

71166-1

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No. 71166-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

WANNA CHOI,
an individual,

Appellant,

v.

ASHLEY YOUNG,
an individual,

Respondent.

REPLY BRIEF OF APPELLANT WANNA CHOI

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I. INTRODUCTION

Ashley Young attempts to argue for the first time on appeal that under CR 60(b)(1) the default judgment is void contending, incorrectly, that Wanna Choi's motion for entry of default judgment was not filed until six months after the entry of the Court Commissioner's July 30, 2013 Order Granting Motion for Default Judgment and the Default Judgment. Young did not challenge the validity of the filing of the motion for default judgment under CR 60(b)(1), and this issue is not before the court. Instead, we have before us Choi's appeal of only the trial court's granting of Young's motion to vacate the default judgment as to damages.

Even if Young had raised this issue to the trial court, the court should reject Young's argument because on July 29, 2013, Choi properly e-filed the Motion for Entry of Default Judgment and supporting declarations and exhibits with the King County Superior Court Ex Parte Department. On July 29, 2013, the King County's Superior Court issued an official confirmation of Choi's e-filing of Choi's Motion for Default Judgment (11 pages), Declaration of Wanna Choi with attached exhibits (40 pages); Declaration of Eileen McKillop with attached exhibits (12 pages), the Order Granting Plaintiffs' Motion for Entry of Default Judgment (5 pages), and the Default Judgment (2 pages). (See Appendix A-1). Choi paid the \$30.00 Ex Parte Clerk Presentation Fee for the filing.

Furthermore, the entire Motion for Entry of Default Judgment and the support declarations and exhibits was again e-filed in King County Superior Court and served on Young's counsel on September 18, 2013 (CP 57-221). On October 8, 2013, Young filed a Motion to Vacate the Default Order and Default Judgment. (CP 222-235). At no time did Young raise any issue under CR 60(b)(1) concerning a lack of filing of the motion for default judgment. In its response to the motion, on October 16, 2013, Choi e-filed and served Young's counsel with a second copy of the Motion for Entry of Default Judgment and the declarations and exhibits in support thereof. (CP 269-341). Again, Young did not raise any issue concerning a lack of filing of the motion for default judgment. Young does not dispute that on July 30, 2013, the Court Commissioner filed the Order Granting the Motion for Default Judgment, which contains findings of fact and conclusions of law, and the Default Judgment. The Court Commissioner's Order clearly states the pleadings considered in ruling on the motion, which include (1) Plaintiff's Motion for Entry of Default Judgment; (2) the Declaration of Eileen McKillop and the exhibits attached; and (3) the Declaration of Wanna Choi and the exhibits attached. (CP 13-17). Had Young checked the court docket she could have easily discovered the Order Granting the Default Judgment and the Default Judgment. Any argument that the Motion for Entry of Default Judgment

was not “effectively” before the court commissioner and is void is without merit and is not appealable at this stage. Notwithstanding Young’s contention, any procedural error in the filing of the motion was cured by the subsequent filing and service on Young’s counsel of the motion for default judgment, and cannot be a basis for vacating the default judgment under CR 60(b)(1).

Young has not cited any rule or statute that requires notice to a defaulting defendant of a damages hearing. Under CR 55(a)(2) and CR 55(a)(3), the previous entry of an order of default deprived Young of the right to notice of the motion for entry of default judgment. Young did not appear before the motion for default was filed, and was not entitled to notice of the motion for default or any subsequent proceedings, including the motion for entry of default judgment.

Finally, Young has not met her burden of establishing any of the factors set forth in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), for setting aside the default judgment.

II. ARGUMENT

A. **CHOI PROPERLY FILED THE MOTION FOR DEFAULT JUDGMENT AND YOUNG IS BARRED FROM RAISING THIS ISSUE FOR THE FIRST TIME ON APPEAL.**

Young seeks to raise for the first time on appeal an argument that the default judgment is void under CR 60(b)(1) “due to irregularity in

obtaining a judgment or order”, contending that the motion for entry of default judgment was not filed until January 10, 2014. Young did not move to vacate the default order based on any irregularity in the filing of the motion for entry of judgment. On appeal from a ruling on a motion to vacate, the scope of review is limited to determining whether the trial court abused its discretion in ruling on the motion. *Northwest Land and Inv., Inc. v. New West Federal Sav. and Loan Ass'n*, 64 Wn. App. 938, 827 P.2d 334 (1992). The trial court did not vacate the default judgment as to damages based on any alleged irregularity in the filing of the motion for default. An appellate court should refuse to consider an argument for vacating the judgment if the argument was not first presented to the trial court. *In re Marriage of Wherley*, 34 Wn. App. 344, 661 P.2d 155 (1983) (appellate court declined to consider ground not raised in trial court). A motion to vacate a default judgment under CR 60 must be direct to, and decided by, the trial court. An appellate court has no authority to vacate a judgment pursuant to CR 60. *Foster v. Knutson*, 10 Wn. App. 175, 516 P.2d 786 (1973). Young’s cites *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d (1986), for the proposition that a lower court’s decision to vacate a judgment can be affirmed on grounds other than those relied upon by the trial court. Contrary to Young’s contention, *Nast* did not involve a motion to vacate a default judgment. In *Nast*, the court addressed the issue of

whether the right to photocopy court case files would be impermissibly restricted if the only machines available for copying such files charged an excessive fee. The court ruled that appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court. *Nast*, 107 Wn.2d at 308, 730 P.2d 786. *Nast* does not address a motion to vacate a default judgment under CR 60 and is simply not applicable. Young is not entitled to raise new grounds under CR 60(b)(1) as a basis to support the trial court's decision vacating the default judgment as to damages.

Furthermore, the evidence shows that on July 29, 2013, Choi e-filed with the King County Superior Court Ex Parte Department through the Clerk's office the Motion for Entry of Default Judgment, the Declaration of Wanna Choi, with attached exhibits, the Declaration of Eileen McKillop with attached exhibits, and the proposed Order Granting Plaintiff's Motion for Entry of Default Judgment, and proposed Default Judgment. (See Appendix A-1). Choi paid the \$30.00 presentation fee applied to all matters filed without oral argument to the Ex Parte Department through the Clerk's office. (See Appendix A-1). The court commissioner's Order Granting Motion for Default Judgment expressly states that he considered all of these pleadings on ruling on the motion for default judgment. (CP 13-17). Even assuming that recording the filing on

the Clerk's Docket was required on July 29, 2013, voiding the default judgment is not necessary when a full understanding of the issues on appeal can nevertheless be determined by this court. *Little v. King*, 160 Wn.2d 696, 161 P.3d 345, 351-52 (2007). The motion for default judgment was filed with the court and served on Young's counsel on multiple occasions. Young had full knowledge of the motion for default judgment, and subsequently filed a motion to vacate the exact same motion.

For reasons unbeknownst to Young, the King County Clerk's Office did not record the filing of the motion for default judgment on the Clerk's docket on July 29, 2013. The mistake would be considered ministerial and would be in the nature of a technical error such as that dismissed in *In re Personal Restraint of McKiernan*, 165 Wn.2d 777, 203 P.3d 375 (2009). The mistake was not the result of any intentional act on the behalf of Choi's counsel. The Court Commissioner's findings of fact and conclusions of law filed on July 30, 2013 clearly state that the motion for default judgment was considered, including the declarations and exhibits filed in support.

Moreover, under CR 55(a)(2), Young was not entitled to notice or otherwise respond to the motion for default judgment because she had not appeared before the filing of the motion for default order.

Notwithstanding, on September 19, 2013, Choi filed and served Young with the motion for default judgment, and the declarations and exhibits in support. Young also filed and served Young with the motion to vacate the default judgment on October 8, 2013. Choi also filed and served Young the motion for default judgment on October 16, 2013. Young obviously suffered no prejudice by any lack of recording on the Clerk's docket of the filing of the motion for default judgment on July 29, 2013. However, the Clerk's Docket did record the July 30, 2013 Order Granting the Motion for Default Judgment and the Default Judgment.

Choi only refiled the entire motion for default judgment on January 10, 2014, after discovering that the Clerk's Office had not recorded the July 29, 2013 filing of the same motion on the Clerk's docket. Young's argument for vacating the default judgment fails because she had actual knowledge of the motion for default judgment, and filed a motion to vacate the default judgment, which was granted. Young was not prejudiced by any lack of recording of the filing on July 29, 2013, nor can she establish that the default judgment was void.

B. THE ENTRY OF AN ORDER OF DEFAULT DEPRIVED YOUNG OF THE RIGHT TO NOTICE OF THE MOTION FOR A DEFAULT JUDGMENT.

Young misrepresents the trial court's basis for vacating the default judgment. The trial court's Order Granting Defendant's Motion to Vacate

sets forth the grounds on which the default judgment was vacated as “Defendant has shown that the default judgment herein was obtained by plaintiff without notice and after defendant had entered a notice of appearance.” (CP 434-435). The trial court determined the issue of whether Young demonstrated a prima facie issue of lack of personal jurisdiction at an evidentiary hearing on November 15, 2013. The trial court ruled that Young had not shown by clear and convincing evidence that she was not properly served with process on May 30, 2013. (CP 437-439). In fact, the trial court refused to vacate the default order and default judgment as to Young’s liability finding that she had not presented a prima facie defense to liability. Obviously, Young did not meet the first primary factor in *White*, 73 Wn.2d at 352-53, 438 P.2d 581.

Young incorrectly asserts that the first basis under *Morin* for vacating a default judgment is where the defendant has actually appeared before the motion for default *judgment* has been filed. The *Morin* court rejected the informal appearance rule and held that the defendants were not entitled to notice of the default judgment hearing because they had not appeared before the motion for *default* was filed. *Morin v. Burris*, 160 Wn.2d 745, 757-758, 161 P.3d 956 (2007). Young fails to cite any rule, statute or legal authority that requires notice to a defaulting defendant of the filing of motion for default judgment or a damages hearing. As our

Supreme Court held in *Conner v. Universal Utilities*, 105 Wn.2d 168, 712 P.2d 849 (1986), once a defendant has been adjudged to be in default, he is not entitled to notice of subsequent proceedings, including a damages hearing. *Id.* at 171, 712 P.2d 849.

CR 55(a)(3) states that “Any party may respond to any pleading or otherwise defend at any time ***before a motion for default and supporting affidavit is filed***, whether the party previously has appeared or not ... If the party has not appeared before the motion is filed he may not respond to the pleading nor otherwise defend without leave of court.” Regardless, Young argues that CR 55(a)(3) entitles her to notice of subsequent proceedings even if she is in default. CR 5(a) states that no service need be made on parties in default for failure to appear except pleadings asserting new or additional claims for relief. Once a default has been entered under CR 55(a), that party is not entitled to notice of any subsequent proceedings, including a motion for entry of default judgment. *J-U-B Engineers, Inc. v. Routsen*, 69 Wn. App. 148, 848 P.2d 733 (1993) (defaulting defendant not entitled to notice of hearing to establish amount of damages); *C. Rhyne & Associates v. Swanson*, 41 Wn. App. 323, 704 P.2d 164 (1985) (default defendant not entitled to notice of presentation of the default judgment). A party cannot appear for purposes of default judgment after a court enters a default order against her. *See Pedersen v.*

Klinkert, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960) (holding that, under common law, a defendant in default is not entitled to further notice and cannot contest subsequent proceedings); *C. Rhyne & Associates*, 41 Wn. App. 323, 704 P.2d 164 (1985) (holding that the enactment of similar notice provisions under CR 55(a)-(b) did not abrogate the common law rule of *Pedersen*); *Hyde v. Heaton*, 43 Wash. 433, 440-41, 86 P.664 (1906) (interpreting statute, now codified in identical form as RCW 4.28.210, defining ‘appearance’). Only the filing of a motion to set aside the default order entitles the party in default to notice of any subsequent hearings pertaining to entry of judgment. *J-U-B Engineers, Inc.*, 69 Wn. App. at 152, 848 P.2d 733. Under both CR 55(a)(2) and (3), Young was not entitled to notice of the motion for entry of the default judgment or to respond to the motion without leave of court. Thus, Young’s arguments have no merit.

C. YOUNG DID NOT MEET ANY OF THE STANDARDS FOR SETTING ASIDE THE DEFAULT JUDGMENT.

The party seeking to vacate a default judgment pursuant to CR 60(b)(1) must establish: (1) That there is substantial evidence 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*, 73 Wn.2d at 352, 438 P.2d 581. Due process obviously does not require that the defaulting defendant be given notice of a damages hearing. *Conner v. Universal Utilities*, 105 Wn.2d 168, 712 P.2d 849 (1986). By failing to appear and defend the lawsuit, a defaulting defendant bears the risk of surprise at the size of a default judgment. *J-U-B Engineers, Inc.*, 69 Wn. App. at 151, n. 2, 848 P.2d 733.

1. Young clearly did not meet her burden under the first primary element of *White* as to damages.

Young first contends that the trial court concluded that substantial evidence of two prima facie defenses was presented by Defendant Young: lack of personal jurisdiction/insufficiency of process and deficiencies in the proof of Plaintiff's damages. However, the issue of personal jurisdiction/insufficiency of process was addressed by the trial court at an evidentiary hearing, wherein the trial court concluded that Young had not shown by clear and convincing evidence that she was not properly served with process on May 30, 2013. The trial court denied Young's motion to vacate the default order and default judgment based on lack of personal jurisdiction/insufficiency of process. Young did not appeal the trial

court's decision denying her motion to vacate based on personal jurisdiction/insufficiency of process and may not raise this issue on appeal. *Smith v. Shannon*, 100 Wn.2d, 26, 37, 666 P.2d 351 (1983); RAP 2.5(a).

Moreover, contrary to Young's contention, there is no evidence that the trial court found any deficiencies in the proof of Plaintiff's damages. The trial court's October 22, 2013 order merely states that Plaintiff's claim is for an "amount uncertain." The trial court crossed out the sentence in the Order that "Plaintiff failed to present live testimony of her damages." There is no evidence suggesting that the trial court found any deficiencies in the proof of Plaintiff's damages. In fact, there are no findings that indicate the trial court assessed any of the damages awarded. Young provided no competent evidence of a prima facie defense to damages. Young merely asserted in her motion her personal belief that Choi's damages were excessive because medical bills were only \$1,822 and that she has presented only a "dubious evidence of wage loss in 2010."

However, Choi's own declaration establishes the significant injuries she suffered to her back and left leg as a result of this accident. She produced her medical records from her physicians confirm a diagnosis of low back strain, whiplash injury secondary to the motor vehicle

accident, and the numbness in her left leg. Choi tried physical therapy exercises for her back for several weeks, which worsened the pain. (CP 419-423; CP 662-701). Although she suffered from persistent and ongoing back pain and numbness in her left leg, Choi had to stop medical treatment solely because she could not afford to pay the medical bills. (CP 419-423; CP 662-701).

Choi also described the impact her injuries have had on her ability to work and enjoy life. Choi was a marathon runner prior to the accident, and had to give up running altogether and gained 15 pounds. (CP 419-423; CP 662-701). She suffers from depression and low self-esteem because of her inability to run and enjoy life due to her persistent low back pain. She now suffers from numbness/tingling in her right arm. (CP 419-423; CP 662-701).

Choi presented a letter from the President of NHS, Inc. dated November 15, 2012, verifying that she missed 50 hours of work after the accident, which amounts to \$1,500.00. (CP 662-701; CP 699). Young claims that this letter is insufficient simply because it did not list the exact dates of lost work due to her accident or doctor's visits. Choi also presented her 2010 income tax return showing she had suffered a loss of income from Local Transports, LLC between April 2010 and December 2010 of \$20,422.00. (CP 662-701; CP 701). Young claims that this

income loss is insufficient because it was only in 2010, which makes no sense whatsoever. Finally, Choi presented her 2010 and 2011 federal income tax returns showing her loss of income in 2010 from Pacific Realty of \$10,000.00. (CP 662-701; CP 696-697). Once again, Young claims that this evidence is insufficient because Choi is only claiming income loss for 2010, and not 2011 or 2012. Whether Young believes Choi should have had more income loss does not constitute a prima facie defense to her claimed damages.

A trial court has broad discretion in determining the appropriate damages awarded under CR 55(b)(2). The court has discretion to hold a hearing, bench trial, or even a jury trial. 4 Karl B. Tegland, *Washington Practice: Rules Practice CR 55* at 339 (5th ed. 2006). Here, the court commissioner elected to enter a damages award based on the declarations and exhibits alone. This, too, was within its discretion. *See Miller v. Patterson*, 45 Wn. App. 450, 457, 725 P.2d 1016 (1986). The court commissioner's findings of fact and conclusions of law are supported by substantial evidence, and "substantial evidence" is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Price v. Kitsap Transit*, 125 Wn.2d 456, 466, 886 P.2d 556 (1994). The evidence presented was sufficient to persuade a fair-minded,

rational person that Choi's total damages amounted to \$133,744.00. (CP 600-606).

To establish a prima facie defense, affidavits supporting motions to vacate default judgments must set out the facts constituting a defense and cannot merely state allegations and conclusions. CR 60(e)(1); *Commercial Courier Service, Inc. v. Miller*, 13 Wn. App. 98, 104, 533 P.2d 852 (1975). The standard for vacating a damages award from default judgment is the same as the standard for setting aside awards of damages from trial. *Shepard Ambulance, Inc. v. Helsell Fetterman, Martin, Todd & Hokinson*, 95 Wn. App. 231, 241-42, 974 P.2d 1275 (1999). Such determinations require a showing that the evidence before the court granting the award was insufficient to support the amount of damages. *Shepard*, 95 Wn. App. at 241, 974 P.2d 1275. It is not a prima facie defense to damages that a defendant is surprised by the amount awarded by a default judgment or that the damages might have been less in a contested hearing. *Shepard*, 95 Wn. App. at 242, 974 P.2d 1275.

In this case, Young presented no affidavit or declaration contesting any of Choi's damages. In fact, Young provided no competent evidence whatsoever of a prima facie defense to damages. Young merely asserted in her motion to vacate that the damages were excessive because Choi's medical bills were only \$1,822, that she suffered wage loss only in 2010,

and that there was an absence of any evidence of pre-accident earnings. Even viewed in the light most favorable to the parties moving to set aside the default judgment, mere speculation is not substantial evidence of a defense. *White*, 73 Wn.2d at 352, 438 P.2d 581. In fact, Young's arguments on the claimed damages are nonsensical and contradicted by the evidence. Young clearly did not meet her burden under the first primary element of *White* as to damages.

2. Young did not meet her burden under the second primary element of *White* – mistake, inadvertence, surprise or excusable neglect.

Young claims that the trial court found that she demonstrated inadvertence, surprise and excusable neglect after notice of entry of the default judgment. However, there is no such finding in the record that the trial court found that Young satisfied this second primary element of *White*, that the moving party's failure to timely appear in this action was occasioned by mistake, inadvertence, surprise, or excusable neglect. In fact, after the evidential hearing, the trial court ruled that Young had not demonstrated a prima facie defense based on lack of personal jurisdiction, due diligence and excusable neglect.

Young admitted that she had actual notice of the summons and complaint on May 30, 2013, and read some portion of both the summons and complaint. The trial court found that Young was properly served with

process on May 30, 2013. Young chose not to answer or appear, having been informed of the consequences. Her failure to read or understand the summons and complaint is not excusable neglect. *State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989). After an evidentiary hearing, the trial court ruled that Young failed to show by clear and convincing evidence that she was not properly served with process on May 30, 2013, and denied Young's motion to vacate the default order. Young did not appeal the trial court's order denying her motion to vacate the default order. Thus, Young cannot raise the issue of insufficiency of service of process to establish mistake, inadvertence, surprise or excusable neglect for purposes of vacating the default judgment.

Moreover, Young cannot show excusable neglect because she was not provided notice of the default judgment. As a defaulting defendant, Young was not entitled to notice of the default judgment. *Conner*, 15 Wn.2d at 171, 712 P.2d 849. Young clearly did not meet her burden under the second primary element of *White*.

3. Young did not meet her burden under the third element of *White* – due diligence.

Young also claims that the trial court found that she acted with due diligence after notice of entry of the default judgment. Once again, there is nothing in the record that supports this assertion. On July 12, 2013,

Choi's counsel provided the claims adjuster at USAA, Wade Langston, with a copy of the default order. That same date, Young's counsel, Alan Piezer, contacted Choi's counsel and was also provided a copy of the default order. For the next two months, Young's counsel did absolutely nothing to respond to or defend the suit. On September 12, 2013, Peizer's partner, Martin Ziontz, filed a motion to show cause why the order of default should not be vacated, which was improperly noted in the King County Superior Court Ex Parte Department. On September 18, 2013, Choi filed and served Young's counsel with her response to the motion, which included a complete copy of Choi's Motion for Entry of Default Judgment, including the Declaration of Wanna Choi and all exhibits, the Order Granting Motion for Default Judgment entered on July 30, 2013, and also the Default Judgment entered on July 30, 2012. The court commissioner denied Young's motion because it was improperly noted. (CP 242-243).

Despite being served with the Choi's Motion for Entry of Default Judgment, and the Default Order, Young's counsel, Martin Ziontz, waited another month to file a Motion to Vacate the Default Order and Default Judgment. (CP 222-235). There is no dispute that Young's counsel had actual notice of the motion for entry of default judgment, the order of default, and the default judgment on September 18, 2013. Young's claim

that she waited only two weeks to file the motion to vacate the default judgment is directly contradicted by the record.

Young's claim that any delay in moving to vacate the default judgment was due entirely to Choi's failure to serve the motion for default judgment on Defendant is without merit. Again, as a defaulting defendant, Young was not entitled to notice of the default judgment. *Conner*, 105 Wn.2d at 171, 712 P.2d 849. Young's counsel could have easily checked the court docket and discovered the Order Granting Motion for Default Judgment and the Default Judgment, which was filed on July 30, 2013. Moreover, Choi served Young's counsel with the motion for default judgment, the order granting the default judgment and the default judgment on September 18, 2013.

Pietz's medical condition is not grounds for inexcusable neglect and due diligence. Pietz's partner, Martin Ziontz, is the one that drafted and filed the motion to vacate the default judgment. Young provides no reasonable basis for the unreasonable delay. Young clearly did not demonstrate due diligence under the third element of *White*.

4. Young did not meet her burden under the fourth element of *White* – no substantial hardship to Choi.

The fourth factor in *White* that a court must consider in passing upon a motion to vacate a default judgment is whether substantial hardship

will result to the opposing party. *White*, 73 Wn.2d at 352, 438 p.2d 581. The four facts in *White* are not given equal weight: "The first two factors are the major elements to be demonstrated by the moving party, and they, coupled with the latter two secondary factors, vary in dispositive significance under the circumstances of the particular case. Thus, where the moving party is unable to show a prima facie defense, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party." *Shepard*, 95 Wn. App. at 239, 974 P.2d 1275.

Young claims that the only hardship to Choi of vacating the default judgment is to require her to litigate this case on the merits. First, the trial court did not grant Young's motion to vacate the default order or the default judgment as to liability. The trial court granted Young's motion to vacate the default judgment only as to damages. (CP 437- 439). The vacation of the default judgment on damages unjustly delays a final resolution of this case, when Young has presented no credible defense to damages. Choi is in desperate need of medical treatment for her injuries, and delaying the final resolution of the damages portion will mean she has to wait another year and a half before she could receive any damages to

pay for her medical treatment. The record does not support vacating the judgment on damages and will cause Choi substantial hardship.

D. THERE ARE NO GROUNDS TO VACATE THE DEFAULT JUDGMENT BASED ON INEQUITABLE CONDUCT.

Young claims that the third ground to vacate a default judgment under *Morin* is inequitable conduct by the Plaintiff. Young's counsel claims that Choi acted inequitably by failing to notify her insurer, USAA, and her counsel before filing the "order of default of June 27, 2013" and the default judgment of July 30, 2013. Young cites *Morin* to support this theory. *Morin* consolidated three cases concerning the appearance requirement for providing notice of default judgment proceedings. *Id.* at 753-54, 161 P.3d 956. In the third case, the Gutzes and the Johnsons were involved in an automobile accident. *Id.* at 758, 161 P.3d 956. Gutzes' counsel engaged in settlement discussions with the Johnsons' insurer. *Id.* Shortly after the statute of limitations ran, the insurer called Gutzes' counsel to discuss settlement and asked whether there would be litigation. *Id.* The Gutzes had filed suit shortly before the statute of limitations ran, but the attorney made no mention of the suit to the insurer during the conversations about settlement. *Id.* Without informing the insurer that a default judgment was pending, counsel continued to negotiate a settlement with the insurer. The Supreme Court believed that counsel's failure to

disclose may have been an inequitable attempt to conceal the litigation that would allow for the default judgment to be set aside. *Id.*

Young argues that Choi's behavior towards USAA correlates to the concealment discussed in *Morin*. Young ignores the fact that the *Morin* court ruled that "Gutzes' counsel had no duty to inform [the insurer] of the details of the litigation." *Id.* The inequitable conduct did not arise from counsel's failure to notify the insurer of the lawsuit. Instead, the problem stemmed from the apparent attempt to conceal the existence of the suit while the parties engaged in settlement negotiations. *Id.* Here, Young did not conceal the existence of the lawsuit from USAA, and actually provided USAA with a copy of the Summons and Complaint. USAA and Choi were not involved in ongoing settlement negotiations. Choi informed USAA that she would be serving Young with the Summons and Complaint. Choi had no duty to notify USAA of the details of the litigation. *Caouette v. Martinez*, 71 Wn. App. 69, 856 P.2d 725 (1993). There is no case law supporting the proposition that it is inequitable to enter a default order or default judgment without notifying the insurer. *Id.* at 77, 856 P.2d 725. In *Morin*, the Washington Supreme Court refused to adopt the "manifested intent" test and held that "mere intent to defend, whether shown before or after a case is filed, is not enough, the defendant must go beyond merely acknowledging that a

dispute exists and instead acknowledge that a dispute exists in court.”
Morin, 160 Wn.2d at 756, 161 P.3d 956.

Furthermore, Young did not appeal the trial court’s order denying the motion to vacate the default order. Thus, she cannot argue that the failure to provide notice to USAA of the default order is inequitable conduct justifying vacating the default judgment as to damages.

Lastly, no rule or statute requires notice to a defaulting defendant of a motion for default judgment. Choi had no duty to provide notice to either USAA or Young’s counsel of the motion for default judgment.

E. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CHOI HER ATTORNEYS FEES AND COSTS INCURRED IN DEFENSE OF THE MOTIONS TO VACATE.

There is no reasonable basis for the trial court’s award of only \$1,873.97 in fees and costs to Choi, which are only for drafting the motion to vacate the default order. CR 60(b) allows the trial court to impose terms it considers just on a moving party to a motion to set aside a default order or judgment. Here, the trial court denied Young’s motion to vacate the default order but granted the motion to vacate the default judgment as to damages. Instead of awarding Choi her fees and costs incurred relating to the default judgment, the trial court granted Choi an award of only her fees and costs associated with drafting the motion for default, which was

not the order vacated. Choi's counsel was required to respond to two separate motions to vacate the default judgment and attend three separate hearings, including an evidentiary hearing. Choi's counsel reported \$28,094.61 in fees and costs associated with drafting and filing motion for default order, the motion for default judgement, and responding to Young's motions to vacate the default order and default judgment. At the very least, the trial court should have awarded Choi her fees and costs associated with the default judgment, which total \$24,266.13. Contrary to Young's contention, the default judgment was not obtained under improper circumstances, as discussed above. If this court affirms the trial court's order vacating the default judgment as to damages, then justice requires that Young pay Choi's fees and costs that were needlessly incurred because of Young's motions to vacate.

F. CHOI IS ENTITLED TO AN AWARD OF HER FEES AND COSTS ON APPEAL.

RAP 18.1(a) provides that if a party prevails on appeal and was entitled to attorney's fees at trial, the party may properly seek fees on appeal. An award of fees and costs under CR 60(b) is a proper basis upon which to award attorney's fees on appeal. This court should award Choi her fees and costs on appeal under RAP 18.1(a).

III. CONCLUSION

For the foregoing reasons, this court should reverse the trial court's order vacating the default judgment as to damages, and award Choi her fees and costs incurred at the trial court level and on appeal.

DATED this 5 day of May, 2014.

LANE POWELL PC

By 
Eileen I. McKillop, WSBA 21602
Attorneys for Appellant Wanna Choi

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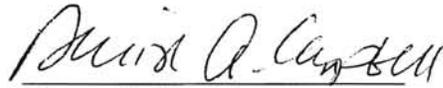
CERTIFICATE OF SERVICE

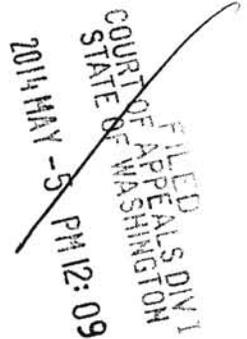
I hereby certify under penalty of perjury under the laws of the State of Washington that on May 5, 2014, I caused to be served a copy of the foregoing **Reply Brief** on the following person(s) in the manner indicated at the following addresses:

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- by First Class Mail
- by Hand Delivery
- by Overnight Delivery

DATED this 5th day of May, 2014 at Seattle, Washington


Denise A. Campbell



APPENDIX A-1

King County Superior Court's Confirmation of E-Filing



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Official Confirmation of ExParte Documents and Printing Options

Case Information	
Case Number:	13-2-14374-7
Case Title:	CHOI VS YOUNG
Case Description:	Personal Injury
Lawfirm or User Name:	Oles Morrison Rinker & Baker
Contact Person:	Catherine Melland
Address:	701 Pike Street, Suite 1700 Seattle WA 98101
Phone:	206-667-0655
Presentation/Pick-up Location:	SEA
Return Type:	Mail to the address listed above
Payment Type:	Credit Card or Internet Check
Online Payment Reference:	3593427319
Date Paid:	7/29/2013 4:03:21 PM
Paid Amount:	\$30.00
ExParte Services and Document(s) Requested	
Order Granting Plaintiffs Motion for Entry of Default Judgment.pdf 5 Page(s) Document E-Filed: No	
Default Judgment.pdf 2 Page(s) Document E-Filed: No	
Plaintiffs Motion for Entry of Default Judgment.pdf 11 Page(s) Document E-Filed: No	
Declaration of Wanna Choi with attached exhibits.pdf 40 Page(s) Document E-Filed: No	
Declaration of Eileen McKillop with attached exhibits.pdf 12 Page(s) Document E-Filed: No	
Costs Information	
Regular Service Fees:	\$30.00
Cost For Services Requested:	\$0.00
Total Costs:	\$30.00

Grand Total: \$32.49 (including the eCommerce fee: \$2.49)



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Environment: PROD

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