COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 41457-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ROBERT ROBINSON, an individual, Appellant,

v.

MIDWEST AIR TECHNOLOGIES, INC., a Washington Corporation;
Respondent.

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its November 17, 2010, order granting defendant Midwest Air Technology, Inc.'s, motion to vacate the July 22, 2009, default judgment, when more than one year had elapsed between the entry of judgment and the defendant's motion to vacate it.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Robinson's legs were crushed by a forklift being driven by an employee of defendant Midwest Air Technology, Inc., ("defendant") on May 25, 2007. After sending only one letter to plaintiff's counsel, the defendant did nothing further for the next 18 months. In light of that lack of contact, Mr. Robinson commenced this lawsuit by filing it on February 3, 2009, and then properly serving it on February 11, 2009. The defendant failed to acknowledge the lawsuit or otherwise appear. Mr. Robinson later properly obtained a default order, which was subsequently reduced to a judgment on July 22, 2009. Well over one year after the judgment was entered, the defendant finally appeared and filed a motion to vacate the judgment. Because more than one year had elapsed between the judgment and the motion to set it aside, the defendant was barred from asserting CR 60(b)(1) defenses, such as excusable neglect, irregularity in the trial court proceedings, or mistake. Nevertheless, the trial court set the default judgment aside after finding that the entry of default was due to the defendant's mistake. Did the trial court err in vacating the judgment under the extraordinary circumstances/catchall provision of CR 60(b)(11) by

finding that the defendant made a "mistake," when the "mistake" defense was unavailable because more than one year had elapsed?

2. In entering judgment, the trial court specifically found that live testimony was not required. Instead of live testimony, the court relied on direct evidence consisting of a detailed declaration of Mr. Robinson outlining the facts of this case and his injuries, as well as a detailed declaration of Mr. Robinson's surgeon outlining Mr. Robinson's injuries, surgeries, and permanent disability. After obtaining a judgment, Division Two authority is clear that Mr. Robinson is presumed to have submitted substantial evidence to support his judgment. Supreme Court authority is clear that, to overcome a default judgment based upon a defense to damages, the defendant must submit admissible evidence of a prima facie defense to those damages. Did the trial court err in vacating the judgment when the defendant submitted absolutely no evidence of any kind to support a defense to damages and, therefore, failed to overcome both Mr. Robinson's direct evidence of damages and the legal presumption of substantial evidence to support his damages award?

3. Whether the trial court erred in vacating the default judgment when no extraordinary circumstances exist under CR 60(b)(11) justifying vacation of the Order and Judgment, and when CR 60(b)(11) is unavailable to the defendant when it asserted other CR 60(b) defenses?

C. FACTS OF THE CASE

1. Mr. Robinson suffered permanent, debilitating injuries through the defendant's negligence.

On May 25, 2007, plaintiff Robert Robinson was employed by a local temporary employment agency, Corestaff Services. CP 17. Corestaff Services had temporarily placed Mr. Robinson to work at the defendant's Lakewood facility primarily loading and unloading pallets of fencing materials. Id. The defendant concedes that Mr. Robinson was not its employee but was instead working for Corestaff Services, which provided Mr. Robinson as temporary help for the defendant's seasonal work. CP 42.[1]

While Mr. Robinson was working, one of the defendant's employees was driving a loaded forklift. CP 18; CP 42. Failing to see Mr. Robinson working in the area, the defendant's employee drove a forklift loaded with fencing materials into Mr. Robinson, which pinned him between the loaded forklift and other nearby pallets. CP 18. As a result of that traumatic event, Mr. Robinson's legs were crushed. Id.

The crushing injuries necessitated emergency transport to St. Clare Hospital. CP 18; CP 24. Mr. Robinson suffered bilateral leg injuries, to include an open tibial fracture. CP 20-21. The fracture was repaired via emergency surgery, which included the placement of various pins and screws by a local orthopedic surgeon, Spencer Coray, M.D. CP 21.

After the first surgery, Mr. Robinson was advised to undergo an intense course of physical therapy, and he was confined to a wheelchair.

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1 The Clerk designated the defendant's memorandum in support of its motion to vacate default two separate times. For ease of reference, this brief will refer to the designation at pp. 41-56, not at pp. 96-111.

CP 18; CP 21. He was also required to remain off work for several months because of his injuries. CP 18.

Unfortunately, the screws used to pin Mr. Robinson's serious fracture caused further pain over the next few months. Thus, Mr. Robinson underwent a second surgery on December 19, 2007, to remove the screws from his right leg. CP 21. He continued physical therapy after the second surgery. Id.

Since the day his legs were crushed, Mr. Robinson suffered intense pain on a regular basis. CP 18-19. He no longer regularly participates in sports, which were activities in which he engaged without limitations prior to his legs being crushed. CP 18-19. Mr. Robinson had no preexisting problems with his legs, which were completely asymptomatic. Id. But because of the defendant's negligence, his surgeon testified via declaration that Mr. Robinson is permanently disabled. CP 18-19; CP 21. He also endures a permanent disfigurement consisting of a large mass of scar tissue resulting from this crushing injury. CP 19.

2. Mr. Robinson filed a lawsuit and properly served the defendant.

Mr. Robinson's counsel notified the defendant by letter dated September 6, 2007, that he was presenting a personal injury claim for this crushing incident. CP 65; CP142. The letter asked the defendant to provide any statements it had obtained, as well as Mr. Robinson's personnel file. CP 65. On September 13, 2007, the defendant responded by conceding that 1) Mr. Robinson did not work for the defendant, 2)

Corestaff Services was Mr. Robinson's employer when the crush occurred, and 3) the forklift that struck Mr. Robinson was driven by the defendant's employee when it crushed Mr. Robinson's legs at the defendant's Lakewood warehouse. CP 68. But the defendant refused to provide any information regarding the claim. In fact, the defendant did nothing further with the claim, other than to refer Mr. Robinson's counsel to Mr. Robinson's employer, Corestaff Services. Id.

Over the next approximately 18 months, the defendant never contacted Mr. Robinson's counsel again. CP 143. The defendant never asked for any information about the claim. The defendant's insurer likewise failed to contact Mr. Robinson's counsel. Id. And the defendant never provided any information that it obtained regarding the claim. CP 142. In light of that lack of contact, Mr. Robinson filed a lawsuit on February 3, 2009. CP 143.

After filing the lawsuit on February 3, 2009, Mr. Robinson's counsel engaged a process server to serve the defendant's registered corporate agent in Olympia. CP 154. Proper service of process was completed on February 10, 2009. Id. Also served on the defendant along with the summons and complaint was the Order Setting Case Schedule, which was generated by the trial court on February 3, 2009, when this lawsuit was filed. CP 1; CP 8. That Order instructed the parties of all pertinent dates in this lawsuit, to include the deadline for demanding a jury trial, the deadline for disclosing defense witnesses, the discovery cutoff and the trial date of February 2, 2010. CP 1. Importantly, the Case Schedule also specified the following in bold, underlined print:

Unless otherwise instructed, ALL attorneys/Parties shall report to the trial court at 9:00 AM on the date of trial.

Id. (Emphasis in original).

3. The defendant failed to appear, plead or otherwise defend.

The defendant failed to appear or otherwise respond to the properly served Summons, Complaint and Case Schedule. Indeed, the defendant failed to even contact Mr. Robinson's counsel or the court after being served. CP 143. Thus, the trial court entered an Order of Default on March 3, 2009, which was more than 20 days after service of the Summons, Complaint and Case Schedule. CP 12.

Over the next several months, the defendant still failed to appear, answer or otherwise even respond to the lawsuit. CP 143. The defendant did not even attempt to contact counsel for Mr. Robinson or the court. Id. Indeed, the defendant missed the mandatory Case Schedule deadlines to file a confirmation of joinder, to demand a jury trial, to set a settlement conference or to engage in a status conference. CP 1. Thus, on July 22, 2009, the trial court entertained a motion to reduce the default order to judgment. CP 143.

In the motion to reduce the default order to judgment, the trial court was presented with, among other things,1) a motion to enter judgment, 2) a memorandum on why live testimony is not required to enter a judgment, 3) a sworn declaration of Spencer Coray, M.D., declaring that Mr. Robinson was permanently injured despite two surgeries and incurred over $50,000 in medical expenses alone, and 4) a sworn declaration of Mr. Robinson declaring how he was injured by the defendant's employee, that

he had no preexisting injuries, that he was permanently injured, that he missed a wealth of time from work, and detailing all of the negative, permanent residuals he had from this crushing incident. CP 13-32.

Based upon the wealth of evidence and legal authority presented to the trial court, the court on July 22, 2009, entered specific findings of fact and conclusions of law. CP 28-29. Those included that 1) no live testimony was required to determine Mr. Robinson's damages, 2) Mr. Robinson suffered severe emotional and physical injuries as a result of the defendant's negligence, and 3) Mr. Robinson was entitled to a judgment of $2 million, plus statutory costs. CP 29-29. The court then entered a judgment consistent with those findings and conclusions. CP 31-32. The defendant still did nothing.

4. Without defending or even contacting Mr. Robinson's counsel for 18 months after being served, and 13 months after the default judgment was entered, the defendant belatedly appeared and filed a motion to vacate the default.

Approximately 18 months after the defendant was properly served with this lawsuit, including the Case Schedule, and over 13 months after the trial court entered a default judgment, the defendant appeared on August 26, 2010, and later filed the present motion. CP 38-39. By then, the defendant had failed to comply with any dates on the Case Schedule, including those to complete discovery, to disclose its witnesses, and to appear at trial on February 2, 2010, as required in bold, underlined words on the Case Schedule itself. CP 1.

Other than the defendant's belated appearance and its motion to

vacate the default judgment obtained over 18 months prior, the only contact the defendant ever had with Mr. Robinson or his counsel was its one letter dated September 13, 2007. CP 143. Between sending its one and only letter and finally appearing in this lawsuit, 36 months had passed, along with the deadline to appear, and all of the various deadlines set forth on the Case Schedule.

Finally, over thirteen months after the default judgment was entered, the defendant filed its motion asking the trial court to vacate the default judgment pursuant to CR 60(b)(1) and CR 60(b)(11). As the defendant conceded in its motion to vacate, the only thing the defendant did in the 18 months after being served with the lawsuit was to forward the complaint to a claims adjuster. CP 43. The claims adjuster responded and asked for some information about Mr. Robinson's claim, but the defendant never responded to the adjuster with that information. CP 43; CP 72. For the next 18 months, the defendant did absolutely nothing further on the case, such as following up with Mr. Robinson's counsel, contacting the court for a status, appearing in the case, following up with the insurance adjuster, responding to the adjuster's inquiries, retaining its own counsel to defend it, or showing up for trial.[2]

The trial court, despite the one year time limit to file a motion to vacate a default based on mistake, excusable neglect, or the like, found

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2 Had the defendant appeared at trial as required by the Case Schedule, it would have learned of the default judgment and could have tried to file its motion to vacate within one year of the entry of judgment.

that the defendant made a mistake based upon a misunderstanding between it and its insurer. CP 171. The trial court also found that there was an inference of a defense to Mr. Robinson's damages, even though the defendant submitted absolutely no evidence to support a defense or to overcome Mr. Robinson's and his surgeon's direct evidence of serious damages. Id. The court also found that CR 60(b)(11) and its "catchall" language applied, even though the defendant failed to prove any entitlement to that strictly construed, rarely used rule. Id. The trial erred by granting the defendant's motion to vacate the default judgment. This court should now reverse the trial court and reinstate the judgment in full.

D. LEGAL ARGUMENT

1. Standard of Review is De Novo.

The ultimate decision of whether to uphold a default judgment is normally reviewed for abuse of discretion. Little v. King, 160 Wn.2d 696, 702, 161 P.3d 345 (2007). Discretion is abused if the trial court makes its decision based on untenable grounds, such as a misunderstanding of the law applied to default judgments. Id.

While abuse of discretion is the normal standard of review for default judgments, the application of court rules to those facts is reviewed de novo when the facts are undisputed. Farmers Ins. Exch. v. Dietz, 121 Wn. App. 97, 100, 87 P.3d 769, 771 (2004)("The application of a court rule to undisputed facts is a matter of law that we review de novo.") In the case at bar, the facts of this case are entirely undisputed. The trial court

misinterpreted CR 60 and case law applicable thereto in vacating the default judgment in this case. Thus, appellate review is de novo.

2. CR 60(b)(1) is unavailable to the defendant because more than one year passed after the entry of judgment, which unavailability is fatal to the defendant's request to vacate the judgment.

The defendant's motion to vacate asserted that it was entitled to relief from the judgment based upon both CR 60(b)(1) and CR 60(b)(11). CR 60(b)(1), which is the most often used rule to vacate default judgments, allows a defaulted party to vacate a default judgment if the default was occasioned by such things as mistake, surprise or irregularity in obtaining a judgment. But CR 60(b)(1) is of no avail to the defendant and cannot be used to vacate the judgment at bar.

The reason CR 60(b)(1) is unavailable to the defendant is that motions under that rule must be brought within one year from the entry of judgment. CR 60(b)("The motion [to vacate] shall be made within a reasonable time and for reasons [constituting mistake, inadvertence, excusable neglect or irregularity in obtaining the judgment] not more than 1 year after the judgment. . .was taken.") And that one year time limit cannot be extended for any reason, equitable or otherwise. CR 6(b). According to CR 6(b), although the Court can generally extend or enlarge the time to perform an act for good cause shown, or permit the act to be done where the failure to act was the result of excusable neglect, the Court **"may not extend the time for taking any action under rules . . . 60(b)."** CR 6(b)(emphasis added). According to Karl Tegland, "CR 6(b)

prohibits the enlargement of time under CR 60. The time limits in CR 60 must, therefore, be strictly followed."[3] Karl B. Tegland, Washington Practice: Rules Practice CR 60 (5th Ed.) Karl Tegland stated in the Washington Handbook on Civil Procedure, 2007 Edition, p. 536, that the one year time limit of CR 60(b) sets the **absolute maximum time** within which a motion to vacate can be considered. Even if a motion is brought less than one year after entry of judgment, the court may still consider the motion to be unreasonably late. Id.

In the case at bar, the thrust of the defendant's motion to vacate was that there was some excusable neglect, mistake or inadvertence because of an alleged miscommunication between it and its insurer, which caused the defendant to ignore the lawsuit for the next 18 months. In the alternative, the defendant implied that there was some irregularity in entering the judgment because there was no live testimony at the time judgment was entered.

The defendant's alleged justifications to vacate the judgment fall squarely within the confines of CR 60(b)(1). In an almost identical case, an auto accident tortfeasor was sued after his insurer negotiated but could not settle with the plaintiff's attorney. Norton v. Brown, 99 Wn. App. 118, 992 P.2d 1019(1999)(review denied, 142 Wn.2d 1004, 11 P.3d 826

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3 In short, a court is without authority to vacate a default judgment even if mistake, inadvertence, excusable neglect or irregularity in obtaining the judgment is shown if more than one year has elapsed from the entry of the judgment before the defaulting party brings a motion to vacate. Ghebremichale v. Department of Labor and Industries, 92 Wn. App. 567, 575, 962 P.2d 829 (1998).

(2000)). After the defendant was served and the insurer failed to hire counsel to appear, the plaintiff obtained a default order.

Just before a default judgment was entered, counsel for the defendant filed an appearance. Id. at 121, 992 P.2d at 1021. Over the next 10 months, defense counsel tried to contact plaintiff's counsel to discuss the lawsuit, but defense counsel did not realize the existence of the default judgment. When defense counsel finally learned of the judgment, he filed a motion to vacate pursuant to CR 60(b). The motion was filed less than one year after entry of the default judgment. Id.

In setting the default judgment aside when the motion to vacate was filed less than one year after the entry of judgment, the Court of Appeals first ruled that a trial court can only set a default judgment aside pursuant to the requirement of CR 60(b), plus the 4 part test set forth in White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968).[4] Norton, 99 Wn. App. at 123, 992 P.2d at 1022.[5] The court then acknowledged that the trial court judge specifically found that the defendant presented prima facie

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4 The 4 factors are "(1) the existence of substantial evidence to support at least a prima facie defense to the claim that the damages were excessive; and (2) his failure to timely appear was the result of mistake, inadvertence, surprise or excusable neglect. Next, he had to show that he exercised diligence in seeking relief after notice of the default judgment and that the effect on [the defaulted party] would not be prejudicial if the judgment was vacated." Norton v. Brown, 99 Wn. App. 118, 123-24, 992 P.2d 1019(1999)(review denied, 142 Wn.2d 1004, 11 P.3d 826 (2000)).

5 The defendant in the case at bar concedes that both CR 60(b) and the 4 part test in White v. Holm is the applicable standard to vacate a default judgment. CP 45-46. But as detailed below, the 4 part test is unavailable if the defendant waits more than one year after judgment to file its motion, such as is the case here.

evidence of a defense to the plaintiff's damages, thus meeting that part of the test for setting aside a default judgment. Id. Thus, the next test was whether the defendant exhibited the CR 60(b)(1) factors of mistake, surprise or excusable neglect sufficient to comply with CR 60(b)(1).

In finding that the defaulted defendant had met the "mistake" test of CR 60(b)(1), the court noted that "[a] genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a **mistake** [one of the elements of CR 60(b)(1)] for purposes of vacating a default judgment. Berger v. Dishman Dodge, Inc., 50 Wn. App. 309, 312, 748 P.2d 241 (1987)." Norton, 99 Wn. App. at 124, 992 P.2d at 1022 (1999)(emphasis added). Because there was a mistake, and because the motion to vacate was filed within one year of the judgment, the Court of Appeals vacated the judgment.

In the case at bar, the "mistake" test of CR 60(b)(1) is inapposite because the defendant did not file its motion to vacate within one year of the entry of judgment. Case law is clear that a genuine misunderstanding between an insured and insurer as to who is to defend a lawsuit may, under the right facts, constitute a mistake sufficient to meet the requirement of CR 60(b)(1). But whether the defendant at bar made a "mistake" is irrelevant under CR 60(b) because its motion was untimely because it was filed more than one year after the entry of judgment.

Despite the clear requirement that the defendant in the case at bar

file its motion within one year of judgment if it wished to assert "mistake" as a defense to the judgment, the trial court in the case at bar, using almost identical language to the CR 60(b)(1) "mistake" finding in Norton v. Brown, specifically ruled as follows:

> A genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a **basis** for purposes of vacating a default judgment. Norton v. Brown, 99 Wn. App. at 188[sic](1999) citing Berger v. Dishman Dodge, Inc., 50 Wn. App. 309(1987)

CP 171(emphasis added).

The trial court in the case at bar, apparently aware that the "mistake" test of CR 60(b) was unavailable to the defendant, changed only one word from the applicable portion of the Norton case; namely, the trial court removed the word "mistake" from the Norton case and replaced it with the word "basis." But the fact remains that a genuine misunderstanding between an insured and its insurer is at best a "mistake" for the purposes of CR 60(b)(1) and, therefore, is of no help to the defendant here. That is even more true here because the defendant's motion was untimely.

Because the present motion was brought well over one year after the entry of judgment, the trial court had no authority to vacate the default judgment even though the misunderstanding between the defendant and its insurer may have constituted a "mistake." The trial court misapprehended CR 60(b) when it applied the "mistake" test even though more than one year had elapsed between the default judgment and the defendant's motion

to vacate it. CR 6(b), in conjunction with CR 60(b), prohibits the court from vacating a judgment based on mistake after one year. This court should reverse the trial court and reinstate the judgment in full.

3. CR 60(b)(11) is of no help to the defendant either as it applies only to "extraordinary circumstances" not covered by any other section of CR 60(b).

The trial court, acknowledging that the defendant's motion was filed well over one year after the judgment was entered, instead set the judgment aside under the catchall language of CR 60(b)(11) using the same "mistake" analysis applicable under CR 60(b)(1). Pursuant to CR 60(b)(11), default judgments may be set aside for "[a]ny other reason justifying relief from the operation of the judgment." But the law is clear that the use of CR 60(b)(11) to vacate a judgment is "confined to situations involving extraordinary circumstances not covered by any other section of [CR 60(b)]." Friebe v. Supancheck, 98 Wn. App. 260, 266, 992 P.2d 1014 (1999)(quoting In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (Div. 2, 1985). "Furthermore, CR 60(b)(11) cannot be used to circumvent the one-year time limit applicable to CR 60(b)(1)." Friebe, 98 Wn. App. at 267. And the "catchall" provision cannot be used to set aside a judgment if the moving party asserts any CR 60(b) defense other than the catchall provision, such as CR 60(b)(1). Shoen v. Shoen, 933 F.Supp. 871, 877 (D.Ariz.,1996).

Federal cases interpreting the "catchall" provision of CR 60(b) are in accord with Washington's courts. Specifically, FRCP 60(b)(6), like

Washington's CR 60(b)(11), provides for the vacation of judgments for "any other reason that justifies relief." Federal cases hold that, to obtain FRCP 60(b)(6) relief, the moving party must show "both injury and that circumstances beyond its control prevented timely action to protect its interests. Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir.1998) (quoting United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993)). **Neglect or lack of diligence is not to be remedied through Rule 60(b)(6).**" San Luis & Delta-Mendota Water Authority v. U.S. Dept. of Interior, 624 F.Supp.2d 1197, 1208 (2009)(quoting Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir.1998) (emphasis added); see also United States v. RG & B Contractors, Inc., 21 F.3d 952, 956 (9th Cir.1994)).

Case law in the federal courts also comports with Washington's courts in holding that a defaulted party is barred from asserting the "catchall" provision of CR 60(b) if the defaulted party asserts that a default should be vacated under any other CR 60(b) provision:

> For these same reasons, this court must reject the plaintiffs' request for relief under Rule 60(b)(6). First, a number of courts have held that a movant may only use Rule 60(b)(6) for a claim for relief that does not fit into the five specific categories of Rule 60(b)(1) through (5). See, e.g., Met-Al, Inc. v. Hansen Storage Co., 844 F.Supp. 485, 487 (E.D.Wis.1994); VanLeeuwen v. Farm Credit Admin., 600 F.Supp. 1161, 1164 (D.Or.1984); see Fed.R.Civ.P. 60(b) (subsection (6) is separated by an "or" from subsections (1) through (5)). **Thus, by claiming that they were entitled to relief under Rule 60(b)(2), the plaintiffs are prevented from pursuing a Rule 60(b)(6) line of attack.**

Shoen v. Shoen, 933 F.Supp. 871, 877 (D.Ariz.,1996)(emphasis added).

Federal cases also comport with the rule that a "defendant who chooses not to put the plaintiff to its proof, but instead allows default judgment to be entered and waits, for whatever reason, until a later time to challenge the plaintiff's action, should have to bear the consequences of such delay." S.E.C. v. Internet Solutions for Bus. Inc., 509 F.3d 1161, 1166 (9th Cir., 2007).

Not only is CR 60(b)(11) useless to the defendant pursuant to the above authority, but none of the provisions of CR 60(b) can be used to correct any alleged errors of law thought to have been made in the trial court's entry of the judgment. State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982); Haley v. Highland 142 Wn.2d 135, 156, 12 P.3d 119 (2000). Instead, the proper remedy to correct alleged errors of law in the entry of judgment is to timely file an appeal of the judgment. State v. Keller, 32 Wn. App. at 140. Appeals must be filed within 30 days of a final judgment.[6] RAP 5.2.

A recent Washington case illustrating why CR 60(b)(11) motions cannot be used like the defendant wishes to use it in the case at bar is Friebe v. Supancheck, 98 Wn. App. 260, 266, 992 P.2d 1014 (1999). In that case, a default judgment was entered against the defendants on March 18, 1996. Just over one year later on March 20, 1997, the defendants first learned of the default judgment when they were served with a notice of

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6 Some post judgment motions can extend the time limit for filing an appeal, but CR 60 motions do not. RAP 5.2(e).

garnishment proceedings. Id. at 264. Thereafter, the defendants promptly moved to set aside the default judgment.

In ruling on the motion to set aside the default judgment, the trial court found that 1) good cause existed to vacate the judgment, 2) the defendants had asserted a meritorious defense, 3) the defendants had acted with due diligence, and 4) that no substantial hardship would result from setting aside the default judgment. Id. The trial court then vacated the judgment, and later granted summary judgment to the defendants on all claims. Id. at 265.

On appeal, the Court of Appeals reversed the trial court's decision setting aside the default judgment, reversed the order on summary judgment against the defendants, and reinstated the default judgment. Id. at 269-270. In concluding that the trial court had improperly used CR 60(b)(11) as a basis to vacate the judgment, the Court of Appeals noted that relief under CR 60(b)(11) is "confined to situations involving extraordinary circumstances not covered by any other section of the rule." Id. at 266 (citing In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (Div. 2, 1985)). Thus, the Court held that, even though the defendants' motion persuaded the trial court that the defendants 1) established a prima facie defense, 2) exhibited due diligence, and 3) failed to appear due to mistake, inadvertence or excusable neglect, CR 60(b)(11) could not be used to circumvent the one year time limit applicable under CR 60(b)(1). Id. at 267. The Court also specifically found that waiting

over one year to begin collection proceedings on the default judgment was neither unfair nor deceptive. Id.

The trial court at bar did precisely what the court in Friebe held was reversible error. The trial court at bar erroneously found that the defendant, even though it submitted no evidence of a defense, raised some inference of such a defense. The trial court at bar incorrectly found that the defendant exhibited due diligence after it learned of the default judgment. And the trial court at bar committed error when it found that there was some mistake by the defendant that led to the default judgment. By setting the default judgment aside on those grounds even though more than one year had elapsed between the judgment and the motion to vacate it, the trial court committed the exact same error as the trial court in Friebe. This court should, like the Court of Appeals in Friebe, reverse the trial court at bar and reinstate Mr. Robinson's judgment.

In yet another Washington case on point, a plaintiff was injured in a car crash and later sued Adams County for damages. Bergren v. Adams County, 8 Wn. App. 853, 509 P.2d 661 (1973). The defendant, through the mistake of its county auditor and legal counsel, failed to answer the complaint, so the plaintiff later obtained a default judgment. The defendant sought to vacate the default judgment over one year after the judgment was entered. Id. at 855.

In its motion to vacate, the defendant asserted that the default resulted from its mistake, surprise or excusable neglect, or that the

judgment should be set aside under CR 60(b)(11). The defendant actually set forth facts showing that the accident did not even happen in Adams County, but instead happened in an adjacent county and, therefore, Adams County had no duty to the injured plaintiff. Id. at 856.

The Court of Appeals affirmed the trial court's decision to uphold the default judgment. Specifically, the court found that arguing a liability defense was too late because a judgment had already been entered. Id. at 664. The court also ruled that the defendant's only explanation for why it was defaulted was through the excusable neglect or mistake of its auditor and attorney. Id. at 664. "This does not constitute an 'other reason' within CR 60(b)(11); rather, it falls within CR 60(b)(1) and cannot be asserted after 1 year from the date of judgment. 4 Orland, Wash.Prac. 423 (2d ed. 1968); 7 J. Moore's Federal Practice, 60.27 at 352 (2d ed. 1972)." Bergren, 8 Wn. App. at 664.

Bergren is similar to the case at bar. Here, the defendant asserts that it did not respond to the complaint through a "mistake" based upon an alleged misunderstanding between it and its insurer. But "mistake" is remedied only through CR 60(b)(1), which Bergren confirmed is not cognizable to justify setting aside a default pursuant to CR 60(b)(11).

The one and only CR 60(b)(11) case that the defendant cited to the trial court in the case at bar in support of its CR 60(b)(11) motion was the older case of Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993)(which was severely limited in its application by the subsequent

Friebe decision, supra.) In Caouette, the plaintiff was injured in a car accident and sued both the driver and the alleged owner of the car that struck her. The owner was sued under a theory of negligent entrustment, which elements require proof of who owned the car, and that the car owner entrusted his car to someone he knew was reckless, heedless or incompetent. Id. at 78. But nowhere in her complaint or in her materials seeking her default judgment did the plaintiff ever allege any facts to prove who actually owned the car that hit her. Id. at 77. She also failed to even allege any of the elements of negligent entrustment, and she failed to present any proof to support any of those elements. Id. at 78-79.

Without even properly serving the defendants within the statute of limitations, by publication or otherwise, and without even proving who owned the car or any of the other elements of negligent entrustment, at the plaintiff's request, the trial court entered a default judgment on October 9, 1990. Id. at 71. About five weeks later, the defaulted defendants moved to set the judgment aside. Id. at 71-72.

The Court of Appeals upheld the vacating of the default judgment because neither the car driver nor the alleged car owner had been timely served. Although that ground alone was sufficient to set aside the default judgment as to both defendants, the Court of Appeals, in *dicta*, agreed that the alleged car owner was not properly defaulted on the independent bases that 1) there was absolutely no proof at the time of entering the judgment of who owned the car, and 2) there was no proof that any of the elements

of negligent entrustment had been met. Id. at 79.

As for the defendant's attempt to utilize the rule in Caouette, that case is entirely distinguishable from the case at bar. First, the plaintiff in Caouette never even timely served the defendants, but she obtained a default judgment anyway. It is undisputed in the case at bar that the defendant was timely and properly served.

Second, the defendants in Caouette moved to set aside the default judgment within five weeks of its entry. In the case at bar, the defendants waited over one year and lost any right to vacate this judgment for mistake, surprise, irregularity in obtaining the judgment, etc.

Third, the plaintiff in Caouette obtained a judgment against a person for negligent entrustment without even submitting any evidence that the alleged vehicle owner negligently entrusted the car. Subsequent cases in Washington have ruled that Caouette merely stands for the proposition that a plaintiff, in seeking a default judgment, needs merely to assert minimal facts supporting each element of her claim. Friebe v. Supancheck, 98 Wn. App. 260, 268, 992 P.2d 1014 (1999)("We interpret *Caouette* as requiring only that the party seeking a default judgment set forth facts supporting, at a minimum, each element of the claim.")

In the case at bar, Mr. Robinson submitted unrebutted testimony that 1) he was not employed by the defendant, 2) the person who struck Mr. Robinson with a loaded forklift was employed by the defendant, 3) the person who struck Mr. Robinson with the forklift did not even see Mr.

Robinson when he crushed his legs with the loaded pallet, and 4) Mr. Robinson was severely injured when his legs were crushed by the defendant's employee. Mr. Robinson has provided ample evidence supporting each element of his claim and his damages. The trial court made specific findings and conclusions that Mr. Robinson was not negligent, the defendant was negligent, and that Mr. Robinson was injured. Mr. Robinson has certainly provided more than the minimal facts necessary under Caouette to establish liability and damages, which means he provided substantial evidence to uphold his default judgment. Caouette is of no help to the defendant in the case at bar.

Like the defendant in the case at bar, the defaulted defendant in Friebe v. Supancheck, 98 Wn. App. 260, 992 P.2d 1014 (1999), asserted CR 60(b)(11) pursuant to Caouette. But the court in Friebe rejected the application of Caouette and held that, as set forth above, CR 60(b)(11) cannot be used to extend the one year time limit for mistake, excusable neglect, irregularity in the obtaining of the judgment, etc., and can only be used in extraordinary circumstances extraneous to the action of the court. Friebe, 98 Wn. App. at 266.

In the case at bar, the defendant asserted that it failed to timely appear or answer the summons and complaint for 18 months, and that it ignored the Case Schedule for 18 months, and that it totally missed the trial date, because of a miscommunication it allegedly had with its

insurer.[7] The trial court ignored the vast law on the extremely narrow use of CR 60(b)(11) and its "catchall" language, and vacated the judgment because of the defendant's alleged mistake based upon a misunderstanding with its insurer. As the above authority makes clear, however, a misunderstanding with an insurer is at best a "mistake" remedied only under CR 60(b)(1), which is unavailable in the case at bar. The defendant's motion to the trial court was replete with excuses for why its failure to do anything until August 2010, despite being properly served with a lawsuit and a Case Schedule on February 10, 2009, specifically telling it to appear for trial on February 2, 2010, should be excused. But those excuses are of no help under CR 60(b)(1) because more than one year has elapsed and are of no help under CR 60(b)(11) under the authority set forth above.

4. Even if the court ignores the strict time limits of CR 60(b)(1) and ignores the rule that CR 60(b)(11) cannot be asserted when the defaulted party asserts other CR 60(b) elements, the court still may not set aside this judgment because the defendant has not provided any evidence of a prima facie defense.

The defendant concedes that, not only must it prove entitlement to relief under CR 60(b), but it must also provide evidence of a prima facie defense to Mr. Robinson's claim. CP 45-46. The defendant did not submit any evidence of a defense.

A. The defendant has no prima facie defense to liability.

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7 The defendant makes this argument despite the fact that the defendant itself failed to respond to its own insurer's request for information necessary to evaluate Mr. Robinson's claim. CP 72.

The defendant claimed to the trial court that the Labor & Industries laws "May Provide Immunity to [the defendant]." CP 50. But the defendant failed to alert the trial court of the binding authority in direct opposition to the defendant's claim that the worker's compensation bar to a third party injury claim "could apply." CP 51. And the trial court did not find any liability defenses in its ruling vacating the default judgment.

In Novenson v. Spokane Culvert & Fabricating Co., 91 Wn.2d 550, 588 P.2d 1174 (1979), a temporary agency assigned one of its employees to work for Spokane Culvert. While working for the culvert company, the temporary agency's employee had his hands injured in a machine. Id. at 551.

The temporary agency's employee sued the culvert company for negligence. The trial court summarily dismissed the claim against the culvert company under the mistaken belief that the employee's claims were barred by Labor & Industries laws under the borrowed servant doctrine. The Supreme Court reversed and ruled that, in order to apply the worker's compensation bar to third party injury claims, the injured victim and the business where she was placed by the temporary agency must **mutually agree** that an employee/employer relationship exists between them. Id. at 553. Absent that mutual agreement of an employee/employer relationship, the injured party is not barred from suing the company where she was placed to work by the temporary agency. See also Rideau v. Cort Furniture Rental, 110 Wn. App. 301, 307, 39 P.3d 1006 (2002)(no bar to

injured temporary agency employee when he considered himself an employee of the temporary agency, not the furniture business where he was placed to work.)

In the case at bar, the defendant itself agrees that Mr. Robinson was not its employee and actually wrote that "Mr. Robinson is not a Midwest Air Technologies employee." CP 68. And Mr. Robinson alleged in his complaint and in his materials in support of his judgment that he "was employed by Corestaff Services" and "was not an employee of Midwest Air Technologies, Inc." when he was injured by one of the defendant's employees. CP 17. Thus, there is no dispute that neither of these parties considered there to be any employee/employer relationship between them, thus negating any borrowed servant or other bar to Mr. Robinson's third party injury claim.

B. The defendant has no defense to damages either.

1. The defendant submitted no evidence of a defense.

The defendant submitted some jury verdicts as its only "evidence" of a defense to the judgment amount Mr. Robinson was awarded. But the trial court correctly struck the jury verdicts from its consideration. CP 180. That order striking the jury verdicts was not appealed, so the trial court's ruling in that respect may not be reviewed. RAP 2.4

2. The defendant submitted absolutely no evidence to meet its burden to prove a defense to damages.

"After a party obtains a judgment, it is presumed that he or she has substantial evidence to support his or her claim. If a CR 60 movant cannot

produce substantial evidence with which to oppose the claim, there is no point to setting aside the judgment and conducting further proceedings." Pfaff v. State Farm, 103 Wn. App. 829, 834, 14 P.3d 837 (Div. 2, 2000). In the case at bar, the trial court ignored that presumption and turned it on its head by ruling that, even though the defendant submitted no evidence of a defense to damages, the trial court "infers that there is a prima facie defense to the amount of damages. . . ." CP 171. Thus, the trial court erred when it failed to place the burden of proving a defense to damages on the defaulted party instead of on Mr. Robinson, who is presumed to have submitted substantial evidence in support of his judgment and who indeed submitted direct evidence supporting his serious injuries.

Division Two of the Court of Appeals, in a recent opinion by Judge Quinn-Brintnall, confirmed that a defaulted defendant's assertion on a motion to vacate that the default judgment amount is not fair "is not a legally cognizable argument." Rosander v. Nightrunners Transport, Ltd., 147 Wn. App. 392, 408, 196 P.3d 711 (2008). The court went on to hold that "a trial court abuses its discretion if it sets aside a default judgment solely because the 'defendant is surprised by the amount or. . . the damages might have been less in a contested hearing.'" Rosander v. Nightrunners Transport, Ltd., 147 Wn. App. 392, 408, 196 P.3d 711 (2008)(quoting Little v. King, 160 Wn.2d 696, 704, 161 P.3d 345 (2007)).

The facts of Rosander are simple. The plaintiff was injured in a car crash caused by a driver employed by the defendant, Nightrunners

Transport, Ltd. After being served with process, the defendant's insurer negotiated with the plaintiff's attorney but did not file an answer. Id. at 397-98. Thus, the plaintiff moved for default.

On the morning of the default hearing, the defendant's insurer called plaintiff's counsel and claimed that its adjuster had not worked on the case because of some health problems. Id. at 398. The plaintiff postponed the default hearing for two weeks and so informed the defendant's insurer. Id. at 398. When the defendant or its insurer failed to show up at the re-noted hearing, the trial court entered a default judgment for nearly $1 million. Id. at 398.

The Court of Appeals refused to vacate the judgment, even though the case does not mention that live testimony was ever submitted to the trial court. The defaulted defendant argued that it had a defense to damages because it was not just or equitable to award the injured party such a large judgment in a default setting. Id. at 408. In rejecting that argument, the court reiterated that a defaulted party's argument that the general damages are too high "is not a prima facie defense to the damage award and falls squarely under the holding in Little, 160 Wn.2d at 705-06, 161 P.3d 345." Rosander, 147 Wn. App. at 408.

A recent Supreme Court case, which was specifically followed by Rosander, further illustrates that the trial court at bar misconstrued the law when it set the subject default judgment aside. In Little v. King, 160 Wn.2d 696, 704, 161 P.3d 345 (2007), the plaintiff was injured in a car

crash. When the defendant did not answer, the plaintiff moved for a default judgment. At the hearing on the default judgment, no live testimony was presented. Id. at 701-02. The trial court, without live testimony, entered a judgment in a neck and back injury case in the amount of $2,155,835.58. That judgment was based on written materials submitted by the plaintiff, to include declarations of some of her doctors. Id. at 701-02. Amazingly, the trial court did not even enter findings of fact or conclusions of law, which are required in personal injury cases. CR 55(b)(2).

The defendant later moved to vacate the default judgment and supported a defense to the plaintiff's damages with a declaration from an experienced insurance adjuster that the plaintiff had preexisting injuries. Id. at 704-05. But the Supreme Court rejected that argument and stated as follows:

> a party who moves to set aside a judgment based upon damages must present evidence of a prima facie defense to those damages. See CR 60(e)(1); White, 73 Wn.2d at 352, 438 P.2d 581. The amount of damages in a default judgment must be supported by substantial evidence. See, e.g., Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 240–42, 974 P.2d 1275 (1999). It is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might has[sic] been less in a contested hearing. Shepard, 95 Wn. App. at 242, 974 P.2d 1275.

Little, 160 Wn. 2d at 704.

Applying the above, it is clear that the defendant's argument that Mr. Robinson was awarded too much money has been summarily rejected as not even being legally cognizable. Second, the defendant has no

admissible evidence to rebut that Mr. Robinson was awarded a proper amount of damages. The Supreme Court in Little v. King rejected the declaration of an experienced injury adjuster who had reviewed the plaintiff's medical records and questioned the injured party's injuries because the adjuster's testimony was too speculative. Third, a party who obtains a judgment is presumed to have substantial evidence to support the judgment. In the case at bar, the defendant has submitted no evidence, competent or otherwise, questioning Mr. Robinson's damages or in any way overcoming his presumption of substantial evidence. Indeed, at least one of the reasons why the defendant has no evidence to rebut damages is because it did no investigation of any kind into the nature and extent of Mr. Robinson's damages, despite having been on notice of this claim for over three years. The defendant has no defense, which is fatal to this motion.

5. The one year time limit of CR 60(b) bars the trial court from vacating a judgment even if all 4 White v. Holm factors are met.

It is clear that a court is without authority to vacate a default judgment under CR 60(b)(1) even if a defense is shown, and even if mistake, inadvertence, excusable neglect or irregularity in obtaining the judgment is shown, if more than one year has elapsed from the entry of the judgment. Ghebremichale v. Department of Labor and Industries, 92 Wn. App. 567, 575, 962 P.2d 829 (1998). In the case at bar, the trial court, acknowledging that mistake or excusable neglect is unavailable to the defendant, erroneously set the default judgment aside pursuant to the 4

factors of White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968). But the Holm case was decided prior to the enactment of CR 60. Pfaff v. State Farm Mutual Auto. Ins. Co., 103 Wn. App. 829, 14 P.3d 837 (2000). White v. Holm is not an independent ground upon which to set aside a default judgment. Instead, CR 60(b) is the rule applied to setting aside a judgment, and White v. Holm merely sets forth the four factors the court is to use when analyzing a CR 60(b)(1) motion. Pfaff, 103 Wn. App. at 831-32. In Luckett v. Boeing Co., 98 Wn. App. 307, 314-15, 989 P.2d 1144 (1999), the court reaffirmed that the White v. Holm factors are merely used to analyze a CR 60(b)(1) as follows:

> [t]he White factors are most appropriately applied. . .to determining whether sufficient grounds exist for vacating a judgment under CR 60(b)(1). CR 60(b) makes the question of the timeliness of a motion to vacate analytically distinct from the reasons for which relief from a judgment may be granted.

A case that squarely adopted the one year time limit to file a motion to set aside a default judgment on the basis of a prima facie defense is Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 974 P.2d 1275 (1999). In that case, a defaulted defendant in a personal injury case claimed that the default judgment should have been set aside because the defendant had prima facie defenses to both liability and the amount of damages that were awarded to the plaintiff in the default judgment. However, the defaulted party's attorney failed to file a motion to vacate the default until sixteen months after the judgment was entered. Because CR 60(b) requires

motions on those grounds to be filed within one year of the default judgment, the default was upheld. The attorney who filed the untimely motion was then sued for malpractice. Id. at 233.

In the malpractice lawsuit, the Court of Appeals examined the prima facie defense basis for setting aside a default judgment and its interplay with the one year time restriction set forth in CR 60(b). The court determined that the defaulted party in Shepard Ambulance had sufficient evidence of a prima facie defense to damages such that the default could have been set aside. Id. at 242. However, because the attorney for the defaulted party failed to bring a motion to set aside the judgment within the strict one year time limit, the fact that the defaulted defendant had both a prima facie defense and evidence constituting a "mistake" was insufficient to vacate the default. Id. at 242.

In the case at bar, the defendant argued alleged defenses to damages and liability, but submitted no evidence to support the argument. Even if it had submitted evidence of a defense, said defense could only be raised pursuant to CR 60(b)(1) and must be brought within one year of entry of the default judgment.

Instead of following the law set forth herein, the trial court at bar set the default judgment aside by relying on the older, inapposite Division 3 case of Calhoun v. Merritt, 46 Wn. App. 616, 731 P.2d 1094 (1987). In that case, the defaulted defendant appeared 17 days after a default judgment was entered. The defendant then moved to set the judgment

aside about one month later. Thus, the defendant was able to argue setting the default aside for excusable neglect, mistake, etc. The court, in affirming the trial court's decision to vacate only the damages portion of the default judgment, rightfully never even mentioned CR 60(b)(11) or the one year time restriction applicable to CR 60(b)(1). The default was instead vacated under the more familiar mistake, surprise, etc., rule set forth in CR 60(b)(1). But in the case at bar, CR 60(b)(1) is unavailable, so Calhoun is inapplicable. The defendant at bar has no defense to damages, and even if it did, it would be of no use.

The defendant in the case at bar tries to analogize its failure to respond to the lawsuit, account for any of the Case Schedule dates, or to appear for mandatory trial with the diligent conduct exhibited by the defendant in Calhoun. That analogy fails when the defendant cannot legitimately explain why it waited over 36 months after being told that Mr. Robinson had legal counsel to pursue his injury claim without ever even contacting counsel or the court, and over 18 months after being served with a lawsuit, and over 18 months after being served with a Case Schedule from which deadlines had been passing during the first year after service of process. The only thing the defendant did was send a copy of the served lawsuit to its insurer and thereafter failed to follow up with the insurer, counsel or the court. That lack of diligence is inexcusable, especially for a large corporation like this defendant.

6. The defendant has not exhibited excusable neglect.

Division Two authority is clear that, without excusable neglect, "neither an order of default nor a default judgment can be vacated." Estate of Stevens, 94 Wn. App. 20, 30, 971 P.2d 58 (Div. 2, 1999)(citing Seek Systems, Inc. v. Lincoln Moving/ Global Van Lines, 63 Wn. App. 266, 271, 818 P.2d 618 (Div. 2, 1991). Illustrating the often reversible error in trial courts' decisions to set aside default judgments, in one week's time in June 2007, our Supreme Court reversed the decisions of three separate trial judges that had vacated default judgments.

In Little v. King, 160 Wash.2d 696, 161 P.3d 345 (2007), the trial court set aside the default judgment in a personal injury case. The Court of Appeals reversed the trial court. The Supreme Court affirmed the Court of Appeals, concluding that the trial court abused it discretion in setting aside the default judgment. The default judgment was reinstated.

In Morin v. Burris, 160 Wn.2d 745, 161 P.3d 956 (2007), the trial court set a default judgment aside in a personal injury case. The trial court's decision was upheld by the Court of Appeals. The Supreme Court reversed both the Court of Appeals and the trial court, concluding that the trial court abused it discretion in setting aside the default judgment. The default judgment was reinstated.

In Matia Investment Fund, Inc. v. City of Tacoma, 160 Wn.2d 745, 161 P.3d 956 (2007), the trial court judge set a default judgment aside more than one year after entry of judgment. The trial court's decision was upheld by the Court of Appeals, Division 2. The Supreme Court accepted

review, reversed both the Court of Appeals and the trial court, and concluded that the trial court abused it discretion in setting aside the default judgment. The default judgment was reinstated.

The three cases cited above resulted in the trial court being overturned for setting a default judgment side. The case at bar is even more compelling for upholding the default than the three cases cited immediately above. The defendant in the case at bar was properly served with process and a Case Schedule that specifically, in bold and underlined print, informed the defendant that it must appear for trial on February 2, 2010. Despite that, the defendant did nothing to appear in this lawsuit or to even verify if its interests were being protected until over 18 months after it was served.

Another Division Two case where this court reinstated a default includes Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93, 97, 900 P.2d 595 (1995), rev. denied, 129 Wn.2d 1007, 917 P.2d 129 (1996). In that case, the defendant was an insurance company that was properly served with process through the Insurance Commissioner's office. The process was then forwarded to the attorney who was listed as the person to receive process on behalf of the defendant. That attorney, however, no longer held the position of responding to process. As such, the defendant failed to appear or answer the complaint within the appropriate time frame.

After the plaintiff obtained a default, the defendant moved to set it aside. The defendant in Prest argued that the process had been misplaced,

which is why no answer was timely filed. The motion to set aside was granted by the trial court judge. Id.

The trial court's order to set aside the default was reversed on appeal. Division Two reaffirmed that the party moving to set aside a default must prove **excusable** neglect in failing to timely respond to process. Id. The Prest court held that the defendant's failure to answer was certainly neglect, but that the neglect "is not excusable." Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93, 100, 900 P.2d 595 (1995), rev. denied, 129 Wn.2d 1007, 917 P.2d 129 (1996). Because the defendant only showed neglect and failed to show **excusable** neglect, the trial court's decision to vacate the default was overturned. "The most that can be said is that [the defendant] acted with due diligence after it learned that the default judgment had been entered. That does not, however,. . . excuse its neglect." Prest, 79 Wn. App. at 100. The court went on to hold that the defendant's failure to show **excusable** neglect in not answering the complaint mandated a reversal of the trial court's decision to set aside the default.

In Smith v. Arnold, 127 Wn. App. 98, 110 P.3d 257 (Div. 2, 2005), a default order was entered in a personal injury case. The defendant was personally served, and her insurer was provided with a copy of the summons and complaint. Id. at 102. When the insurer got the lawsuit, its assigned adjuster was on vacation. Over twenty days after the insurer received the lawsuit, and because no appearance had been made, the court

entered a default.

One week later, an attorney appeared for the defendant and promptly moved to vacate the default. Id. at 102-03. The trial court denied the motion to vacate.

Division Two of the Court of Appeals affirmed. In so doing, the court held that there was no excusable neglect in failing to timely appear in the lawsuit despite the fact that the assigned insurance adjuster was on vacation when the insurer got a copy of the lawsuit. Id. at 113. The court reaffirmed Division Two's holding in Prest v. American Bankers Life Assur. Co., 79 Wn. App. 93, 100, 900 P.2d 595 (1995), rev. denied, 129 Wn.2d 1007, 917 P.2d 129 (1996), that it was not excusable in that case for a corporation to neglect forwarding a lawsuit to its corporate counsel.

Applying Prest and Arnold to the case at bar, it is clear that the trial court erred in vacating the subject default judgment. Like the defendants in Prest and Arnold, the defendant in this case was properly served with process. Like in Prest and Arnold, the defendant at bar then failed to respond to the process. A major corporation like the one at bar, which delivers goods "throughout the United States,"[8] has no valid excuse for failing to respond to this lawsuit. Its claim that it should be excused because it forwarded the lawsuit to its insurer ignores the fact that it did nothing for over 18 months after it forwarded the lawsuit to its insurer. It did not contact its insurer to check a status. It did not contact Mr.

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8 CP 42.

Robinson's attorney to see what was going on, whether discovery was being completed, or the like. The defendant did not contact the court at all despite the Case Schedule and its mandatory deadlines that had come and gone over the next 12 months after service of this lawsuit. The defendant did not even respond to its own insurer's request for information about Mr. Robinson's claim. And the defendant never contacted an attorney or received contact from any attorney hired by the insurer, despite being aware that it had been sued 18 months earlier. The first time the defendant took any action was when it got a copy of the judgment over 18 months after this lawsuit was filed and served. That type of neglect is simply inexcusable. Thus, the court should deny the defendants' motion to vacate this default.

7. The trial court entering the judgment had substantial evidence.

Mr. Robinson and his doctor both provided sworn testimony that, as a result of having his legs crushed, Mr. Robinson 1) suffered permanent, debilitating injuries, 2) underwent two separate surgeries, 3) is disfigured, 4) can no longer regularly participate in sports, 5) was confined to a wheelchair, 6) suffers ongoing, regular pain that is permanent, and 7) incurred substantial medical bills and wage loss. Mr. Robinson submitted a detailed synopsis of his special damages. The trial court entered a default judgment based upon that evidence, which was proper.[9]

---

9 The declarations of Mr. Robinson and his surgeon are attached as Appendix A. The court's order and written ruling are attached as Appendix B.

Damages awarded in a personal injury case include past and future pain and suffering, past and future loss of enjoyment of life, the amount of special damages, etc. WPI 30, et seq. In seeking his judgment, Mr. Robinson presented evidence pertaining to all of those factors. The court considered that evidence and entered an award accordingly. Even if the court who entered the judgment did not have substantial evidence to support the damages award, that would constitute an error of law subject to correction only via direct appeal. As set forth above, CR 60 motions cannot be used to correct errors of law. And Mr. Robinson is presumed to have submitted substantial evidence to support his judgment. Pfaff v. State Farm, 103 Wn. App. 829, 834, 14 P.3d 837 (Div. 2, 2000).

On a related note, the trial court in Little v. King failed to enter findings of fact or conclusions of law when it entered the default judgment. Pursuant to CR 55(b)(2), findings and conclusions are required in such cases as personal injury claims. The Supreme Court nevertheless reversed the vacation of that default judgment and remanded the case to the trial court to reinstate the default judgment and retroactively enter findings/conclusions. In the case at bar, the court on entering judgment made detailed findings/conclusions based upon two sworn declarations supporting the severity of Mr. Robinson's injuries. Once again, "a trial court abuses its discretion if it sets aside a default judgment solely because 'the 'defendant is surprised by the amount or. . . the damages might have been less in a contested hearing.'" Rosander v. Nightrunners Transport,

Ltd., 147 Wn. App. 392, 408, 196 P.3d 711 (2008)(quoting Little v. King, 160 Wn.2d 696, 704, 161 P.3d 345 (2007)). Even if the court determines that the findings and conclusions are too conclusory, the remedy is to merely remand to the trial court for the entry of more detailed findings/conclusions. The Supreme Court reinstated a default judgment and remanded a case with **no** findings or conclusions in Little v. King, so it was error for the trial court here to have set the judgment aside based upon allegedly conclusory findings/conclusions.

8. It was proper for Mr. Robinson to wait one year to notify the defendant of his default judgment.

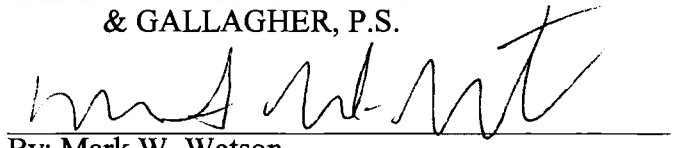
It is well settled that "waiting more than a year to execute a judgment is not characterized as unfair or deceptive." Friebe v. Supancheck, 98 Wn. App 260, 267, 992 P.2d 1014 (1999); See also Allison v. Boondock's, Sundecker's & Greenthumb's, Inc., 36 Wn. App. 280, 285-86, 673 P.2d 634 (1983)(review granted, 101 Wn.2d 1001, review dismissed, 103 Wn.2d 1024 (1984)). The defendant's argument below that it was improper for Mr. Robinson to notify the defendant of his judgment more than one year after its entry has already been foreclosed.

CONCLUSION

For the foregoing reasons, the court should reverse the trial court and reinstate Mr. Robinson's default judgment.

DATED this 20 day of May, 2011.

THE LAW OFFICES OF WATSON
& GALLAGHER, P.S.



By: Mark W. Watson
Attorney for Appellant

APPENDIX A

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUL 22 2009 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

The Honorable Judge Michael A. Hecht

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

ROBERT ROBINSON, Plaintiff, v. MIDWEST AIR TECHNOLOGIES, INC., a Washington Corporation; "JOHN DOE" FORKLIFT DRIVER and "JANE DOE" FORKLIFT DRIVER, husband and wife and the marital community comprised thereof; Defendants.	NO. 09-2-05376-1 **DECLARATION OF PLAINTIFF ROBERT ROBINSON IN SUPPORT OF MOTION TO ENTER DEFAULT JUDGMENT**

ROBERT ROBINSON hereby declares and states as follows:

1. I am the plaintiff herein. I am over the age of eighteen and make this declaration based upon personal knowledge.
2. The present lawsuit arises out of injuries I sustained in a forklift accident that occurred on or about May 24, 2007.
3. On or about May 24, 2007, I was employed by Corestaff Services.
4. On or about May 24, 2007, I was temporarily placed by Corestaff Services to work at Midwest Air Technologies, Inc.
5. At the time of the forklift incident referenced herein, I was not an employee of Midwest Air Technologies, Inc.

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MILTON, WASHINGTON 98354
253-926-8437
FAX 253-926-8426

6. On or about May 24, 2007, an employee of Midwest Air Technologies, Inc., was operating a forklift.

7. The forklift driver was carrying a loaded pallet on the front forks of the forklift he was operating. Apparently failing to see me in the vicinity, the forklift operator drove the load on the forklift into my body, thereby pinning me between it and another stack of pallets nearby.

8. As a result of the forklift accident, I suffered severe injuries to both of my legs.

9. Immediately following the accident, I was taken to St. Clare Hospital, where I was taken into emergency surgery with Dr. Spencer Coray.

10. Following my emergency surgery, I stayed overnight in the hospital. I was given pain medication and a subsequent referral to physical therapy.

11. On or about December 19, 2007, I underwent a second surgery with Dr. Coray, in order to remove some of the screws he put in me in the first surgery. I continued physical therapy treatment after said procedure.

12. Immediately prior to the May 24, 2007, forklift accident, I was not suffering from any pain or injuries to my legs, and I was completely asymptomatic and in no need of medical treatment for my legs.

13. Since the accident, I have suffered intense pain on a regular basis and was forced to miss substantial amounts of work to recover. I lost wages of no less than $14,287.52. I still have pain to this day that I believe is a direct result of the subject accident.

14. As the result of the May 24, 2007, forklift accident, I incurred treatment bills of no less than $50,138.28, for emergency services, x-rays, emergency surgery with Dr. Spencer A. Coray, an overnight hospital stay, wheelchair rental, a second surgery to remove painful hardware, and physical therapy with Westgate Physical Therapy.

15. As a result of the May 24, 2007 forklift accident, I have a permanent physical impairment.

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16. As a result of the May 24, 2007 forklift accident, I have permanent disfigurement of the leg, including a large mass of protruding scar tissue.

17. As a result of the May 24, 2007 forklift accident, I cannot regularly participate in sports. Before the accident, I regularly played basketball and was a member of a bowling league. I had no physical difficulties performing any of those activities immediately before the subject incident.

18. As a result of the May 24, 2007 forklift accident, exposure to cold temperatures causes extreme pain in my knee and ankle, where I have excessive scar tissue as a result of the screw removal. I even have severe pain when it is not cold. I believe my pain will plague me the rest of my life and will permanently effect my life for the worse.

I declare under the penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 29 (day) day of MAY (month), 2009, at Tacoma (city), Washington.

Robert Robinson
ROBERT ROBINSON

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MILTON, WASHINGTON 98354
253-926-8437
FAX 253-926-8426

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUL 22 2009 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY

The Honorable Judge Michael A. Hecht

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

ROBERT ROBINSON, Plaintiff, MIDWEST AIR TECHNOLOGIES, INC., a Washington Corporation; "JOHN DOE" FORKLIFT DRIVER and "JANE DOE" FORKLIFT DRIVER, husband and wife and the marital community comprised thereof; Defendants.	NO. 09-2-05376-1 **DECLARATION OF SPENCER A. CORAY, M.D.**

Spencer A. Coray, M.D., hereby declares and states as follows:

1. I am an orthopedic surgeon licensed to practice in the State of Washington. I am not a party to this action, I am over the age of eighteen, and I make these statements based upon my own personal knowledge and belief. All opinions set forth herein are expressed on a more probable than not basis.

2. My first treatment of Mr. Robert Robinson was on or about May 24, 2007. On that day, he saw me for injuries he sustained in a forklift accident that occurred on the same day.

3. Based on the radiological studies and my initial examination of Mr. Robinson, I diagnosed him as suffering from a potential grade I injury consisting of a bilateral

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lower extremity injury with a right open tibial fracture.

4. On or about May 24, 2007, I performed an irrigation and debridement of Mr. Robinson's open fracture, as well as a tibial intramedullary nailing. Mr. Robinson was implanted with a Synthes 11 x 380 mm nail, fixing the dynamic screw position. Mr. Robinson remained in the hospital overnight for observation.

5. Upon release from the hospital, Mr. Robinson was fitted with a boot and ordered to change his dressings twice daily until dry. He was directed to use a wheelchair, walker, or crutches as directed by his physical therapist, and to follow-up with me in 10-14 days.

6. In the subsequent weeks following his surgery, Mr. Robinson complained of prominent tenderness surrounding the locking screws in his right leg. On or about December 19, 2007, Mr. Robinson underwent a second surgery. During that surgery, I removed the proximal locking screw and distal locking screw from his right leg. Mr. Robinson was continuing to seek physical therapy treatment.

7. Mr. Robinson's treatment with me continued through March 20, 2008. All of his treatment with me, including both surgeries, was reasonable and necessary as a result of the forklift incident. As indicated above, I referred Mr. Robinson to physical therapy for supplemental treatment of his injuries. In my opinion, the treatment Mr. Robinson received from the physical therapist between the time of the subject accident and January 23, 2008, was reasonable and necessary as a result of the subject accident.

8. As a result of the May 24, 2007 forklift accident, Mr. Robinson has a permanent physical impairment of 5-8% in his lower extremity, and a 2% impairment of his whole person.

9. Attached hereto is a copy of an itemization of Mr. Robinson's treatment expenses, which itemization was provided to me by Mr. Robinson's lawyers. It is reasonable for physicians to rely on such compilations of treatment expenses when formulating opinions on the reasonableness and necessity of treatment costs.

THE LAW OFFICES OF WATSON & GALLAGHER, P.S.
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I have reviewed the attached itemization and believe that the treatment costs reflected thereon were reasonable and necessary expenses incurred as the result of injuries Mr. Robinson suffered in the forklift incident referenced herein.

I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this _____ day of _____, at _____, Washington.

By: (See Attached)
SPENCER A. CORAY, M.D.

THE LAW OFFICES OF WATSON & GALLAGHER, P.S.
2748 MILTON WAY, SUITE 212
MILTON, WASHINGTON 98354
253-926-8437
FAX 253-926-8426

I have reviewed the attached itemization and believe that the treatment costs reflected thereon were reasonable and necessary expenses incurred as the result of injuries Mr. Robinson suffered in the forklift incident referenced herein.

I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 16 day of July, 2009 at Tacoma, Washington.

By: SPENCER A. CORAY, M.D.

THE LAW OFFICES OF WATSON & GALLAGHER, P.S.
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FAX 253-926-8426

THE LAW OFFICES OF WATSON & GALLAGHER, P.S.
SPECIAL PROVIDER REPORT
Date Prepared: May 27, 2009

MEDICAL SPECIALS FOR: Robert Robinson
DATE OF INJURY: May 24, 2007

PROVIDER	DATES OF SERVICE	CHARGES	TOTAL CHARGES
St. Clare Hospital 11315 Bridgeport Way SW. Lakewood, WA 98499	5/24/07 - 5/25/07	$35,920.00	$35,920.00
Franciscan Home Med. Supply 1708 S. Yakima St., #201 Tacoma, WA 98405	5/25/07 6/25/07	$277.91 $133.64	$411.55
Lakewood Orth. Surgeons 7308 Bridgeport Way W., #201 Lakewood, WA 98499	5/25/07 6/4/07 7/12/07 9/11/07 11/19/07 12/19/07 1/3/08 3/20/08	$2,792.00 $70.00 $64.00 $134.00 $64.00 $2,608.00 N/C $64.00	$5,796.00
Rural Metro P.O. Box 1026 Scottsdale, AZ 85252	5/24/07	$990.73	$990.73
Tacoma Radiology 4700 Point Fosdick Dr. NW. Gig Harbor, WA 98335	5/24/07	$60.00	$60.00
Westgate Ortho. PT 2102 N. Pearl St., #203 Tacoma, WA 98406	6/21/07 - 6/27/07 7/3/07 - 7/31/07 8/7/07 - 8/29/07 9/7/07 - 9/28/07 10/12/07 - 10/29/07 11/1/07 - 11/27/07 12/4/07 1/10/08 - 1/23/08	$283.00 $822.00 $750.00 $984.00 $746.00 $982.00 $336.00 $879.00	$6,960.00
			$50,138.28

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

Robert Robinson, Petitioner, vs. Midwest Air Technologies, Inc, et.al., Respondent.	NO. 09-2-05376-1 **DECLARATION RE: SIGNATURE on ELECTRONIC DOCUMENT (NPED)**

I, Marie Ekstrand, declare under penalty of perjury under the laws of the State of Washington, that the foregoing electronic document(s) attached to this declaration, which consist of 6 pages including this declaration page, is a complete and legible image that I have examined personally and that was received by me via

☑ FAX at the following number (253) 926-8426 or via

☐ mail at the following address. _____ or

☐ signed in my presence.

Dated 7/20/09

Place Milton, WA

Marie Ekstrand

Declarant's Signature

APPENDIX B

RECEIVED
NOV 1 9 2010
THE LAW OFFICE OF
WATSON & GALLAGHER, P.S.

FILED
IN OPEN COURT
DEPT 20
NOV 17 2010
PIERCE COUNTY, Clerk
By
DEPUTY

THE HONORABLE K.A. VAN DOORNINCK
Date of Hearing: Friday, November 5, 2010
Hearing Time: 9:00 am

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

ROBERT ROBINSON, Plaintiff, v. MIDWEST AIR TECHNOLOGIES, INC., A Washington corporation; "JOHN DOE" FORKLIFT DRIVER and "JANE DOE" FORKLIFT DRIVER, husband and wife and the marital community comprised thereof, Defendants.	No. 09-2-05376-1 [~~PROPOSED~~] ORDER GRANTING DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT

THIS MATTER comes before the Court on Defendant Midwest Air Technologies, Inc.'s Motion to Vacate Default Judgment, the parties appearing by and through their respective counsel, the Court has considered the pleadings and records on file herein, including argument of counsel,

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Defendant Midwest Air Technologies, Inc.'s Motion to Vacate Default Judgment is GRANTED, and the only issue to be decided will be damages.

Plaintiff's Motion to Strike Jury Verdicts submitted by Defendant in support of the Motion to Vacate is GRANTED.

In Granting the motion to Vacate Default Judgment the Court made findings incorporated in the October 12, 2010 letter attached and incorporated herein as Exhibit A to this order.

Done in open court this 17 day of November, 2010.

HONORABLE K.A. VAN DOORNINCK

FILED
IN OPEN COURT
DEPT 20
NOV 17 2010
PIERCE COUNTY, Clerk
By _____
DEPUTY

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Presented by:

Todd W. Rosencrans, WSBA No. 26551
TRosencrans@perkinscoie.com
Daniel Ruttenberg, WSBA No. 29498
DRuttenberg@perkinscoie.com
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Defendant
Midwest Air Technologies, Inc.

\\\

\\\

Approved as to Form; Copy Received, Notice of Presentation Waived:

The Law Offices of Watson & Gallagher, P.S.

Mark W. Watson, #24260
Attorney for Plaintiff's

CERTIFICATE OF SERVICE

I, Sherri Sybil, declare under penalty of perjury under the laws of the State of Washington and of the United States of America that I caused to be served a copy of the [PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION TO VACATE DEFAULT JUDGMENT to be served by E-mail and U.S. Mail on the following counsel of record as indicated:

COUNSEL FOR PLAINTIFF ROBERT ROBINSON:

Mark W. Watson, Esq. 3623 S. 12th Street Tacoma, WA 98405 (253) 926-8437	X	Via U.S. Mail Via Legal Messenger Via Facsimile Via Overnight Mail

Dated this 1st day of November, 2010, at Seattle, Washington.

/s/Sherri Sybil
Sherri L. Sybil, Legal Secretary

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Analyzing factor #1, the Court notes that the amount of damages in a default judgment must be supported by substantial evidence in the record. Here, plaintiff filed two declarations, one on his own behalf and one from a treating physician. The physician's declaration outlines the surgeries that were performed and indicated that the listed expenses were reasonable and necessary; however, the medical specials are not detailed in terms of the specific treatments that occurred and the necessity of each itemized expense. The plaintiff's declaration also details the surgeries and medical care received, however, in terms of the issue of pain and suffering, there are no specifics to support the $2,000,000 judgment. The plaintiff indicates he has "pain to this day that I believe is a direct result of the subject accident" and that he cannot "regularly participate in sports " Both of those statements are vague and conclusory In Little v. King, the court conducted a hearing and entered a judgment that was very specific in amounts for past economic damages and future economic damages, as well as general damages Here, there were no specifics presented to the court

Because there was not substantial evidence supporting the judgment amount and because there was no discovery conducted, this Court infers that there is a prima facie defense to the amount of damages and thus factor #1 is satisfied This is consistent with the reasoning in Calhoun v Merritt, 46 Wn App. 616 (1987)

The defendant did act with due diligence after notice of the default judgment This satisfies factor #2. Likewise, factor #3 is satisfied because plaintiff waited over a year to seek collection on the judgment, and apparently will not suffer substantial hardship if the default judgment is vacated

Factor #4 is more problematic There is no question that the motion to vacate was filed well after the one year deadline as outlined in CR 60(b)(1), and therefore excusable neglect is not available to the defendant This Court, however, finds that there is sufficient evidence in the record to support a finding that relief is available under CR 60(b)(11) "any other reason justifying relief from the operation of the judgment" The defendant notified its insurance carrier. A denial of coverage letter was never received by the defendant, and therefore the defendant relied on the insurance carrier to pursue the defense of the case A genuine misunderstanding between an insured and his insurer as to who is responsible for answering the Summons and Complaint will constitute a basis for purposes of vacating a default judgment. Norton v Brown, 99 Wn App 188 (1999) citing Berger v Dishman Dodge, Inc., 50 Wn. App 309 (1987). Based on these considerations, factor #4 is satisfied

Only the default judgment will be vacated and the only issue to be decided will be damages

Attorney Rosencrans shall prepare the paperwork for presentation on November 5, 2010, at 9 00 a m

Sincerely,

Kitty-Ann van Doorninck
Judge

COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

ROBERT ROBINSON, an individual, Appellant, v. MIDWEST AIR TECHNOLOGIES, INC., a Washington Corporation, Respondent.	NO. 41457-1-II **DECLARATION OF MAILING**

Marie Ekstrand hereby declares and states as follows:

On May 20th, 2011, I deposited into the U.S. Mail, postage prepaid, true and correct copies of the following documents in the above-captioned matter:

1. Appellant's Brief; and
2. Declaration of Mailing;

addressed to the attorneys of record for respondent and cross-appellant Midwest Air Technologies, Inc., as follows:

Todd W. Rosencrans, Esq.
Daniel Ruttenberg, Esq.
Katherine E. Page, Esq.
Perkins Coie, LLP
1201 Third Avenue, Ste. 4800
Seattle, WA 98101-3099

I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 20th day of May, 2011, at Tacoma, Washington.

Marie Ekstrand

Marie Ekstrand

THE LAW OFFICES OF WATSON & GALLAGHER, P.S.
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FAX 253-301-2167