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STATE OF WASHINGTON
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DEPUTY

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

**BETTER FOODS LAND INVESTMENT CO.,
a California Limited Partnership,**

Respondent,

v.

RICK BOWLER and MARILEE THOMPSON,

Appellants.

BRIEF OF RESPONDENT

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PM 8-3-09

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I. INTRODUCTION

Defendants did not file a timely answer in this case. Indeed, they never filed an answer, timely or not. Six months after defendants' answer was due, plaintiff moved for a default judgment. Defendants received that motion; they also received notice that a hearing on the motion had been set for one week later. However, defendants did not respond to the motion, nor did they appear at the hearing. Accordingly, the trial court granted plaintiff's motion and entered a default judgment against defendants.

Over five weeks after entry of the default judgment, defendants finally moved to vacate it. Nonetheless, they offered no evidence in defense to plaintiff's claim. They offered no explanation that would have excused their failure to file a timely answer. They offered no reason whatsoever why it took them over five weeks to object to the default judgment. And they offered no grounds for concluding that plaintiff would not be prejudiced by vacation of the default judgment.

Based on those failures, the trial court denied defendants' motion. The court concluded that defendants had not demonstrated any defense. It also found that defendants' failure to file a timely answer was inexcusable. It also found no good reason for defendants' delay in moving to vacate the default judgment.

Defendants now appeal the trial court's denial of their motion to

vacate the default judgment. They rely on new materials and new arguments which they did not present to the trial court. They rely on factual assertions that the trial court rejected. And they rely on distortion and confusion of Washington law in an attempt to make this case appear to be something it is not.

This is not a case of innocent defendants who were left in the lurch by their fiduciaries, or who were trapped by procedural technicalities, or who were otherwise denied a fair shake. No, this is a run-of-the-mill case involving defendants who were represented by competent counsel, who failed to comply with simple civil rules, and who had, as the trial court found, a full opportunity to avert the default judgment. This is also a case involving defendants who failed to meet the established standards for vacation of a default judgment and whose only excuses were rejected by the trial court and are insufficient in any event.

In short, this is a case where the trial court reasonably concluded in its discretion that vacation of the default judgment would be unjust. This Court should affirm the trial court's ruling.

II. ISSUE PRESENTED

Did the trial court abuse its discretion in denying defendants' motion to vacate the default judgment against them? No, it did not.

III. STATEMENT OF FACTS

A. The proceedings before the default

Defendants Rick Bowler and Marilee Thompson (“defendants”) are husband and wife and the only members of Original Centerpointe, LLC, also known as Centerpointe, LLC (“Centerpointe”). (CP 234.) In 2005, Centerpointe owned a shopping center. Plaintiff desired to buy that shopping center. Accordingly, plaintiff and Centerpointe entered into a contract under which Centerpointe was to sell plaintiff the shopping center for about \$8 million. Under the contract, Centerpointe was also supposed to build, within one year of closing, an access point to allow cars to enter the shopping center parking lot from the street. Centerpointe never built that access point, however. Instead, almost immediately after the sale and knowing there was an unfulfilled obligation to plaintiff, defendants transferred all of Centerpointe’s assets to themselves and allowed Centerpointe to be administratively dissolved. (CP 1-9.)

In June 2007, plaintiff instituted an arbitration proceeding against Centerpointe for breach of contract. (The contract between plaintiff and Centerpointe included an arbitration provision.) Defendants then reinstated Centerpointe. (CP 1-9.)

In Spring 2008, plaintiff amended its arbitration claim to add defendants as parties, alleging, among other things, that defendants were

alter egos of Centerpointe and that the corporate veil should thus be pierced. Defendants objected on the ground that the arbitration panel had no jurisdiction over them because they had not signed the contract with plaintiff. (CP 1-9, 39.)

Accordingly, on March 5, 2008, plaintiff instituted the present action against defendants and Centerpointe. Among other things, the complaint contained an alter ego veil-piercing claim against defendants similar to the one plaintiff had included in its amended arbitration claim. The complaint also contained a claim for declaratory relief seeking a declaration that, because defendants were alter egos of Centerpointe, they were required to participate in the arbitration. (CP 1-9.) (Joseph Vance, then counsel for defendants and Centerpointe, accepted service of the complaint on behalf of them on March 19, 2008. (CP 85-86.))

Also on March 5, 2008, plaintiff moved for a court order compelling defendants to participate in the arbitration based on the claim for declaratory relief. (CP 39-48.) Defendants, through their attorney Vance, filed a response to the motion, arguing that it should not be granted because plaintiff had not offered any evidence to support its alter ego allegations. (CP 82-84, 128, 134.) The trial court agreed and denied the motion on that basis. The court was careful to note, however, that it was “not passing on” the merits of plaintiff’s other veil-piercing claim, which

was not based on arbitration and which plaintiff could pursue later after obtaining evidence. (CP 234-37.)

After the trial court made its ruling, plaintiff and Centerpointe returned to arbitration without defendants. The arbitration panel heard plaintiff's breach of contract claim against Centerpointe and ruled in plaintiff's favor, awarding plaintiff \$736,749.55. Shortly thereafter, plaintiff returned to the trial court and moved for confirmation of the arbitration award. (CP 237-46.) On September 2, 2008, plaintiff served defendants, through their attorney Vance, with a notice setting a hearing on the motion for September 12, 2008. (CP 328-30.)

On September 5, Vance served notice on plaintiff that he was withdrawing as counsel for defendants and Centerpointe, effective September 18. Vance listed defendants' last known address as 1111 SE 201st Ave., Camas, WA 98607 (the "Camas Address"). Vance also listed the same address as Centerpointe's last known address because defendant Bowler is Centerpointe's registered agent. (CP 246-51.) In addition, Vance served the same notice of withdrawal on defendants and Centerpointe at the Camas Address. (CP 249-51.) There is no evidence in the record that defendants failed to receive the notice of withdrawal or that they objected to Vance's listing of the Camas Address as their address.

On September 12, the hearing on plaintiff's motion to confirm the

arbitration award proceeded as scheduled. Neither defendants, nor Centerpointe, nor Vance, who was still counsel for defendants and Centerpointe at that time, made an appearance. After the hearing, the trial court confirmed the arbitration award. (CP 252-53.)

On September 16, plaintiff moved for entry of judgment against Centerpointe and set a hearing for September 26. (CP 256-58, 261.) Plaintiff served the motion, notice of hearing, and supporting documents on Vance, who still represented defendants and Centerpointe; plaintiff also served all of those documents on defendants and Centerpointe by mailing the documents to the Camas Address. (CP 331-32.) Defendants again did not appear at the hearing. There is no evidence in the record that defendants failed to receive these pleadings or that they were unaware of the hearing. After the hearing, the court entered judgment in favor of plaintiff and against Centerpointe. (CP 262-63.)

B. The default proceedings

On October 3, plaintiff moved for an order and judgment of default against defendants, noting that neither of them had yet filed an answer in the case. Also on October 3, plaintiff served defendants with the motion, supporting documents, and notice of an October 10 hearing by mailing those documents to the Camas Address. (CP 264-66, 287-89.) The trial court held the hearing as scheduled on October 10. Defendants for the

third time did not appear at the hearing. The court then granted plaintiff's motion, and signed and entered an order and judgment of default against defendants. (CP 290-95.)

During this time, plaintiff also began its collection efforts against Centerpointe. Plaintiff obtained a writ of garnishment against Fidelity National Title Company ("Fidelity"), which held Centerpointe funds in escrow related to plaintiff's purchase of the shopping center. (CP 335-39.) On November 5, the trial court signed a judgment and order requiring Fidelity to pay that money to plaintiff. (CP 340-41.) Fidelity then did so, and plaintiff received the money around November 14. (CP 342; RP 8.)

On November 18, shortly after the garnished funds were sent to plaintiff, and more than five weeks after the default judgment against defendants had been entered, Robert E.L. Bennett, an attorney, filed a notice of appearance on behalf of defendants. (CP 303-304; RP 8.) On the same date, Bennett also filed a motion seeking to vacate the default judgment against defendants. (CP 296-300.)

The motion was based on three grounds. First, it cited RCW 25.15.125 for the proposition that limited liability company members are not inherently liable for the company's debts. Second, the motion cited the trial court's denial of plaintiff's motion to compel arbitration. Finally, the motion included a declaration by defendant Bowler in which he

claimed that defendants are “not accustomed to receiving mail” at their Camas Address, that it “is not [their] mailing address,” and that their actual mailing address is in Vancouver, Washington. Bowler also claimed that defendants went on vacation on September 27 and did not return until October 4 (six days *before* the default hearing took place). (CP 296-300.) At the same time, Bowler admitted that defendants encountered “a back log of mail” at the Camas Address upon their return from vacation. Bowler asserted that, because of the back log, defendants “did not learn of the [October 10] hearing date until after it had already taken place.” (CP 296-300.) Significantly, Bowler did not claim that defendants had not *received* the notice until after the hearing; he claimed only that defendants did not *learn* of the notice until after the hearing.

On December 19, the trial court held a hearing on defendants’ motion to vacate the default judgment. (CP 316-17.) At the hearing, defendants admitted, among other things, that the Camas Address was where defendants lived. (RP 1.) Plaintiff pointed out that the Camas Address was the address given to plaintiff by Vance, the attorney who had represented defendants for nearly a year. Plaintiff also remarked that, even if defendants prefer to get their mail in Vancouver, they still get mail at their Camas home (as evidenced by the “back log” of mail there), and they actually received the motions, notices, and other documents that

plaintiff mailed to defendants' Camas home. (RP 2-3.) Plaintiff explained that, in its view, "the only reason" defendants ended up coming back to court after failing to appear at three successive hearings was because plaintiff had garnished the Centerpointe funds and defendants "realized [plaintiff] was serious" about collecting on its judgment against them. (RP 4.)

After hearing the parties' arguments, the trial court rejected defendants' claims of excusable neglect and due diligence. The court explained that defendants had had several months to file an answer but failed to do so, even though they took the opportunity to file a response to plaintiff's motion to compel arbitration. (RP 6-7.) The court also rejected defendants' theory that their failure to open their mail constituted a failure to receive notice of the motion for default until after the hearing. As the court found, defendants "did receive notice. They did not respond to the notice." (RP 9.) The trial court also found that defendants "only responded after the garnishment had occurred and the check had been disbursed from the clerk." *Id.* That finding is significant; it shows that the trial court agreed with plaintiff that "the only reason" why defendants ever reappeared in court was because "they realized [plaintiff] was serious" about collecting on its judgment against them. (RP 4.)

The trial court also concluded that defendants had not proven a

defense. As the court explained, when it denied plaintiff's earlier motion to compel arbitration, it was "only dealing with the arbitration agreement" and the "formation of the arbitration agreement"; it was not dealing with the ultimate merits of plaintiff's separate, broader veil-piercing claim, which was based on "the actions of the parties." (RP 6.) Because the court concluded that defendants had not proven a defense, excusable neglect, or due diligence, it denied their motion to vacate the default judgment. (RP 8; CP 316-317.)

IV. ARGUMENT

A. Scope of review

On appeal, defendants challenge only the trial court's denial of their motion to vacate the default judgment. (CP 318-19.) They have not appealed any other facet of the proceedings below, such as the trial court's original entry of default judgment against them.¹

When confronted with a motion to vacate a default judgment, the trial court may grant the motion only if the defendant makes the showing required by CR 60(b). *See* CR 55(c)(1) (so stating). CR 60(b) requires the

¹ Defendants argue that plaintiff failed to follow CR 55(a)(3) by giving them four days' notice of the hearing on the motion for default rather than five days' notice. (Appellants' Br. 17 n.3.) However, that issue was not raised below and is not preserved. *See In re Tang*, 57 Wn. App. 648, 655, 789 P.2d 118 (1990) ("Arguments or theories not presented to the trial court will not be considered on appeal."). Moreover, even if there were error, it was one of law, and "[e]rrors of law may not be corrected [under] CR 60(b)." *Id.* at 654. Perhaps that is why defendants relegate their argument to a footnote and do not appear to actually rely on it as a ground for reversal here.

defendant to file the motion “within a reasonable time” after judgment; that rule also permits the vacation of a default judgment only if it would be “just,” and then only for certain specified reasons. Here, defendants rely on a single specified reason: CR 60(b)(1) (“Mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order”). (Appellants’ Br. 13.)²

B. Standard of review

A trial court’s ruling on a motion to vacate a default judgment is reviewed for abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). “A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds.”

Rosander v. Nightrunners Transp., Ltd., 147 Wn. App. 392, 403, 196 P.3d

² Defendants also appear to rely on CR 60(b)(11) (“Any other reason justifying relief from the operation of the judgment”). (Appellants’ Br. 13.) However, “CR 60(b)(11) applies only to extraordinary circumstances not covered by any other section of the rule.” *In re M.G.*, 148 Wn. App. 781, 793, 201 P.3d 354 (2009). Defendants do not argue that this case presents extraordinary circumstances or that it is not covered by another section of CR 60(b). On the contrary, defendants argue that this case *is* covered by CR 60(b)(1). Moreover, because defendants do not offer any analysis supporting their reliance on CR 60(b)(11), they have forfeited that argument. *See State v. Gossage*, 165 Wn.2d 1, 8-9, 195 P.3d 525 (2008) (court does not address issues on which appellant presents no independent analysis, argument, or authority).

Defendants also appear to rely on CR 6(b), which authorizes the trial court to extend certain deadlines. (Appellants’ Br. 13.) However, defendants forfeited that argument because they never made it to the trial court, *see In re Tang*, 57 Wn. App. at 655, and because they offer no analysis to support it here, *see Gossage*, 165 Wn.2d at 1. Moreover, that rule does not apply here because it explicitly forbids courts from “extend[ing] the time for taking any action under rule[] * * * 60(b),” and because the trial court in this case never found “good cause” for extending any deadlines.

711 (2008); *see also Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004) (trial court’s ruling must be upheld if it “is based upon tenable grounds and is within the bounds of reasonableness”). Put differently, “[a]n abuse of discretion exists only when no reasonable person would take the position adopted by the trial court.” *Griggs v. Averbek Realty*, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979).

While judgments on the merits are preferred, judgments of default hold an important place in Washington law. They serve to promote “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*, 160 Wn.2d at 703; *see also Griggs*, 92 Wn.2d at 581 (recognizing “the necessity of having a responsive and responsible system which mandates compliance with judicial summons, that is, a structured, orderly system not dependent upon the whims of those who participate therein”); *Johnson v. Cash Store*, 116 Wn. App. 833, 840-41, 68 P.3d 1099 (2003) (“[T]he need for a responsive and responsible legal system mandates that parties comply with a judicial summons.”); *Duryea v. Wilson*, 135 Wn. App. 233, 238, 144 P.3d 318 (2006) (“Even if a party has appeared in an action, if the party then fails to answer * * *, the party may still enter default.”). As the Washington Supreme Court recently recognized in this context:

[L]itigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose, and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.

Morin v. Burris, 160 Wn.2d 745, 757, 161 P.3d 956 (2007); *see also Rosander*, 147 Wn. App. at 403 (applying *Morin* to uphold trial court's denial of motion to vacate default judgment).

Given the importance of default judgments to the rule of law in Washington, the fundamental question on review is “whether or not justice is being done.” *Little*, 160 Wn.2d at 703 (quoting *Griggs*, 92 Wn.2d at 582). Accordingly, appellate courts do not apply bright line rules; instead, they ask whether the trial court's ruling was reasonable given the facts before it. *See id.* (“This system is flexible because ‘[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.’”) (quoting *Griggs*, 92 Wn.2d at 582) (some quotation marks omitted).

Because a trial court's default judgment is “presumed to be correct,” the defendant who seeks to vacate it must make “an affirmative showing of error.” *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). That is,

A party moving to vacate a default judgment must be

prepared to 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 notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

Little, 160 Wn.2d at 703-04. The first two factors are primary, while the second two factors are secondary. *Id.* at 704.

Again, consideration of the four factors is not subject to hard and fast rules. Instead, the factors are interdependent such that “the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors.” *Housing Authority v.*

Newbigging, 105 Wn. App. 178, 186, 19 P.3d 1081 (2001). For instance, if a defendant has offered evidence showing a “virtually conclusive defense” under the first factor, then the second factor is less important.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). On the other hand, if the defendant has only offered evidence showing a merely plausible defense, then the second factor may be decisive. *Id.* at 352-53; *see also Little*, 160 Wn.2d at 706 (“Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. It is thus an abuse of discretion.”); *Rosander*, 147 Wn. App. at 409 (“[Defendant] did

not provide any evidence of a prima facie defense and failed to show excusable neglect. Therefore, we affirm the trial court's denial of [defendant's] motion to vacate [plaintiff's] default order and judgment.”); *Cash Store*, 116 Wn. App. at 849 (“Because [defendant] failed to establish more than a prima facie defense to [plaintiff's] claims and did not satisfy its burden of demonstrating that its failure to appear and answer was occasioned by mistake, inadvertence, surprise, or excusable neglect, the trial court did not abuse its discretion in denying the motion to vacate the default judgment.”).

Two last points merit mentioning. First, in their brief, defendants imply that the trial court based its ruling entirely on the third *Little* factor (defendants' diligence), and that this Court should reverse on that basis. (*See* Appellants' Br. 11-12, 16 (so implying).) However, as discussed above and below, the trial court expressly considered, in addition to that factor, both the first factor (defendants' defense) and the second factor (defendants' neglect). Accordingly, this Court should disregard defendants' false implication.

Second, defendants quote *Little* for the proposition that the amount of the judgment against them is a good reason for this Court to reverse the ruling below. (Appellants' Br. 9-10.) However, the quotation on which defendants rely is from the dissent in that case, a fact that defendants fail

to mention. Moreover, the majority in *Little* upheld a default judgment for over \$2.1 million, three times the size of the judgment here. 160 Wn.2d at 702. The *Little* court explained that “[i]t 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.” *Id.* at 704. And, in *Rosander*, this Court upheld a default judgment for over \$900,000, also greater than the judgment here. 147 Wn. App. at 408. In so doing, this Court rejected as not “legally cognizable” the idea that a default judgment should be reversed merely because it is unfairly large. *Id.* Defendants do not complain of any irregularity in the size of the judgment against them; it is therefore presumptively valid. *See Little*, 160 Wn.2d at 704 (so stating); *Rosander*, 147 Wn. App. at 408 (same).

C. All four *Little* factors weigh in plaintiff’s favor.

With the foregoing scope and standard of review in mind, plaintiff turns to a discussion of the four factors mentioned in *Little*. As shown below, defendants have not met their burden of proof as to any of the four factors. Accordingly, they are not entitled to reversal here.

1. Defendants provided no evidence of a defense.

Under the first *Little* factor, defendants must show that there is “substantial evidence” supporting a defense. 160 Wn.2d at 703-04; *see also Penfound v. Gagnon*, 172 Wash. 311, 312, 20 P.2d 17 (1933) (“A

default judgment will not be set aside for irregularity without a showing of a meritorious defense.”).

a. The governing standard

There are two types of defense that defendants could prove: a virtually conclusive defense or a prima facie defense. A virtually conclusive defense is one that is so strong it renders the plaintiff’s claim “meritless.” See *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 205, 165 P.3d 1271 (2007). A prima facie defense, on the other hand, is merely one that, “if later believed by the trier of fact, would constitute a defense to the claims presented.” *Rosander*, 147 Wn. App. at 404. The initial inquiry under the first factor is whether defendants have demonstrated either type of defense. See *TMT Bear Creek*, 140 Wn. App. at 201 (“[A] trial court’s initial inquiry is whether the defendant can demonstrate the existence of a * * * virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff’s claims.”).

Regardless which type of defense defendants try to prove, they must offer “substantial evidence” in support of it. *Little*, 160 Wn.2d at 703-04; *TMT Bear Creek*, 140 Wn. App. at 211 n.10 (“[T]he burden is on the moving party to demonstrate the existence of a * * * virtually conclusive defense, not on a trial court to discern it.”); *Rosander*, 147 Wn.

App. at 404 (“The defendant satisfies its burden of demonstrating a prima facie defense if it produces evidence that, if later believed by the trier of fact, would constitute a defense to the claims presented.”).

In other words, defendants must offer affidavits and declarations; they cannot rely on mere allegations and denials. *See* CR 60(e)(1) (motion to vacate judgment “shall” be based on “affidavit * * * setting forth * * * facts or errors upon which the motion is based”); *Penfound*, 172 Wash. at 312 (“A bare statement that appellants had a meritorious defense was not sufficient. To entitle them to a vacation of the default and judgment, it was necessary for them to set out, in the supporting affidavit, the facts constituting the defense.”); *Cash Store*, 166 Wn. App. at 847 (“To establish a * * * defense, the affidavits submitted to support vacation of a default judgment must precisely set out the facts or errors constituting a defense and cannot rely merely on allegations and conclusions.”); *Rosander*, 147 Wn. App. at 405 (affirming denial of motion to vacate default judgment where moving party “baldly state[d] that it presented a prima facie defense, but [did] not explain how the facts support a legally cognizable defense”).³

³ It is true that, when considering whether defendants have proven a prima facie defense, the trial court must view the evidence in the light most favorable to defendants. *See TMT Bear Creek*, 140 Wn. App. at 207 (so stating). However, when considering whether defendants have proven a virtually conclusive defense, the trial court may weigh the evidence as it deems best, without any special solicitude for defendants. *Id.*

With that background in mind, the starting point for this Court's analysis is the fact that the trial court denied defendants' motion to vacate the default judgment. Accordingly, the question on review is whether the trial court abused its discretion in acting as it did, not whether the trial court's ruling is the same as the one this Court would have adopted. *See Griggs*, 92 Wn.2d at 584 ("An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court."); *Wade*, 138 Wn.2d at 464 ("A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error.").

b. Defendants provided no evidence.

When defendants moved to vacate the default judgment, they did not cite to the trial court *any evidence*, let alone the *substantial evidence* required, to prove either a virtually conclusive defense or a prima facie defense. Instead, defendants cited only three materials to the trial court: RCW 25.15.125, the trial court's ruling on the motion to compel arbitration, and the declaration of defendant Bowler. (CP 296-300.)

Bowler's declaration says exactly nothing about defendants' defense; it only concerns when defendants learned of the default hearing. Accordingly, it is wholly irrelevant to the analysis under this factor. *See Little*, 160 Wn.2d at 704 (holding that "defendants provided *no* competent evidence of a prima facie defense" where their only evidence

was irrelevant) (emphasis in original).

Moreover, neither the statute nor the ruling constitutes evidence. *See State v. Boehning*, 127 Wn. App. 511, 522, 111 P.3d 899 (2005) (fact that prosecutor dropped certain charges not evidence; “[E]vidence is ‘[s]omething (including *testimony, documents, and tangible objects*) that tends to prove or disprove the existence of an alleged fact.’”) (citing *Black’s Law Dictionary* 595 (8th ed 2004)) (emphasis in *Boehning*). Defendants thus cannot rely on either the statute or the ruling to support their defense. *See Little*, 160 Wn.2d at 703-04 (defendants must submit “substantial *evidence*” of defense) (emphasis added); CR 60(e)(1) (affidavits required); *Penfound*, 172 Wash. at 312 (same); *Cash Store*, 166 Wn. App. at 847 (precise affidavits required); *Rosander*, 147 Wn. App. at 405 (facts required).

c. Defendants’ non-evidence is insufficient.

Even if defendants could rely on the statute and the ruling, neither one proves a defense to plaintiff’s veil-piercing claim.

RCW 25.15.125 provides that limited liability company members are not inherently liable for the company’s debts. But that statute is beside the point. Plaintiff recognizes that the only way to hold defendants liable for Centerpointe’s debts is to pierce the corporate veil; that is why plaintiff brought a veil-piercing claim against defendants in this action. RCW

25.15.125 is thus no defense to plaintiff's veil-piercing claim. Even if it were, it would be a legal defense, not a factual one, and the trial court would not have been able to vacate the default judgment on that ground anyway. *See In re Tang*, 57 Wn. App. 648, 654, 789 P.2d 118 (1990) ("Errors of law may not be corrected by a motion pursuant to CR 60(b), but must be raised on appeal. Since vacation of the decree was based upon no grounds other than the alleged errors of law set forth above, the trial court abused its discretion by granting the motion.") (citation omitted).

Nor do defendants gain from the trial court's ruling on the motion to compel arbitration. As noted, the trial court denied that motion on the ground that plaintiff had not *at that time* (which was the same day plaintiff filed its complaint in this case) presented any evidence supporting plaintiff's veil-piercing theory *as it related to the arbitration agreement and the formation of that agreement*. Importantly, the trial court did not base its decision on any evidence *presented by defendants* that would have defeated plaintiff's claim; the court's ruling was limited to plaintiff's lack of evidence. As the court explained: "Whether or not [plaintiff] may establish [its] factual claims is an issue that the Court is not passing on because there is not that measure of proof to make a determination." (CP 236.)

Not only was the court's ruling based on the initial lack of evidence on plaintiff's part – as opposed to any countervailing evidence on defendants' part – but the court's ruling was limited to the arbitration claim and did not encompass plaintiff's separate and broader veil-piercing claim, which was not limited to the arbitration agreement. The trial court specifically recognized as much when it denied defendants' motion to vacate the default judgment, stating that its earlier ruling “only deal[t] with the arbitration agreement” and the “formation of the arbitration agreement,” not the ultimate merits of plaintiff's broader veil-piercing claim, which was based on “the actions of the parties.” (RP 6.)

The foregoing facts are revealing in two significant respects. First, they prove that the trial court *did* consider the first *Little* factor when it ruled on defendants' motion to vacate the default judgment, contrary to what defendants would have this Court believe. (*See* Appellants' Br. 11-12, 16 (implying that trial court ignored first factor).) Second, they show that the trial court did not believe that its earlier ruling on the motion to compel arbitration aided defendants in their attempt to prove the defense required by the first *Little* factor. That is significant because the trial court was in the best position to know what it intended by its earlier ruling in this case. Accordingly, the trial court's ruling on the motion to compel arbitration does not support either a virtually conclusive defense or a

prima facie defense.

d. Defendants' unpreserved argument is meritless.

On appeal, defendants seek to rely on additional material which they did not cite to the trial court when they moved to vacate the default judgment: their response to plaintiff's motion to compel arbitration. (Appellants' Br. 20.) This Court may not consider that material, however, because defendants did not preserve any reliance on it. *See Tang*, 57 Wn. App. at 655 ("Arguments or theories not presented to the trial court will not be considered on appeal.").

Defendants attempt to make an end run around the preservation requirement by citing *Tang* and *Griggs*. Neither case helps defendants, however. In both cases, the trial court vacated a default judgment, even though the moving party had not alerted it to the necessary evidence, because the trial court chose to exercise its discretion to review the entire court record, which did contain the necessary evidence. *Tang*, 57 Wn. App. at 653-54; *Griggs*, 92 Wn.2d at 582-83. In both cases, the appellate court held that the trial court had not abused its discretion in going beyond the materials submitted by the moving party. *See Griggs*, 92 Wn.2d at 584 (court could not "say that there was an abuse of discretion" when trial court reviewed uncited evidence); *Tang*, 57 Wn. App. at 653-54 (reaching

same conclusion).⁴

This case is not like *Tang* or *Griggs*. Unlike those cases, the trial court here *denied* defendants' motion to vacate the default judgment. Unlike those cases, the trial court here chose *not* to go beyond the materials submitted by defendants with their motion. Although the trial court *might* have exercised its discretion to do so under *Tang* and *Griggs*, nothing in those cases *required* it do to so, and defendants have not shown that the trial court abused its discretion in acting as it did. *See Griggs*, 92 Wn.2d at 584 (“An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court.”). Moreover, nothing in *Tang* or *Griggs* supports the notion that this Court can reverse the trial court based upon arguments and submissions which were not before the trial court when it made its ruling. On the contrary, *Tang* makes clear that “[a]rguments or theories not presented to the trial court will not be considered on appeal.” 57 Wn. App. at 655.

⁴ The *Tang* court cited *Griggs* for the proposition that “it will not always be necessary to submit a supporting affidavit pursuant to CR 60(e)(1) if the grounds for the motion are clearly evidenced from an examination of the files.” 57 Wn. App. at 653. Although that statement might be read broadly as exempting all moving parties from having to submit affidavits, the court’s citation to *Griggs* indicates that the statement is more limited and merely recognizes, as *Griggs* did, that a trial court *may* exercise its discretion to review materials not submitted with the motion. That understanding of the statement also comports better with CR 60(e)(1) (motion “shall” be based on affidavit). *See Vaughn v. Chung*, 119 Wn.2d 273, 281, 830 P.2d 668 (1992) (term “shall” in court rules means “mandatory” not “permissive”); *see also TMT Bear Creek*, 140 Wn. App. at 211 n.10 (“[T]he burden is on the moving party to demonstrate the existence of a * * * defense, not on a trial court to discern it.”). On an unrelated note, the quotation from *Tang* on page 21 of defendants’ brief is not actually in that opinion, nor is it, so far as plaintiff can tell, in any reported opinion.

Even if this Court could look to defendants' response to the motion to compel arbitration, defendants still have not proven with substantial evidence either a prima facie defense or a virtually conclusive defense. That is because the response does not contain any evidence; it consists only of bare statements and conclusory allegations and denials. *See Boehning*, 127 Wn. App. at 522 (defining evidence). Accordingly, it cannot constitute the evidence defendants need to produce in order to establish a defense. *See Little*, 160 Wn.2d at 703-04 (defendants must submit "substantial evidence" of defense); CR 60(e)(1) (affidavits required); *Penfound*, 172 Wash. at 312 (bare statements do not suffice; affidavits required); *Cash Store*, 166 Wn. App. at 847 (mere allegations and conclusions insufficient; precise affidavits required); *Rosander*, 147 Wn. App. at 405 (bald statements insufficient; facts required).

Even if the response were evidence, it does not contain a defense to plaintiff's veil-piercing claim. Instead, it merely asserts that defendants did not sign the Centerpointe contract or provide any guaranties on it. That is not a virtually conclusive defense, let alone a prima facie one, especially when the response also admits that defendants took nearly all of Centerpointe's assets immediately after Centerpointe received \$8 million from plaintiff and that defendants then let Centerpointe dissolve administratively before resurrecting it for the sole purpose of defending

plaintiff's claims.

In short, defendants did not cite to the trial court *any* evidence, let alone the *substantial evidence* required, to prove either a virtually conclusive defense or a prima facie defense. The materials defendants did submit were all irrelevant, unhelpful, not evidence, or all three of those things; the same is true of the material they failed to submit to the trial court but rely on here. Accordingly, the trial court did not abuse its discretion in denying the motion to vacate the default judgment. *See Penfound*, 172 Wash. at 312 (“A default judgment will not be set aside for irregularity without a showing of a meritorious defense.”); *Little*, 160 Wn.2d at 703-04 (defendants must submit “substantial evidence” of defense); *TMT Bear Creek*, 140 Wn. App. at 211 n.10 (“[T]he burden is on the moving party to demonstrate the existence of a * * * virtually conclusive defense, not on a trial court to discern it.”); *Rosander*, 147 Wn. App. at 404 (“The defendant satisfies its burden of demonstrating a prima facie defense if it produces evidence that, if later believed by the trier of fact, would constitute a defense to the claims presented.”); CR 60(e)(1) (moving party “shall” submit “affidavit”).

2. Defendants provided no evidence to excuse their failure to file a timely answer.

Even if this Court were to conclude that defendants offered the

substantial evidence necessary to support a prima facie defense, this Court must nonetheless affirm the ruling below because defendants have not shown that their failure to file a timely answer was in any way excusable. *See Little*, 160 Wn.2d at 706 (“Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to [answer] was [excusable], there is no equitable basis for vacating judgment. It is thus an abuse of discretion.”); *Rosander*, 147 Wn. App. at 409 (“[Defendant] did not provide any evidence of a prima facie defense and failed to show excusable neglect. Therefore, we affirm the trial court’s denial of [defendant’s] motion to vacate [plaintiff’s] default order and judgment.”); *Cash Store*, 116 Wn. App. at 849 (“Because [defendant] failed to establish more than a prima facie defense to [plaintiff’s] claims and did not satisfy its burden of demonstrating that its failure to * * * answer was [excusable], the trial court did not abuse its discretion in denying the motion to vacate the default judgment.”).

a. Defendants provided no evidence.

Under the second *Little* factor, defendants must show that their “failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect.” *Little*, 160 Wn.2d at 704. As an initial matter, it is important to emphasize the proper scope of that inquiry. The issue is whether defendants can prove that they had a good excuse for

failing to file a *timely answer*. *Id.* (so stating); *see also White*, 73 Wn.2d at 354 (considering whether defendants were “at fault in failing to * * * answer plaintiff’s claim for relief *within 20 days* after service thereof”) (emphasis added).

Defendants were served with the summons and complaint on March 19 (CP 85-86), so their answer was due 20 days later, on April 8. *See* CR 12(a)(1) (answer due “20 days * * * after the service of the summons and complaint”). Because defendants did not file an answer by April 8, they were in default *as of that date*. *See Gen. Lithographing & Printing Co. v. Am. Trust Co.*, 55 Wash. 401, 402, 104 P. 608 (1909) (defendant “was actually in default” after failing to file answer by twentieth day); *Duryea*, 135 Wn. App. at 238 (same).

Bearing the proper inquiry in mind, it is fatal to defendants’ case that they have *never* offered *any* excuse for their failure to file a timely answer. Defendants were represented by counsel throughout the twenty-day period. There is no evidence that their counsel was incompetent in any way. Although defendants note that they appeared in the case in March when they opposed plaintiff’s motion to compel arbitration, that appearance was not enough; defendants needed to file an answer. *See Duryea*, 135 Wn. App. at 238 (“Even if a party has appeared in an action, if the party then fails to answer * * *, the party may still enter default.”);

Morin, 160 Wn.2d at 757 (answers serve different purposes from appearances and “must be served and filed timely in accordance with the rules”).

Because defendants have not shown that their failure to file a timely answer was excusable, the trial court did not abuse its discretion in denying their motion to vacate the default judgment. *See Little*, 160 Wn.2d at 706 (so holding); *Rosander*, 147 Wn. App. at 409 (same); *Cash Store*, 116 Wn. App. at 849 (same).

b. Defendants’ failure was inexcusable.

Even if the scope of the inquiry under the second *Little* factor could be expanded, defendants still are not entitled to reversal. Over five months passed between April 8, when defendants’ answer was due, and September 18, when their counsel withdrew. Defendants have *never* offered *any* excuse for their failure to file an answer during that period. Again, defendants were represented by counsel during that entire time, and there is no evidence that their counsel was incompetent in any way. For that additional reason, defendants have not shown that their “failure to timely * * * answer” was excusable. *Little*, 160 Wn.2d at 704.

Defendants’ counsel gave them two weeks to find alternate counsel before he withdrew. (CP 246-51.) They failed to do so. Instead, they took on the task of representing themselves after that point. Significantly,

defendants have *never* denied that they were in charge of their own litigation as of September 18. They have *never* complained of any miscommunication between them and their counsel which might have led them to believe that he was still representing them in October. This case is therefore not like those cases where an innocent defendant was defaulted due to neglect on the part of the defendant's insurer or attorney. *See, e.g., White*, 73 Wn.2d at 354 (trial court erred in denying motion to vacate default judgment where "defendants were not themselves at fault" but their insurer and attorney were).

Once on their own, defendants still did not file an answer to plaintiff's complaint. Two weeks later, on October 3, with no answer forthcoming, plaintiff finally moved for default. Even then, defendants had yet another week to file an answer before October 10, when the trial court heard plaintiff's motion and signed and entered the order and judgment of default. In short, even after their counsel withdrew, defendants had three weeks to file the answer that was required of them more than six months before. They never did.

In light of the foregoing circumstances, it should come as no surprise that the trial court rejected defendants' claims of excusable neglect. As the trial court found, defendants had a "full opportunity" to file a timely answer. (RP 7.) Failing that, they had another "full

opportunity” to at least file an untimely answer that preceded entry of the default judgment. Those findings are binding on this Court. *See Rutcosky v. Tracy*, 89 Wn.2d 606, 609, 574 P.2d 382 (1978) (trial court’s factual findings are binding on appellate court when supported by substantial evidence); *Knapp Brick & Tile Co. v. Skagit County*, 4 Wn.2d 152, 161, 4 P.2d 152 (1940) (same is true for trial court’s implicit factual findings); *see also Rosander*, 147 Wn. App. at 406 (“The trial court has broad discretion over the issue of excusable neglect and may make credibility determinations and weigh facts in order to resolve it.”).

Equally binding is the trial court’s finding that defendants received actual notice of plaintiff’s motion but did not respond to it. (*See* RP 8 (“They did receive notice. They did not respond to the notice.”).) Equally binding is the trial court’s finding that defendants “only responded after” plaintiff had garnished funds from a Centerpointe escrow account “and the check had been disbursed from the clerk.” *Id.* That finding essentially adopts plaintiff’s argument that “the only reason” why defendants ever reappeared in court was because “they realized [plaintiff] was serious” about collecting on its judgment against them. (RP 4.)

The trial court’s binding factual findings preclude any notion that defendants’ failure to file a timely answer was excusable. Indeed, those findings imply that, in the trial court’s view, defendants refused to

“acknowledge the jurisdiction of the court to decide their case[] and comply with court rules.” *Little*, 160 Wn.2d at 703. That is precisely the sort of attitude that default judgments are designed to remedy. *See Griggs*, 92 Wn.2d at 581 (recognizing “the necessity of having a responsive and responsible system which mandates compliance with judicial summons, that is, a structured, orderly system not dependent upon the whims of those who participate therein”); *Cash Store*, 116 Wn. App. at 840-41 (“[T]he need for a responsive and responsible legal system mandates that parties comply with a judicial summons.”). Based on the trial court’s findings, this Court must affirm the ruling below.

c. Defendants’ arguments are meritless.

Defendants attempt to escape that result through distraction and confusion of the issues. It bears repeating that defendants have *never* offered *any* excuse for their failure to file an answer in this case between April 8, when it was due, and October 3, when plaintiff moved for default. Instead, defendants’ sole argument is that they did not learn of the default hearing until after it had occurred. Defendants claim that the notice was “mailed to one of defendants’ secondary addresses,” that they did not see the notice because they were on vacation, and that, once they returned, they still did not see the notice because it was buried in a “backlog of mail.” (Appellants’ Br. 23.) Based on those claims, defendants assert that

their failure to file a timely answer was excusable.

There are several problems with defendants' claims. First and foremost is the fact that the trial court rejected them. As noted, the trial court implicitly found that defendants only responded to the default notice when they discovered the Centerpointe garnishment and realized that plaintiff was serious about collecting on its judgment against them. That finding, which is binding on this Court, destroys defendants' claims to innocent inadvertence or excusable neglect.

Rosander is instructive. In that case, as here, the defendant asserted that it had not received notice of the default hearing until after the hearing took place. 147 Wn. App. at 406. As here, the trial court rejected that assertion and concluded, instead, that the defendant had actual notice of the hearing. *Id.* at 407. Also, as here, the trial court concluded that the defendant "did not appear or otherwise defend the case until after it received notice of a \$925,794.54 default judgment." *Id.* Under those circumstances, and giving due deference to the trial court's factual findings, this Court affirmed the trial court's denial of the defendant's motion to vacate the default judgment. *Id.* Following *Rosander*, this Court should affirm the ruling below.

A second problem with defendants' argument is that it distorts the proper inquiry under the second *Little* factor. As noted, the issue is

whether defendants can prove that they had a good excuse for failing to file a “timely * * * answer.” *Little*, 160 Wn.2d at 704. They have not, as explained above.

Defendants would have this Court ignore their failure to file a timely answer. They would have this Court ignore the six month period following that failure, during which time defendants did not even file an untimely answer. They would also have this Court ignore the trial court’s finding that they had a “full opportunity” to file an answer in this case before the order of default. (RP 7.) Instead, defendants would have this Court look only to the last week before default and conclude, contrary to the trial court’s factual findings, that, because they purportedly did not have notice of the default hearing until after it occurred (due *only* to their failure to open the mail they had received), there was no reason for them to have filed an answer in that last week. This Court cannot indulge that misplaced focus. As the Washington Supreme Court recently recognized in this context:

[L]itigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose, and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.

Morin v. Burris, 160 Wn.2d at 757; *see also Rosander*, 147 Wn. App. at

403 (applying *Morin* to uphold trial court's denial of motion to vacate default judgment).

Defendants' argument suffers from additional flaws as well. Even if this Court could ignore the trial court's factual findings and the rest of this case to focus solely on the last week before the default hearing and accept defendants' factual claims at face value, defendants still have not shown that their failure to file an answer was due to excusable neglect.

It is undisputed that the Camas Address where plaintiff served the default motion and notice is the address where defendants' attorney of nearly a year told plaintiff, when he withdrew, to mail documents to defendants. It is also undisputed that defendants live at that address, that they get mail there, and that they get so much mail there that they have backlogs when they return home from vacation. It is also undisputed that defendants returned home from their vacation on October 4 and that they thus had an entire week before the default hearing to open their backlog of mail and read the default motion and notice that were there the whole time. Significantly, defendants have *never* claimed that the notice arrived at their home after the hearing – only that they did not “learn” of the hearing until after it occurred.

Washington courts have rejected claims of excusable neglect under similar circumstances. In *Cash Store*, the defendant actually received the

complaint and notice of default hearing. 116 Wn. App. at 848-49.

Nonetheless, those documents got lost in the shuffle, and the defendant failed to answer the complaint or appear at the default hearing. *Id.* at 839, 848-49. On appeal, the court held that the defendant's "unexplained" neglect was "inexcusable." *Id.* at 848-49; *see also Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995) (defendant's failure to file timely answer was not excused by fact that defendant "mislaidd" complaint); *Rosander*, 147 Wn. App. at 407 (fact that defendant's point person was on medical leave did not excuse failure to appear at default hearing); *cf. TMT Bear Creek*, 140 Wn. App. at 213 ("Judicial decisions have repeatedly held that if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable.")). Although the cited cases involved corporate defendants, the principle applies equally well to individual defendants such as defendants here.

Defendants also opine that they were "lulled into a sense that they no longer needed to remain vigilant in the litigation" after the arbitration went forward without them and their counsel withdrew. (Appellants' Br. 23.) However, those facts should have instilled the opposite feeling in defendants. Once their counsel withdrew, they knew that they were on their own in this case, that plaintiff still had a veil-piercing claim against

them, and that plaintiff would likely turn to that claim because Centerpointe did not have sufficient funds to pay plaintiff's judgment against it. Indeed, plaintiff served other pleadings on defendants during the weeks before it moved for default.

There is nothing wrong with defendants' choice to defend themselves after September 18, but self-representation does not excuse a litigant from the requirements of the civil rules. *See Rosander*, 147 Wn. App. at 407 (defendant's failure to appear at default hearing was not excusable where defendant "had every opportunity to associate with * * * counsel" but decided "to handle the claim pro se"). Nor does a litigant's belief that the litigation is not serious save it from the consequences of violating those rules. *See Comm. Courier Svc., Inc. v. Miller*, 13 Wn. App. 98, 105, 533 P.2d 852 (1975) (defendant's failure to file answer was inexcusable where defendant thought complaint was "merely a bluff").

In short, defendants have not shown that their failure to file a timely answer was due to excusable neglect. Accordingly, this Court must affirm the ruling below. *See Little*, 160 Wn.2d at 706 ("Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to [answer] was [excusable], there is no equitable basis for vacating judgment. It is thus an abuse of discretion."); *Rosander*, 147 Wn. App. at 409 ("[Defendant] did not provide any evidence of a prima facie defense

and failed to show excusable neglect. Therefore, we affirm the trial court's denial of [defendant's] motion to vacate [plaintiff's] default order and judgment.”); *Cash Store*, 116 Wn. App. at 849 (“Because [defendant] failed to establish more than a prima facie defense to [plaintiff's] claims and did not satisfy its burden of demonstrating that its failure to * * * answer was [excusable], the trial court did not abuse its discretion in denying the motion to vacate the default judgment.”).

3. Defendants provided no evidence that they acted with due diligence after notice of the default judgment.

The final two *Little* factors are of secondary importance. *Little*, 160 Wn.2d at 704. They could not overcome the first two factors even if both of them weighed in defendants' favor. *See id.* at 706 (so recognizing); *Rosander*, 147 Wn. App. at 409 (same); *Cash Store*, 116 Wn. App. at 849 (same). Nonetheless, both of the final two factors weigh in plaintiff's favor here.

Under the third factor, defendants must show that they “acted with due diligence after notice of the default judgment.” *Little*, 160 Wn.2d at 704. The necessary due diligence has often been equated with the requirement under CR 60(b) that the moving party file its motion to vacate within a “reasonable time.” As the court explained in *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999): “The critical period in

the determination of whether a motion to vacate is brought within a reasonable time is the period between when the moving party became aware of the judgment and the filing of the motion.” From there, the key consideration is “whether the moving party has good reasons for failing to take appropriate action sooner.” *Id.*; *see also id.* at 313 (motion to vacate untimely even though opposing party was not prejudiced by delay).

It is important to remember that defendants bear the burden of proving their own due diligence. *See Little*, 160 Wn.2d at 703 (moving party must show due diligence). That means defendants bear the burden of proving when they learned of the default judgment and the reasons for their delay in moving to vacate it.

a. Defendants provided no evidence.

The default judgment in this case was signed and entered on October 10, but defendants did not take any action against it until they moved to vacate it on November 18, more than five weeks later. Significantly, defendants have not offered *any* evidence that would excuse their delay. Washington courts have rejected claims of due diligence in similar circumstances. *See In re Stevens*, 94 Wn. App. 20, 35, 971 P.2d 58 (1999) (delay of two-and-a-half months not reasonable); *Lockett*, 98 Wn. App. at 313 (delay of four months not reasonable). When Washington courts have found due diligence, they did so only where parties acted more

promptly than defendants did here. *See Stevens*, 94 Wn. App. at 35-36 (citing cases involving reasonable delays of one day and 23 days); *White*, 73 Wn.2d at 350 (reasonable delay of 11 days); *Cash Store*, 116 Wn. App. at 840 (reasonable delay of three weeks).

Not only is there *no* evidence that would excuse defendants' delay, but the trial court found that the delay was *inexcusable*. As the trial court explained, defendants "only responded after the garnishment had occurred and the check had been disbursed from the clerk." (RP 8.) In other words, the trial court implicitly found that defendants chose not to respond to the default until the November 14 garnishment of the Centerpointe funds made them realize that plaintiff was serious about collecting on its judgment against them. That finding is binding here. *See Knapp Brick & Tile*, 4 Wn.2d at 161 (appellate court must defer to trial court's implicit factual findings). Accordingly, this Court should affirm the ruling below.

b. Defendants' arguments are meritless.

Defendants' arguments to the contrary are without merit. First, they assert that the clock should start running on October 19, the day they claim default judgment was entered, rather than on October 10, the day it was actually entered. (*See* Appellants' Br. 18 (measuring "one month delay from entry of default judgment to motion to set aside said judgment").) Defendants' only authority for the October 19 date is a

misstatement contained in plaintiff's response to defendants' motion to vacate the default judgment.⁵ Plaintiff's inadvertent misstatement does not change the date the judgment was entered.

Defendants' reliance on that mistake underscores a deeper problem with their claim. Defendants bear the burden of proving their own due diligence. *See Little*, 160 Wn.2d at 703 (so stating). Accordingly, they bear the burden of proving when exactly they "became aware of the [default] judgment." *Luckett*, 98 Wn. App. at 312. Despite bearing that burden, defendants have *never* offered *any evidence* that would satisfy it. In other words, defendants have chosen to cherry pick statements from the pleadings in an attempt to avoid the work that is required to vacate a default judgment. Defendants' lack of evidence must be construed against them, and the clock must be considered to have started running on October 10, the day the default judgment was actually entered.

Second, defendants opine that their delay in moving to vacate the default judgment was due to "the burden of deducing what had transpired, and locating a replacement lawyer with availability to take on the chore, coupled with the vicissitudes of attorney and court schedules."

⁵ On page 7 of their brief, defendants cite CP 292 and CP 309 as support for the October 19 date. However, CP 292, the judgment, shows that it was filed on October 10. Similarly, the trial court docket shows that the judgment was entered on October 10. On the other hand, CP 309 is a page from plaintiff's response to the motion to vacate the default judgment. On that page, plaintiff mistakenly, and without citation to any court record, states that the "default judgment was * * * entered on October 19."

(Appellants' Br. 18.) Defendants' opining does not aid their cause for one simple reason: The trial court rejected it. As noted, the trial court implicitly found that defendants did *not* spend their time looking for an attorney who could take their case; instead, they sat on the documents they had received from plaintiff until the Centerpointe funds were garnished. That finding is binding on this Court. *See Knapp Brick & Tile*, 4 Wn.2d at 161 (so stating).

Moreover, there is no evidence in the record to support defendants' opining. There is no evidence showing when defendants began looking for a lawyer, how long it took them to find one, how many lawyers were contacted but could not take the case because of unavailability, how long defendants' current lawyer had the case *before* filing the motion to vacate, or how court schedules delayed the filing of the motion. Because there is no evidence to support the excuses defendants rely on now, this Court must disregard them.

Even if there were "vicissitudes" in the trial court's schedule, that would not excuse defendants' delay. In *Gutz v. Johnson*, 128 Wn. App. 901, 117 P.3d 390 (2005), *rev'd on other grounds*, *Morin v. Burris*, 160 Wn.2d 745, 757, 161 P.3d 956 (2007), this Court made clear that filing a motion to vacate is not the only way to show due diligence. Because the defendants in that case "promptly asked the [plaintiffs] to voluntarily set

aside the default order,” and did so again shortly after the plaintiffs’ refusal, this Court held that they had been diligent even though they did not file a motion to vacate until 79 days after they first learned of the default. *Id.* at 919-20. Unlike the defendants in *Gutz*, defendants in this case provided the trial court with no evidence that they ever contacted plaintiff about voluntarily setting aside the default. Rather, the evidence before the trial court showed the first objection to the default that defendants ever made was their motion to vacate, which was filed over five weeks after notice of the default.

Defendants also gain nothing from their reliance on *Suburban Janitorial Svcs. v. Clarke Am.*, 72 Wn. App. 302, 308, 863 P.2d 1377 (1993), in which the court stated that relief from default was not precluded by the fact that the motion to vacate was filed 17 months after entry of the default judgment. Significantly, the moving party in *Suburban Janitorial* did not learn of the default judgment until the 17th month, and it “promptly” moved to vacate the judgment as soon as it did learn of it. *Id.* at 304. Here, by contrast, defendants learned of the default judgment the day it was signed, but they waited over five weeks before moving to vacate it and provided the trial court with no explanation for their delay.

Nor do defendants gain from *Cash Store*, in which the defendant “filed a motion to vacate the default judgment less than a month after it

received notice of the writ of garnishment.” 116 Wn. App. at 842. Significantly, the court in *Cash Store* based its conclusion that the defendant was diligent on the assumption that the writ of garnishment was the *first* notice of default that the defendant had received. *See id.* (so stating). Here, by contrast, defendants learned of the default judgment the day it was signed but waited over five weeks before moving to vacate it. The fact that they filed their motion a few days after learning of the Centerpointe garnishment is relevant only because it reveals their true motive for filing the motion: to avoid plaintiff’s collection efforts.

4. Defendants provided no evidence that plaintiff will *not* suffer a substantial hardship if the default is vacated.

Under the fourth factor, also a secondary factor, defendants bear the burden of proving that “plaintiff will not suffer a substantial hardship if the default judgment is vacated.” *Little*, 160 Wn.2d at 704. Because defendants have *never* offered *any* evidence on this factor, it weighs in favor of plaintiff. *See Wade*, 138 Wn.2d at 464 (party seeking to vacate trial court judgment must make “affirmative showing of error”); *Newbigging*, 105 Wn. App. at 186 (recognizing that “proof needs to be shown on [each *Little*] factor”).

Plaintiff has been litigating with defendants for nearly two years, suffering delay, incurring substantial attorney fees, and being denied the

compensation to which it is entitled. A reversal here would prolong that delay, impose additional attorney fees, and deny plaintiff its rightful compensation yet further. It is true that “[t]he possibility of a trial,” by itself, is not a substantial hardship. *Gutz*, 128 Wn. App. at 920. However, this case involves more.

A reversal here would send this case back to the trial court years after the events at issue occurred; the consequent faded memories and lost documents would impose a substantial hardship on plaintiff’s ability to prove its veil-piercing claim, the evidence of which is largely in defendants’ control.

Additionally, the judgment in this case is nearly a year old by this point. Plaintiff has spent the last year attempting to collect on that judgment, recording it in those counties where defendants own real property, garnishing funds, obtaining charging orders against other limited liability companies of which defendants are members, promulgating interrogatories on defendants, and seeking a debtor’s exam.

A reversal now would cause plaintiff to lose its priority over competing creditors – be they banks, former business partners, or others – who also have claims to defendants’ assets. Given the state of the economy, it would be shocking if defendants had not incurred significant additional liabilities within the last year which would leap over plaintiff in

priority if this Court were to reverse the ruling below. Moreover, given the state of the economy, it is very likely that, if plaintiff lost its priority now, it would also lose all practical ability to collect the judgment it would obtain on remand.

In short, a reversal here would cause plaintiff to suffer a substantial hardship. Defendants have not offered anything to negate that conclusion. Because they bear the burden of proving that plaintiff would *not* be prejudiced by vacation of the default judgment, *see Little*, 160 Wn.2d at 703-04 (so stating); *Wade*, 138 Wn.2d at 464 (same); *Newbigging*, 105 Wn. App. at 186 (same), and because they have not met that burden, this Court must affirm the ruling below.

D. Defendants are not entitled to costs, attorney fees, or terms.

Finally, defendants assert that, “[u]pon motion to vacate a default judgment, the court may, in its discretion, award costs and terms” to the prevailing party. (Appellants’ Br. 25.) In support of that assertion, defendants cite only *Newbigging*, which they describe as follows:

“[A]ttorney fees awarded to defendant after successfully moving to have default judgment vacated.” 105 Wn. App. at 192.

It is not clear what defendants seek. If defendants fault the ruling under review, their objection is meritless. It is true that, in vacating a default judgment, a trial court may impose “such terms as are just.” CR

60(b). For instance, the trial court might condition vacation of the default judgment on the moving party's paying the opposing party's attorney fees or posting a bond. *See Pamelin Industs., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 622 P.2d 1270 (1981) (trial court did not abuse its discretion in imposing those terms). In egregious circumstances, the trial court might even require the opposing party to pay the moving party's attorney fees. *See Newbigging*, 105 Wn. App. at 192 (listing circumstances such as "fraud, misrepresentation, or other misconduct of the opposing party"). The trial court might also impose, as a term of vacation of a default judgment, payment of a party's costs.

Here, however, the trial court did not vacate the default judgment; accordingly, it had no authority to impose terms on any party. *See CR 60(b)* (granting trial court authority to impose terms only when it "relieve[s] a party * * * from a final judgment"). Even if it had that authority, defendants did not object to the lack of favorable terms in the trial court and thus cannot do so here. *See Tang*, 57 Wn. App. at 655 ("Arguments or theories not presented to the trial court will not be considered on appeal.").

Moreover, because *plaintiff* prevailed in the trial court, there is no reason why *defendants* would have recovered their costs or attorney fees there. Accordingly, to the degree that defendants challenge the trial

court's failure to award them costs, attorney fees, or terms when it denied their motion for relief from default, that challenge is meritless.

If defendants are instead asking for attorney fees or terms on appeal, they have not cited any authority to support that claim. They do not cite RAP 18.1 (award of attorney fees on appeal), nor do they point to any statute, contract, or equitable principle that would entitle them to attorney fees. *See Torgerson v. One Lincoln Tower, LLC*, __ Wn.2d __, __, 210 P.3d 318, ¶ 26 (June 25, 2009) (“In Washington parties may not recover attorney fees except under a statute, contract, or some well-recognized principle of equity.”). Moreover, as explained above, CR 60(b) only authorizes a *trial court* to impose terms when it *vacates* a default judgment; that rule does not authorize an *appellate court* to impose terms when it *reverses* a trial court ruling *sustaining* a default judgment. *See Pamelin*, 95 Wn.2d at 403 (CR 60(b) authorizes “a trial court” to impose terms); *Diehl v. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 216, 103 P.3d 193 (2004) (“[T]he civil rules are clearly intended to apply only to civil actions invoking the general jurisdiction of the superior courts.”).

The only authority defendants cite – *Newbigging* – has nothing to do with costs, attorney fees, or terms on appeal. In *Newbigging*, the trial court granted the defendant's motion to vacate a default judgment and, as

a term of that vacation, ordered the plaintiff to pay part of the defendant's attorney fees. 105 Wn. App. at 184. The plaintiff appealed, arguing that, while CR 60(b) gives trial courts authority to impose terms on parties who obtain vacation of a default judgment, it does not give those courts authority to impose terms on opposing parties. *Id.* at 192. The Third Division disagreed, holding that, when the opposing party has committed "fraud, misrepresentation, or other misconduct," then "a trial court" may impose terms against that party. *Id.*

In short, nothing in *Newbigging* suggests that an appellate court may impose terms under CR 60(b). Because defendants do not cite any other authority for that proposition, defendants are not entitled to attorney fees or terms on appeal. (No special request is required for an award of costs on appeal. *See* RAP 14.2 (so indicating)).

Finally, it is true that, if this Court were to reverse and remand for entry of an order vacating the default judgment, then – and only then – the trial court might impose terms, including costs and attorney fees. Defendants may be asking this Court to *require* the trial court to impose those terms on any remand this Court might order.

The problem with that claim is that "[t]he decision to impose terms as a condition on an order setting aside a judgment lies within the discretion of the [trial] court." *Newbigging*, 105 Wn. App. at 192 (quoting

Knapp v. S.L. Savidge, Inc., 32 Wn. App. 754, 649 P.2d 175 (1982); *see also Pamelin*, 95 Wn. App. 2d at 403 (trial judge has “discretion in imposing terms”). Because only a trial court can impose terms as a condition of vacating a default judgment under CR 60(b), and because the propriety and nature of any terms imposed is a matter left to the sound discretion of the trial court in the first instance, this Court, if it were to reverse and remand this case, should not require the trial court to impose any terms on plaintiff, let alone terms awarding defendants their costs and attorney fees.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court’s denial of defendants’ motion to vacate the default judgment.

Respectfully submitted this 3rd day of August, 2009.

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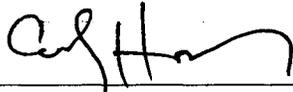
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CERTIFICATE OF SERVICE

I certify that on the 3rd day of August, 2009 I caused a true and correct copy of the Notice to be served on the following in the manner indicated below.

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U.S. Mail
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Cody Hoesly

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