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NO. 708635

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION I

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INNA MEDNIKOVA and VYACHESLAV AVADAYEV,

Respondents,

v.

MARE MORSE and MARTIN MORSE,

Appellants.

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Appeal from the Superior Court for King County  
Cause No. 13-2-19004-4 SEA

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**BRIEF OF APPELLANTS**

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## **I. INTRODUCTION**

This case involves a default order and default judgment taken hurriedly against defendants in a personal injury action in a manner that overstepped the bounds of equity and, through artifice and questionable tactics, avoided the merits and by design failed to accomplish a just result.

There are two primary issues presented to this Court. First, whether the trial court erred when it refused to vacate the Default Order entered against defendants Morse when they appeared through their attorney on the same day they learned of the default order and promptly filed a motion to vacate that order because they had mistakenly, but reasonably, believed that their insurance carrier was handling the defense of the lawsuit; Second, whether the court erred in granting plaintiff Mednikova's Motion and Declaration for Default Judgment when Morse showed a prima facie defense to damages and no prejudice would result.

Mare and Martin Morse seek vacation of King County Superior Court's Default Order entered on May 31, 2013 and reversal of the trial court's decision to deny Morse's motion to vacate that default order. CP 7, 8, 191-192. Further, Morse seeks vacation of the Default Judgment entered on August 1, 2013 and reversal of the trial court's order granting Mednikova's motion for Default Judgment. CP 189-192. Finally, Morse

seeks reversal of the denial of their motion for reconsideration as to both Default Orders.

The trial court clearly erred in entering these default orders and equity, coupled with applicable law, requires that this matter be tried on the merits.

## **II. ASSIGNMENTS OF ERROR**

- A. The Trial Court Erred in Denying Morse's Motion to Vacate the Default Order Dated August 1, 2013.**
- B. The Trial Court Erred in Granting Mednikova's Motion for Default Judgment Dated August 1, 2013.**
- C. The Trial Court Erred in Entering a Default Judgment Which is Not Supported by Substantial Evidence.**
- D. The Trial Court Erred in Denying Morse's Motion for Reconsideration.**
- E. The Trial Court Erred in Entering the Findings of Fact and Conclusions of Law dated August 1, 2013.**

## **ISSUES PRESENTED**

- A. Whether There is Good Cause to Vacate the Default Order When Defendants/Respondents' Failure to Timely Appear was the Result of Excusable Neglect and When they Acted Diligently Upon Learning of the Default?**
- B. Whether the Default Judgment Should be Vacated Because Defendants/Respondents Have Shown a Prima Facie Defense as to Damages and No Prejudice to Any Party Would Result?**

**C. Whether There is Insufficient Evidence to Support the Default Judgment?**

**D. Whether the Findings of Fact and Conclusions of Law Were Based on Sufficient Evidence and Pursuant to Applicable Law?**

### **III. STATEMENT OF THE CASE**

This case arises from a personal injury action filed by Mednikova and Avadayev (collectively “Mednikova”) against Mare and Martin Morse (collectively “Morse”). The parties were involved in a motor vehicle accident on May 11, 2010. On May 17, 2010, Mednikova’s counsel contacted Morse’s motor vehicle insurer, Omni Insurance Company (“Omni”), and for the next two years Omni and Mednikova’s counsel engaged in ongoing settlement negotiations. CP 83-84. Omni also gave notice to its insureds, Morse, of Mednikova’s claims and informed them that Omni would handle the defense of these claims against Morse. CP 85-86.

Just days before the statute of limitations ran, unbeknownst to Omni, Mednikova filed a lawsuit on May 7, 2013, and served Mare Morse the following day. CP 85-86. When the Summons and Complaint were served on Mare Morse, she was told by the process server that the matter was a “simple tort” and she should not worry about it. CP 85-86. Mrs. Morse therefore reasonably believed, based on her understanding that

Omni was handling the defense of the claim, that any response or further defense would be taken care of by Omni. CP 85-86.

Mednikova's counsel never notified Omni that a lawsuit had been filed. Instead, Mednikova's counsel simply stopped taking calls from Omni in May of 2013. CP 83-84. On or about May 28, 2013, an Omni agent tried to call Mednikova's counsel twice for a status update and both times the phone was answered and immediately hung up. Omni again tried calling twice on June 4, 2013 and on June 13, 2013, and each time the phone was picked up and immediately hung up. CP 83-84. Unable to contact Mednikova's counsel, Omni did not become aware of the lawsuit until approximately June 13, 2013. CP 83-84.

Mednikova filed a motion for default on May 31, 2013 – just 23 days after service of process was complete. CP 9-25. That motion was granted the same day. CP 7-8. However, it was not until June 13, 2013 that Omni learned their insureds had been served with the Summons and Complaint. Omni then assigned the matter to Michael P. Scruggs of Schlemlein Goetz Fick & Scruggs, PLLC, for defense on June 21, 2013, and defense counsel filed a Notice of Appearance on behalf of Morse that same day. CP 26-28. June 21, 2013 was also the first day Morse became aware of the default order.

Upon discovering that the Default Order had been obtained by Mednikova's counsel, counsel for Morse called Mednikova's counsel, Zara Sarkisova, to request that she voluntarily vacate the default order. Sarkisova refused and Morse then filed a motion with the Superior Court to Vacate the Default Order. CP 64-82. Mednikova noted their Motion and Declaration for Judgment to be heard on the same day as Morse's Motion to Vacate Default Order. CP 31-61. Those motions were both decided without oral argument and without hearing or taking testimony, on August 1, 2013. Morse's Motion to Vacate Default Order was denied and Mednikova's Motion for Default Judgment was granted. CP 189-192.

Morse then filed a Motion for Reconsideration of both orders which was denied on August 23, 2013. CP 195-213, 228. Morse's Notice of Appeal was timely filed on September 10, 2013. CP 229-242.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

A trial court's decision to vacate a default judgment or order is reviewed under the abuse of discretion standard. Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *In re Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58, 63 (1999).

Proceedings to vacate defaults are equitable in nature, and relief should therefore be granted or denied in accordance with equitable principles. A trial court deciding such motions should exercise its discretion liberally and equitably, so that substantial rights are preserved and justice between the parties is “fairly and judiciously done.” *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 238, 974 P.2d 1275, 1280 (1999). Where the determination of the trial court results in the denial of a trial on the merits, an abuse of discretion may be more readily found than in those instances where the default is set aside and a trial on the merits ensues. *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581, 584 (1968).

It is well established that defaults are disfavored because the law favors a determination of controversies on their merits. *Hwang v. McMahill*, 103 Wn. App. 945, 950-51, 15 P.3d 172, 175 (2000). The overriding policy is that controversies should be determined on their merits, not by default. *Johnson v. Cash Store*, 116 Wn. App. 833, 840, 68 P.3d 1099, 1103 (2003). Washington Courts recognize that justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. In fact, justice might, at times, require a default or a delay. *Shepard Ambulance, Inc.*, 95 Wn. App. at 238.

At the same time, however, courts have recognized “the necessity of having a responsive and responsible system which mandates compliance with judicial summons. The court's principle inquiry in balancing these competing policies is whether or not justice is being done.” *Hwang*, 103 Wn. App. at 950-51. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome. It is against this backdrop that a trial court should exercise its discretion to grant or deny motions to vacate defaults. *Shepard Ambulance, Inc.*, 95 Wn. App. at 238.

**B. The Trial Court Erred in Denying Morse’s Motion to Vacate the Default Order.**

**i. Good Cause Existed to Vacate the Default Order.**

The Superior Court Civil Rules provide different standards for setting aside default *orders* and default *judgments*. CR 55(c)(1), CR 60(b); *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wn. App. 266, 271, 818 P.2d 618 (1991). A default order may be set aside upon a showing of good cause. CR 55(c)(1). To establish good cause under CR 55, a party need only demonstrate excusable neglect and due diligence. *Seek Systems*, at 271.

**a. Morse's Failure to Timely Appear was the Result of Excusable Neglect.**

Morse's failure to formally appear within 20 days of service of process was the result of excusable neglect because: (1) Morse reasonably relied on their insurance company, Omni, to defend them in the litigation; (2) Mednikova's counsel failed to make Omni aware of the lawsuit despite ongoing communication for two years prior; and (3) counsel for Mednikova purposefully evaded communication with Omni, making the existence of a lawsuit difficult and time consuming to discover. There was no willful delay or inexcusable neglect by Morse.

Morse knew that Omni was handling Mednikova's claims and therefore reasonably relied on Omni to protect their interests in any litigation. Additionally, when Mrs. Morse was served with the Summons and Complaint, the process server assured her that she had nothing to worry about. CP 85-86. Therefore, Morse did not formally appear within the required 20 days, not because they wanted to ignore or delay the lawsuit, but rather because they reasonably believed that their insurance company would appear or had already appeared on their behalf.

Washington courts have found excusable neglect in several instances where the defendants were aware of the lawsuit against them and failed to respond. *See, White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1966)

(defendant failed to respond because he believed the insurance company was defending the lawsuit and the insurance company believed the defendant was represented by independent counsel); *Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (2004) (defendant failed to respond due to internal miscommunication regarding whether the paralegal or the manager was supposed to give the claims to the internal claims administrator); *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986) (defendant did not understand that he needed to respond because he believed his insurance company would).

Particularly helpful in this instance is Washington precedent which clearly holds “a genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a mistake for purposes of vacating a default judgment.” *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019, 1022 (1999) *amended*, 3 P.3d 207 (Wn. Ct. App. 2000) *citing Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987) (“a delay solely attributable to an oversight or mistake on the insurance carrier's part will excuse a default where the insured has no reason to believe his interests are not being protected”). *See also, Calhoun*, 46 Wn. App. at 621 (holding that the late appearance was a mistake and excusable for purposes of a motion to vacate a default when the defendant did not answer the

summons and complaint because he believed his insurer was already involved in the case).

Like Morse, the defendant in *Norton* did not inform his insurance company when he was served with the summons and complaint because he reasonably assumed that his insurance company was handling the claim on his behalf. *Norton*, 99 Wn. App. at 125. Plaintiff Norton thereafter obtained a default and several months later defendant Brown filed a motion to vacate. That motion was denied, as was defendant's motion for reconsideration on the issue. However, Washington Court of Appeals reversed, finding the misunderstanding between Brown and his insurer regarding the obligations upon service of the summons and complaint constituted a mistake on behalf of the insurer and excusable neglect on behalf of Mr. Brown, and held that the trial court's decision not to vacate the default was an abuse of discretion. *Norton*, at 124-125.

The *Norton* Court also clarified that it is the named defendant, not the insurance company, whose actions are considered to determine whether the failure to timely appear is excusable, stating "a review of the transcript of the court's oral decision on reconsideration makes it clear that the court focused more on the insurance company's failure to contact Mr. Brown than it did on any excusable neglect on Mr. Brown's part. Because

the case law does not support the trial court's conclusion, ***this was an abuse of discretion.***" *Norton*, at 125 (*Emphasis added*).

The facts of the *Norton* case are identical to those presented in this case, except that in *Norton*, the plaintiff's counsel even sent a courtesy copy of the summons and complaint to defendant's insurer prior to service. In this matter, despite two years of prior communication with Omni, Mednikova's counsel did not extend the professional courtesy of notifying Omni that the lawsuit had been commenced. In fact, Morse's insurance company tried to contact Mednikova's counsel regarding the status of the lawsuit. However Mednikova's counsel ceased all communication with Omni in May of 2013. CP 83-84. This appears to have been purposeful and strategic on behalf of Mednikova to take the default hurriedly without notice. Indeed, the motion for default order was filed just 23 days after service of process was complete.

Like mistake or excusable neglect, misrepresentation or other misconduct justifies vacation of a judgment under CR 60(b)(4). *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280, 290 (2009). Party misconduct is also grounds to grant reconsideration. CR 59(a)(2). Washington precedent clearly holds that a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable. Specifically, the

Court should find “excusable neglect” for purposes of vacating a default when an alleged tortfeasor acted with due diligence but the victims' counsel attempted to conceal the existence of the litigation. *Morin v. Burris*, 160 Wn.2d 745, 755-759, 161 P.3d 956 (2007).

In *Morin*, our Supreme Court observed “[Plaintiff’s] counsel had no duty to inform [insurer] of the details of the litigation. But counsel's failure to disclose the fact that the case had been filed and that a default judgment was pending when the [Plaintiff's] claim representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation.” *Morin*, 160 Wn.2d at 759. The *Morin* Court remanded on this issue, holding that when the failure to appear may have been reasonably excused by the conduct of the opposing party, a default judgment should be vacated. *Morin*, at 750.

Morse’s late appearance in this case was in part due to the artful and less than forthcoming conduct of Mednikova’s counsel. Omni attempted to call Mednikova’s counsel several times in the weeks prior to the running of the statute of limitations to inquire into the status of the claim. CP 83-84. However, each time the call was picked up and immediately hung up. CP 83-84. Omni was never able to reach anyone and could not leave a message. CP 83-84. At least two of the calls placed

by Omni were coincidentally between the time Morse was served and when Mednikova obtained the Order of Default. CP 83-84. Counsel for Mednikova can provide no reasonable explanation as to why Omni's calls were avoided and therefore it appears that this was a tactical decision made by Mednikova to avoid having to disclose the fact that a lawsuit had been filed.

Mednikova and counsel cannot credibly assert that they were unaware of Morse's and Omni's intention to defend this matter. Based on its prior dealings with Omni, Mednikova should have understood that Morse clearly intended to defend in the action and should not have actively tried to hide the existence of the lawsuit. *Norton*, 99 Wn. App. at 126.

It is clear that the intent of Mednikova's counsel was to conceal the existence of the litigation and avoid the merits of this case by pursuing a quick default against Morse. Only three days before the statute of limitations ran Mednikova quickly filed the complaint and served Morse. Mednikova then waited only three days after the answer was due before filing their motion for default order. It is undeniable that Mednikova wanted a default judgment in order to avoid having to prove their claims and they successfully obtained one, but only through disingenuous conduct. This type of misconduct is grounds to vacate a default order and

judgment. *Mitchell*, 153 Wn. App. at 825; *See also, Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526, 532 (1990). Further, to reward Mednikova for such behavior would be unjust and inequitable.

The failure to formally appear within 20 days was caused by an honest mistake by Morse regarding their obligations upon service of process, as well as Omni's inability to contact Mednikova's counsel and Mednikova's counsel's purposeful failure to apprise the insurance carrier of the lawsuit. This amounts to excusable neglect for purposes of vacating a default.

The facts in this case clearly show excusable neglect and it was an abuse of discretion to hold otherwise.

**b. Morse Acted Diligently Upon Notice of the Default Order.**

A party must use diligence in asking for relief following notice of entry of a default. What constitutes a reasonable time to bring a motion depends on the facts and circumstances of each case. Major considerations in determining a motion's timeliness are whether the nonmoving party would be prejudiced due to the delay and whether the moving party has good reasons for failing to take appropriate action sooner. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999).

A default judgment is normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party. *Norton*, 99 Wn. App. at 126. That is not the case here. The delay, if any, did not cause any disruption or pause in the trial schedule. Morse's neglect in appearing late was not only excusable, it was corrected almost immediately. The diligence of Morse's formal appearance and motion to vacate simply cannot be disputed.

Mednikova filed their lawsuit four days before the statute of limitations ran. Mednikova then filed their motion for default order 23 days after service of process was complete. Omni did not assign the case to defense counsel until June 21, 2013, which is when it was first discovered that an order of default had already been entered on May 31, 2013. Defense counsel immediately filed a Notice of Appearance that same day and contacted Mednikova's counsel, Zara Sarkisova, requesting that the Default Order be vacated voluntarily. Once Mednikova's counsel refused, Morse's counsel began drafting the motion to vacate. CP 64-70. The motion was filed only two weeks after Morse first learned of the Default Order. Morse's diligence cannot be questioned.

Further, there was and is no conceivable prejudice to Mednikova caused by the minimal delay in filing the motion to vacate the default order. The only delay in bringing the motion was approximately two

weeks from the time Morse learned of the default. That brief two week delay was agreed upon by the parties after Mednikova's counsel requested that both Morse's Motion to Vacate and Mednikova's Motion for Default Judgment be noted for the same day to accommodate scheduling. Therefore, to the extent this motion could have been filed any sooner, any plausible "delay" was agreed to and even suggested by Mednikova's counsel. To the extent that any delay occurred, it cannot legitimately be claimed by Mednikova as the basis for any prejudice.

Morse's late appearance was the result of a misunderstanding between the insurer and insured and the tactics utilized by Mednikova. Washington precedent makes clear that this amounts to excusable neglect for purposes of vacating a default judgment. Further, almost no delay occurred and no prejudice to Mednikova resulted. Therefore, good cause to vacate the default order was clearly established and the trial court abused its discretion by denying Morse's Motion to Vacate the Default Order. CP 191-192.

**C. The Trial Court Erred in Granting Mednikova's Motion for Default Judgment.**

**i. A Default Judgment Cannot be Entered When No Enforceable Default Order has Been Entered.**

Pursuant to KCLR 40(b), a party may move for a default judgment only upon the entry of an order of default. KCLR 40(b). In this case, a

default judgment should never have been entered because there was good cause to vacate the default order and the trial court abused its discretion in failing to do so. A holding by this Court that the trial court erred in entering the default *order* requires reversal of the default *judgment*, as the judgment was entered in reliance on the Order of Default. However, even if the more rigorous requirements for vacating a default *judgment* were applied, Morse is entitled to have this judgment vacated.

**ii. The Default Judgment Must be Vacated.**

Any discussion of default judgments begins with the proposition that they are not favored in the law. A default judgment has been described as one of the most drastic actions a court may take to punish disobedience to its commands. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). Proceedings to vacate default judgments are equitable in nature, and relief should therefore be granted or denied in accordance with equitable principles. It is against this backdrop that a trial court should exercise its discretion to grant or deny a motion to vacate a default judgment. *Shepard Ambulance, Inc.*, 95 Wn. App. at 238.

The discretion the trial court is called upon to exercise in deciding whether to set aside a default judgment concerns two primary and two secondary factors which must be shown by the party requesting that the

default be set aside. The primary factors are: 1) that there is substantial evidence to support, at least *prima facie*, a defense to the claim; and 2) that the moving party's failure to timely appear was the result of mistake, inadvertence, surprise or excusable neglect. The two secondary factors are whether the moving party acted with due diligence and whether substantial hardship for the opposing party will result. *White*, 73 Wn.2d at 351-352. Two of these factors, excusable neglect and due diligence, have already been established in sections B(i)(a) and B(i)(b) above and are hereby incorporated by reference.

Each of the factors must be applied in the context that default judgments are not favored and motions to vacate a default judgments are equitable proceedings and the overriding concerns of the court is to do justice. *Calhoun*, 46 Wn. App. at 620.

Mednikova is not entitled to a default judgment because Morse has at the very least a *prima facie* defense to the claims asserted against them. This is true despite the fact that Morse has not had the opportunity to conduct the discovery they are entitled to. Further, Morse's failure, if any, to timely appear was the result of excusable neglect and Morse acted promptly and diligently upon learning of the default. Finally, Mednikova would in no way be prejudiced if this case were to be properly adjudicated

on its merits. Justice will not be served if the default judgment against Morse is not vacated.

**a. Morse can Show at Least a Prima Facie Defense to Damages.**

In determining whether a party is entitled to vacation of a default judgment, a trial court's initial inquiry is whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff's claims. Where a party moving to vacate a default judgment is able to demonstrate a strong or virtually conclusive defense to an opponent's claim, scant time is spent inquiring into the reasons which occasioned entry of the default provided the moving party's failure to properly appear in the action was not willful. When the moving party's evidence supports no more than a prima facie defense, the reasons for the failure to timely appear will be scrutinized with greater care. *Johnson*, 116 Wn. App. at 841-842. Similarly, where the defendant moves promptly to vacate and has a strong case for excusable neglect, the strength of the defense is less important to the reviewing court. *C. Rhyne & Associates v. Swanson*, 41 Wn. App. 323, 328, 704 P.2d 164, 167 (1985).

The requirement for a prima facie defense ensures that a subsequent trial is not useless. In determining whether a trial would be

useful, the trial court need only determine whether the defendant is able to demonstrate any set of circumstances that, if believed by the tier of fact, would constitute a defense to the claims presented. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202-203, 165 P.3d 1271, 1279 (2007). In determining whether there exists evidence to support a prima facie defense, “the trial court must take the evidence, and the reasonable inferences therefrom, in the light most favorable to the movant, assuming the truth of that evidence favorable to the defendant, and disregarding inconsistent or unfavorable evidence.” *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 404-405, 196 P.3d 711, 717 (2008).

A prima facie defense on the issue of damages may be sufficient to justify vacating the judgment, even if the defendant has no defense on the issue of liability. *Calhoun*, 46 Wn. App. at 620-621. If a damages award is not supported by substantial evidence, then the defaulting party will be found to have set forth a defense as to damages, which entitles them to a vacation of the damages portion of a default judgment. *Shepard Ambulance, Inc.*, 95 Wn. App. at 242 and 234. Additionally, when the damages sought are unliquidated, the party moving to have the default judgment vacated is entitled to conduct discovery because it would be

inequitable to expect a full defense of damages without the ability to conduct discovery. *Calhoun*, 46 Wn. App. at 620.

Viewing the evidence in the light most favorable to Morse, and considering the fact that there has been no opportunity for discovery, Morse has shown, at the very least, a prima facie defense to Mednikova's damages claim because Mednikova failed to provide the trial court with substantial evidence to support her damages.

The only evidence of damages presented to the trial court were unauthenticated medical bills, portions of three medical records and a declaration of only one of the plaintiffs. CP 31-61. The medical bills provided are not authenticated and Mednikova provides no expert testimony regarding the reasonableness and necessity of the bills. Further, the medical bills are attached to the declaration of Mednikova's attorney, who has no personal knowledge of the plaintiffs' injuries or treatment. CP 31-61.

The only medical records provided include; one discharge summary from Overlake Hospital dated May 17, 2010; a discharge summary from her Chiropractor dated October 29, 2010 (which is unsigned and appears to be incomplete); and a medical record from Group Health dated April 13, 2011 – almost a year after the accident. CP 148-185, Ex. G. Although the Court was only provided medical records for

three dates of service, the Court awarded Mednikova \$15,063.47 in medical specials, which included two visits to Overlake Hospital, approximately 39 chiropractic treatments and six visits to Group Health Cooperative. CP 189-190. The medical specials were clearly not supported by the evidence.

In the chiropractic discharge summary, Mednikova's chiropractor lists Mednikova's injuries but does not mention her knee. CP 148-185, Ex. G. The same is true for the Overlake Hospital discharge summary. CP 148-185, Ex. G. Mednikova stopped seeking treatment from Overlake and her chiropractor in October 2010. CP 148-185, Ex. G. Then in January of 2011 she restarted treatment, this time for a knee injury and this time at Group Health Cooperative. CP 148-185, Ex. G. The only medical record provided for this second phase of treatment was for treatment in April of 2011. CP 148-185, Ex. G. Therefore, based on the evidence provided, the first time Mednikova complained of knee pain which she now relates to the accident was almost a year after the accident. CP 148-185, Ex. G. Clearly there is no substantial evidence that her knee injury and her later treatment were related to this accident.

Although the chiropractor states in an unsigned, unauthenticated, inadmissible and seemingly incomplete, discharge summary that he believes the charges for his own treatment were reasonable and necessary,

there is no medical testimony regarding the reasonableness or necessity of the other treatment claimed by Mednikova. CP 148-185, Ex. G. Additionally, the chiropractor reveals that Mednikova was in a previous car accident two years prior. CP 148-185, Ex. G. The evidence does not support Mednikova's claim that the bills were related, reasonable or necessary.

Additionally, Vyacheslav Avadayev claims damages in the amount of \$14,000.00 for loss of consortium without offering any evidence at all to support that claim. In fact, there is no evidence that Avadayev and Mednikova are even legally married. In the Mednikova's Complaint for Personal Injuries, Avadayev is referred to as a "common law husband". CP 1-6. However, it is not possible to contract a "common law" marriage in Washington. *Meton v. State Indus. Ins. Dept.*, 104 Wn. App. 652, 655, 177 P. 696 (1919). Therefore, Avadayev is not legally entitled to make a loss of consortium claim. *Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wn.2d 87, 102, 960 P.2d 912 (1978) (holding that a claim for loss of consortium is only recognized if the injury occurs during marriage or the discovery of the injury occurred during marriage).

Mednikova's wage loss claim is supported by only a letter from her employer indicating the days she missed from work, but not whether those missed days were a result of the motor vehicle accident. CP 53.

Almost two weeks of her alleged lost wages were incurred eight months after the accident. Also there is no evidence to support Mednikova's claim of \$28,000.00 in "pain and suffering". That amount is unsubstantiated and there is no evidence to persuade a fair-minded, rational person that it is a reasonable or justified amount.

Clearly there is a lack of evidence to prove Mednikova's claim of damages and specifically, the evidence provided does not establish causation, mechanism of injury and/or reasonableness of treatment. Morse, therefore, has shown at least a *prima facie* defense to these damages, as there is no substantial evidence of the damages. Morse is entitled to have the judgment vacated. *Shepard Ambulance, Inc.*, 95 Wn. App. at 242 and 234.

Morse has established at least a *prima facie* defense even without the opportunity for discovery. However, Morse is entitled to conduct discovery on the issue of damages, both special and general, because the damages in this case are not liquidated. In fact, Washington courts are clear that it would be *an abuse of discretion*, to deny the motion to vacate the damages portion of the judgment on the grounds that the defendant did not present a *prima facie* defense when the damages are not liquidated and there had been no opportunity for discovery. *Calhoun*, 46 Wn. App. at 620-622.

In *Calhoun*, the court noted the particular difficulty presented for the defendant in developing a prima facie case to a damage award for pain and suffering without the opportunity for discovery and also the difficulty in developing a defense to the special damages claim without a defense expert. The court held that it would be *inequitable and unjust* to deny the motion to vacate the damages portion of the judgment on the ground that the defendant did not present a prima facie defense and, therefore, under these circumstances the court should focus more on the remaining factors to determine whether the default judgment was proper. *Calhoun*, 46 Wn. App. at 620-621.

Similarly, Morse should have the opportunity to conduct discovery regarding Mednikova's damages claims, especially when Mednikova provided insufficient evidence to support the alleged causation or whether the damages were actually incurred. In this case, Morse provides a strong defense to Mednikova's damages claims even without the opportunity for discovery, therefore, the judgment must be vacated.

**b. There was Good Reason for Morse's Untimely Appearance.**

The second factor to consider on a motion to vacate a default judgment is the reason for the party's failure to timely appear. As addressed above in section B(i)(a), Morse's late appearance was the result

of an honest mistake and Mednikova's inequitable attempt to conceal the existence of litigation from the Morse's insurance company, which amounts to excusable neglect.

**c. Appellants Were Diligent.**

As discussed in above in Section B(i)(b), Morse promptly took action upon learning of the default order. The delay from the time that Morse learned of the Default Order to when they filed their Motion to Vacate the Default Order was approximately two weeks. Further, that two week delay was agreed upon by Mednikova. CP 64-70. The Morse's diligence cannot be disputed.

**d. Mednikova Will Suffer No Hardship When the Default Judgment is Vacated and Their Claims are Tried on the Merits.**

There is simply no imaginable hardship that will be suffered by Mednikova when Mednikova's Default Judgment is vacated. Mednikova will in no way be limited in their ability to fully pursue their claims against Morse and, furthermore, the matter could be appropriately adjudicated on its merits.

Mednikova does not identify any hardship or prejudice that would result should this judgment be set aside and the matter tried on its merits. Based upon the two year negotiation process with Omni, Mednikova had

known of Morse's intent to defend the lawsuit from the beginning and surely should be prepared to try their claims on the merits. The trial in this case was not even scheduled to occur until August 4, 2014.

Vacation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits. *Johnson*, 116 Wn. App. at 842. The equities in this case require a trial on the merits.

**D. The Trial Court Erred in Denying Morse's Motion for Reconsideration.**

Morse brought a Motion for Reconsideration to be heard on August 20, 2013 regarding both of the trial court's August 1, 2013 orders denying Morse's Motion to Vacate the Default Order and granting Mednikova's Motion and Declaration for Default Judgment. Morse's Motion for Reconsideration was denied on August 23, 2013. CP 228.

For the same reasons set forth above in Sections B and C, the trial court's order denying reconsideration was also an abuse of discretion and the August 23, 2013 order should be vacated.

Morse has shown a strong defense to the claim of damages as well as a clear case of excusable neglect. Morse was diligent in filing a motion to vacate and Mednikova would not be prejudiced by a trial on the merits.

It was an abuse of discretion to grant the default judgment and deny Morse's Motion for Reconsideration under these circumstances.

**E. The Judgment is Not Support by Substantial Evidence.**

After entering an order of default, the court must make a reasonable inquiry to determine the amount of damages. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333, 54 P.3d 665 (2002). The reasonableness of the damage award is a question of fact reviewed for abuse of discretion. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 357–58, 177 P.3d 755 (2008), *review denied*, 164 Wn.2d 1032, 196 P.3d 139 (2008). Washington law requires the existence of substantial evidence to support an award of damages. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Shepard Ambulance, Inc.*, 95 Wn. App. at 242. Such proof is required to support any judgment except where the amount due is liquidated or readily ascertainable by mere calculation. *Pedersen v. Klinkert*, 56 Wn.2d 313, 317, 352 P.2d 1025 (1960).

As explained in section C(ii)(a), Mednikova has not provided substantial evidence sufficient to persuade a fair and reasonable person of the truth of their claims for damages. Without sufficient proof, the

judgment amount is arbitrary and certainly has not been substantially proven by the evidence provided. It was an abuse of discretion to enter this judgment.

**F. The Findings of Fact and Conclusions of Law are Not Supported by Substantial Evidence.**

The trial court erred in adopting Mednikova's Findings of Fact and Conclusions of Law because many of the findings and conclusions are not supported by the evidence. CP 186-188.

Morse does not dispute the accuracy of Findings of Fact number 1-4. CP 186-188. However, as explained above in sections C(ii)(a) and D, there is insufficient evidence to support the finding that Mednikova suffered personal injuries (Finding of Fact Nos. 5 and 6), absolutely no evidence to support a property damage claim (Finding of Fact No. 5) and insufficient evidence to support her claim for lost wages and no evidence that she was put on light duty at work (Finding of Fact No.8). Further, there is no evidence presented that Mare Morse breached any duty of care (Conclusions of Law No. 9), and insufficient evidence of the proximate cause of Mednikova's alleged injuries or alleged damages (Conclusions of Law Nos. 10, 11 and 12). There is a blatant lack of evidence that Vyacheslav Avadayev was even married to Mednikova at the time of the accident (needed to support the loss of consortium claim) (Conclusions of

Law No. 12). There is also no evidence to support the application of the family car doctrine (Conclusions of Law No. 13). CP 186-188.

## V. CONCLUSION

The refusal to vacate the Order of Default and the entry of a Default Judgment in this matter were an abuse of discretion by the trial court. The result was inequitable and flies in the face of the well established principles which encourage parties to try cases on the merits to reach just results. This is not a case of a neglectful defendant. For two years before the Default Order was quickly and clandestinely obtained, Mednikova was well aware of the Morse's intent to defend in this matter. Mednikova intentionally and deceptively took the default to avoid having to prove their case.

This Court should not encourage questionable practices that seek to avoid justice and avoid justly deciding cases *on the merits*. Morse made an honest and reasonable mistake in believing her insurance carrier was aware of and defending this lawsuit, and acted diligently to correct that misunderstanding.

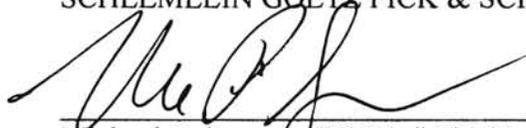
Not only is a default judgment inequitable in this cause, the amount of the judgment has not been proven by substantial evidence. Without even engaging in the discovery they are entitled to, Morse has

shown that they have, at the very least, a prima facie defense as to damages because Mednikova has utterly failed to provide substantial evidence of her alleged damages. Clearly, a trial on the issue of damages would not be useless.

The default order and judgment should be vacated and this case should be remanded to the trial court to be properly resolved on its merits.

Respectfully submitted,

SCHLEMLEIN GOETZ FICK & SCRUGGS, P.L.L.C.

A handwritten signature in black ink, appearing to read 'M. Scruggs', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Schlemlein Goetz Fick & Scruggs, P.L.L.C.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On December 5, 2013, I served the foregoing BRIEF OF APPELLANTS on the following parties via the method indicated:

Zara Sarkisova, WSBA #38381  
KESSELMAN LAW FIRM  
2101 112th Ave. NE, Suite 220  
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Via U.S. First Class Mail, Prepaid

Via Legal Messenger for hand delivery on December 5, 2013

Via Facsimile

Via e-mail to: zara@kesselmanlaw.net

Original sent by e-mail for filing to:

Court of Appeals, Division I  
Court Clerk's Office  
One Union Square  
600 University St  
Seattle, WA 98101-1176

Dated at Seattle, Washington this 5<sup>th</sup> day of December, 2013.

  
Lacey J. Georgeson