyways"). He testified that no housemate or visitor to his house ever told him they had received legal documents for him. He testified that if served, he would have contacted Allstate and asked what he needed to do.

¶19 After the lawyers concluded their examination of Mr. Firl, the judge asked Mr. Firl where he was on July 25, 2020, at 3:30 in the afternoon, and he answered, "Honestly, Your Honor, I have no idea. If it was on a Monday through Saturday, I was at work[.] I get off work at three o'clock when I leave the job site." RP at 22. The court continued, "And you have no way to reconstruct that[?]" to which Mr. Firl responded, "I could try and find an old pay stub." *Id.*

¶20 After hearing the evidence and argument, the court denied Mr. Firl's motion to vacate the judgment. The court expressed surprise that Mr. Firl had not presented evidence

beyond his own declaration and testimony that he had not been present and was not served:

THE COURT: ... Look, the burden is on the defendant to show that he wasn't served and that he didn't receive it. ... [The return of service] says Saturday, July 25th, at 3:28 p.m. It was on him to figure out where he was and what could have happened that day, and he hasn't done that, at least not to the Court's satisfaction. I'm not convinced by a preponderance of the evidence, not to mention clear and convincing, that he didn't get it. ...

....

It seems like he could have figured out whether he was even home that day or not. He could have gone back and looked at his phone records. He could have looked at what he was doing and where he was going and checkbooks—where did he make Visa purchases, if he did He could have looked at his work record So he comes here without it, and I am just unable to make a finding that he for sure wasn't the one—didn't get service.

RP at 29-31. The court discounted the importance of Mr. Firl not being 27 years old, stating: “I mean, he looks like—I couldn't tell his age if I looked at him. I couldn't tell whether he was 23 or 27 or 24. I have no idea. And I just assume that's what the process server just assumed.” RP at 31. The plaintiffs had argued that Mr. Firl essentially admitted that his 27-year-old roommate *was* served, which would itself suffice, but the court rejected that argument, observing that the return of service “doesn't say, ‘I served a suitable person.’ It says: I served him.” RP at 31.

¶21 The court also questioned the delay between defense counsel learning of the default judgment and his moving to vacate it.

¶22 Mr. Firl's argument at the hearing had addressed his alternative challenge to the noneconomic damage award, reminding the court that “the vast majority of damages in this case are non-economic damages.” RP at 23. He argued that while plaintiffs' counsel had provided Mr. Peters with evidence of R.A.C.'s medical expenses, Mr. Firl lacked information with which to respond to the noneconomic damages. Plaintiffs did not respond to the challenge to the noneconomic damage amount at the hearing. Their briefing

opposing Mr. Firl's motion had argued *876 that Mr. Peters's declaration that \$66,731.49 was a reasonable total damages amount was speculative opinion. The court did not offer any reason for rejecting Mr. Firl's argument that the noneconomic damages, at a minimum, should be set aside.

¶23 The court's handwritten order entered at the conclusion of the hearing states, “The defendant has not proved that service did not occur by any burden of proof,” and, “The court finds no other equitable grounds on which to vacate the default or void the judgment.” CP at 123. Mr. Firl appeals.²

ANALYSIS

¶24 Mr. Firl makes three assignments of error. He prevails on his third assigned error, which is the one we address in the published portion of the opinion.

I. The trial court abused its discretion in failing to consider and grant Mr. Firl's challenge to the noneconomic damage award, because no substantial evidence supports it

¶25 Mr. Firl's third assignment of error is that the trial court failed to consider and grant his request for relief from excessive noneconomic damages under CR 60(b)(1) and *White v. Holm*, 73 Wash.2d 348, 438 P.2d 581 (1968).³

¶26 CR 60(b)(1) authorizes the trial court to relieve a party from a judgment for “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” The longstanding showing that supports vacating a default judgment for these reasons is “(1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.” *Little v. King*, 160 Wash.2d 696, 703-04, 161 P.3d 345 (2007) (citing *White*, 73 Wash.2d at 352, 438 P.2d 581 (citing, in turn, *Hull v. Vining*, 17 Wash. 352, 49 P. 537 (1897))).

¶27 The first two factors are the major elements to be demonstrated by the moving party. *White*, 73 Wash.2d at

352, 438 P.2d 581. When 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.* On the other hand, if the moving party demonstrates a weaker defense but one that would, prima facie at least, warrant a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will his diligence after notice of the default, and the potential hardship on the opposing party. *Id.* at 352-53, 438 P.2d 581.

¶28 In determining the primary factor of whether the CR 60 movant has presented substantial evidence of a prima facie defense, the court reviews the evidence in the light most favorable to the moving party. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wash. App. 829, 834, 14 P.3d 837 (2000). This is consistent with the primary purpose for requiring a meritorious defense, which is to avoid the useless trial that would occur if the defendant has no factual basis on *877 which to defend. *Griggs v. Averbeck Realty, Inc.*, 92 Wash.2d 576, 583, 599 P.2d 1289 (1979). We review a trial court's decision on a motion to set aside a default judgment for abuse of discretion. *Little*, 160 Wash.2d at 702, 161 P.3d 345 (citing *Yeck v. Dep't of Lab. & Indus.*, 27 Wash.2d 92, 95, 176 P.2d 359 (1947)). An abuse of discretion is more readily found when the trial court *denies* a trial on the merits than when a judgment is set aside and a trial is had. *White*, 73 Wash.2d at 351-52, 438 P.2d 581.

A. Washington decisions recognize three ways to address the prima facie defense factor when an allegedly excessive award of noneconomic damages is challenged

¶29 In *Little*, the Supreme Court accepted it as a given that a party can rely on CR 60(b)(1) to request the setting-aside of an allegedly excessive default damage award without also seeking to set aside the finding of liability. 160 Wash.2d at 704, 161 P.3d 345 (majority), 716 (Madsen, J., concurring/dissenting). Little was injured in two rear-end collisions caused in quick succession by King, a 16- to 17-year-old driver. *Id.* at 699, 161 P.3d 345. King responded in person after being served and allowed a judgment by default to be taken against her. She had no defense to liability. *Little*

v. King, noted at 127 Wash. App. 1021, 2005 WL 1090134 at *4 & n.3 (unpublished), *aff'd*, 160 Wash.2d 696, 161 P.3d 345 (2007). After the court awarded damages totaling \$2.1 million, King retained counsel and sought to set aside only the award of damages. *Little*, 160 Wash.2d at 702, 161 P.3d 345.

¶30 The opinions in *Little* recognize three ways to address *White's* prima facie defense factor when a default damage award determined under CR 55(b)(2) is challenged. One is a fact-based showing of a defense; a second is excuse-based, pointing to the difficulty of rebutting a large general-damages claim without the benefit of discovery; and the third is a challenge to the legal sufficiency of evidence to support the damage award.

1. Fact-based showing

¶31 A fact-based showing is common and literally conforms to *Little's* statement that the first primary consideration is whether "substantial evidence support[s] a prima facie defense." 160 Wash.2d at 703-04, 161 P.3d 345. It is illustrated by *White*. In *White*, the defendant had stepped back from the recessed entryway to his office and, when he turned on the sidewalk, either collided with or brushed an elderly passer-by. She fell and was injured. 73 Wash.2d at 349, 438 P.2d 581. *White*, the passer-by, sued, and as a result of a misunderstanding between Holm and his insurer, no answer was filed. *Id.* at 349-50, 438 P.2d 581. After a \$16,497 default judgment was taken, Holm moved to set it aside, claiming his failure to appear and respond was due to mistake, inadvertence, surprise or excusable neglect.

¶32 To demonstrate at least a prima facie defense, Holm testified by affidavit that *White* was not visible to him from the recessed entry; his presence and actions were clearly visible to her; in turning onto the sidewalk, he merely brushed her with his arm; and her fall was occasioned by her own evasive action. *Id.* at 350-51, 438 P.2d 581. The Supreme Court observed that the facts presented could give rise to "a factual issue revolving about either negligence on the part of Mr. Holm or contributory negligence on the part of Mrs. *White*, or both." *Id.* at 353, 438 P.2d 581.

¶33 Fact-based showings of a prima facie defense can be made not only to liability, but also to an allegedly excessive award of damages. In *Showalter v. Wild Oats*, 124 Wash. App. 506, 101 P.3d 867 (2004), a grocery customer obtained a default judgment for injuries sustained when she slipped and fell on a grocery floor. Of the over-\$28,000 judgment amount, \$25,000 was for past and future noneconomic damages. *Id.* at 513, 101 P.3d 867. In moving to vacate the judgment, the grocer offered evidence of reasonable care as a defense to liability: the floor had been swept 20 minutes before the fall, the staff had no notice of a hazardous condition, and the grocer adopted and followed policies to protect against overlooked debris on the floor. *Id.* The grocer also offered a fact-based prima facie defense to the general damages award: it pointed to evidence that Ms. Showalter *878 had preexisting medical conditions, including having received chiropractic and spinal treatment for injuries sustained in 1997 and 1999. *Id.* The court held that this evidence, viewed in the light most favorable to the grocer, “persuasively challenge[d] the amount of damages for past and future noneconomic loss.” *Id.*

¶34 Other evidence that has been recognized as presenting at least a prima facie defense to a large general damage award includes evidence in an auto accident case that one injured party did not seek treatment for over two years and another, who admitted prior neck and back problems at the time of the accident, had sought only six months of massage therapy. *Gutz v. Johnson*, 128 Wash. App. 901, 917-18, 117 P.3d 390 (2005), *aff’d sub nom. Morin v. Burris*, 160 Wash.2d 745, 161 P.3d 956 (2007). In a more recent auto accident decision, a prima facie defense was demonstrated by evidence that medical progress notes reported the injured party was pain free and returning to full activities within five weeks after surgery for a *herniated disc* caused by the accident. *VanderStoep v. Guthrie*, 200 Wash. App. 507, 523, 402 P.3d 883 (2017).

¶35 Mere speculation is not substantial evidence of a defense. *Little*, 160 Wash.2d at 705, 161 P.3d 345 (citing *White*, 73 Wash.2d at 352, 438 P.2d 581). Instead, a defendant generally must submit affidavits identifying specific facts that support a defense; allegations or conclusory statements are insufficient. *VanderStoep*, 200 Wash. App. at 519, 402 P.3d 883 (citing *Shepard*, 95 Wash. App. at 239, 974 P.2d 1275). In *Little*, the Supreme Court

characterized an insurance adjuster’s declaration that Little’s medical records revealed prior reports of headaches, hip pain, and depression as presenting no “competent” evidence of a defense because the insurer offered no proof that Little’s prior complaints were causally related to her postaccident damages. *Little*, 160 Wash.2d at 705, 161 P.3d 345.

¶36 *Little* can be distinguished from other cases in which tenuous or even incompetent evidence of a defense has not been fatal to a defaulting party’s motion for relief, because in *Little*, King failed to demonstrate both of *White*’s primary factors. Not only was competent evidence of a defense lacking, but King “fail[ed] to show that [her] failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect,” leaving the trial court with “no equitable basis for vacating judgment.” *Id.* at 706, 161 P.3d 345 (emphasis added). King had appeared in the lawsuit but declined to file an answer even when the trial court adjourned the default hearing to give her that opportunity.

¶37 *Little* held that the trial court abused its discretion by vacating the default judgment on these facts, but the court did not retreat from *White*’s holding that even a tenuous defense may sufficiently support a motion to vacate. As this court observed in *VanderStoep*, the court in *Little* seemed to acknowledge that depending on the other equitable considerations, even incompetent evidence might suffice, when it stated, “‘*Except in unusual circumstances*, a party who moves to set aside a judgment based upon damages must present evidence of a prima facie defense to those damages.’” *VanderStoep*, 200 Wash. App. at 521, 402 P.3d 883 (quoting *Little*, 160 Wash.2d at 704, 161 P.3d 345).

2. Excuse-based showing

¶38 In *Calhoun v. Merritt*, 46 Wash. App. 616, 731 P.2d 1094 (1986), this court allowed the prima facie defense factor to be addressed by an explanation why the defendant would have difficulty presenting a defense without discovery. *Calhoun* was an auto accident case in which the defendant challenged a default judgment in an amount slightly exceeding \$55,000, \$50,000 of which was for damages for pain and suffering. The trial court denied a motion to set the judgment aside.

¶39 The “evidence” offered as Merritt's prima facie defense was an insurance adjuster's affidavit expressing the view that the claim “has a value far less than the judgment entered.” *Id.* at 618, 731 P.2d 1094. This court agreed with the trial court that because the affidavit merely stated allegations and conclusions, it was insufficient. *Id.* at 620, 731 P.2d 1094. This court was nevertheless persuaded *879 by Merritt's argument that presenting a defense to damages for pain and suffering requires some opportunity for discovery. *Id.* The court observed:

[D]evelopment of a defense to the damages would require the examination of Mr. Calhoun by a defense expert. Here, the default was entered before any such discovery could take place. Moreover, presenting a defense to damages for pain and suffering is always complicated by the subjective as opposed to objective nature of such damages.

Id. Taking the position that “it would be inequitable and unjust,” to deny the motion to vacate for failure to present a prima facie defense, this court looked to *White*'s three remaining considerations and concluded that they weighed in favor of vacating the damages. *Id.*

¶40 *Calhoun* has been relied on in later published and unpublished cases. For published cases relying on *Calhoun*, see *Shepard*, 95 Wash. App. at 241, 974 P.2d 1275; *Little*, 160 Wash.2d at 714, 161 P.3d 345 (Madsen, J., concurring/dissenting); and *VanderStoep*, 200 Wash. App. at 523-24, 402 P.3d 883.

¶41 In *Farmers Insurance Co. v. Waxman Industries, Inc.*, 132 Wash. App. 142, 130 P.3d 874 (2006), this court rejected an argument that it is always inequitable to let a large noneconomic damages award stand without allowing an opportunity for discovery. Waxman, a manufacturer and marketer-distributor of hoses, was sued by Farmer's for the insurance company's cost of covering a homeowner's claim for major damage caused by a broken water supply line. The broken line was labeled with Waxman's name. *Id.* at 144, 130 P.3d 874. Farmers sent the broken line to Waxman for inspection in April 2003, made inquiries of Waxman thereafter to which it received no response, and did not obtain a default judgment against Waxman until June 2004. *Id.* at 144-45, 130 P.3d 874. Waxman successfully moved to

set aside the judgment by presenting evidence that its failure to appear was due to mistake and arguing that it should be permitted to explore defenses through discovery. *Id.* at 146, 130 P.3d 874.

¶42 This court reversed the setting aside of the judgment, distinguishing the case from *Calhoun* because Waxman had been “unable to identify or substantiate a defense despite having the allegedly defective line in its possession for a number of months.” *Id.* at 148, 130 P.3d 874. The court observed that to accept Waxman's argument “as a general rule would mean that no default judgment could ever stand, because a default judgment by definition is entered before the discovery phase of litigation begins.” *Id.* at 147, 130 P.3d 874; see also *Johnson v. Cash Store*, 116 Wash. App. 833, 847, 68 P.3d 1099 (2003) (rejecting argument that discovery was necessary to defend where prescient witnesses would be store employees, so “Cash Store held the keys to its own defense”).

¶43 The dissenting justices in *Little* endorsed the approach followed by *Calhoun*, reasoning that “[t]he practical difficulty of defending a claim in the absence of discovery may be a relevant consideration in evaluating whether a defendant has presented a meritorious defense sufficient to support a motion to vacate a default judgment.” 160 Wash.2d at 714, 161 P.3d 345 (Madsen, J., concurring/dissenting). They characterize the majority opinion in *Little* as rejecting the reasoning of *Calhoun* in favor of the reasoning in *Waxman*. *Id.* The majority opinion in *Little* voices no disagreement with *Calhoun*, however. As earlier discussed, the majority's decision can be distinguished from *Calhoun* as turning on the fact that King presented “no equitable basis for vacating judgment.” 160 Wash.2d at 706, 161 P.3d 345.

3. Law-based challenge

¶44 The third showing addressing the prima facie defense factor is a challenge as a matter of law, recognized in *Shepard* and endorsed in *Little*. It turns the tables on which party's evidence is examined for its sufficiency, looking back to the evidence the plaintiff offered in support of the default judgment. It is the easiest challenge to avoid: the party moving for a default judgment need only present substantial evidence.

¶45 *Shepard* was a legal malpractice case in which the law firm's liability turned on whether a \$204,000 judgment against Shepard *880 would have been set aside if its lawyers had made a timely CR 60(b)(1) motion. 95 Wash. App. at 233, 974 P.2d 1275. The judgment against Shepard was obtained by a quadriplegic patient who allegedly sustained injuries from a fall as he was removed from Shepard's ambulance. The parties agreed that whether a timely motion would have been granted presented an issue of law and submitted it to the trial court as a matter of partial summary judgment. The trial court ruled that the motion to set aside the judgment would not have been granted and dismissed the malpractice claim. The law firm appealed.

¶46 One of Shepard's unsuccessful arguments for vacating the judgment had been that a timely challenge to the damage amount would have succeeded, because the damages awarded were excessive. The appeals court observed, citing *Calhoun*, that “a trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense is established.” *Id.* at 241, 974 P.2d 1275. The court expressed concern that *Calhoun* had not set forth a standard as to when default damages should be vacated, however. *Id.* Looking to case law from other jurisdictions that applied rules similar to CR 60(b)(1), *Shepard* adopted a standard applied in Indiana: default damages should be vacated on “a showing that the evidence before the court granting the award was insufficient to support the amount of damages.” *Id.* at 241-42, 974 P.2d 1275. It observed that this is analogous to Washington's standard for setting aside awards of damages from trials. *Id.* at 242, 974 P.2d 1275. “Evidence is substantial,” *Shepard* observed, “if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.* (citing *Price v. Kitsap Transit*, 125 Wash.2d 456, 464, 886 P.2d 556 (1994)).

¶47 Among the trial court findings that had supported the \$204,000 damage amount was a finding that the patient injured in the fall suffered two or more broken ribs. *Id.* Even the patient's own declaration did not support that finding, however. *Id.* For that and other reasons, the *Shepard* court held that a timely challenge to the damages award would have been successful. It reversed dismissal of the malpractice claim. *Id.* at 244-45, 974 P.2d 1275.⁴

¶48 While noneconomic damages especially are within the factfinder's discretion, “there must be evidence on which the award is based.” *Bunch v. King County Dep't of Youth Servs.*, 155 Wash.2d 165, 180, 116 P.3d 381 (2005). A claimant has the burden of proof on the amount of damages, and must come forward with sufficient evidence to support a damages award. *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wash. App. 702, 715-16, 315 P.3d 1143 (2013) (citing *O'Brien v. Larson*, 11 Wash. App. 52, 54, 521 P.2d 228 (1974)). “ ‘Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or conjecture.’ ” *Clayton v. Wilson*, 168 Wash.2d 57, 72, 227 P.3d 278 (2010) (quoting *State v. Mark*, 36 Wash. App. 428, 434, 675 P.2d 1250 (1984)).

¶49 If a case is tried and a legally-insupportable amount of damages is requested or awarded, the defending party can move for judgment as a matter of law on the damages issue under CR 50.⁵ The trial court is required to view the evidence and all inferences *881 in favor of the nonmoving party, but it would err if it denied the motion and the evidence and inferences were legally insufficient to support a damages award. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989) (citing *Cherberg v. Peoples Nat'l Bank*, 88 Wash.2d 595, 606, 564 P.2d 1137 (1977)).

¶50 Where a defaulting party is able to demonstrate that the evidence presented to support an award of noneconomic damages is legally insufficient, its defense can fairly be characterized as conclusive. The more conclusively a defense can be shown, the more readily the court will vacate the default judgment. *Beckett v. Cosby*, 73 Wash.2d 825, 828, 440 P.2d 831 (1968). Legal defenses can be conclusive defenses. *E.g.*, *Merrell v. Hamilton Produce Co.*, 55 Wash.2d 684, 686, 349 P.2d 597 (1960) (surety's defense to damages awarded was its statutory right to have claims exceeding the face value of its bond prorated; “[s]uch a conclusive defense requires little excuse on a prompt motion to vacate”); *Yeck*, 27 Wash.2d at 98-99, 176 P.2d 359 (defense that the statute under which damages were awarded did not apply was a conclusive legal defense, and the court abused its discretion in refusing to set aside the judgment).

¶51 CR 55 and case law construing it provides a further basis for requiring that legally sufficient evidence support the amount of noneconomic damages awarded by a default judgment. CR 55(b)(2) governs the entry of default judgment “[w]hen [a]mount [u]ncertain,” and provides:

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages ..., the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury.

The subsection requires the entry of findings and conclusions. *See id.* Our Supreme Court has held that findings and conclusions are required “in part to allow appellate scrutiny of the trial court’s decision in uncontested cases.” *Little*, 160 Wash.2d at 706, 161 P.3d 345 (citing CR 55(b)(2)). “This protects the integrity of the justice system because it allows the reviewing court (and others) to evaluate the factual and legal basis for the trial court’s decision.” *Id.*

¶52 It is well settled that “ [j]udges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court when the amount of a default judgment is uncertain.” *Id.* (quoting *Lenzi v. Redland Ins. Co.*, 140 Wash.2d 267, 281, 996 P.2d 603 (2000)). The fact that a default judgment was entered without the court independently assessing the evidence is a factor that weighs in favor of allowing a trial on the merits. *Little*, 160 Wash.2d at 724, 161 P.3d 345 (Madsen, J., concurring/dissenting).

B. The trial court abused its discretion in refusing to vacate the award of damages

¶53 Applying the *White* elements, the trial court abused its discretion in refusing to vacate the damages award—not based on Mr. Firl’s fact-based or excuse-based showing of the prima facie defense factor, but based on the legal insufficiency of the plaintiffs’ evidence.

1. Fact-based showing

¶54 As plaintiffs pointed out in responding to Mr. Firl’s motion to vacate, the only fact-based evidence he offered as a defense to the damages was Mr. Peters’s opinion that, having reviewed the information provided by the plaintiffs in support of settlement, he believed a reasonable total damage amount was \$66,731.49. The plaintiffs argued that Mr. Peters’s declaration, viewed in the light most favorable to Mr. Firl, offered only a speculative opinion. We agree.

¶55 On appeal, Mr. Firl advances the plaintiffs’ January 2020 settlement offer of \$335,718.54—\$300,000.00 of that being general damages—as another piece of evidence that \$800,000.00 in noneconomic damages alone is excessive. Plaintiffs respond that the evidence of their offer is inadmissible under ER 408. Mr. Firl disagrees, arguing that he is not offering the evidence to establish the amount of the plaintiffs’ damages, but only to *882 highlight the “discrepancy” between damages representations to the trial court and to Allstate. Reply Br. of Appellants at 31 (emphasis omitted). Use for this purpose operates “to prove ... [the] invalidity of the claim or its amount,” however, which is the proscribed purpose under ER 408.

¶56 As for Mr. Firl’s explanation for his failure to appear, he continues to claim on appeal that he was not served. But for purposes of weighing the *White* factors, we rely on the trial court’s finding that Mr. Firl failed to overcome process server John Knight’s presumptively correct return of service. The trial court did not find that Mr. Firl was served, however; both in the court’s oral ruling and its order it found that Mr. Firl simply fell short of meeting his burden to prove otherwise. The trial court did not find that Mr. Firl’s failure to appear was willful and the evidence does not support such a finding. Mr. Firl put plaintiffs’ lawyers in contact with his insurer, apparently cooperated with his insurer, and attended the hearing to testify in support of setting the default aside. While his explanation for his failure to appear does not weigh in his favor, it does not support willfulness.

¶57 Turning to whether Mr. Firl acted with due diligence after notice of the default, his lawyer did not appear until over four months after Mr. Peters was informed of the lawsuit. The failure to learn of the default until March 26 can be excused. Plaintiffs’ counsel’s half-truth in reporting only that a lawsuit had been filed would lead Mr. Peters to reasonably believe it was enough to contact Mr. Firl and

obtain assurance that Mr. Firl would notify him if served. Upon learning of the default, however, it still took counsel three months to move to vacate the default. Due diligence does not weigh in Mr. Firl's favor. Nevertheless, we have no reason to believe the lack of diligence was Mr. Firl's fault.

¶58 Finally, plaintiffs have not demonstrated that they will suffer a substantial hardship if the judgment is vacated. The only argument of hardship made in the trial court was that “[y]ou've ... got witnesses leave, you've got problems with memory.” RP at 15. But the limited evidence the plaintiffs presented in the trial court was all opinion evidence based on record review. The records could be reviewed anew in a future trial.

¶59 Looking at Mr. Firl's fact-based showing for setting aside the damages award, only the absence of any substantial hardship to the plaintiffs weighs in favor of setting aside the award of noneconomic damages. No abuse of discretion in denying relief is shown.

2. Excuse-based showing

¶60 Mr. Firl also made an excuse-based showing for setting aside the noneconomic damages award. Although he did not cite *Calhoun*, his briefing and oral argument emphasized that without discovery, he lacked information needed to respond to an \$800,000 noneconomic damage claim. Documentation filed by the plaintiffs in support of the default judgment did not provide information usable by Mr. Firl. Unlike in *Waxman* and *Cash Store*, the plaintiffs have not demonstrated that information available to Mr. Firl would have enabled him to respond.

¶61 In *Calhoun*, however, Merritt's excuse for being unable to present a fact-based defense was accepted where he was able to make strong showings on the second, third, and fourth *White* factors. Merritt admitted to being served, and the court accepted his explanation that he thought his insurer knew of the lawsuit and would respond, characterizing Merritt's failure to act as “a bona fide mistake.” *Calhoun*, 46 Wash. App. at 621, 731 P.2d 1094. The court observed that Merritt “acted promptly” in moving to vacate the default. *Id.* at 622, 731 P.2d 1094. Merritt's lawyer evidently appeared in Calhoun's action within days of Merritt's insurer learning of

the default, and he moved to vacate the judgment a month later. *Id.* at 618, 731 P.2d 1094. Nothing in the record indicated that Calhoun had been prejudiced in asserting his damage claim by the lapse of time. *Id.* at 622, 731 P.2d 1094.

¶62 Here, by contrast, Mr. Firl did not make a strong showing of an excusable failure to appear or due diligence. Again, no abuse of discretion in denying relief on this basis is shown.

*883 3. Law-based challenge

¶63 Finally, Mr. Firl's motion asked the trial court to set aside the \$800,000 award of noneconomic damages under *Shepard*. The *Shepard* standard asks whether the evidence before the court granting the award was insufficient to support the amount of damages. “Appellate and trial courts are equally competent to review the record for legal sufficiency,” so even if the trial court intended, implicitly, to reject Mr. Firl's challenge to the damage amount, “appellate courts owe no deference to trial courts' conclusions” on that score. *Coogan v. Borg-Warner Morse Tec, Inc.*, 197 Wash.2d 790, 812, 490 P.3d 200 (2021). We review the evidence and reasonable inferences in the light most favorable to the judgment. *Id.*

¶64 No substantial evidence supports R.A.C.'s and Ms. Evans's noneconomic damage awards. The only evidence presented in support of the \$800,000.00 noneconomic damage award was evidence that R.A.C. incurred \$26,067.79 in medical expenses, that the toddler was a candidate for scar revision surgery at a cost of \$8,500.00 to \$10,000.00, and skeletal hearsay information about six settlements allegedly negotiated by R.A.C.'s lawyers for other clients with dog bite injuries.⁶ Although plaintiffs' briefing in the trial court characterized the six settlements as “Jury Verdicts,” they are characterized in counsel's declaration as settlements. *Compare* CP 90 and 96 with CP at 28-29, ¶¶ 5-10. The information about the settlements is too limited to be useful and there is no identifying information that would enable Mr. Firl or the trial court to confirm or investigate them. The trial court was provided with none of the underlying medical records and no photographs of R.A.C.'s injuries. Because no hearing was held, the shortcomings in the written submissions were never compensated for by testimony.

¶65 No witness provided an explanation why \$750,000 and \$50,000 would be reasonable measures of R.A.C.'s and Ms. Evans's noneconomic damages. Those figures appear only in the findings, conclusions, and judgment that plaintiffs proposed for entry by the court. A declaration from Ms. Ramsey offers allegations and conclusory statements in support of her opinion that "the plaintiff's damages likely fall at the high-end range of settlements and/or jury verdicts researched." CP at 29. But her speculative opinion on reasonable damages is just as inadequate as Mr. Peters's opinion, which plaintiffs persuade us to reject.

¶66 The application of the *White* considerations "is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity." *Little*, 160 Wash.2d at 704, 161 P.3d 345 (citing *White*, 73 Wash.2d at 351, 438 P.2d 581). It is not difficult to present legally sufficient evidence of bona fide noneconomic damages in an uncontested default judgment hearing. Plaintiffs who do not make that effort are not in a position to argue that the equities favor them, even where a defendant is unable to make a strong showing of a reason for failing to appear or due diligence. Mr. Firl did not willfully fail to appear, and the shortcoming in diligence was not extreme nor is it fairly imputed to him. Given a conclusive defense of legally insufficient supporting evidence, it was an abuse of discretion not to vacate the award of noneconomic damages.

¶67 We affirm the judgment as to liability, the \$34,567.54 awarded as special damages, and the \$701.95 awarded as statutory costs. We reverse the award of noneconomic damages and remand for a trial on that element of the plaintiffs' damages.

¶68 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Unpublished Text Follows

II. The trial court did not abuse its discretion in refusing to vacate the judgment as void for lack of personal jurisdiction

¶69 Under CR 60(b)(5), a court may relieve a party from a final judgment if the judgment is void. A default judgment

against a party is void if the court did not have personal jurisdiction over that party. *Delex Inc. v. Sukhoi Civ. Aircraft Co.*, 193 Wash. App. 464, 468, 372 P.3d 797 (2016). A court does not have personal jurisdiction over a party if service of the summons and complaint was improper. *Id.*

¶70 Under Washington law, the plaintiff bears the initial burden of proving a prima facie case of sufficient service. *Scanlan v. Townsend*, 181 Wash.2d 838, 847, 336 P.3d 1155 (2014). An affidavit of service that is regular in form and substance is presumptively correct. *Leen v. Demopolis*, 62 Wash. App. 473, 478, 815 P.2d 269 (1991) (citing *Lee v. W. Processing Co. Inc.*, 35 Wash. App. 466, 469, 667 P.2d 638 (1983)). The return is subject to attack, however, and may be discredited by competent evidence. *Lee*, 35 Wash. App. at 469, 667 P.2d 638 (citing *Dubois v. W. States Inv. Corp.*, 180 Wash. 259, 39 P.2d 372 (1934)). When the plaintiff meets its burden of proving a prima facie case of sufficient service (by the presumption or otherwise), the burden is on the person attacking the service to show by clear and convincing proof that the service was improper. *See Leen*, 62 Wash. App. at 478, 815 P.2d 269 (citing *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); *McHugh v. Conner*, 68 Wash. 229, 231, 122 P. 1018 (1912)). Evidence is "clear and convincing" when it shows the ultimate fact in issue to be highly probable. *Dalton v. State*, 130 Wash. App. 653, 666, 124 P.3d 305 (2005). Whether service of process was proper, such that the exercise of personal jurisdiction was appropriate, is a question of law reviewable de novo. *Sutey v. T26 Corp.*, 13 Wash. App. 2d 737, 749, 466 P.3d 1096 (2020).

¶71 When a motion to set aside a default judgment presents the court with conflicting affidavits addressing whether service occurred, a triable issue of fact is presented. *Roth v. Nash*, 19 Wash.2d 731, 732, 144 P.2d 271 (1943); *Woodruff v. Spence*, 76 Wash. App. 207, 210, 883 P.2d 936 (1994). We conduct substantial evidence review of a trial court's findings on disputed facts that bear on whether process was served. *Sutey*, 13 Wash. App. 2d at 750, 466 P.3d 1096. " 'Substantial evidence' is 'a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.' " *Id.* (quoting *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wash.2d 873, 879, 73 P.3d 369 (2003)). We cannot review credibility determinations on appeal. *Id.* (citing *Morse v. Antonellis*, 149 Wash.2d 572, 574, 70 P.3d 125 (2003)).

¶72 The trial court did not enter written findings articulating its reasons for concluding that Mr. Firl failed to rebut the presumptively correct return of service. But the court's oral ruling announced findings, including that Mr. Firl appeared to the court to be someone who could be mistaken for 27 years old. The court also announced that Mr. Firl's testimony denying he was served was not only *not* clear and convincing, it did not preponderate over the sworn return of John Knight, the process server, that he personally served Mr. Firl.

¶73 Mr. Firl's presence and the court's ability to observe him qualifies as substantial evidence supporting its finding that Mr. Firl could be mistaken for 27 years old. Mr. Knight's presumptively correct return of service (whose description of the person he served apparently fit Mr. Firl in every respect except for Mr. Firl's age) is substantial evidence that service of process took place as attested.

¶74 Additionally, Mr. Firl's failure to produce evidence corroborating his alleged absence from his residence at the time of service would support an adverse inference. "When a party fails to produce relevant evidence within its control without satisfactory explanation, the trial court is permitted to draw the inference that the evidence would be unfavorable to the nonproducing party." *Northwick v. Long*, 192 Wash. App. 256, 264, 364 P.3d 1067 (2015) (citing *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wash.2d 678, 689, 871 P.2d 146 (1994)).

¶75 Finally, Mr. Firl suggests the trial court applied the wrong standard to his burden of rebutting the return of service because when announcing its decision, the court said it was unable to find that Mr. Firl "*for sure* wasn't the one—didn't get the service." RP at 30-31 (emphasis added).

¶76 The fact that Mr. Firl's burden of overcoming the return of service was by clear and convincing evidence was briefed by the parties and argued during the hearing. The trial court commented itself on the clear and convincing standard. See RP at 29 ("I'm not convinced by a preponderance of the evidence, not to mention clear and convincing, that he didn't get it."). In entering its written order, the court did not say that Mr. Firl failed to disprove service by a "for sure" burden of proof, it said he failed to disprove service "by any burden of proof." CP at 123.

¶77 In the context of the briefing and argument, the court's "for sure" reference is most reasonably seen as unfortunate vernacular. A court's written decision, not any different oral ruling, is considered its ultimate understanding of the issue presented. *State v. Dailey*, 93 Wash.2d 454, 459, 610 P.2d 357 (1980).

¶78 Mr. Firl fails to demonstrate that the court erred in rejecting his argument that the judgment was void.

III. An argument that Mr. Firl had appeared within the meaning of CR 55 was not raised in the trial court, and fails

¶79 Mr. Firl's second assignment of error conflates two bases for challenging a default judgment. The first is an argument that a defendant who has appeared in a lawsuit is entitled to notice of motions for default and default judgment. The second is an argument that acts of concealment that prevent a defendant from appearing and responding can support vacating the judgment under CR 60(b)(1) or (4) and the *White* criteria. Only the first is a true "appearance" argument.

¶80 CR 55(a)(3) provides that "[a]ny party who has appeared in the action for any purpose shall be served with a written notice of motion for default ... at least 5 days before the hearing." A defendant appears in an action and is thereby entitled to notice when he "answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of ... her appearance." RCW 4.28.210; see also CR 4(a)(3) ("A notice of appearance, if made, shall be in writing, shall be signed by the defendant or the defendant's attorney, and shall be served upon the person whose name is signed on the summons."). If a default judgment is rendered against a party who was entitled to notice but did not receive it, the judgment will be set aside. *Morin*, 160 Wash.2d at 749, 161 P.3d 956 (citing *Tiffin v. Hendricks*, 44 Wash.2d 837, 847, 271 P.2d 683 (1954)).

¶81 In *Morin*, our Supreme Court accepted review of three decisions of this court that vacated default judgments on the basis that the defendants' substantial compliance with the appearance requirement had given them a right to notice of the plaintiffs' motions for an order of default. The Supreme Court was concerned that this court was sometimes applying a "doctrine of informal appearance" that failed to measure substantial compliance against the fact that "litigation is a

formal process.” *Id.* It emphasized that “where we have applied the substantial compliance doctrine, the defendant’s relevant conduct occurred *after litigation was commenced.*” *Id.* at 755, 161 P.3d 956 (emphasis added). This is consistent with the impossibility of “appearing” in an action that does not yet exist. “[P]relitigation communication alone is insufficient” to constitute an appearance. *Id.* at 749, 161 P.3d 956 (emphasis added). Were it otherwise, the Supreme Court observed, any claims representative to a potential dispute could simply write a letter conveying an intent to contest litigation and then “ignore the summons and complaint ... and wait for the notice of default judgment before deciding whether a defense is worth pursuing.” *Id.* at 757, 161 P.3d 956.

¶82 Addressing *postlitigation* contacts, the *Morin* court clarified that a defendant served with a summons and complaint “must do more than show intent to defend; they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences.” *Id.* at 749, 161 P.3d 956. “Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing.” *Id.* at 757, 161 P.3d 956.

¶83 Mr. Firl complains that in ruling on his motion, the trial court failed to address whether, having appeared, he was entitled to notice. We see no suggestion in Mr. Firl’s motion that he *claimed* to have appeared, however. His motion spoke only of his “failure to appear.” *See* CP at 58.

¶84 Mr. Firl has no viable argument that he had appeared and was entitled to notice. Mr. Peters’s prelitigation contacts do not count, because there was not yet a lawsuit in which to appear. His and defense counsel’s *postlitigation* contacts do not count because they did not “acknowledge that a dispute exists *in court*” before the plaintiffs moved for default and default judgment. *Morin*, 160 Wash.2d at 756, 161 P.3d 956. The trial court understandably did not rule on an argument that Mr. Firl had appeared and was entitled to notice.⁷

¶85 We affirm the judgment as to liability, the \$34,567.54 awarded as special damages, and the \$701.95 awarded as statutory costs. We reverse the award of noneconomic damages and remand for a trial on that element of the plaintiffs’ damages.

End of Unpublished Text

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

All Citations

523 P.3d 869

Footnotes

- ¹ Initials are used to protect the privacy interests of R.A.C., a minor child. Gen. Orders of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.
- ² Represented by new counsel on appeal, Mr. Firl initially moved for leave to submit five documents as additional evidence under [RAP 9.11](#), either for consideration by the trial court or for this court's consideration on appeal. Mr. Firl contends that some of the documents provide the corroboration of his absence from home at the time of service that the trial court ruled was lacking. Our commissioner denied the motion, finding that the proposed evidence was available at the time of the hearing and Mr. Firl did not demonstrate good cause for failing to present it to the trial court.
- ³ The assigned error also challenges the trial court's failure to grant relief under [CR 60\(b\)\(11\)](#), but Mr. Firl did not adequately brief or argue subsection (11) as a basis for relief in the trial court or on appeal. We will not consider issues that are not adequately briefed and argued, even if they are included as assignments of error. See *Holland v. City of Tacoma*, 90 Wash. App. 533, 538, 954 P.2d 290 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”).
- ⁴ In *VanderStoep*, Division Two was presented with an argument that *Shepard's* standard—whether the plaintiff's evidence in support of a default judgment was legally sufficient—was endorsed by the Supreme Court in *Little*, and had become the exclusive standard for determining the first *White* element. The VanderStoeps relied on the statement in *Little*, citing *Shepard*, that “[t]he amount of damages in a default judgment must be supported by substantial evidence.” 160 Wash.2d at 704, 161 P.3d 345. Division Two rejected the VanderStoeps' argument, holding that *Little* merely recognizes the legal sufficiency of evidence supporting a default damages award is a *minimal* requirement. *VanderStoep*, 200 Wash. App. at 524-25, 402 P.3d 883. It observed that nothing in *Little* abandons long-settled precedent that a *prima facie* defense can defeat a legally sufficient claim. We agree.
- ⁵ [CR 50\(a\)\(1\)](#) allows judgment as a matter of law “where ‘there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue.’ ” *Coogan v. Borg-Warner Morse Tec, Inc.*, 197 Wash.2d 790, 812, 490 P.3d 200 (2021).
- ⁶ This might have been partially inadvertent. Almost none of the exhibits purportedly attached to the plaintiffs' supporting declarations appear in the record on appeal. We have confirmed that they are not present in the trial court record. A declaration of Madison Evans is also referred to in plaintiffs' briefing but no such declaration was ever filed with the court.
- ⁷ Mr. Firl's second assignment of error also suggests that *Morin* announced a new basis on which a party will be deemed to have “appeared”: the party will be deemed to have appeared if and when it is the victim of inequitable concealment by its adversary. We disagree. The discussion in *Morin* on which Mr. Firl relies had to do with the remand of one of the three appeals consolidated in *Morin*, *Gutz v. Johnson*. In *Gutz*, the Court of Appeals not only found an “informal appearance” but also concluded that “the Johnsons satisfied their evidentiary burden under [CR 60\(b\)](#).” 128 Wash. App. at 921, 117 P.3d 390 It was in connection with remanding *Gutz* because of the viable [CR 60\(b\)\(1\)](#) basis for setting aside the judgment that the Supreme Court discussed the fact that *Gutz* representatives had spoken with an Allstate adjuster about settlement without disclosing they had already filed suit and effected service, and later, that they had obtained a

default order—something the Supreme Court said “appears to be an inequitable attempt to conceal the existence of the litigation.” *Morin*, 160 Wash.2d at 759, 161 P.3d 956.

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