

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JAMIE STANLEY,

Plaintiff-Appellant

v.

HAROLD COLE, and "JANE DOE" COLE and their marital
community,

Defendant-Respondent.

AMENDED BRIEF OF APPELLANT

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

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I. INTRODUCTION AND SUMMARY

Jamie Stanley's vehicle was struck by Harold Cole's truck. Ms. Stanley sustained injuries to her neck and back. Harold Cole conceded liability. The matter was sent to mandatory arbitration. While the matter was sent to mandatory arbitration, Ms. Stanley's attorney, Vonda Sargent, confronted an unavoidable misfortune, which prevented Ms. Sargent from prosecuting Ms. Stanley's case.

Ms. Sargent's mother was hospitalized in July of 2008 and suffered a series of strokes. She was hospitalized again in August 2008 and never returned home. Ms. Sargent arranged for hospice care and spent her mother's last autumn at her mother's side. Her mother passed away in November and her father was hospitalized shortly after the funeral. Ms. Sargent cared for her father throughout the months of December, January and February. During this time, the date was set for the arbitration; the deadline for prehearing statements, the arbitration and the *de novo* period came and went. The arbitrator awarded a small award to Ms. Stanley and opposing counsel moved for entry of judgment, which the trial court granted. Ms. Sargent moved the court to set aside the award for excusable neglect under CR 60. The court denied the motion and plaintiff appeals.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

- A. The trial court erred in entering the February 13, 2009 Order Denying Plaintiff's Motion To Set Aside Arbitration Award.

- B. Issues pertaining to assignment of error.
 - 1. The trial court failed state the standard of review it applied to evaluate the CR 60 motion. Does Washington case law require that the trial court liberally grant CR 60 motions, where an award is entered against a party without representation?

 - 2. The trial court did not find excusable neglect. Does care for a hospitalized parent, who subsequently dies, followed by care for the second hospitalized parent, constitute an excuse for an attorney's neglect of a case?

III. STATEMENT OF THE CASE

On December 16, 2004, Jamie Stanley was driving her vehicle southbound on Warren Avenue in Bremerton. CP 5. Ms. Stanley was struck and injured by Harold Cole. She hired attorney Vonda Sargent and brought suit in 2007. CP 1-8.

In the July of 2008, Ms. Sargent provided the court with a statement of arbitrability. CP 12. Also in July of 2008, and after the

statement of arbitrability was filed Ms. Sargent's mother fell ill and was hospitalized. CP 16. In August of 2008, the court transferred the case to mandatory arbitration. CP 13. Also, in August 2008 Ms. Sargent's mother's condition deteriorated. CP 16. Counsel for defense states Ms. Sargent neglected to contact him in this matter. CP 17. While Ms. Sargent's memory during that time period is a bit fractured she did manage to contact two of opposing counsel's co-workers regarding two additional and separate matters.¹ CP 17. Ms. Sargent then began to make arrangements for her mother's hospice care and began to make arrangements for the return of her only brother, Lt. Col Kenneth K. Sargent, United States Army from Camp Freedom in Iraq. CP 16-17. The arbitrator set a November deadline for pre-hearing statements and a December arbitration date. CP 20. Ms. Sargent cared for her mother in hospice care until she passed away on November 17, 2008. CP 17. Ms. Sargent was responsible for planning a funeral, making travel arrangements for family members, and caring for her father who was heart-broken after more than 50 years of marriage. CP 17. Her mother's funeral was the same day that the pre-hearing statement was due. Compare CP 18 with CP 20. Ms. Sargent did not provide the arbitrator with a pre-hearing statement. CP 21.

¹ Bongiorno v. Diamond Cleaning et.al 08-2-11977-7 (Nathaniel Green) & Blue v. Emerald Concrete 07-2-18010-9 (James P. McGowan)

On December 2nd or 3rd, Ms. Sargent's father was hospitalized. Her father's illness manifested itself on the way home from the airport dropping off her brother for his return to Iraq. *Id.* Ms. Sargent did not attend the December 5, 2008 arbitration. CP 21. There were no advocates for Ms. Stanley present at the arbitration. CP 21. The arbitrator made a small award in Ms. Stanley's favor. CP 21, 27. Ms. Sargent spent the months of December, January and February taking her father from one specialist to another at various hospitals. CP 18. She neglected to appeal the award, and judgment was entered. CP 27-28.

In late January, after returning to her office for the first time since August, Ms. Sargent learned that judgment had been entered in this matter. CP 18. Ms. Sargent filed a CR 60 motion to set aside the arbitration award due to excusable neglect. CP 15-19. The trial court denied this motion. CP 23. The trial court did not state the standard of review it used to evaluate the CR 60 motion. CP 23. The trial court did not provide a rationale for its denial of the CR 60 motion. CP 23. Ms. Sargent timely appeals to this court so that Ms. Stanley may have the opportunity to prosecute her claim and to present her side to a finder of fact.

IV. SUMMARY OF THE ARGUMENT

The trial court is under a mandate to liberally grant CR 60 motions to vacate awards entered in default judgments. An arbitration

award, entered after a hearing where only one party's attorney is present, functions like a default judgment. Accordingly, the trial court was under a mandate to liberally grant CR 60(b) motions to set aside judgment.

Washington courts look to two primary factors when considering whether to grant CR 60(b) motions: (1) whether the party has a *prima facie* claim or defense and (2) whether the reason for the neglect is excusable. Under the Washington *White v. Holm* test, if there is substantial evidence in support of one of these factors, a court shall make less inquiry and give less weight to the other factor. Here, there is substantial support for *both* factors. First, Mr. Cole, the opposing party, has conceded liability on the underlying claim. Thus, Ms. Stanley has made more than a *prima facie* showing; she has meritorious claim as a matter of law. Second, Washington courts have found that the health problems of an attorney's employee are grounds for excusable neglect. Surely the health problems of an attorney's parents merit similar consideration by Washington Courts. Federal courts already hold that an attorney's care for aging parents constitutes grounds to grant a FRCP 60 motion.

The trial court did not state what standard of review it applied to the CR 60(b) motion. Nor did it state how it weighed the CR 60(b) factors under the *White v. Holms* test. Under a mandate to liberally grant CR 60(b) motions and where substantial evidence favored a

finding of excusable neglect, the trial court abused its discretion when it denied Ms. Stanley's CR 60(b) motion. Further, the Washington Supreme Court instructs appellate courts to more readily find an abuse of discretion when the trial court enters a judgment without a hearing on the merits. Defendant is not prejudiced by the plaintiff's CR 60(b) motion, as it has already conceded liability and will have full opportunity to present arguments as to damages.

V. ARGUMENT AND AUTHORITY

A. STANDARD OF REVIEW

There are two components to the standard of review. First, there is the standard of review that the trial court should have used when it considered plaintiff's CR 60(b) Motion To Set Aside Arbitration Award. The trial court, in this default-like judgment instance, shall liberally grant CR 60(b) motions so as to do substantial justice between the parties. Second, there is the standard of review that this Appellate Court employs when evaluating the trial court's order. This Court reviews the trial court for abuse of discretion; however, an abuse of discretion is more likely to be found where the order results in entry of a default-like judgment.

1. The award in this case is similar to a default judgment.

This case involves an arbitration award, entered without any representation from Ms. Stanley's counsel at the arbitration hearing.

Here, the proceeding is similar to but not strictly a default proceeding. This Court of Appeals considered whether an arbitration award was to be treated as a default judgment for purposes of vacating the award upon CR 60(b) motion in *Pybas et al. v. Paolino*, 73 Wn. App. 393; 869 P.2d 427 (1994). The court's analysis of the law and facts in *Pybas* focuses on the presence of both advocates at the arbitration hearing.

In *Pybas* the underlying claim was an auto accident negligence claim, just as in this case. *Pybas*, 394. Plaintiffs Pybas and Hill sued defendant Paolino, and the case was sent to mandatory arbitration. *Id.* 394. Both the plaintiff and the defendant attended arbitration. *Id.* 399, 400. An award was entered in favor of the plaintiffs. *Id.* 394. The deadline for the request for trial de novo was set for Monday, June 11, 1990. *Id.* 395. On Friday June 8, 1990, plaintiffs decided to request trial de novo and hired a messenger service to serve the court and opposing counsel with the request. *Id.* 395. The messenger service properly served opposing counsel, but failed to timely file with the court. *Id.* 395. Plaintiffs brought a CR 60(b) motion to set aside the arbitration award. The appellate court framed the question narrowly as whether a CR 60(b) motion could be used to circumvent the deadline for a request for trial de novo. *Id.* 396. The appellate court denied the CR 60(b) motion, reasoning that the public policy and equitable considerations that favor vacating default judgments did not

apply because the party was fully represented at arbitration. In full, the court stated:

The policy consideration of favoring a hearing on the merits directly concerns those cases seeking relief from a default judgment, thus allowing for a more liberal application of the rules. That policy consideration has little relevance in cases involving an appeal where there has been a hearing on the merits, such as here where nothing suggests that Hill was deprived of an opportunity to present his case at the arbitration hearing.

Id. 399–400. Here, Ms. Stanley’s counsel did not submit the pre-hearing statement of facts to the arbitrator due to neglect. CP 19, 21. Likewise, Ms. Stanley’s counsel did not attend the arbitration hearing due to neglect and the extraordinary circumstances surrounding the hospitalization, death and funeral of one parent (scheduled for the same day as the arbitration hearing), followed by the hospitalization of the other parent. CP 18, 19, 20. These facts show that Ms. Stanley was ‘deprived of the opportunity to present her case at the arbitration hearing.’ In no way, did this arbitration hearing, which resulted in a penurious award, provide a judgment on the merits of the claim. No one was present to advocate for the merits of Ms. Stanley’s claim. In *Pybas*, the court relied on the fact that both attorneys were present to rule that arbitration provided a full and fair judgment on the merits. It is uncontested that Ms. Stanley lacked the necessary advocate at the arbitration to ensure a full and fair judgment on the merits. Accordingly, the same equity and policy considerations expressed in *Pybas*, favor treating this arbitration award as a default judgment.

2. Courts shall liberally grant CR 60(b) motions for default-like judgments

A motion to vacate or set aside a default judgment brought pursuant to CR 60 is equitable in its character, and the relief sought should be administered according to equitable principles. *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968) (citing *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943)). Equitable principles favor a judgment on the merits, as opposed to a default. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007); *Griggs v. Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (It “is the policy of the law that controversies be determined on the merits rather than by default.”) (citing *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). Likewise, equitable considerations require the court to set aside the default judgment under CR 60(b) if there has been some defect in the proceedings. See *Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978). Finally, courts may vacate default judgments to preserve the integrity of the judicial system. *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1170, 2002 U.S. App. LEXIS 3589 (9th Cir. Cal. 2002).

Equitable principles require that “the court *should* exercise its authority liberally ‘to preserve substantial rights and do justice between the parties.’” *In re Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985) (emphasis added) (citing *Haller v. Wallis*, 543). The court’s mandate to liberally vacate default judgments is as old as the State of Washington itself. Compare *Morin v. Burris*, 754 (2007) (“for

more than a century, it has been the policy of this court to set aside default judgments liberally”) with *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897) (“where there is a showing, not manifestly *insufficient*, the court should be liberal in the exercise of its discretion in furtherance of justice”) (emphasis original).

This same basic fairness principle is expressed throughout the common law. Where there are irregularities in the proceedings or the parties have not been represented at settlement negotiations, equitable considerations favor vacation pursuant to CR 60(b) motions. See *Haller v. Wallis*, 544.

The Court of Appeals reviews of trial court CR 60(b) orders for abuse of discretion. *White v. Holm*, 351. An abuse of discretion occurs when the trial court’s decision was “manifestly unreasonable” or lacks tenable bases. *Pybas v. Paolino*, 399. The Washington Supreme court notes that the appellate courts will find an abuse of discretion more readily where the trial court denies a trial on the merits. *White v. Holm*, 351-2. (“In this vein, however, it is pertinent to observe that where the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues.”); *Griggs v. Averbek Realty, Inc.*, 582. (“Abuse of discretion is less likely to be found if the default judgment is set aside.”)

Accordingly, the specific question before the Court is whether it was manifestly unreasonable for trial court to deny plaintiff's CR 60(b) motion to vacate the arbitration award, despite being under the strict mandate to grant motions to vacate judgments when a party was deprived of the opportunity to present its side.

B. AN ATTORNEY'S CARE FOR DEATHLY ILL PARENTS CONSTITUTES GROUNDS FOR EXCUSABLE NEGLIGENCE

1. Under the White v. Holms test, Washington Courts shall excuse neglect where the party has a strong case, or the reason for neglect is understandable; Ms. Stanley has a strong case and the reason for the neglect is understandable

Plaintiff respectfully requested the trial court to set aside the arbitration award in *Stanley v. Cole* pursuant to CR 60(b)(9), quoting in relevant part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

CP 15.

CR 60(b)(1) is also called to the Court's attention for its general principle, which the court may consider under RAP 2.5. Under CR 60(b)(1), the court may set aside judgments due to "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." Both the specific exception contained in CR 60(b)(9) and the broad exception of CR 60(b)(1) apply here: the hospitalization and death of Ms. Sargents's mother followed by the

hospitalization of Ms. Sargent's father constitute both (1) an unavoidable misfortune that prevented the party from prosecuting under CR 60(b)(9) and (2) a reason for excusable neglect of the case and arbitration hearing under CR 60(b)(1).

The Washington Supreme Court adopted a four factor test to determine whether a trial court should grant a CR 60(b) motion in *White v. Holm*, 73 Wn.2d 348, 352(1968) (finding that the trial court abused its discretion in refusing to vacate a default judgment; awarding fees to appellant). The test revolves around two primary factors and two secondary factors. *White v. Holm*, 352. These factors are:

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

White v. Holm, 352.

If the strong evidence supports either of the first two factors—a prima facie defense to a claim asserted by the opposing party, or the moving party's failure to answer the opponent's claim was occasioned by excusable neglect—then less evidence is necessary to support the other factor. That is, if there is a strong defense to an opposing party's claim, then the court will put less weight on whether the neglect was excusable. *White v. Holm*, 352. (“[W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's

claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful.”); *See also Calhoun v. Merrit*, 46 Wn. App. 616, 619, P.2d 1094 (1986) (“A strong defense requires less of a showing of excuse”); *Canam Hambro Sys., Inc., v. Horbach*, 33 Wn. App. 452, 655 P.2d 1182 (1982) (the allegation that plaintiff furnished defective steel constituted a strong defense, therefore the trial court abused its discretion by refusing to grant motion to vacate default judgment).

Here, the plaintiff’s position is analogous to a defendant that was unable to present its defense under the first factor. Ms. Stanley was unable to present her side before the arbitrator and opposing counsel. Ms. Stanley was unable to defend against any allegations by opposing counsel regarding any comparative fault. Ms. Stanley was unable to defend any challenges to the record. Ms. Stanley was deprived of the opportunity to tell the story of her injuries and the suffering caused by the defendant’s neglect to the finder of fact. The fact that Ms. Stanley was not able to present her case before the arbitrator did not result from any willful conduct on the part of Ms. Stanley or her attorney.

When weighing the loss of a party’s opportunity to present its side, courts are instructed to consider whether there is a prima facie

showing of evidence to support the party's side. *White v. Holm*, 352. There is more than a prima facie showing here. The defense does not even contest liability. Because Ms. Stanley has strong evidence establishing the defense's liability, the trial court was not required to make extensive inquiry into the reasons behind the neglect and should have granted motion to set aside the award based solely on the strength of Ms. Stanley's claim.

This accords with the principles outline in *Shepard v. Helsell Fetterman*, 95 Wn. App. 231, 974 P.2d 1275 (1999). In *Shepard v. Helsell Fetterman*, a patient carried by Shepard, an ambulance company brought a negligence action for personal injuries he allegedly sustained in transit. *Id.* 234. Shepard's insurance carrier attempted to negotiate settlement, and sent the patient two checks, which he cashed. *Id.* 234. The patient never signed a release and later brought suit against Shepard. *Id.* 234. Shepard had properly received a complaint and summons by a patient it transported. *Id.* 234. Shepard claimed that the complaint went unanswered because "Shepard's Loss Control Manager, who received the complaint, misplaced it as a result of vision problems caused by diabetic complications and that she later suffered a heart attack while on medical leave." *Id.* 234-5. Shepard only retained Helsell Fetterman as counsel to respond to the complaint 10 months after entry of default judgment. *Id.* 235. Helsell Fetterman did not bring its CR 60(b) motion to set aside the judgment until 16

months after entry of judgment because it was looking for the non-existent waiver to also use as grounds to vacate the judgment. *Id.* 235. The motion to vacate was denied and Shepard brought a malpractice suit against Helsell Fetterman. *Id.* 235.

The appellate court was asked to determine as a matter of law whether the trial court should have granted the CR 60(b) motion. The court found no evidence in the record that Shepard's failure to properly appear in the action in the first instance was willful. *Id.* 242. And, "In the absence of such willful behavior, where a party moving to vacate a default shows a strong defense and the cause of the error is understandable, a motion to vacate can be granted if it is filed within the one year period of CR 60(b)(1) even where the moving party has been less than totally diligent." *Id.* 242-3. In applying this rule to the facts before it, the court stated: "*The cause of the error here, an employee's health problems, is understandable.*" *Id.* 243. (emphasis supplied).

The cause of error in Ms. Stanley's case is equally understandable. Through no fault of Ms. Stanley or her counsel, Ms. Sargent's parents fell ill, requiring hospital care. Ms. Sargent in attending to her mother, arranging for a hospice, planning a funeral, flying in out-of-town family members, and then caring for her heart-broken and hospitalized father, taking him to one specialist after another, confronted exactly the sort of "unavoidable misfortune"

contemplated by CR 60(b)(9). Just as the *Shepard* court held that an employee's health problems are grounds for excusable neglect, so should this court hold that parent falling deathly ill is grounds for excusable neglect.

2. Under federal case law, an attorney's care for ill parents constitutes grounds to grant a CR 60(b) motion

Federal courts already hold that a parent's illness may be grounds to grant Federal Rule 60(b) motion. *See L.P. Steuart Inc. v. Matthews*, 329 F.2d 234, 117 U.S. App. D.C. 279 (1964). And Federal Rule of Civil Procedure 60(b) is the federal counterpart to the state CR 60(b). *Peoples State Bank v. Hickey*, 55 Wn.App. 367, 371, 777 P.2d 1056; (1989). When interpreting the state counterpart to a federal rule, Washington courts look to federal decisions. *Peoples State Bank v. Hickey*, 371 (“[W]hen Washington statutes or regulations have the same purpose as their federal counterparts, we will look to federal decisions to aid us in reaching the appropriate construction.”) (Citations omitted). *See also, Morgan v. Burks*, 17 Wn. App. 193, 563 P.2d 1260 (1977) (in which this court looked to decisions interpreting FRCP 60(b) for guidance in deciding a CR 60(b) motions).

In *L.P. Steuart Inc.*, plaintiff Matthews was injured in a car accident. *L.P. Steuart*, 235 He secured counsel and brought a civil action. *Id.* 235. His counsel neglected to prosecute the case and the case was dismissed with prejudice. *Id.* 235. Matthews secured new counsel and later moved to reinstate the suit under FR 60(b). *Id.* 235.

Matthews' former counsel swore that "he had been 'beset with personal problems' which involved a serious illness of his wife and the recent deaths of his parents." *Id.* 235. The court found the FRCP 60 is "is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client." and the circuit court affirmed the trial court's order to reinstate the case *Id.* 236. *See also Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1171 2002 U.S. App. LEXIS 3589 (9th Cir. Cal. 2002). (Finding that an attorney's negligence represented an extraordinary circumstance beyond the client's control, that such negligence resulted in the breakdown of the attorney-client principal-agent relationship, the court reinstated the case pursuant to an FR 60 motion).

Here, through no fault of Ms. Stanley, the extraordinary circumstances involving the hospitalization and death of her attorney's mother, then the hospitalization of her father caused Ms. Stanley's attorney to neglect the case to Ms. Stanley's severe detriment. Like the courts in *L.P. Steuart* and *Cmty. Dental Servs. v. Tani*, this court should use its equitable powers to reinstate Ms. Stanley's case. Mr. Cole will not be prejudiced in the sense that he has already conceded liability. Ms. Stanley will benefit to the extent her advocate ensures she gets a fair hearing on the merits of her case. And Mr. Cole will not

profit from the neglect occasioned by the unavoidable misfortune of the hospitalization and death of counsel's mother.

3. Defendant is not prejudiced by plaintiff's motion to set aside entry of arbitration award

Washington appellate courts hold that where a default judgment is entered due, in part, to miscommunication or errors in communication between the attorneys, that trial courts should vacate the judgment. *See Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577, review denied 130 Wn. 2d 1005, 925 P.2d 988 (1996) (State of Washington's reasonable belief that outside counsel was representing its interests constituted excusable neglect, trial court did not abuse its discretion in granting motion to vacate default judgment) (cited in *Shepard v. Helsell Fetterman*, 95 Wn. App. 231, 243). *See also O'Toole v. Phoenix Insurance Company*, 39 Wash. 688, 693, 82 P. 175 (1905).

The court in *Hardesty* specifically stated “. . . notwithstanding Hardesty's failure to serve Leedom with a summons, under the facts of this case, it would have been inequitable to allow Hardesty to prevail on the motion for default where her attorneys could have easily informed the attorneys whom they knew to be representing the defendants of the motion for a default judgment.” *Hardesty*, 265. Here, notwithstanding the fact that Ms. Sargent submitted a statement of arbitrability in July CP 12, it would be inequitable to allow opposing counsel to prevail in his opposition to the motion vacate

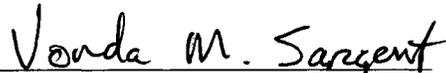
default judgment, when opposing counsel could have contacted Ms. Sargent after she neglected to file a pre-hearing statement or appear at arbitration. Indeed, opposing counsel could have taken the short walk down the hallway to his own co-workers, whom Ms. Sargent informed of her situation, to learn of her whereabouts. CP 17.

VI. CONCLUSION

Ms. Stanley was injured in a car accident. Her attorney neglected to attend Ms. Stanley's arbitration hearing due to the hospitalization, death, and funeral of the attorney's mother, followed by the hospitalization of her father. Without Ms. Stanley's advocate present, arbitration resulted in an award insufficient to compensate Ms. Stanley for her injuries. This court should reverse the trial court's order denying plaintiff's motion to set aside the arbitration award pursuant to CR 60(b).

RESPECTFULLY SUBMITTED this 16th day of August 2009.

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