

NO. 36847-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NIGHTRUNNERS TRANSPORT, LTD.,

Appellant,

v.

JUANITA ROSANDER and DAVID ROSANDER,

Respondents.

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE E. THOMPSON REYNOLDS

BRIEF OF RESPONDENTS

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INTRODUCTION

On January 14, 2005, Juanita Rosander was seriously injured when her vehicle was struck in the rear by a tractor-trailer combination operated for Nightrunners. Unable to reach a settlement with Nightrunner's insurer, Mr. and Mrs. Rosander filed suit in March 2007. The basis of Mrs. Rosander's claim was for her injuries and the basis of Mr. Rosander's claims was the loss of services and consortium of his wife.

Nightrunners was served with the summons and complaint and a courtesy copy provided to its insurer, ING. Nightrunners failed to file an answer, and after notice to ING, the Rosanders moved for default. On July 26, 2007, the Skamania County superior court entered an order of default. After the order of default was entered, the court took evidence with regard to liability and damages, and entered findings of fact, conclusions of law, and judgment accordingly. It found that defendant Nightrunners was liable, there was no comparative fault on Mrs. Rosander's part, and that damages were to be awarded of \$925,794.54.

Nightrunners filed a motion to vacate judgment, which was heard by the superior court on September 27, 2007 and denied.

As the court did not abuse its discretion in denying the motion, judgment should be affirmed.

ISSUES PRESENTED

1. Did the trial court abuse its discretion in finding that defendants were given proper notice of default?

Answer: No.

2. Did the trial court abuse its abuse its discretion in denying the motion to vacate the default judgment?

Answer: No.

STATEMENT OF FACTS

I. Background

By January of 2005, Juanita Rosander was thirty-eight years old. She married David Rosander in 1993. Normally the couple lived with their minor children on a farm in Skamania County. At the time of this collision Mr. Rosander was on active duty with the United State's Army at Fort Bragg S.C. Mrs. Rosander was responsible for many of the farm chores. She also took care of their minor children and provided childcare for her granddaughter. Mrs. Rosander was an accomplished gymnast. She coached gymnastics in her local schools. She was in good health and condition and had no history of significant injury. [CP 145-153]

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II. Facts Concerning the Incident.

On January 14, 2005, Ms. Rosander was driving her 1999 Chevrolet Suburban eastbound on SR 14 near milepost 50. She stopped to allow westbound traffic to clear so that she could make a left turn onto Wind Mountain Road in Home Valley. Nicholas McKay was following her in his tractor, trailer combination. At the time, he was driving in the course of his employment with Nightrunners. By his own admission, Mr. McKay was driving at 55 mph and first took note of Ms. Rosander's vehicle when he was thirty to fifty yards away. Ms. Rosander saw Mr. McKay approaching in the rearview mirror. He did not appear to be slowing. She attempted evasive action to get out of his way. She was not successful. The Nightrunners' vehicle drove directly into the left rear of Ms. Rosander's Suburban. The investigating officer determined that the accident was entirely the fault of the Nightrunners' driver, and cited him for negligent driving. [CP77-78].

The incident was quite frightening for Ms. Rosander. Upon seeing the tractor-trailer combination closing in on her, she felt that she and her granddaughter were going to die. [CP146-147]

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III. Injuries and Course of Care.

Ms. Rosander was taken to Providence Mt. Hood Medical Center in Hood River, Oregon, for emergency care. She had not calmed down by the time she got to the hospital. The records show that she was still shaking. Her blood pressure was elevated. By that time, she was suffering from headache, neck pain, back pain, and pain radiating into the right shoulder. Her x-rays demonstrated muscle spasm. [CP 147]

Ms. Rosander followed up with Dr. James Janney at Mid-Columbia Family Physicians on January 17, 2005. She was then suffering from headaches and back pain. Dr. Janney prescribed Percocet and referred her for massage therapy. He recommended that she remain off work for one (1) week. She was ultimately referred for physical therapy. She received that care through May of 2005. [CP 148]

The physical therapy did not help much. For that reason, Ms. Rosander began treating at Pasa Chiropractic Clinic. She also received massage therapy.

Ms. Rosander's primary care physician, Dr. Raymond Fitzsimmons, asked that she obtain a MRI. This was performed on February 24, 2005. The study demonstrated disc protrusions at the C5-6 level and the C6-7 level. Based on these findings, Dr. Fitzsimmons referred Ms. Rosander to Dr. Emily Moser, a neurologist. Dr. Moser felt

she had ruptured the anterior longitudinal ligament of her cervical spine. Dr. Moser also referred Ms. Rosander for another round of physical therapy. These provided some level of improvement. She continued to see Dr. Pasa and continues that care to this day. It is likely that she will have to receive chiropractic and massage therapy for many years in the future. [CP 149-150].

As stated, the collision was terrifying. After the wreck, Ms. Rosander began to experience severe anxiety attacks. She has been placed on medication to minimize the problem. Even with the medication, she experiences high levels of stress whenever she drives near a large truck. It is likely that she will have to take this medication for the duration of her driving years. [CP 150].

Ms. Rosander continues to have pain in her neck and back. Her ability to care for the children, grandchildren and the family farm is severely restricted due to her injuries. She cannot coach gymnastics. She cannot interact with her children and grandchildren as she would like. [CP 150].

As of December of 2006, Ms. Rosander had incurred \$25,951.38 in medical expenses. [CP 151]. Mileage to treatment visits amounted to \$2,412.00. [CP 151]. Future medical expenses, including anti-anxiety medication are \$181,165.60. [CP 154]. Future mileage to medical visits is

reasonably estimated to be \$5,000.00. [CP 154]. Her past and future wage loss due to her inability to coach gymnastics through age 55 is \$33,630.00. [CP 152].

After the wreck, Mr. Rosander had to leave active military duty to be with his wife. He made far more in the military than he does at his civil job. He also had significant benefits for himself and the family while on active duty. His past and future wage and benefit loss is no less than \$177,000.00. [CP 153].

IV. Attempts at Resolution of the Case.

The Rosanders contacted William Robison of the firm Caron, Colven, Robison & Shafton, to give assistance in resolving claims arising from the collision. Mr. Robison promptly contacted Nightrunners' insurer, ING [CP 186]. By August 30, 2005, Mr. Robison sent a compact disc containing medical records, billings, and the police report. [CP 186]. He followed up with further correspondence concerning Ms. Rosander's situation and records on October 7, 2005, and on June 23, 2006. [CP 186]. Finally, on December 20, 2006, Mr. Robison sent ING, a comprehensive demand package to Cathy Gilbert at ING. It stated:

Based on the foregoing, I have evaluated this case as having a value of \$1,000,000 exclusive of the medical specials, wage loss and transportation expenses incurred to date. The pain, suffering, disability, inconvenience and loss of enjoyment of

life suffered and reasonably expected in the future combined with estimated future expenses make up the rest of my evaluation. We are authorized to offer to settle for these sums. This offer will remain open for a period of thirty (30) days. [CP 107].

ING received the demand and understood what it was seeking. [CP 73].

By March of 2007, it appeared that negotiations were at an impasse. This appeared to be due in part to Ms. Gilbert's belief that the statute of limitations had expired. She expressed to Mr. Robison the view that the applicable period of limitation was two years instead of three. [CP 187]

This action was filed on March 8, 2007. [CP 1-3]. Mr. Robison mailed a copy of the Summons and Complaint to Ms. Gilbert on March 12, 2007. [CP 187]. Nightrunners was served on April 4, 2007 [CP 7].

By June, no attorney had appeared on its behalf. On June 22, 2007, Mr. Robison filed a Motion for Default. [CP188]. He provided a copy of the motion to Ms. Gilbert at ING [CP 127]. The default hearing was set for July 12, 2007. [CP 188].

On July 12, 2007, Mr. Robison received a phone call from Fern Glazier, adjustor at ING. Ms. Glazier advised that she was new to handling of the claim because Ms. Gilbert was out of the office due to a health problem. She asked Mr. Robison for an extension of time in which to answer the complaint or attempt resolution. During the course of the

conversation, Ms. Glazier told Mr. Robison that she did not know attorneys in Washington who she might contact to represent her insured. Mr. Robison had previously dealt with cases involving motor vehicle collisions caused by persons insured by ICBC, the company that insures all British Columbia residents. On those occasions, the firm of Scheer & Zehnder in Seattle represented the defendants. Mr. Robison suggested to Ms. Glazier that she contact that firm to secure an attorney who could answer the complaint. Mr. Robison agreed to put the default hearing over for two weeks so that Ms. Glazier could contact counsel who would file an answer. He provided her with Scheer & Zehnder's address and telephone number [CP 188].

Mr. Robison then set the default hearing for July 26, 2007. He filed an amended citation with the Court. That citation was served on Ms. Glazier. It was mailed to her on July 16, 2007. [CP 11-12]. No attorney was retained. No answer was filed. No further request for time was made. The default was then entered. The court reviewed exhibits and, after hearing the testimony of Mrs. Rosander, entered a default judgment on July 26, 2007 in the following amounts:

1. Past medical specials: \$25,951.38
2. Future medical specials: \$181,165.60
3. Past travel expenses: \$2,412.00

4. Future travel expenses: \$5,000.00
5. Juanita Rosander's past and future income loss: \$33,630.00
6. David Rosander's past and future income and benefit loss: \$177,000.00
7. Juanita Rosander's general damages: \$400,000.00
8. David Rosander's general damages: \$100,000 [CP 24]¹

Nightrunners apparently finally got around to contacting defense counsel, Scheer and Zehnder, on August 16, 2007 [CP 134]. This was the very counsel recommended by William Robison on July 16, 2007 [CP 188 and CP 201]. Scheer and Zehnder filed a motion to vacate the judgment. This was heard by the Skamania County superior court on September 27, 2007 and denied. [CP 202]. This appeal followed.

ARGUMENT

I. Introduction.

The standard of review of a trial court's decision on a motion to vacate a default judgment is an abuse of discretion. *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007). "Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable

¹ Nightrunners incorrectly states that the general damages were blank in the Findings of Fact, Conclusions of Law, and Judgment. [App. Brief p. 6]

reasons, or that the discretionary act was manifestly unreasonable.”

Lindgren v. Lindgren, 58 Wn.App. 588, 595, 794 P.2d 526, 531 (1990)

As the trial court in this case denied Nightrunners’ motion to vacate the default judgment, the abuse of discretion standard applied in this case. Since judgment was made, the same abuse of discretion standard applies to the with regard to the failure of the trial court to set aside the order of default. CR 55(c)(1).

A defendant moving to vacate the default judgment must show:

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

The first two factors are primary while the second two are secondary. However, a default judgment cannot be set aside if the defendant does not demonstrate the presence of the first two factors. *White v. Holm*, 73 Wn.2d 348, 352-3 (1968); *Little v. King*, *supra*.

The trial court did not abuse its discretion in determining that notice was properly given under CR 6(d) of the default hearing. It did not

abuse its discretion in determining that there was no substantial evidence of a prima facie defense or in finding that the failure to appear and answer was inexcusable.

II. Notice for the July 26, 2007 Default Hearing Was Properly Given.

Nightrunners argues that the mailing of the July 16, 2007 amended citation is untimely for a July 26, 2007 hearing. Nightrunners' argument appears to be that the judgment is void because ING claims it did not receive the Amended Citation until July 30, 2007. This argument ignores the following language in CR 5(b)(2)(A) as follows:

If service is made by mail, the papers shall be deposited in the post-office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on Saturday, Sunday, or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday, or legal holiday, following the third day.

(Emphasis added.)

In short, actual receipt does not matter. No one denies that the Amended Citation was actually mailed to ING on Monday, July 16, 2007. Regardless of when it was received, and under the clear language of CR 5(b)(2)(A), the service was complete three days from the mailing or on Thursday, July 19, 2007.

The same argument Nightrunners is making here was made in *Vanderpol v. Schotzko*, 136 Wn.App. 504 (2007), and rejected. In that case, a party seeking *trial de novo* after a mandatory arbitration served the *trial de novo* request by mail on the sixteenth day after filing of the Mandatory Arbitration Award and its service by the arbitrator. The adverse party did not receive the notice until the twenty-first day. On that basis, the non-appealing party argued that service was not complete within the necessary twenty days. The Court gave that argument short shrift. It held, in accordance with CR 5(b)(2)(A), that service was complete on the nineteenth day. It stated that the argument was “unsupported by an authority.” 136 Wn.App. at 509.

CR 6(d) requires five days notice of hearing on written motion.

CR 6(a) states:

In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. **The last day of the period so computed shall be included**, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday. Legal holidays are prescribed in RCW 1.16.050. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(Emphasis added)

As demonstrated above, service of the amended citation of the default hearing was complete on Thursday, July 19, 2007 under CR 5(b)(2)(A). Under CR 6(d), five days notice of the default hearing was required. Friday, July 20, 2007 was the first day; the weekend is not to be counted; Monday, July 22, 2007 was the second day; Tuesday, July 23, 2007 was the third day; and Wednesday, July 24, 2007 was the fourth day. The clear language of CR 6(a) requires that the last day is included. That is Thursday, July 26, 2007, the day of the hearing.

Under the clear language of the CR 6, plaintiff properly gave valid notice to Nightrunners by mailing the amended citation on Monday, July 16, 2007 for a hearing 10 days later, Thursday, July 26, 2007.

Nightrunners also argues that the mailing rule should not apply when the party being served under CR 5(b)(2)(A) is out of the country. [App. Brief p. 16]. It supplies no authority for that contention. Indeed, it was ING's choice to adjust this Skamania County, Washington claim from Alberta, Canada. If the Supreme Court of the State of Washington, in adopting the Civil Rules, believed that it was necessary to make a special rule for mailing outside the United States, it would have done so. It did not, and the Court of Appeals should not make a new rule under the guise of construing CR 5(b)(2)(A). There can be no doubt here. Plaintiff complied with CR 5(b)(2)(A). Notice was sufficient.

Nightrunners argues that the Rosanders failed to properly serve it with the Amended Citation since the certificate of service refers to the Motion to Amend Complaint. [CP 12] [App. Brief p. 15]. The fact that the certificate apparently contains a typographical error does not in any way detract from the fact that the citation was sent –as attested to by Mr. Robison [CP 188 and CP 1199-202], and admitted by Ms. Glazier of ING. [CP 22]. The trial court did not abuse its discretion in determining that Ms. Glazier of ING was served a notice of default hearing on July 16, 2007. [RP 40].

III. There Is No *Prima Facie* Defense.

a. Liability.

i. Introduction.

Although its brief is not clear on the point, Nightrunners Transport, Ltd., appears to be disputing fault when its driver ran its truck into the rear of Mrs. Rosander's car.

ii. Trooper Hoffberger's Statement.

Washington State Patrol Trooper Neil Hoffberger investigated this incident. [CP 77-79] Boxes 1 and 2 in the upper left column of the report indicate a clear dry day. In the narrative portion, Trooper Hoffberger confirms the general facts of how the collision

occurred. His narrative also contains a reference to Mr. McKay's statement that he had trouble braking because a coffee mug became lodged between the brake pedal and the floor.

Washington's Police Traffic Collision Report form requires the investigating officer to identify the factors that contributed to the collision in boxes 27 and 28 on the right side of the face of the form. Box 27 applies to the Nightrunners' vehicle. Trooper Hoffberger placed the numbers "23" and "17" in those boxes. The number "23" means "inattention." The number "17" refers the reader to the narrative regarding the coffee cup lodged under the brake pedal. Box 28 applies to Ms. Rosander. Trooper Hoffberger put the number "18" in that box, which means "none." [CP 190-191]. In other words, from his investigation, Trooper Hoffberger concluded that the accident was caused by the inattention of the driver of the Nightrunners' vehicle and that nothing Ms. Rosander did contributed to the collision. Notably, he cited the Nightrunners' driver for negligent driving. [CP 77].

iii. Analysis of Fault.

There is no doubt that the Nightrunners' tractor-trailer combination struck the rear end of the Rosanders' car. Trooper Hoffberger believes that the driver of the tractor-trailer combination was

not attentive. The driver states that his coffee mug became wedged under the brake pedal impeding his ability to stop. He does not indicate how it got there. Under these circumstances, there can be no doubt that Mr. McKay was at fault.

Mr. McKay's negligence is obvious. The law on this point is well established. The following driver is negligent if he or she runs into the vehicle ahead. *Miller v. Cody*, 41 Wn.2d 775 (1953); *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103 (1967). Even an emergency will not excuse the following driver if the emergency arose out of normal traffic conditions or should have been anticipated. *Izett v. Walker*, 67 Wn.2d 903 (1966). The following driver is obliged to maintain such observation of the vehicle ahead so that it can stop safely if confronted by any reasonably foreseeable traffic conditions. WPI 70.04.

This case presented no unusual traffic conditions. Ms. Rosander was stopped on SR 14 allowing traffic to clear so she could make a left hand turn. This is not an unusual occurrence at an intersection or even elsewhere. If a following driver collides with a driver stopped to make a left hand turn, that driver is negligent as a matter of law. That was the holding of *Supanchick v. Pfaff*, 51 Wn.App. 861 (1988). In that case, the plaintiff stopped behind a car making a left hand turn into a business between intersections. The defendant struck the rear of the plaintiff's car.

The Court of Appeals held that the trial court erred by not granting the plaintiff's motion for a directed verdict on negligence.

Mr. McKay claims that the coffee mug lodged under his brake pedal prevented him from stopping. Mr. McKay was alone in the truck. The only explanation for the cup being beneath the pedal was his negligence in securing it. When did the mug get under the brake pedal? How could Mr. McKay have not discovered this problem earlier? Had he not used his brakes at all while going through Stevenson and the Columbia River Gorge on SR 14 just prior to milepost 50? Even if we believe that story, the coffee mug under the brake pedal was an obvious problem that Mr. McKay was responsible for and should have corrected. When a brake problem is discoverable, it cannot be used to absolve a driver of negligence. *Goldfarb v. Wright*, 1 Wn.App. 759 (1970).

Nightrunners may suggest that Ms. Rosander's attempt at evasive action somehow contributed to the collision and amounted to contributory negligence. There is nothing in Mr. McKay's statement to support such a claim. More to the point, Mrs. Rosander is obviously absolved of all negligence by the operation of the emergency doctrine. That rule provides that a person who is suddenly confronted with an emergency caused through no negligence of his own and who is compelled to decide instantly how to avoid injury and who makes a choice

as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice. *Bell v. Wheeler*, 14 Wn.App. 4 (1975).

Ms. Rosander was confronted with an emergency—the Nightrunners' tractor/trailer combination bearing down upon her and apparently not stopping due to a coffee cup being lodged under the brake pedal. Clearly, she didn't cause the emergency. She believed she was going to die unless she took some evasive action. Many people would have been so frightened by what was about to happen that they would not have been able to do anything. Ms. Rosander, however, was able to try to move her Suburban out of the path of the Nightrunners' tractor/trailer combination. Had she not done so, the injuries may have been far worse. She should be congratulated for her ability to function under pressure rather than accused of contributory negligence. The larger point, however, is that the emergency doctrine applies her to eliminate any claim that Ms. Rosander was contributorily negligent.

The trial court's determination that there was no *prima facie* defense shown was not untenable nor unreasonable. As such, the court did not abuse its discretion.

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b. Damages.

Stripped to its barest essentials, Nightrunners claims that the damages the Court awarded are too high. The default judgment was entered after the Court heard Ms. Rosander's testimony and reviewed exhibits. The Court made the decision as to how much the damages should be. Nightrunners is claiming nothing more than that the Court made the wrong decision. In any event, the Court's opinion in *Little v. King, supra*, makes it clear that such an argument cannot be used to set aside a default judgment.

The defendant in *Little v. King, supra*, rear-ended plaintiff's vehicle on two separate occasions. The first instance occurred when both drivers were in the fast lane on a freeway. They stopped and exchanged insurance information. As they were merging back into traffic, the defendant rear-ended the plaintiff's vehicle again. The plaintiff suffered from neck pain and back pain. She ultimately underwent two neck surgeries and lower back surgery at three levels. She ultimately sued the driver and her underinsured motorist carrier. When neither answered, she took a default judgment in the amount of \$2,155,835.58.

Shortly thereafter, both the defendant and the underinsured motorist carrier moved to set aside the default judgment. They asserted a *prima facie* defense on damages. This stemmed from a declaration from an

insurance adjustor who had reviewed the plaintiff's medical records and found reports of headaches, hip pain, and depression before the collisions. They also claimed that the damage award was unreasonable. The Superior Court found that the *prima facie* defense had been made out on damages and set aside the default judgment.

The Supreme Court reversed. First of all, it stated:

It is not a *prima facie* defense to damages that a defendant is surprised by the amount or that damages might have been less in a contested hearing.

160 Wn.2d at 704. The Court also noted that reference to some level of pre-existing problems was insufficient to make out that *prima facie* defense.

The holding in *Little v. King, supra*, stands for the proposition that a default judgment may not be set aside simply because the defendant disagrees with the amount of damages. The dissenting justices made this clear in their opinion. They believed that the size of the damage award did amount to a *prima facie* defense. 160 Wn.2d at 710-16. The holding in *Little v. King, supra*, also appears to reject the continued vitality of the decision by the Court of Appeals in *Gutz v. Johnson*, 128 Wn.App. 901 (2005). In that case, the *prima facie* defense was made out on the basis that damages were excessive.

If anything, the claim a *prima facie* defense on damages exists in this case is weaker than that in *Little v. King, supra*. In *Little v. King, supra*, there was evidence of some sort of pre-existing problems that Ms. Little may have suffered prior to the incident. There was also a suggestion that the impact between the vehicles was minimal. Apparently, there was no visible property damage to the vehicles involved, and all parties drove away without the need of medical treatment. *Little v. King* at 716.

By contrast, the defense in our case supplied no evidence from a doctor, an adjustor, or anyone else questioning the basis of the Rosanders' damages.. There is also no evidence that Mrs. Rosander had any difficulties prior to our incident of the kind she is now suffering.

It is also notable in this case that the damages awarded the Rosanders were actually considerably less than the \$1,000,000.00 **plus** special damages demanded by William Robison in the demand letter of December 20, 2006, which was contained in ING's files [CP 101-107]. ING knew exactly what was at stake by failing to respond to the complaint.

The defense argues that it was inequitable for the trial court to award Mrs. Rosander non-economic damages of \$500,000.00, when only \$25,000.00 was incurred in past medical bills. That argument is

factually incorrect. A portion of the non-economic damage figure, \$100,000.00, was attributable to Mr. Rosander's loss of consortium. [CP 24]. The \$400,000 non-economic damages award for Mrs. Rosander was well supported by the fact that this previously accomplished gymnast suffered both a permanently ruptured anterior longitudinal ligament in her spine, several bulging cervical disks, and permanent anxiety disorder, the combination of which have radically altered her life and her ability to function in her family. Significant evidence was submitted in that regard to the trial court [CP 147-155] [RP 8-12].

Failure by the trial court to vacate the judgment in light of the claim of excessive damages was not untenable or unreasonable. It was not an abuse of discretion. The trial court's order denying the motion to vacate should be upheld.

IV. Nightrunners Cannot Demonstrate Excusable Neglect.

The default judgment was taken on July 26, 2007. This is a period of 136 days or approximately 4½ months from the date Mr. Robison sent a copy of the Summons and Complaint to ING.

If we compare what happened here to other cases, it is clear that ING was guilty of neglect. It is also clear that the neglect is not excusable.

The first case worthy of discussion is *Prest v. American Bankers Life Assurance Company*, 79 Wn.App. 93 (1995). Justice Alexander authored this decision. In that case, Ms. Prest sued American Bankers Life based upon a mortgage insurance claim. Ms. Prest sued and served American Bankers Life through the Insurance Commissioner. Through its normal process, the Insurance Commissioner sent a copy of the Summons and Complaint to American Bankers Life. It received the Summons and Complaint on March 24, 1992. American Bankers Life failed to answer within 60 days. Ms. Prest obtained default judgment on May 22, 1992. American Bankers Life moved to set aside the default. It alleged that it did not file an answer because its General Counsel had been reassigned to other duties and was out of town at the time the Summons and Complaint was received at the insurer's offices. It was subsequently "mislaidd" and steps were not taken to "forward it to the proper personnel in time."

The trial court granted the insurer's motion to set aside the default motion. The Court of Appeals reversed. It held that the insurer's neglect in failing to deal with the Summons and Complaint properly was neglect but was not excusable.

Division Two of the Court of Appeals came to a similar conclusion in *Smith ex rel. Smith v. Arnold*, 127 Wn.App. 98 (2005). This case arose from a motor vehicle where the plaintiff was the defendant's grandson.

Suit was filed on October 1, 2002, and the defendant was served. The defendant claimed to be ill at the time and did not forward the suit papers to her insurer, Allstate, in a prompt fashion. On November 20, 2002, Allstate received the Summons and Complaint from the plaintiff's attorney. The adjustor did not review the documents until December 10. For reasons that were never made clear, Allstate's staff counsel did not enter a notice of appearance. On December 20, 2002, approximately 2½ months after service of the Summons and Complaint, the plaintiff obtained an order of default. The defendants moved to set aside the default order on the basis of excusable neglect. The trial court denied that request, and the Court of Appeals affirmed.

The Court ruled that there was no evidence to support a conclusion that a failure to appear was the result of excusable neglect. The Court was not impressed with the defendants' excuse that they did not respond or forward the documents to Allstate because of an illness. The Court was also not impressed by Allstate's failure to see to the filing of a notice of appearance for over thirty-seven days after receiving notice of the suit.

The defendant in *Little v. King, supra*, was, apparently, a troubled young adult. She appeared at the default hearing. The judge gave her the opportunity to file a handwritten answer, but she declined to do so. After the default judgment was entered, she obtained counsel and moved to set

aside the default judgment. St. Paul Insurance, the underinsured motorist carrier, also had knowledge of the proceedings. It chose not to intervene as it had the perfect right to do. The Court held that there was no excusable neglect because both Ms. King and St. Paul declined to participate and defend.

The facts of our case present a more egregious example of inexcusable neglect than the cases cited above. ING knew of the Summons and Complaint for well over four months and, apparently, never appointed counsel to appear on Nightrunners' behalf. It cannot rely on issues relating to assignment and availability of its personnel. *Prest v. American Bankers Life Assurance Company, supra*, makes that clear. Allstate inexcusably delayed thirty-seven days without securing the filing of an appearance from the time it learned of the suit and the entry of the default judgment in *Smith ex rel. Smith v. Arnold, supra*. ING delayed far longer, over four months, without taking any action. This must amount to inexcusable neglect.

The fact that ING's neglect was no excusable is reinforced by the minimal effort that would have been necessary to see that counsel appeared for Nightrunners and that an answer was timely filed. All ING had to do was call an attorney of its choosing and forward the file. This

activity would take at most ten minutes of time, fifteen if the adjuster and the attorney decided to get into a detailed discussion of the case.

On July 12, 2007, Mr. Robison advised Ms. Glazier of a perfectly competent firm that could provide representation. He even provided their phone number. This is the precise firm that has now made the motion to set aside the default judgment. It would have been a simple matter for Ms. Glazier to end her call with Mr. Robison and then call the Scheer & Zehnder firm to make sure that counsel was appointed. It would also have been an easy matter for her to see to the transmission of the claims file to the firm so that an answer could be timely prepared. According to her declaration, however, Ms. Glazier did absolutely nothing between July 12 and July 26 to secure representation for Nightrunners or to see that an answer was filed. She gives no explanation for this lack of action. [CP 75]. Indeed, the first time ING appears to contact counsel is August 16, 2007, yet another twenty-one days later. [CP 134]

Mr. Robison afforded Nightrunners' insurer, ING, every opportunity to appear and answer—a greater opportunity than was required under the circumstances. Nonetheless, ING simply could not accomplish the simple task of getting an attorney to file its answer for its insured over a period of more than four months. A better example of neglect that is not excusable is hard to imagine.

Nightrunners cites *Spoar v. Spokane Turn-Verein* 64 Wash. 208, 116 P. 627 (1911). In that case, the court affirmed a trial court's order vacating a default judgment. The defendant's representative served with the summons and complaint:

1. Was unfamiliar with the American court system;
2. Had thought that there was no need to appear in the case until after default judgment had been entered;
3. Had thought a trial is scheduled after default;
4. Had never read the complaint;
5. Had misplaced the summons and complaint and did not know their contents.

Id at 212, 628-629.

These factors are not present here. It would strain credulity to believe that an insurance company (whose very purpose is to handle claims) would be unfamiliar with the court system or the importance of responding to complaints. Even before the lawsuit was filed in this case, ING knew plaintiffs were making a claim in excess of \$1,000,000.00. It chose to do nothing to defend the case, however.

The trial court did not abuse its discretion in determining that there was no excusable neglect. That determination was neither unreasonable nor untenable. As such, the order denying the motion to vacate should not be overturned.

V. Trial Court did not abuse its Discretion in Reviewing Evidence Regarding Excusable Neglect.

Nightrunners argues that the trial court abused its discretion by finding that Fern Glazier's statement that William Robison gave an open extension is not credible. It also argues that the Rosanders admitted that the court applied the wrong standard [App. Brief 20-25]. Nightrunners misunderstands the difference between the first and second prongs of *White v. Holm, supra*.

As the court stated in *Pfaff v. State Farm Mutual Auto. Ins. Co.* 103 Wn.App. 829, 834, 14 P.3d 837, 840 (2000):

White demonstrates that a trial court must take the evidence and reasonable inferences in the light most favorable to the CR 60 movant when deciding whether the movant has presented "substantial evidence" of a "prima facie" defense.

In that regard, the trial court was required, as it did, to look at the facts of the accident in the light most favorable to Nightrunners. This is only in regard to the first of the *White v. Holm, supra*, factors, i.e. whether there was substantial evidence supporting a *prima facie* defense. The excusable neglect prong of the *White* rule does not require a deferential standard. In that regard, it was entirely proper for the trial court to view the affidavits and Mr. Robison and Ms. Glazier and determine credibility. If the courts were not permitted to weigh the evidence in such a manner,

then, arguably, default judgments would always be set aside. Nothing in Washington case law supports Nightrunners' position.

Even if we assume that the trial court improperly weighed the credibility of Mr. Robison and Ms. Glazier as to what was discussed in the conversation of July 12, ING is still guilty of inexcusable neglect. Ms. Glazier clearly understood that there was a July 26, 2007, deadline to do something. [CP 75]. There is no evidence that she did anything in regard to this claim during the two weeks between July 12 and July 26, 2007 or even for twenty-one days after that, when she finally contacted Scheer and Zehnder. There is simply no excuse for that delay, especially after her July 12 conversation with Mr. Robison.

Nightrunners appears to argue that Mrs. Rosanders's counsel somehow stipulated that the standard for reviewing the evidence would be the same for both the first and second prong of *White*. [App, Brief p. 20]. It cites [RB 27] (sic.). A fair reading of the transcript indicates directly the opposite as what Nightrunners suggests. [RP 27].

CONCLUSION

The trial court did not act on untenable nor unreasonable grounds in determining that defendant did not show substantial evidence of a *prima facie* defense or that the failure to file an answer was the result of

inexcusable neglect, which are the first two and primary prongs of the *White* rule for granting CR 60(b) relief. As such, the trial court did not abuse its discretion in denying Nightrunners' motion to vacate the default judgment. The judgment should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of February,
2008.



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Of Attorneys for Respondents

NO. 36847-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NIGHTRUNNERS TRANSPORT, LTD.,

Appellant,

vs.

JUANITA ROSANDER and DAVID ROSANDER,

Respondents.

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE E. THOMPSON REYNOLDS

AFFIDAVIT OF SERVICE

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FILED
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON)
)
County of Clark) ss.

THE UNDERSIGNED, being first duly sworn, does hereby depose
and state:

1. My name is LORRIE VAUGHN. I am a citizen of the
United States, over the age of eighteen (18) years, a resident of the State of
Washington, and am not a party to this action.

2. On February 29, 2008, I deposited in the mails of the United
States of America, first class mail with postage prepaid, a copy of the BRIEF
OF RESPONDENTS to the following person(s):

Mark P. Scheer
Sean V. Small
Scheer & Zehnder
701 Pike Street, Suite 2200
Seattle, WA 98101

I SWEAR UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY
KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this 29th day of February, 2008.

 *Lorrie Vaughn*
LORRIE VAUGHN

AND SWORN to before me this 29th day of February,
2008.

John P. Olsen
NOTARY PUBLIC FOR WASHINGTON
My appointment expires: 9-27-10