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STATE OF WASHINGTON  
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No. 68206-7-I

COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION ONE

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*VIET N. NGUYEN*

*Appellant*

v.

HAI TANG and JANE DOE TANG,

*Respondent*

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(The Honorable Theresa Doyle)

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REPLY BRIEF

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ORIGINAL

## TABLE OF CONTENTS

|   | <u>Page</u> |
|---|-------------|
| I. REPLY  | 1           |
| A. Uncontested Facts  | 1           |
| II. ARGUMENT  | 2           |
| A. There is no support for the respondents’ position that the Order to vacate judgment also extends to the order for default entered four months earlier  | 2           |
| B. There is per se no due diligence when defendant and counsel have actual notice of case and controversy but fail to investigate and seek to vacate default order for four months  | 4           |
| C. The trial court abused its discretion in vacating the judgment based upon hearsay and other inadmissible evidence and respondents’ position lacked substantial evidence required under CR 60   | 7           |
| 1. No dispute about evidence before the Court below   | 7           |
| 2. Respondents cite no authority that the court can accept hearsay and lack of personal knowledge as evidence over the objection of opposing party, and ER801, 802 and ER 602 prohibit hearsay and evidence that lacks personal knowledge | 8           |
| 3. Respondents’ reliance on “other evidence” in the record is unpersuasive and evidence relied upon by the respondents was not in the record at the time the motion was ruled upon  | 13          |
| 4. Without admissible evidence, the respondents lacked substantial evidence sufficient to support   |             |

|  |    |
|--|----|
| their CR 60 Motion   | 14 |
| D. Respondents' support for excusable neglect is<br>Deficient on its face and cannot on its own support<br>A CR 60 Motion  | 15 |
| 1. The only evidence offered was inadmissible<br>testimony of respondents' trial counsel that<br>respondents were unsophisticated or had<br>limited comprehension of English             | 15 |
| 2. Even if counsel's affidavit is sufficient on<br>the issue of sophistication, the weak evidence<br>of a prima facie defense increases scrutiny of<br>excusable neglect                 | 17 |
| 3. Respondents fail to cite any authority<br>supporting excusable neglect on the limited<br>facts before the trial court   | 17 |
| a. If the respondents had been pro se,<br>the result might be different, but they<br>were actually represented by counsel<br>who also had knowledge of the claims<br>by plaintiff Nguyen | 19 |
| 4. Respondents' case citations are not supportive<br>to find excusable neglect and clearly<br>distinguishable  | 20 |
| III. CONCLUSION  | 24 |

## TABLE OF AUTHORITIES

### **Cases**

|   |            |
|---|------------|
| <u>Berri v. Rogero</u> , 168 Cal. 736, 145 P. 95 (1914) .....   | 23         |
| <u>Briones v. Riviera Hotel &amp; Casino</u> , 116 F.3d 379 (9 <sup>th</sup> Cir. 1997).....            | 19,22      |
| <u>Brothers v. Brothers</u> , 71 Mont. 378, 230 P. 60 (1924) .....                                      | 20         |
| <u>Brown v. Martin</u> , 23 Cal.App. 736, 139 P. 823 (1914) .....                                       | 21         |
| <u>Canfield v. Van Atta Buick</u> , 127 F.3d 248 (2 <sup>nd</sup> Cir. 1997) .....                      | 19         |
| <u>Commercial Courier Serv., Inc. v. Miller</u> , 13 Wash.App 98, 533 P.2d 852<br>(1975) .....          | 11         |
| <u>Consortium Consulting v. Chee Tsai</u> , 2 A.D.3d 177, 768 NYS.2d 213<br>(2003) .....                | 22         |
| <u>C. Rhyne &amp; Assoc. v. Swanson</u> , 41 Wn. App. 323, 704 P.2d 164 (1985)<br>.....                 | 13, 14     |
| <u>Enron Oil Corp. v. Diakuhra</u> , 10 F.3d 90 (2 <sup>nd</sup> Cir. 1993).....                        | 19         |
| <u>Farmers Ins. Co. of Wash. v. Waxman Indus. Inc.</u> , 132 Wn. App. 142,<br>130 P.3d 874 (2006) ..... | 11         |
| <u>Fowler v. Johnson</u> , __ Wn. App. __, 273 P.3d 1042 (Apr. 9, 2012) ...                             | 11         |
| <u>Hwang v. McMahill</u> , 103 Wn. App. 945, 15 P.3d 172 (2000).....                                    | 18         |
| <u>In re Harbert</u> , 85 Wn.2d 719, 538 P.2d 1212 (1975) .....   | 11         |
| <u>In re Marriage of Martin</u> , 22 Wn. App. 295, 588 P.2d 1235 (1979) .....                           | 15         |
| <u>In re Marriage of Morrison</u> , 26 Wn. App. 571, 613 P.2d 557 (1980) ....                           | 10         |
| <u>J.J. Sports Productions Inc. v. Prado</u> , 2008 WL 822159 (E.D. Cal.<br>2008).....                  | 20,22      |
| <u>Johnson v. Cash Store</u> , 116 Wn. App. 833, 68 P.3d 1099 (2003) .....                              | 10         |
| <u>Little v. King</u> , 160 Wn.2d 696, 161 P.3d 345 (2007) .....  | 11, 18, 19 |
| <u>Luckett v. Boeing</u> , 98 Wn. App. 307, 989 P.2d 1144 (1999) .....                                  | 7          |
| <u>Meadows v. Grant's Auto Broker, Inc.</u> , 71 Wn.2d 874, 432 P.2d 215<br>(1967) .....                | 9          |
| <u>Moody v. Reichow</u> , 38 Wash. 303, 80 P. 461 (1905) .....  | 10,18,20   |
| <u>Morin v. Burris</u> , 160 Wn.2d 745, 161 P.3d 956 (2007) .....                                       | 12         |
| <u>N. Commercial v. Goldman</u> , 164 NW 133, 37 N.D. 542 (1917)...                                     | 21         |
| <u>Pfaff v. State Farm Mut. Auto Ins. Co.</u> , 103 Wn. App. 829, 14 P.3d 837<br>(2000) .....           | 11         |
| <u>Pioneer Inv. Serv. Co. v. Brunswick Assoc.</u> , 507 U.S. 380, 113 S.Ct.<br>1489 (1993) .....        | 18, 20, 22 |
| <u>Puget Sound Med. Supply v. Wash. State DSHS</u> , 156 Wn. App. 364, 234<br>P.3d 246 (2010) .....     | 11         |
| <u>Rosander v. Nightrunners Transp., Ltd.</u> , 147 Wn. App. 392, 196 P.3d<br>711(2008) .....           | 9,11,17    |

|   |          |
|---|----------|
| <u>Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd &amp; Hokanson</u> , 95 Wn. App. 231, 974 P.2d 1275 (1999) ..... | 7,11     |
| <u>Showalter v. Wild Oats</u> , 124 Wn. App. 506, 101 P.3d 867 (2004) .....   | 10       |
| <u>Stirm v. Puckett</u> , 107 Idaho 1046, 695 P.2d 431 (1985) .....   | 20       |
| <u>TCI Group Life Ins. v. Knoebber</u> , 244 P.3d 691 (9 <sup>th</sup> Cir. 2001) ..  | 19,20,22 |
| <u>Thompson v. Goubert</u> , 137 Cal.App.2d 152, 289 P.2d 887 (1953) .....  | 22       |
| <u>Thor v. McDearmid</u> , 63 Wn. App. 193, 817 P.2d 1380 (1991) .....  | 10       |
| <u>TMT Bear Creek Shopping Ctr. v. Petco</u> , 140 Wn. App. 191, 165 P.3d 1271 (2007) .....                                     | 11, 17   |
| <u>Wilson v. Streubach</u> , 98 Wn.2d 434, 656 P.2d 1030 (1982) .....   | 9        |

**Other Authorities**

|  |    |
|--|----|
| 5 Karl B. Tegland, Wash. Prac., Tegland on Evidence, 413-14 (2011) ... | 9  |
| 2 S. Gard, Jones on Evidence s 8:2 (1972 & Supp. 1979) .....           | 11 |

**Rules**

|                  |                         |
|------------------|-------------------------|
| CR 12(b) .....   | 11                      |
| CR 56 .....      | 9                       |
| CR 60.....       | 7, 8, 9, 10, 11, 14, 15 |
| ER 602 .....     | 10                      |
| ER 801-803 ..... | 8, 9, 10, 11            |

## I. REPLY

Respondents' brief avoids the central issues in this appeal, and that is the lack of evidence supporting the motion to vacate and the legal standards under which an "unsophisticated" party can be granted relief from their own failure to respond to a properly served summons and complaint. The record was simply insufficient to vacate the November 28, 2011 judgment, and it was abuse of discretion to do so.

### A. UNCONTESTED FACTS

The respondents make no showing that any of the following facts are disputed, and they are verities for the purposes of argument.

1. August 28, 2009 – Date of Accident.<sup>1</sup>
2. This is not a case involving informal appearance.
3. April 19, 2011 – Tangs served with property claim by State Farm.<sup>2</sup>
4. May 6, 2011 – Complaint and summons in this case properly served on defendants, evidenced by Return Receipt.<sup>3</sup>
5. May 17 – June 1, 2010 – Motion and Order Changing Case Assignment Area were served on defendants.<sup>4</sup>
6. August 9, 2011 – Default Order Entered by Judge Prochnau.<sup>5</sup>

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<sup>1</sup> CP 2.

<sup>2</sup> CP 75, Wais Decl.

<sup>3</sup> CP 21-22; CP 25-26, 118-121.

<sup>4</sup> CP 27-36. The notice of this motion and the order were sent to the same address as the summons and complaint, 9631 58<sup>th</sup> Avenue South, Seattle, WA 98118; CP 128. E-mail from counsel for Tangs (Nov. 30, 2011), McGlothlin Decl., Ex. 9.

7. August 11, 2011 – Tangs’ counsel (Mr. Wais) received State Farm’s answers to Tangs’ discovery requests, including being notified of the “suit” by plaintiff Nguyen.<sup>6</sup>
8. November 28, 2011 – Default Judgment Entered.<sup>7</sup>
9. November 30, 2011 –Tangs’ Counsel Admitted that the Tang’s failed to deliver the Summons and Complaint to him.<sup>8</sup>
10. December 16, 2011 – Trial Court issued Order to Vacate Judgment without oral argument, findings of fact, or conclusions of law.<sup>9</sup>
11. On its face, the Order to Vacate Judgment did not alter the August 19, 2011 default order, and applied only to the November 28, 2011 judgment.

## II. ARGUMENT

A. THERE IS NO SUPPORT FOR RESPONDENTS’ POSITION THAT THE ORDER TO VACATE JUDGMENT ALSO EXTENDS TO THE ORDER OF DEFAULT ENTERED FOUR MONTHS EARLIER.

Respondents’ argument that the order vacating the November 28, 2011 judgment impliedly vacates the August 9, 2011 order of default<sup>10</sup> is without merit. The respondents do not contest that the December 2011

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<sup>5</sup> CP 47-48.

<sup>6</sup> CP 129-143, McGlothin Decl., Ex. 10. CP 143 contains Declaration of Mailing to defense counsel Wais.

<sup>7</sup> CP 62-63.

<sup>8</sup> CP 67, lines 17-18; CP 74, Wais Decl. ¶5.

<sup>9</sup> CP 157-58.

<sup>10</sup> Resp’t.’s Br. at 9-10.

order to vacate only vacated the November 28, 2011 judgment, and does not even mention the August 09, 2011 default order.

Respondents' sole arguments for this proposition are that the underlying motion asked for that relief, the appellants argued against the vacation of the default order, and because the standard for vacating the default order is essentially the same as CR 60 so it must somehow subsume the default order with the judgment. These arguments are unpersuasive and unsupported in with legal authority.<sup>11</sup>

Respondents cite no authority that the default order is automatically eliminated with the vacation of the judgment. The logical reason is because the two rulings are treated differently and were entered at different times. Excusable neglect and due diligence differ for each because there is a four month gap between the order and the judgment. Arguably, though we lack findings from the trial court to adjudicate the reasoning, the court could have come to different results for the order and the judgment based on the facts presented in this case.

However, more persuasive is the fact that the order addressed only the November default judgment, and respondents took no steps to clarify it with the court, or to cross appeal. They could have sought clarification from the trial court and did not. The independent orders and

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<sup>11</sup> RAP 10.3. This Court should not consider any argument not properly supported by legal authority.

judgments of the court are specifically enforceable and competent until a ruling is made specifically vacating each order or judgment. Until the respondents cite authority that allows vacating the judgment to also simultaneously vacate the default order, on the facts presented herein, then the order of default remains valid and is not properly before this Court on appeal.

B. THERE IS PER SE NO DUE DILIGENCE WHEN DEFENDANT AND COUNSEL HAVE ACTUAL NOTICE OF CASE AND CONTROVERSY BUT FAIL TO INVESTIGATE AND SEEK TO VACATE THE DEFAULT ORDER FOR OVER FOUR MONTHS.

The respondents entire argument for due diligence is premised upon the position that once the respondents and their counsel learned of the November 28, 2011 judgment they took prompt action. However, this factual slight-of-hand is not the proper inquiry because due diligence is examined on the totality of circumstances related to the default. Respondents' argument can only be supported if you find that the November 30, 2011 notice of judgment was the first notice respondents and their counsel received of Mr. Nguyen's lawsuit. The facts and circumstances demonstrate that both the Tangs and their defense counsel knew of the Nguyen suit for over four months before the judgment was entered, yet they took no action.

Due diligence is about taking all appropriate action once defendants knew or should have known of the suit against them. The record before this court does not support due diligence by respondents or their trial counsel. There is no controversy that the Tangs were served May 6, 2011. There is no controversy that they received additional pleadings in June 2011. There is no controversy that the Tangs simply failed to give Nguyen's summons and complaint to their already appointed counsel, Mr. Wais. Certainly that is not "due diligence" by the respondents.

Defense counsel also failed due diligence by failing to investigate the Nguyen suit when he had the opportunity in August 2011, following notice of the suit in State Farm's discovery responses. Respondents' argument as to why the August 11, 2011 State Farm responses were not sufficient notice boils down to one position; that the discovery responses from State Farm did not provide sufficient data to place him on notice.<sup>12</sup>

Counsel's "lack of knowledge" in the face of the State Farm discovery responses is unreasonable for an attorney. The State Farm discovery answers informed respondents' counsel that: "PIP is not relevant to this suit... documents otherwise available *through Mr.*

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<sup>12</sup> See CP 155-156, Wais Decl.

*Nguyen’s suit*”, and “Vince Nguyen who can be reached through his attorneys at Olympic Law Group...”.<sup>13</sup>

No reasonable attorney could have read these responses by State Farm and not have known that Mr. Nguyen had a personal injury lawsuit, that any information on said suit could have been obtained from Nguyen’s own attorneys, and that Nguyen’s counsel was clearly identified. At the very least, respondents’ counsel had a due diligence obligation to inquire about the existence of the lawsuit, to confer with his clients (the Tangs) whether they received another summons and complaint, and at the very least to have checked the docket to see if there was an active case between Nguyen and Tang.

Instead, at page 19 of respondents’ brief, the respondents claim that because no case number was offered in the discovery response, they were not really put on notice. Alternatively, and even more unbelievably, respondents claim that even if the discovery response was notice, there was nothing they could do two days after the default order was entered.

Aside from respondents’ position being completely unsupported with any legal citation to authority on this issue<sup>14</sup>, it flies in the face of common sense and case law. “Due diligence after discovery of a default

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<sup>13</sup> CP 136 (emphasis added).

<sup>14</sup> RAP 10.3, such unsupported argument should not be considered by this Court.

[order] contemplates a prompt motion to vacate.”<sup>15</sup> In other words, the respondents should have sought to vacate the order of default immediately once they knew or should have known about the default order, but they failed to do so. As the court found in Luckett v. Boeing Co., four months of delay after notice of default was lack of diligence. That case had a factually similar pattern in that the counsel knew about the default in August but failed to take action until December.<sup>16</sup> Had the respondents and their counsel exercised due diligence in August 2011, the resulting motions and this appeal would likely have been moot. Respondents cannot establish due diligence on the factual record before this Court.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN VACATING THE JUDGMENT BASED UPON HEARSAY AND OTHER INADMISSIBLE EVIDENCE AND RESPONDENTS’ POSITION LACKED SUBSTANTIAL EVIDENCE REQUIRED UNDER CR 60.

Respondents provided no competent, sufficient evidence to support the motion to vacate so it was abuse of discretion to vacate the judgment.

1. NO DISPUTE ABOUT EVIDENCE BEFORE THE COURT BELOW

Respondents’ brief does not contest that the only evidence supplied by the respondents in their motion to vacate was the two

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<sup>15</sup> Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 243, 974 P.2d 1275 (1999).

<sup>16</sup> Luckett v. Boeing Co., 98 Wn. App. 307, 313, 989 P.2d 1144 (2002).

declarations of Wais and the attached, unsworn letter from Geico. No other “purported” evidence was before the trial court when the motion was decided.

There is also no dispute that Wais’ declarations as to what happened in the accident are hearsay and without his personal knowledge. There is also no argument that the GEICO letter is not hearsay, without oath, and, aside from being factually and legally conclusory, the letter also contained numerous layers of imbedded hearsay. There is also no dispute that the only purported evidence of respondents’ alleged problems with English was Wais’ bare assertion of that fact in his declaration.

No other evidence was before the trial court. No declarations from respondents were offered. No evidence of how well the respondents understand English, or how “sophisticated” the respondents are, including their education levels, how long they have lived in the United States, or what jobs they work and whether those jobs require English competency.

2. RESPONDENTS CITE NO AUTHORITY THAT THE COURT CAN ACCEPT HEARSAY AND LACK OF PERSONAL KNOWLEDGE AS EVIDENCE OVER THE OBJECTION OF OPPOSING PARTY, AND ER 801, 802 AND ER 602 PROHIBIT HEARSAY AND EVIDENCE THAT LACKS PERSONAL KNOWLEDGE

The sole argument that respondents make rebutting appellant’s motion was that CR 60 allows attorneys to make affidavit in support of

the motion to vacate.<sup>17</sup> Respondents also criticize appellant for analogizing to CR 56 standards for affidavits. However, respondents cite no authority that contravenes the position taken by appellant and permits a court to accept inadmissible statements that are hearsay and made by a person who lacked personal knowledge, just because an attorney attaches it to a declaration under CR 60. None of the citations provided by respondents supports such a rule.

Rosander, cited by respondents, specifically states that the moving party has an obligation to produce affirmative *evidence* that, if believed by a trier of fact, would constitute a defense and excusable neglect.<sup>18</sup> Inherent in any question of evidence that would go to a trier of fact is whether the evidence is admissible. Inadmissible hearsay is not evidence and does not go to the finder of fact.<sup>19</sup>

An attorney's affidavit must still meet the same requirements of admissibility as any other affidavit. As Wilson v. Streubach held, the affidavit of counsel in a CR 60 motion must still meet the personal knowledge requirements, and any factual statements made by counsel not made from personal knowledge are not admissible.<sup>20</sup> And in a case that

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<sup>17</sup> Resp't. 's Br. at 12-15.

<sup>18</sup> Rosander v. Nightrunners Transp, Ltd., 147 Wn.App. 392, 404-5, 196 P.3d 711 (2010)

<sup>19</sup> 5 Karl B. Tegland, WASH. PRACTICE: Tegland on Evidence, 413-414 (2011); ER 802.

<sup>20</sup> 98 Wn.2d 434, 438-39, 656 P.2d 1030 (1982), *citing* Meadows v. Grant's Auto Broker, Inc., 71 Wn.2d 874, 880, 431 P.2d 215 (1967).

predates CR 60, but is still good law and is otherwise persuasive, an affidavit that was hearsay and lacking personal knowledge was not evidence.<sup>21</sup> In the present case, that means that Mr. Wais' declarations of the facts of the accident and the lack of English skills by the respondents is not his own personal knowledge, and is therefore not admissible.<sup>22</sup>

Likewise, hearsay is not admissible, and unless the party purporting the hearsay can demonstrate exemption or exception to ER 802, it is not evidence.<sup>23</sup> In the case of Thor v. McDearmid, in a motion to revise a partition judgment, the hearsay contained in the affidavit of the moving party was admitted to evidence, but only because it was not hearsay because it was an admission against interest of party opponent.<sup>24</sup>

None of the authorities cited by respondents support the proposition that Mr. Wais can testify without knowledge, or offer up his declaration with a multiple level hearsay document to support the motion to vacate. In fact, the cases cited by respondents that successfully vacated default or judgment overwhelmingly contain evidence from the people with knowledge.<sup>25</sup> As noted in In Re Marriage of Morrison, in

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<sup>21</sup> Moody v. Reichow, 38 Wash. 303, 308, 80 P. 461 (1905).

<sup>22</sup> *See also* ER 602.

<sup>23</sup> ER 801-803.

<sup>24</sup> 63 Wn. App. 193, 817 P.2d 1380 (1991) (McDearmid dealt with a revision of a judicial partition and made no reference to CR56).

<sup>25</sup> Showalter v. Wild Oats, 124 Wn. App. 506, 509-510, 101 P.3d 867 (2005) (affidavits supplied by adjustor testifying about the investigation under oath, as well as affidavit of facts by the defendants); Johnson v. Cash Store, 116 Wn. App. 833, 844, 68 P.3d 1099

footnote 2, a judge is presumed in entering an order to vacate to have considered only admissible evidence, and should not consider an attorney's affidavit not made on personal knowledge.<sup>26</sup>

The reason CR 60 allows counsel to submit affidavits is not to eliminate the personal knowledge requirement or to avoid hearsay restrictions, but to allow attorneys to properly testify as to excusable neglect where they have personal knowledge of those facts. Cases involving an attorney affidavit always related to issues specifically in the knowledge of counsel, such as why the answer was not filed, failure to file a notice of appearance, explaining delay, error by their own staff, error by the insurer, or related to error or malfeasance by another.<sup>27</sup>

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(2004) (defendants provided affidavits); Shepard, 95 Wn. App. at 242 (affidavits supplied by defendants); Pfaff v. State Farm Mut. Auto Ins. Co., 103 Wn. App. 829, 831, 14 P.3d 837 (2006) (specific affidavit by defendant that there was no bad faith); Little v. King, 160 Wn.2d 696, 704-706, 161 P.3d 345 (2007) (defendants and insurer provided affidavits on liability defense); Commercial Courier Serv., Inc., v. Miller, 13 Wn. App. 98, 101, 533 P.2d 852 (1975) (defendant filed affidavit with bill of sale to support CR 60 motion); Puget Sound Med. Supply v. Wash. State DSHS, 156 Wn. App. 364, 368, 234 P.3d 246 (2010) (defendants provided memorandum with declaration on good cause); Fowler v. Johnson, \_\_ Wn. App. \_\_, 273 P.3d 1042, 1045 n.2 (Div. 1, Apr. 9, 2012) (defendant had declaration submitted); Rosander, 147 Wn. App. at 405 (driver's accident report to the insurer was admitted into evidence, but the decision does not reflect whether it was admitted without objection or was admitted as attachment to affidavit of insurer as a business document).

<sup>26</sup> 26 Wn. App. 571, 575, 613 P.2d 557 (1980) (Hearsay evidence in affidavits is inadmissible and may not be considered by the court. 2 S. Gard, Jones on Evidence s 8:2 (1972 & Supp. 1979). See CR 12(b), 43(e)(1), 56(e); ER 801, 802. Further, a trial judge is presumed to know the rules of evidence and is presumed to have considered only admissible evidence. In re Harbert, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975)).

<sup>27</sup> Farmers Ins. Co. of Wash. v. Waxman Indus., Inc., 132 Wn. App. 142, 145, 130 P.3d 874 (2006) (adjustor and attorney failed to take action); TMT Bear Creek Shopping Ctr. Inc., v. Petco, 140 Wn. App. 191, 199-202, 165 P.3d 1271 (2010) (Defendants' counsel made affidavit to support because the evidence of defense was a set of legal arguments

In particular, Morin v. Burris is instructive, and the difference in the outcomes of the three cases in that decision illustrate that appellant's arguments are correct in this matter. In Morin and Matia the court affirmed the denial of the motion to vacate. In Gutz the court overruled the trial court's denial of the motion to vacate. Like the present case, Morin provided no declarations to support the motion and merely provided the court with pre-litigation communications. The court held that Morin failed to provide substantial evidence to warrant vacating the default.<sup>28</sup> Matia was denied because the motion was filed after one year from default.<sup>29</sup>

In contrast, Gutz was allowed to vacate the judgment because the defendant provided an affidavit as to defenses, and there was evidence that prior counsel for the defendant had concealed the default from the adjustor, which evidence was provided by the adjustor and trial counsel through their affidavits.<sup>30</sup> All the declarations contained admissible evidence within the personal knowledge of the declarants.

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based on admitted facts); Morin v. Burris, 160 Wn.2d 745, 758-59, 161 P.3d 956 (2010). (attorney and adjustor declaration of concealment by defense counsel).

<sup>28</sup> Morin, 160 Wn.2d at 750-51, 758.

<sup>29</sup> Id.

<sup>30</sup> Id. at 758-59.

3. RESPONDENTS' RELIANCE ON "OTHER EVIDENCE" IN THE RECORD IS UNPERSUASIVE AND EVIDENCE RELIED UPON BY RESPONDENTS WAS NOT IN THE RECORD AT THE TIME THE MOTION WAS RULED UPON

Respondents' argument also seems to suggest that the court can look to other evidence in the record, particular the answer to the complaint, to find evidence of a prima facie defense.<sup>31</sup> While the respondents generally cite the proposition from Calhoun and C. Rhyne & Assoc. that the court may look into the evidence in the record, there is no support for such an argument in the present case.

First, as a factual issue, the respondents' answer to the complaint is not part of this record, and the court can take judicial notice of the fact that the Tangs filed their answer to the summons and complaint on December 22, 2011 after the order to vacate the default judgment was entered.<sup>32</sup> Any answer that can be provided by defendants-respondents was not part of the record when the motion to vacate was decided, and cannot be entertained in this appeal.<sup>33</sup>

Second, the cases cited by respondents discuss the ability of the court to look to other evidence in the record, or filed with the court, to

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<sup>31</sup> Resp't's. Br. at 14-15.

<sup>32</sup> See Superior Court Docket; Appellant will supplement the record if the court requires. Also, the answer is not included in the designation of clerk's papers.

<sup>33</sup> Moreover, the answer was improperly filed. CR 55 prohibits a party from filing responsive pleadings once the default is entered. Here, there is an extant default order entered on August 9, 2011, that has not been vacated.

support evidence of a defense.<sup>34</sup> In the present case, respondents had no other evidence except Mr. Wais' two declarations and the unsworn, hearsay letter from GEICO's adjustor from prior to the litigation. Quite simply, respondents provided no further evidence to support the motion to vacate.

4. WITHOUT ADMISSIBLE EVIDENCE, THE RESPONDENTS LACKED SUBSTANTIAL EVIDENCE SUFFICIENT TO SUPPORT THEIR CR 60 MOTION

Respondents have provided no statements that are not hearsay or otherwise lacking in personal knowledge. Mr. Wais cannot testify about the accident. The letter from GEICO is summary and conclusory based on other statements evidence that are not provided or referenced in the document and is not sworn to by any declaration or affidavit. Respondents provided no personal declarations of fact. All the statements respondents submitted fail to pass hearsay and personal knowledge scrutiny and are therefore not evidence properly before the trial court.

Respondents cite no authority that CR 60 is exempt from hearsay or personal knowledge requirements. General rules of evidence still apply under CR 60 and the moving party must present substantial admissible evidence to prevail. As such, the order to vacate is reversible

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<sup>34</sup> *C. Rhyne & Assoc. v. Swanson*, 41 Wn. App. 323, 327-328, 704 P.2d 164 (1985) (the court had substantial evidentiary documents in the court file to support looking past the inadequate affidavits on the motion to vacate).

because it was abuse of discretion to grant the motion based solely on non-evidentiary statements presented to the trial court by the respondents, especially when appellant timely objected to the trial court.<sup>35</sup>

D. RESPONDENTS' SUPPORT FOR EXCUSABLE NEGLIGENCE IS DEFICIENT ON ITS FACE AND CANNOT ON ITS OWN SUPPORT A CR 60 MOTION.

The evidence provided by respondents to prove excusable neglect – even if admissible – was insufficient to demonstrate excusable neglect. Counsel's affidavit did not provide any evidence that the respondents were illiterate, substantially deficient in English, or otherwise unable to assist in responding to the complaint. Further, respondents were represented by counsel at the time they were served, and that negates any claim of excusable neglect when the respondents admit to service of the summons and complaint, but merely failed to provide it to counsel.

1. THE ONLY EVIDENCE OFFERED WAS INADMISSIBLE TESTIMONY BY RESPONDENTS' TRIAL COUNSEL THAT RESPONDENTS WERE UNSOPHISTICATED OR HAD LIMITED COMPREHENSION OF ENGLISH

The only evidence of excusable neglect provided in the motion below was Mr. Wais' declaration, which only stated, "*Defendant, who is relatively unsophisticated and speaks only poor English as a second language, did not inform GEICO of notice of the lawsuit.*"<sup>36</sup> That was

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<sup>35</sup> *In re Marriage of Martin*, 22 Wn. App. 295, 297, 588 P.2d 1235 (1979) (it is an abuse of discretion to enter order based primarily on inadmissible evidence).

<sup>36</sup> CP 74, Wais Decl. in Supp. of Mot. to Vacate, ¶5.

the sole evidence offered by respondents to support excusable neglect. No affidavits were provided by defendants to evidence their level of literacy, or what level of English comprehension defendants had.<sup>37</sup> It is also significant that there is no statement as to Mrs. Tang's literacy level anywhere in the record.

Counsel's statement on its own is not sufficient evidence to support excusable neglect. It offers nothing but conclusory, self-serving opinion by counsel for the respondents. It suffers from the same infirmities that plague the respondents' proof of defense, as detailed in Section C above. There is a complete absence of any factual showing that the Tangs are illiterate, that they have no ability to read English, or even what their English reading level actually is. The statement is also lacking in any facts supporting a lack of sophistication, just a conclusory statement of being unsophisticated. Without specific facts establishing lack of sophistication or illiteracy, it is arguably abuse of discretion to allow that non-specific opinion statement to serve as sufficient evidence to support a motion to vacate.

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<sup>37</sup> These are all criteria used by the court in assessing the excuse of lack of comprehension. In the cases cited by respondents, the defendants seeking to overturn the judgment all demonstrated actual illiteracy in English.

2. EVEN IF COUNSEL’S AFFIDAVIT IS SUFFICIENT ON THE ISSUE OF SOPHISTICATION, THE WEAK EVIDENCE OF A PRIMA FACIE DEFENSE INCREASES SCRUTINY OF EXCUSABLE NEGLIGENCE

As the respondents appear to concede – by citing Rosander and TMT Bear Creek – where the evidence of a defense is less than conclusive, or is otherwise weak, the evidence of excusable neglect will be strictly scrutinized, especially where the defendants admit to service of the summons and complaint.<sup>38</sup> Even if the court finds that Mr. Wais’ declaration as to respondents’ linguistic skills and alleged lack of sophistication is admissible, such evidence of excusable neglect is strictly examined for its sufficiency, and the rule requires strong evidence of excusable neglect.

3. RESPONDENTS FAIL TO CITE ANY AUTHORITY SUPPORTING EXCUSABLE NEGLIGENCE ON THE LIMITED FACTS BEFORE THE TRIAL COURT

“Lack of sophistication” or “poor English skills” on its own does not support excusable neglect. No authority has found excusable neglect evidence similar to what respondents’ provided through their counsel. The court’s typically require more factual evidence than conclusory

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<sup>38</sup> TMT Bear Creek, 140 Wn. App. at 305 (the first two elements under White are a sliding scale. Where the evidence of the defense is not strong, the excusable neglect is reviewed strictly); Rosander, 147 Wn. App. at 400-405 (the defense was equivocal and not strong rejecting taking the evidence in the light most favorable to the moving party, and the evidence of excusable neglect needed to be substantial. Court found insufficient evidence of excusable neglect).

allegations as to literacy limitations, and generally require further evidence of the defendants' history with English on a day to day basis.

As the court held in Hwang, lack of sophistication does not mean that the moving party could not have read and followed the directions in the summons. The defendant did not state that they could not read, and nothing prevented defendant from reading the complaint and summons.<sup>39</sup> Hwang is also significant because, as in the case before this Court, the defendant did not contest that they were served. The court's holding supports the contention that if served, it is not a defense that defendant is unsophisticated. Arguably, unless they can demonstrate that they cannot read at all, failure to respond is inexcusable.<sup>40</sup>

Even the dissent in Little v. King agreed that lack of sophistication on its own is not enough to support excusable neglect. The dissenting court wanted to argue that there was sufficient evidence to support the order to vacate, however, they acknowledged that lack of

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<sup>39</sup> Hwang v. McMahill, 103 Wn. App. 945, 952, 15 P.3d 172 (2005). *See also Pioneer Inv. Serv. v. Brunswick Assoc.*, 507 U.S. 380, 113 S.Ct. 1489 (1993) (inadvertence, ignorance, or mistake as to the procedures is not excusable neglect by itself).

<sup>40</sup> Moody v. Reichow, 38 Wash. 303, 80 P. 461 (1905), (poor English skills were insufficient excuse, and no affidavit evidencing that the defendant failed to understand English well enough to respond).

familiarity with the justice system, lack of sophistication, poor comprehension, are not on their own enough.<sup>41</sup>

- a. IF RESPONDENTS HAD BEEN PRO SE, THE RESULT MIGHT BE DIFFERENT, BUT THEY WERE ACTUALLY REPRESENTED BY COUNSEL WHO ALSO HAD KNOWLEDGE OF THE CLAIMS BY PLAINTIFF NGUYEN.

Lack of sophistication may be a factor in excusable neglect, but courts considering this have stated that it would potentially only be supported in circumstances where the defendant is *pro se*.<sup>42</sup> However, such a circumstance is not at issue in the case for respondents. The respondents were represented by counsel in a claim by State Farm for the property damages related to the same accident as Mr. Nguyen's claims. That counsel appeared to defend that claim before Mr. Nguyen's suit was served on respondents.

The fact that counsel also received actual notice of Nguyen's claims, over three months before the default judgment was taken, is significant in demonstrating that lack of sophistication is not enough to meet excusable neglect when you had the ability to bring in your already retained counsel to assist you. And that same counsel appeared to defend

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<sup>41</sup> Little v. King, 160 Wn.2d 696, 719, 161 P.3d 345 (2007), *citing* TCI Group Life Ins. v. Knoebber, 244 F.3d 691, 698 (9<sup>th</sup> Cir. 2001), Briones v. Riviera Hotel & Casino, 116 F.3d 379, 381 (9<sup>th</sup> Cir. 1997).

<sup>42</sup> Enron Oil Corp. v. Diakuhra, 10 F.3d 90, 96-97 (2<sup>nd</sup> Cir. 1993) (omissions by *pro se* defendant may constituted excusable neglect); Canfield v. Van Atta Buick, 127 F.3d 248 (2<sup>nd</sup> Cir. 1997); Briones at 381 (While in Briones, a lack of "English proficiency" was not enough on its own, the court suggested it may have been had the person been *pro se*).

the Tangs in Nguyen's suit by bringing the motion to vacate. Respondents' case is not the case where a *pro se* rule would apply.

Every other case where the defendant's lack of skills are sufficient on their own to constitute excusable neglect involve extenuating, collateral issues that were deemed to overbear the defendant from responding, such as depression related to the death of a close relative<sup>43</sup>, mental incapacity or illness<sup>44</sup>, or complete illiteracy<sup>45</sup>. However, none of these categories apply in respondents' case as there is no evidence of these factors in the record.

4. RESPONDENTS' CASE CITATIONS ARE NOT SUPPORTIVE TO FIND EXCUSABLE NEGLIGENCE AND ARE CLEARLY DISTINGUISHABLE.

In Washington, a poor command of English has never supported excusable neglect on its own. In Moody v. Reichow, the only excuse provided was poor English skills and that the defendant gave the matter to their counsel to handle. The court found that the affidavit supplied by the defendant failed to state that the defendants did not understand

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<sup>43</sup> Knoebber, 244 F.3d at 698.

<sup>44</sup> Stirm v. Puckett, 107 Idaho 1046, 695 P.2d 431 (1985); Brothers v. Brothers, 71 Mont. 378, 230 P. 60 (1924).

<sup>45</sup> JJ Sports Productions Inc. v. Prado, 2008 WL 822159 (E.D. Cal. 2008), citing Pioneer, 507 U.S. at 392.

English, and they seemed to understand enough English to aid in resisting the default motion.<sup>46</sup>

Respondents cite no cases in Washington to rebut Reichow, and instead rely on citations from California and North Dakota.<sup>47</sup> None of these cases are persuasive because each of these cases dealt with completely illiterate defendants who demonstrated their lack of comprehension to the court by personal affidavit and/or by testimony in the court.

In Brown v. Martin, the Portuguese farmer was illiterate in English, could not read or write, but he did speak English sufficiently to work with his counsel. The court held that illiteracy might possibly constitute excusable neglect, however, the default was affirmed because the defendant failed to make any factual showing in affidavit demonstrating evidence of a *bona fide* defense.<sup>48</sup>

In N. Commercial v. Goldman, the court upheld the order to vacate a default entered against an illiterate Russian family who could speak little English. However, the court made no finding on literacy

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<sup>46</sup> 38 Wash. 303 (1905) (illiteracy alone is insufficient).

<sup>47</sup> Resp't.s Br., n.6.

<sup>48</sup> 23 Cal. App. 736, 139 P. 823 (1914).

being the central factor, but instead emphasized the clear defense to the claim in overturning the default.<sup>49</sup>

Respondents' reliance on Consortium Consulting v. Chee Tsai is also misplaced. The case is a slip opinion order amounting to one to two paragraphs, with no recitation of the facts or evidence in support of the motion to vacate. The case is quite simply a one line conclusion that "lack of English proficiency" was a factor.<sup>50</sup> Without more, it is difficult to see how this case is persuasive or even relevant. It certainly does not hold that poor English skills alone are sufficient to constitute excusable neglect.

Likewise, Thompson v. Goubert is also unpersuasive. The party moving to vacate the default was not illiterate, but merely unfamiliar with the legal process. The court based its decision not on linguistic ability but lack of experience with the courts. Also, the moving party had submitted a verified answer to the complaint and affidavits supporting an absolute defense to the claim.<sup>51</sup> Again, the facts are no way similar to the present case. It should also be noted that lack of sophistication as the sole factor in excusable neglect was later rejected in California.<sup>52</sup>

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<sup>49</sup> 164 N.W. 133, 134-35, 37 N.D. 542 (1917).

<sup>50</sup> 2 A.D.3d 177, 178, 768 NYS 2d. 213 (2003).

<sup>51</sup> 137 Cal.App.2d 152, 154-55, 289 P.2d 887 (1953).

<sup>52</sup> See *supra*, Knoebber (2001); Briones (2003); JJ Sports (2008); Pioneer (1993).

Berri v. Rogero is also not the case before this Court. In Berri, unlike the present case, the party moving for vacation of default was completely English illiterate in writing and in speech. Further, the moving party had translated affidavits and live testimony in the court, which are lacking in respondents' case. Finally, the trial court had a complete record of defenses in the record from litigation prior to the default order.<sup>53</sup> Berri cannot be persuasive because the court there granted relief on a set of facts that are in no ways similar to respondents' case.

Respondents did not provide evidence of illiteracy. Respondents did not provide any evidence that they could not read the summons and complaint. Their counsel only made a vague claim that they lacked sophistication and that one of the defendants spoke English poorly. Yet, as the courts have continuously noted, lack of sophistication is not a defense to failure to answer, by itself. Without more evidence (which respondents have never provided) granting the motion to vacate was an abuse of discretion, because there was insufficient evidence to support excusable neglect.

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<sup>53</sup> 168 Cal. 736, 736-739, 145 P. 95 (1914).

### III. CONCLUSION

Defaults may be disfavored, but they should be enforced where the defendants failed to appear after proper notice, and they should not be vacated unless the defendant proves the facts necessary to obtain relief. The respondents failed their obligation of production of evidence in the motion to vacate.

The Tangs were served. The Tangs failed to give the summons and complaint to their counsel. Tang's counsel failed to follow up on the notice that Nguyen had his own lawsuit three to four months before default judgment was entered. These are undisputed facts in the record.

The only support for the motion to vacate was hearsay, and affidavits without personal knowledge, and which were incomplete in detailing sufficient facts to support the motion to vacate. Tangs were not illiterate, and there is no evidence that they could not read English or communicate with their counsel. There is no reasonable evidence why their counsel never responded to actual notice of the suit in August 2011.

With this factual record, the respondents are shown to have simply ignored the service, not provided notice to counsel, and counsel failed to follow up. This is not sufficient evidence of strong defense, and it fails to provide substantial evidence of excusable neglect. It also demonstrates a lack of diligence in waiting four months to seek to

challenge the default order. Respondents certainly could have easily challenged the default order in August 2011 when counsel learned of it, but they didn't. That is not due diligence.

Likewise, there is no support for any authority that permits this court to interpret that the order to vacate the November 28, 2011 judgment automatically extends to the August 9, 2011 default order. The respondents did not appeal that alleged error in the trial court's December 2011 order to vacate the judgment.

Based on these arguments and appellant's arguments in the main brief, the motion to vacate the default judgment was an abuse of discretion. The December 16, 2011 order vacating the November 28, 2011 judgment should be reversed.

DATED this 13<sup>th</sup> day of June, 2012.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

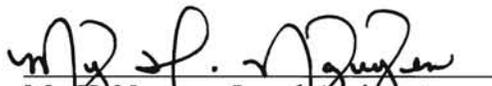
On the below written date, I caused delivery of a true copy of this Reply Brief to the following via Hand Delivery:

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