

NO. 708635

---

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

---

INNA MEDNIKOVA and VYACHESLAV AVADAYEV

Respondents,

v.

MARE MORSE and MARTIN MORSE,

Appellants.

---

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

---

**BRIEF OF RESPONDENTS**

---

ZARA SARKISOVA, WSBA #38388  
ROMAN KESSELMAN, WSBA #35595  
KESSELMAN LAW FIRM  
2101 112th Ave NE, Suite 2201  
Bellevue, WA 98004  
(425) 454-1920

~~COURT FILED  
STATE OF WASHINGTON  
DIVISION I  
APR 11 2014~~

**ORIGINAL**

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. STATEMENT OF ISSUES.....2

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT.....5

    A. Standard of Review.....5

    B. The Trial Court Was Correct in Denying Morse's Motion to Vacate  
    Default Order.....6

    C. The Trial Court Was Correct in Granting Mednikova's Motion for  
    Default Judgment.....15

    D. The Judgment and the Findings of Law and Conclusions are  
    Supported by Substantial Evidence.....24

V. CONCLUSION.....28

## TABLE OF AUTHORITIES

### Cases

- Akhavuz v. Moody*, 2013 WL 6761893 (Wash.App. Div. 1)
- Batterman v. Red Lion Hotels, Inc.*, 106 Wash.App. 54, 21 P.3d 1174 (2001)
- Berger v. Dishman Dodge, Inc.*, 50 Wash. App. 309, 748 P.2d 241 (1987).
- Caouette v. Martinez*, 71 Wn. App. 69, 856 P.2d 725 (1993).
- Calhoun v. Merritt*, 46 Wash.App. 616, 731 P.2d 1094 (1986), amended (1987)
- Colacurcio v. Burger*, 110 Wash.App 488, 41 P.3d 506 (2002)
- Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 533 P.2d 852 (1975);
- Cox v. Spangler*, 141 Wash.2d 431, 439, 5 P.3d 1265 (2000)
- Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979)
- Hwang v. McMahonill*, 103 Wash.App. 945, 15 P.3d 172 (2000)
- James v. Robeck*, 79 Wn.2d 864, 870, 490 P.2d 878. (1971).
- Johanson v. United Truck Lines*, 62 Wn.2d 437, 443-445, 383 P.2d 512 (1963)
- Johnson v. Cash Store*, 116 Wash.App. 833, 68 P.3d 1099 (2003)
- Lian v. Stalik*, 106 Wn.App. 811, 824-25, 25 P.3d 467 (2001).
- Lindgren v. Lindgren*, 58 Wn.App. 588, 596, 794 P.2d 526 (1990), review denied, 116 Wn.2d 1009 (1991);
- Little v. King*, 160 Wash.2d 696. 161 P.3d 345.

*Morin v. Burris*, 160 Wash.2d 745, 161 P.3d 956 (2007)

*Mosbrucker v. Greenfield Implement, Inc.* 54 Wash.App. 647, 652, 774 P.2d 1267 (1989).

*Norton v. Brown*, 99 Wash.App. 188, 992 P.2d 1019 (1999), amended (2000)

*Peoples State Bank v. Hickey*, 55 Wn. App. 367, 373, 777 P.2d 1056, review denied, 113 Wn.2d 1029 (1989).

*Prest v. Am. Bankers Life Assurance Co.*, 79 Wash. App. 93, 98-99, 900 P.2d 595 (1995), review denied 129 Wn.2d 1007 (1995).

*Rosander v. Nightrunners Transport, Ltd.*, 147 Wash.App. 392, 196 P.3d 711 (2008)

*Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wash.App. 231, 974 P.2d 1275 (1999).

*Showalter v. Wild Oats*, 124 Wash.App. 506, 101 P.3d 867 (2004)

*Smith v. Arnold*, 127 Wash.App. 98, 110 P.3d 257 (2005)

*White v. Holm*, 73 Wash.2d 348, 438 P.2d 581 (1968)

*Wilson v. Williams*, 2001 WL 1058224 (Wash.App. Div. 1)

### **Other Authorities**

CR 55

CR 59

CR 60

## **I. INTRODUCTION**

This case involved a default order and default judgment properly entered by King County Superior Court against Defendants in a personal injury action.

There are two primary issues presented to this Court. First, whether the trial court was correct in refusing to vacate the Default Order entered against Defendants/Appellants Morse which was submitted in a timely manner and in accordance with rules of law and civil procedure, and no reason existed to believe that Morse's insurance carrier was handling the defense of the lawsuit. Second, whether the court was correct in granting Plaintiffs/Respondents Mednikova's Motion for Default Judgment where Morse did not show a prima facie defense to damages and prejudice would result to Mednikova.

Inna Mednikova and Vyacheslav Avadayev respectfully ask this Court to affirm King County Superior Court's Default Order entered on May 31, 2013 and Default Judgment entered on August 1, 2013. Further, Mednikova ask this Court to affirm denial of Morse's Motion for reconsideration as to both default orders.

The trial court was correct in entering these default orders, and no valid argument was presented by Morse to warrant vacation and reversal of the trial court's orders.

## **II. ISSUES PRESENTED**

- A. Whether there is Good Cause to Vacate the Default Order and Default Judgment Order When Defendants/Appellants failed to show that their failure to appear was the result of Mistake, Inadvertence, Excusable Neglect or Fraud?
- B. Whether the Default Judgment Should be Vacated Where Defendants/Respondents failed to articulate a Prima Facie Defense to Damages award?
- C. Whether there is Sufficient Evidence to Support the Default Judgment and whether Finding of Fact and Conclusions of Law were based on Sufficient Evidence and Pursuant to Applicable Law?

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

Plaintiff/Respondent Inna Mednikova was involved in a motor vehicle collision caused by Defendant/Appellant Mare Morse on May 11, 2010. A claim against Morse was filed with Omni Insurance. The claim was assigned to Ms. Alfreda Jenkins, Claim Representative with Omni. CP 104-120, 125-141.

On November 23, 2011, a settlement demand package containing supporting documentation was submitted to Ms. Jenkins by Ms. Sarkisova, attorney for Plaintiffs/Respondents. CP 104-120, 125-141. Ms. Sarkisova negotiated for a settlement in good faith with Ms. Jenkins from December 29, 2011, until March 28, 2012. On January 26, 2012, Ms. Jenkins made Mednikova an offer of \$13,000 to settle their claim, which was rejected by the Plaintiffs/Respondents on February 16, 2013. CP 104-120, 125-141. Nonetheless, Ms. Jenkins send the same word for word letter and offer that, while being fully aware that the offer has been rejected by the plaintiffs. CP 104-120, 125-141. On March 28, 2012, Ms. Sarkisova had her last telephone conversation with Ms. Jenkins, during which she informed Ms. Jenkins that the case would be filed in court, unless a better offer was forthcoming. CP 104-120, 125-141.

In July of 2012, Ms. Sarkisova received another letter from Ms. Jenkins, identical to the previous ones. Ms. Sarkisova responded with a letter reminding Omni that Ms. Mednikova had rejected their one and only offer of \$13,000 more than 6 months ago. There was no contact between Omni and anyone at the Kesselman Law Firm in a period of time between August 6, 2012, and March 12, 2013, when Ms. Sarkisova received yet another word for word letter from Ms. Jenkins re-stating her offer of

\$13,000, which by that time had been rejected **four times**. CP 104-120, 125-141.

In spring of 2013, with the statute of limitations date approaching in May of 2013, Mednikova began final discussions with their attorneys at Kesselman Law Firm. In a last attempt to avoid litigation, Ms. Sarkisova tried to contact Omni insurance on March 26, 2013, to give them the opportunity to present Plaintiffs/Respondents with a reasonable offer to avoid filing the lawsuit. CP 104-120, 125-141. Unfortunately, Omni did not respond, and Mednikova filed their law suit on May 7, 2013. CP 1-6.

Ms. Morse was served with the Summons, Complaint and Order setting civil case schedule, on May 8, 2013. Defendants/Appellants have failed to appear within 20 days after the date of service as required by the rules of civil procedure. Attorneys for Ms. Mednikova filed a Motion for Default on May 31, 2013. CP 9-25. The motion was granted by Commissioner Nancy Bradburn-Johnson on May 31, 2013. CP 7-8. In mid-June Mednikova were getting ready to file their Motion for Default Judgment. On June 21, 2013 (one and a half month after service of Summons and Complaint and 21 days after the Default Order had been signed), Kesselman Law Firm received a Notice of Appearance from the law firm of Schlemlein Goetz Fick & Scruggs. Morse Attorneys filed a Motion to Vacate the Default Order, and, by agreement with Ms. Morse'

attorneys, Ms. Sarkisova made a Motion for Default Judgment noticed for the same day. CP 64-70, 31-61. On August 1, 2013, Hon. Theresa Doyle denied Morse's Motion to Vacate Default Order and granted Mednikova's Motion for Default Judgment. CP 191-192. Morse then filed a Motion for Reconsideration of both orders which was denied on August 23, 2013. CP 195-213, CP 228.

#### **IV. ARGUMENT**

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

The appellate court applies the same standard of review for the trial court's denial of the motion to vacate the order of default and the order for default damages and will not overturn the trial court's decision unless it finds a clear abuse of discretion. Calhoun v. Merritt, 46 Wash.App. 616, 731 P.2d 1094 (1986), amended (1987). Griggs v. Averbek Realty, Inc., 92 Wash.2d 576, 582, 599 P.2d 1289 (1979). A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. Showalter v. Wild Oats, 124 Wash.App. 506, 101 P.3d 867 (2004). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. Cox v. Spangler, 141 Wash.2d 431, 439, 5 P.3d 1265 (2000). Although default judgments are generally disfavored in Washington, in Little v. King, the Court stated, "we also value an organized, responsive,

and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.” Little v. King, 160 Wash.2d 696, 703, 161 P.3d 345 (2007). Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted. Griggs v. Averbek Realty, Inc., 92 Wash.2d 576, 599 P.2d 1289 (1979). The granting or denial of an order or judgment of default lies within the trial court’s discretion, and will not be disturbed absent abuse. Garrett v. Nespelen Consol. Mines, Inc., 18 Wn.2d 340, 344, 139 P.2d 273 (1943). Also, any decision as to vacation of default orders under CR 60(b) is left to the sound discretion of the trial court. Griggs, supra.

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

**i. Defendants failed to appear in a timely manner and thus were not entitled to Notice of Default Motion.**

Defendants were properly served on May 8, 2013, and failed to appear, plead or otherwise defend. Plaintiffs’ Motion for default was granted in accordance with the Civil Rule 55. Defendants now argue that they made an informal appearance by way of their Omni Insurance Company. Defendants rely solely on the line of cases such as Colacurcio v. Burger, where the court ruled that extensive settlement negotiations

with defendants' insurance adjuster amounted to an informal appearance by Burger. Colacurcio v. Burger, 110 Wash.App 488, 41 P.3d 506 (2002). Colacurcio decision relied heavily on the decision in Batterman v. Red Lion Hotels, Inc., 106 Wash.App. 54, 21 P.3d 1174 (2001), where the defendant's insurance agent spent a great deal of time trying to obtain records from Plaintiff's attorneys and negotiating a settlement, amounting to an informal pre-litigation appearance and indicating an intent to defend. This line of reasoning in terms of informal appearance **was abrogated** by Morin v. Burris, 160 Wash.2d 745, 161 P.3d 956 (2007), where the Supreme Court unequivocally stated that (1) pre-litigation contacts are insufficient to establish an appearance entitling defendant to notice of motion for default; and (2) mere intent to defend, whether shown before or after a case is filed, is not enough to establish appearance. Id. The Default Order in this case should be affirmed based on the controlling legal precedent as outlined herein above.

However, the Court may not even need to get to Morin case' reasoning, since Defendants here do not even satisfy the abrogated standards of Batterman and Colacurcio. In Colacurcio, the plaintiff was engaged in extensive settlement negotiations with Burger's insurance company before and after the law suit was filed and before and after the motion for default. In this case, there was no communication between the

Kesselman Law Firm and Omni Insurance Company from August 2012 to March 2013, when Omni re-sent the same letter with a different date repeating their offer that had been previously rejected by the Plaintiffs/Respondents four times. This cannot be called “extensive communication” – in fact, there has been virtually none, i.e. one letter in 7 months. This definitely cannot be called “extensive settlement negotiations” as the parties did not negotiate at all. Omni was not requesting any records or additional information. Omni did not ask to be provided with a copy of the Summons and Complaint. Omni did not ask to be served on behalf of their insured. They did not in their letters state that they will defend the lawsuit, even after the Plaintiffs/Respondents' counsel informed them of impending litigation in writing. If Omni tried to mimic the Colacurcio case with their actions, they did a very poor job of it. Sending one “carbon copy” letter in 7 months that ignored repeat rejection of the same offer cannot constitute “negotiations” and certainly cannot be qualified as “extensive negotiations” – a condition cited in all cases on the issue. In Smith v. Arnold, the Court held that informal “appearance” must be narrowly construed. Smith v. Arnold, 127 Wash.App. 98, 110 P.3d 257 (2005). The Court stated that pre-suit phone call between plaintiff and claims adjuster for insurer and pre-suit single settlement offer were

insufficient to prove unmistakable intent on part of defendants to defend a lawsuit, leaving plaintiff with reasonable doubts as to their intent. Id.

One of the biggest issues the Appellants/Defendants have in this case is their complete failure to sustain their burden of proof in vacating the default order. They submitted a self-serving statement from Ms. Morse, the Defendants/Appellants. They submitted some statement from someone named Ms. Smith, whom never figured into any communications between the Plaintiffs/Respondents' counsel and the insurance company until after the entry of the default order. Ms. Smith claims in her Declaration that she is the adjuster for the claims made by the Plaintiffs. Plaintiffs/Respondents' attorneys never heard her name prior to receiving Defendants/Appellants' Motion to Vacate the Order of Default, nor does it appear on any documentation received from Omni. Even the letter dated June 4, 2013 is from Ms. Kimberly McGill, Claims Representative on the claim. Ms. Smith alleges that from June 2010 through 2012, employees of Omni Insurance had been in regular contact with Plaintiffs' counsel when in fact there was no communication for 7 months from August of 2012 until March of 2013, when plaintiffs' attorneys received the letter from Ms. Jenkins identical to all previous letters that ignored plaintiffs' rejection of Omni's one and only offer. CP 104-120, 125-141.

CR 55(a)(3) states that any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A). Defendants/Appellants failed to appear – either formally or informally – before the motion for default was filed. Pursuant to Morin, parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default. Morin v. Burris, 160 Wash.2d 745, 161 P.3d 956 (2007). Since there was no acknowledgment on behalf of Defendants/Appellants, they were not entitled to a notice of a motion for default, the order of default was properly entered, and there were no additional issues on reconsideration to contemplate reversing the previous court’s ruling.

**ii. There was no good cause to vacate the default order.**

Defendants/Appellants did not and cannot show inadvertence, excusable neglect, surprise, or irregularity in obtaining the judgment or order. CR 60. Ms. Morse was served by a process server Craig Brown on May 8, 2013. After verifying her identity, Mr. Brown handed her the papers stating that they were documents for an auto tort. The Appellants attempted to discredit the proper service by stating that the process server somehow misled Ms. Morse by telling her “she had nothing to worry about.” However, Mr. Brown credibly and convincingly contradicted this

false assertion. CP 104-120, 125-141. Furthermore, Appellant Mare Morse, by her own admission, is over the age of eighteen and competent to testify. She is a native English speaker, fully able to read and understand a document written in English. CP 85-86. The Plaintiffs' Summons states as follows:

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded.

Defendants/Appellant Morse failed to either read or act upon the Summons and Complaint against her. Failure to read the legal document or respond in any reasonable way does not constitute an excusable mistake on her part. If Defendants/Appellants thought that insurance company had sufficiently appeared on their behalf, they should have questioned that appearance when three weeks went by after the personal service and no one from Omni insurance contacted them to discuss the law suit. Furthermore, this was the first time that Defendants/Appellants were contacted directly by the Plaintiffs/Respondents by way of service of process. This should have alarmed a reasonable person that at least a phone call to their insurance agent needs to be made. Likely, Defendants/Appellants did contact someone with their insurance company,

albeit too late, without any reasonable excuse to ignore the well established legal process.

Further, there was no irregularity in obtaining the default order. Irregularities occur when there is a failure to adhere to some prescribed rule of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unreasonable time or in an improper manner. *Mosbrucker v. Greenfield Implement, Inc.* 54 Wash.App. 647, 652, 774 P.2d 1267 (1989). Granting or denying default orders are not proceedings where irregularities could have occurred in this case. Defendants/Appellants had ample time to file a motion to vacate a default order and had the chance to oppose the entry of the default judgment. At the same time, Morse were in default and the reasons for that are clearly of their own making. Strictly speaking, Defendants/Appellants did not even have the right to be heard on the matter of default judgment, unless the Court vacated the Default Order. see Johanson v. United Truck Lines, 62 Wn.2d 437, 443-445, 383 P.2d 512 (1963) (The defaulting party has no right to be heard, nor to a jury trial, in the absence of statutory requirements to the contrary). Nonetheless, Morse moved the Court to vacate the default order and opposed the entry of the default judgment and in both instances outlined their case against the default orders. But they did not prove their case. They did not submit sufficient evidence. The

requirement to show defense to the judgment is not an insurmountable obstacle and is easily achieved via affidavits. Morse failed to meet the bare minimum requirement under the controlling legal standards and now have to deal with the consequences. Simply ruling against them is not irregularity, when each side was afforded the opportunity to present evidence, file responses and replies. It cannot be seriously argued that every time there is an outcome that a party dislikes, then an irregularity took place. The Court should not have vacated any of the default orders.

This left the Defendants/Appellants with their last ditch effort to avoid the Morin standard by claiming that Plaintiffs/Respondents' counsel deliberately hid the fact of litigation from the Defendants/Appellants by hanging up the phone in April and May of 2013. The statements by Defendants/Appellants' alleged insurance agent, whom never previously wrote any letters or made any calls to Plaintiffs' attorneys, are specious and calculating. In fact, there were no phone calls from Omni insurance. The Plaintiffs/Respondents' attorneys' office has a voicemail available for those wishing to leave messages. In addition, Kesselman Law Firm has Caller ID on all of its phones. If anyone wanted to avoid a telephone call from Omni, that person would simply refrain from picking up the phone instead of picking it up and hanging up on the caller. The firm's voice mail is being checked on a daily basis. CP 123-124. Omni did not leave

any telephone messages for at least a year prior to the commencement of the law suit. Omni does not make a claim that their phone messages were left unanswered. Omni could also send letters inquiring about litigation or the timing of a lawsuit, as well as demand a copy of Summons and Complaint or even offer to accept service on behalf of their insured. They did not even bother to make a little extra effort to do so. Finally, Defendants/Appellants did not present any actual evidence of phone calls being made, that would have been easily obtainable from a telephone company. Morse presented no credible evidence in support of their Motion to Vacate the Order of Default, which was properly denied.

Finally, Morse cannot claim the element of surprise. Omni insurance company was aware that the plaintiffs rejected their one and only offer more than a year prior to the filing of the lawsuit. Omni was fully aware that the statute of limitations was about to run in May of 2013, yet they made absolutely no attempts to contact their insured to warn them of a possibility of being served with Summons and Complaint. Omni was informed by Plaintiffs/Respondents' attorneys at least two times that a lawsuit would be filed in this case, both in writing and via telephone. CP 104-120, 125-141. Incidentally, Defendants/Appellants' Motion to Vacate with all supporting documents is silent on how Omni found out about the law suit. Defendants/Appellants have completely failed to raise any factual

issue with respect to mistake, surprise or inadvertence that would have even the slightest level of veracity or that would make any logical sense.

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

In vacating default orders, under CR 55, CR 59 and CR 60, i.e., the Courts consider two primary and two secondary factors. The default judgment should be vacated if the defendant can show:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968); Berger v. Dishman Dodge, Inc., 50 Wn. App. 309, 311, 748 P.2d 241 (1987).

Further, affidavits supporting motion to vacate judgments must set out the facts constituting a defense. It is insufficient to merely state allegations and conclusions or to show a merely prima facie defense. Commercial

Courier Serv., Inc. v. Miller, 13 Wash.App. 98, 533 P.2d 852 (1975); Calhoun v. Merritt, 46 Wash.App. 616, 731 P.2d 1094 (1986). The appellate court will not overturn the trial court's denial of the motion to vacate the damages award unless the court finds a clear abuse of discretion. Johnson v. Cash Store, 116 Wash.App. 833, 69 P.3d 1099 (2003).

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

There is no argument that our legal precedents make it more likely for default orders to be vacated, but the moving party still has some burden to present evidence. Moreover, in vacating default, evidence should be viewed in the light most favorable to the party in default. But a party must present substantial evidence supporting a prima facie defense. Little v. King, 160 Wash.2d 696, 161 P.3d 345 (2007). Even viewed in the light most favorable to the parties moving to set aside a default judgment, mere speculation is not substantial evidence of a defense. Id. Again, Morse's biggest problem here is that there is no credible evidence for the Court to view in their favor or otherwise. Morse in their Appellate Brief and papers presented to the Superior Court argue that a failure to appear that was the result of mistake, inadvertence or excusable neglect will be less decisive when a party moving to vacate a default is able to

demonstrate a strong defense. In Griggs, the court held that the primary purpose of requiring a meritorious defense is to avoid a useless trial, which would occur if the defendant were unable to produce facts sufficient to produce a different result. Griggs v. Averbek Realty, Inc., 92 Wash.2d 576, 583, P.2d 1289 (1979). Morse failed to show any defense at all. Without evidence, their mere allegations and conclusions are not enough to demonstrate any defense, let alone a prima facie defense.

Next, Morse failed to provide evidence of misconduct or deceit by Mednikova's counsel. A party attacking a judgment under CR 60(b)(4) must establish fraud, misrepresentation, or misconduct by clear and convincing evidence and must show that the conduct prevented the party from fully and fairly presenting its case or defense. Lindgren v. Lindgren, 58 Wash.App. 588, 596, 794 P.2d 526 (1990), review denied, 116 Wn.2d 1009 (1991); Peoples State Bank v. Hickey, 55 Wash.App. 367, 373, 777 P.2d 1056, review denied, 113 Wn.2d 1029 (1989). In this case, the only evidence of Plaintiffs/Respondents attorneys' misconduct comes from the statement of an alleged insurance adjuster, who never before appeared in the case. CP 83-84. Clear and convincing evidence standard should mean more than mere allegations in the Defendants/Appellants' statements. There is no evidence that the alleged phone calls were ever made, other than the self-serving and deliberate statement from a previously unknown

insurance adjuster, who does not even allege that she placed the calls herself. Her statement is hearsay and therefore is inadmissible in the first place. Further, there is no evidence that Morse tried to contact the Plaintiffs/Respondents after the commencement of the lawsuit and before the order of default was entered. Again, Morse completely failed to provide credible evidence in support of their claims. Instead they make accusations against Plaintiffs/Respondents' counsel, and they also made allegations that a process service carrier, a disinterested third party, somehow misled Mare Morse. However, just like their allegations against the process server are contradicted by the process server's affidavit, the allegations of deceitful conduct are contradicted by Mednikova's attorneys' affidavits and common sense and logic. Why would Mednikova's attorney try to prevent someone from leaving a message? Messages can be ignored and erased in just the same way that phone calls can be answered and immediately disconnected. There is no evidence of the alleged phone calls being made by the insurance company and no evidence of what Morse's insurer was trying to communicate.

It is not uncommon to engage in much the same arguments on appeal as in the motions that resulted in the orders being at issue on appeal. We therefore remind the Court that Morse do not present any new arguments, but simply restate the allegations already considered by the

trial Court. Still, some of their allegations have to be specifically addressed, particularly in light of Morse's reliance on Civil Rule 55. In their attempt to vacate the order of default, Defendants/Appellants presented all but two relatively short statements, one from Mare Morse and another one from an alleged insurance adjuster. Nothing in those statements indicates a genuine misunderstanding between the insured and their insurer as to who is responsible for answering the complaint. There are no facts alleged that led to such misunderstanding, i.e., who Ms. Morse talked to, when, and what was discussed that led her to believe that she could simply disregard the Summons and Complaint. Nothing in the statements provided by the Defendants/Appellants shows that there was an oversight on the insurance carrier's part. Who made a mistake and why? It may very well be that Ms. Morse has a valid claim against her insurance carrier, especially if her insurance company is paying for her legal team, but this is outside the scope of this appeal.

Again, a mere carbon copy of a letter containing the same offer mailed to the Plaintiffs/Respondents' counsel by the insurance company every 7 months or so cannot be described as "active and ongoing negotiations." Morse further fail to substantiate their allegations of their insurance company making repeated phone calls to Mednikova's attorneys. They do not state what the insurance agent wanted to say to

them, i.e., assert that they would defend a lawsuit or make a new offer. It would have been very easy for them to simply write a letter to the Plaintiffs/Respondents' counsel, since they allegedly could not reach them by telephone or leave a message before or after hours if, allegedly, the calls were being picked up and then dropped. Morse allege no facts that would bring them close to any of the fact patterns in the cases cited in support of their legal argument. Importantly, the failure to notify a nonparty insurer of the intent to obtain a default judgment against the insured does not qualify as the basis for vacation of a default judgment. Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993). In this case, Mednikova's counsel did notify the insurance company that a complaint would be filed, without having any duty to do so, but no response was rendered by the insurance company.

Additionally, Morse attempt to rely on cases where defaulting parties did a lot more than the Defendants/Appellants in this case. For example, in Berger v. Dishman Dodge, insured promptly forwarded summons and complaint to the insurer, which then failed to forward the file to the law firm defending the lawsuit. Berger v. Dishman Dodge, Inc., 50 Wash.App. 309, 748 P.2d 241 (1987). In our case, insured Mare Morse does not state when, if ever, she informed her insurance company about the litigation. In fact, it is not even clear how the insurance company

learned about this litigation in the first place. In Norton v. Brown, insured was under impression that his interest were being protected by settlement negotiations, insurer did not warn him that a lawsuit may be commenced or that he should expect service of summons and complaint, and that the paperwork should be immediately forwarded to the insurer. Norton v. Brown, 99 Wash.App. 118, 992 P.2d 1019 (2000). First of all, pre-litigation settlement negotiations are no longer sufficient to constitute an informal appearance. Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956 (2007). In Rosander v. Nightrunners Transport, Ltd., the court held that negotiations between victim and employer's insurer did not constitute an appearance. Rosander v. Nightrunners Transport, Ltd., 147 Wash.App. 392, 196 P.3d 711 (2008). But more importantly, Morse in our case make no allegations against their insurance company whatsoever. We can only conclude that the insurance company, Omni, acted professionally and issued adequate warnings to Defendants/Appellants, which Morse ignored for whatever reason. The Court should not engage in speculation as to what had happened between Morse and their insurance company in our case, but may take notice that a failure to forward summons and complaint to counsel constitutes inexcusable neglect and does not justify vacation of default judgment. Johnson v. Cash Store, 116 Wash.App. 833, 68 P.3d 1099 (2003). Specific facts should have been alleged by Morse in the

Motion to Vacate and in their opposition to the entry of the default Judgment, and they completely failed to carry their rather small burden. A reasonable person should have noted that Mednikova contacted them directly for the first time in three years. A reasonable person should have acted upon the Summons at least by placing a timely phone call to whomever they thought was representing them. If the Court follows Morse's argument, than any delay in answering a Summons and Complaint can be avoided by simply stating that one did not understand the nature of proceedings and relied on a third party to handle it, using only general statements and without stating any facts or providing actual evidence. However, our laws assign a minimum level of responsibility on the residents of the State of Washington, such as having to read and act upon the Summons and Complaint, and having to present probative evidence of some mistake, neglect or inadvertence. Morse did not satisfy any of these requirements. In addition, in Akhavuz v. Moody, the Court of Appeals held that there is no hard-and-fast rule, or "innocent insured doctrine," that allows an insured to be relieved in all situations from a default judgment based on a belief that the insurer is handling the litigation. Akhavuz v. Moody, 2013 WL 6761893 (Wash.App. Div. 1).

- ii. **Mednikova Will Suffer Undue Hardship If the Default Judgment is Vacated.**

Morse allege that vacating default order and order of default judgment and re-litigating the case would not result in a substantial hardship for Mednikova. As Ms. Mednikova stated in her Declaration submitted with Plaintiffs/Respondents' Motion for Default Judgment, many of her medical bills remain unpaid; she was put on collection due to her inability to pay them, which damaged her credit history. CP 31-61. She lost time from work and had other expenses associated with damages sustained as a result of the accident. Plaintiffs/Respondents' family life suffered as well. CP 31-61. Ms. Mednikova's accident happened in 2010. Mednikova tried to resolve her claim amicably with Omni insurance. Mednikova was prepared to try her claim on the merits and thus filed a lawsuit. The lawsuit had been filed before the Statute of Limitation expired and served on Morse in a timely manner. Mednikova waited 20 days for their response, obtained default in a timely manner and then obtained a default judgment. After the default judgment was granted to Plaintiffs/Respondents, Ms. Mednikova was diagnosed with breast cancer. She underwent 3 surgeries and radiation therapy. We are unable to provide an affidavit as to her current condition since it is not allowed on appeal. In short, Mednikova fully complied with the law and rules of civil procedure and should not be penalized merely for the fact that Morse failed to do the same.

**D. The Judgment and Findings of Fact and Conclusions of Law are Supported by Substantial Evidence**

Morse completely failed to provide any evidence as to why the damages award sought and received by Mednikova should not be granted. They had ample opportunity to oppose the entry of the default judgment. It is true that without vacating the order of default, the Defendants/Appellants were not even entitled to oppose the entry of the default judgment. Morse were represented by an experienced counsel in all of the proceedings regarding the default orders at the Trial Court lever. It is to their detriment that they followed the proceedings by agreement with the Plaintiffs/Respondents' counsel to have the motion to vacate the order of default and the motion for default judgment to be heard at the same time. The simplest thing for the Appellants would be to submit affidavits showing a prima facie defense to damages, but they, for some reason, have not done that. At least not in the way that is consistent with the rules of evidence and could provide the trial court with a way to deny the entry of default judgment. More specifically, In Calhoun case, for example, an affidavit provided by insurance adjuster at least alleged that with only about \$5,000 in medical costs and lost wagers, a \$50,000 award was excessive and that the claim was far less than the amount awarded. Id. This was the bare minimum that allowed a defendant to set aside a default

judgment even without articulating a prima facie defense. In reviewing the availability of a defense on the merits, the court may only consider admissible evidence. Prest v. Am. Bankers Life Assurance Co., 79 Wash. App. 93, 98-99, 900 P.2d 595 (1995), review denied 129 Wn.2d 1007 (1995). In this case, Morse's counsel's arguments and assertions contained in their legal memo are not admissible evidence. Morse's counsel's argument that the Mednikova's evidence did not support the amount of damages, is not evidence at all, just mere allegations and conclusions. It is not a prima facie defense to damages that a defendant is surprised by the amount awarded by default judgment or that the damages might have been less in a contested hearing. Little v. King, 160 Wash.2d 696, 698, 161 P.3d 345 (2007). Again, importantly, Defendants/Appellants were afforded time and opportunity to present admissible evidence, but they completely failed to do so, even when doing so did not require much effort.

Moreover, Mednikova showed clearly the amount of medical expenses and provide copies of the most important parts of the Plaintiffs/Respondents' medical billing and medical records supporting causation and the treatment received. The issue of medical billing was raised by Omni insurance adjuster in February of 2012. In response, Mednikova's attorneys sent Ms. Jenkins a letter clearly showing all medical billing related to the accident. CP 104-120, 125-141. The

judgment obtained is well within the range of proven damages. If the verdict is within the range of proven damages, no new trial may be granted. James v. Robeck, 79 Wn.2d 864, 870, 490 P.2d 878. (1971). The award received in this case is not excessive in light of the evidence presented. For it to be overturned on appeal it should be rendered so great that it shocks the conscience of the court. Lian v. Stalik, 106 Wash.App. 811, 824, 825, 25 P.3d 467 (2001). The judgment in this case is fair and reasonable. Therefore, the Court properly refused to vacate the order of default and entered a default judgment against Morse, which was supported by the evidence presented to the Court. No irregularity took place.

The award sought by Plaintiffs/Respondents is supported by substantial evidence. Mednikova submitted medical billing totaling over \$15,000.00, evidence of lost wages of over \$1,204.00, a towing bill of \$241.00, as well as costs and expenses, not including interest. The total award sought, \$60,000.00 is neither excessive nor unreasonable under the circumstances of the case. Notably, in Calhoun case relied upon by the Defendants/Appellants, the medical expenses totaled only \$2,183.27 with \$3,080 of wages losses and \$206.50 in costs. Defendants in that case showed a prima facie defense to an unreasonable award of \$50,000. Calhoun v. Merrit, 46 Wash.App. 616, 731 P.2d 1094 (1987). It is not a

prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing. Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wash.App. 231, 240-42, 974 P.2d 1275 (1999). Defendants must provide competent evidence of a prima facie defense to damages. Little v. King, 160 Wash.2d 696, 703, 161 P.3d 345 (2007). Mere speculation is not substantial evidence of a defense. Id. Further, Defendants/Appellants, through Omni, have had access to Mednikova's full medical file. CP 104-120, 125-141. In addition, evidence of automobile accident victim's prior accident is inadmissible without showing of causal relationship between current injury and pre-existing condition. Little v. King, supra.

Finally, Defendants/Appellants' allegation that Vyacheslav Avadayev is not entitled to damages for loss of consortium because he is not legally married to Inna Mednikova is a new argument not appropriate on appeal. That portion of the Appellate brief arguing new facts or issues not before the Superior Court should be stricken and not considered, and attorney fees and costs imposed on the Appellants for their attempt to introduce new factual arguments on Appeal.

Mednikova provided substantial evidence sufficient to persuade a fair and reasonable person of the truth of her claims for damages. The trial

court was within its discretion to enter this judgment. In fact, the Trial Court was in the best position to determine whether the damages award was warranted and supported by enough evidence. Simply claiming now that amount of damages was unfair is not a prima facie defense. Rosander. The trial court was correct in adopting Mednikova's Findings of Fact and Conclusion of Law.

## **V. CONCLUSION**

The trial court was correct in refusing to vacate the Order of Default and the Default Judgment, and was correct in denying the Appellants Motion for Reconsideration. This is a case of neglectful defendants, who were served in a timely and proper manner, failed to respond within the timeframe prescribed by law, and then failed to carry a rather easy burden of presenting credible evidence necessary to vacate the default orders at issue herein. The Appellants have not brought any better arguments to the Court of Appeals. For these reasons, the Plaintiffs/Respondents respectfully request an award of attorney fees and costs associated with this appeal pursuant to RAP 18.1.

Respectfully submitted this 6th Day of January 2014,

KESSELMAN LAW FIRM  
Attorneys for Respondents

*Zara Sarkisova*

---

Roman Kesselman, WSBA #  
Zara Sarkisova, WSBA #38381  
2101 112th Ave NE, Suite 220  
Bellevue, WA 98004  
(425) 454-1920

**DECLARATION OF SERVICE**

The undersigned, Zara Sarkisova, hereby declares under penalty of perjury of the laws of the State of Washington, that on December 6, 2014, she served by electronic mail and by personal hand delivery, a copy of Brief of Respondents, together with a copy of this Declaration of Service, addressed to the following:

Colleen Cody, Esq.  
Michael Scruggs, Esq.  
Schlemlein Goetz Fick & Scruggs  
Via Email: cac@soslaw.com, mps@soslaw  
Via Hand Delivery at 66 S. Hanford St., Ste 300, Seattle, WA  
98134

Dated at Bellevue, Washington, this 6th day of January, 2014.

  
Zara Sarkisova, Esq.  
WSBA #38381  
KESSELMAN LAW FIRM  
Attorneys for Respondents

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 JAN - 6 PM 4: 29