

NO. 41821-5

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

MASAYOSHI ICHIKAWA and JANE DOE ICHIKAWA,

Defendants/Appellants

v.

ELIZABETH YVONNE KIMBALL,

Plaintiff/Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant, Masayoshi Ichikawa (hereinafter “Ichikawa”), requests that this Court reverse the Trial Court’s Order Denying Ichikawa’s Motion to Vacate the Default and Default Judgment entered against him. The Trial Court abused its discretion when it failed to allow the lawsuit to proceed on the merits.

This case concerns a motor vehicle accident between Ichikawa and Elizabeth Yvonne Kimball (hereinafter “Kimball”). Ichikawa’s insurer and Kimball, by and through her counsel, were subsequently in contact regarding the accident while Kimball treated for her injuries. These contacts eventually progressed into a demand for settlement by Kimball and a subsequent counter offer from Ichikawa’s insurer.

During this time period, Kimball had already filed a complaint against Ichikawa for damages related to the accident. Kimball never notified Ichikawa’s insurer that the complaint had been filed. Approximately eleven months later, Kimball served Ichikawa via the Non-resident motorist statute and obtained a default and default judgment for nearly \$200,000 despite Kimball only incurring special damages of approximately \$16,000.

After the Default Judgment was entered, for the first time, Kimball notified Ichikawa’s insurer of the lawsuit and demanded payment of the

amount of judgment. Within three weeks of receiving notice, Ichikawa moved to vacate the default judgment based on lack of actual notice, Kimball's withholding of the existence of the suit from Ichikawa's insurer, and the obvious excessive amount of the judgment.

Contrary to Washington's disfavor of default judgments, the Trial Court refused to allow the lawsuit to proceed on the merits. The Trial Court erroneously held that Ichikawa had failed to controvert any of the unopposed evidence regarding damages presented at the time Kimball moved for a default judgment. This standard for vacation of a default judgment is unsupported by law.

Further, the Trial Court abused its discretion in refusing to find that Kimball's concealment of the lawsuit while she engaged in negotiations with Ichikawa insurer constituted excusable neglect, mistake, surprise or inadvertence or constituted a form of misrepresentation under CR 60(b)(4).

As a result, the Trial Court's order denying Ichikawa's motion to vacate the default judgment should be reversed.

II. ASSIGNMENTS OF ERROR

1. The Trial Court abused its discretion in denying Ichikawa's Motion To Vacate under the factors in *White v. Holm*, 73 Wn.2d 348 (1968).

- a. Whether the Trial Court abused its discretion in finding that Ichikawa did not have a meritorious defense as to excessive damages where the record available to the Trial Court demonstrates the award of damages was arbitrary, and by requiring Ichikawa to meet an insurmountable burden of controverting all evidence presented at the default judgment hearing.
 - b. Whether the Trial Court abused its discretion in failing to find that Ichikawa showed excusable neglect, surprise, inadvertence or delay, where service was through the secretary of state, notice of service was defective and there is no evidence that Ichikawa actually received notice; and further where Kimball's counsel withheld the existence of the suit from Ichikawa's insurer despite continued communications.
2. The Trial Court abused its discretion in failing to vacate the default judgment based on Kimball's concealment of the suit under CR 60(b)(4).
 - a. The issue presented is whether the Trial Court abused its discretion in failing to find that Kimball deliberately concealed the existence of the suit from Ichikawa's insurer

in order to obtain a default judgment, thereby constituting misrepresentation or misconduct under CR 60(b)(4) and *Morrin v. Burris*, 160 Wn.2d 745 (2007).

3. Ichikawa's Constitutional Right to Due Process has been violated by the lack of notice and opportunity to be heard.

- a. The issue is whether Kimball exercised Due Diligence in attempting to locate Ichikawa under the non-resident motorist statute for purposes of Due Process.
- b. The issue presented is whether service on the secretary of state and notice of such service to a UPS mailbox and physical address of a post office with no return receipt signed by Ichikawa is sufficient to satisfy the Due Process Requirement.

4. Ichikawa appeared in the action by Substantially Complying with the appearance rules, thereby entitling him to notice of the motion for default and default judgment under CR 55.

- a. Whether contacts between Ichikawa's insurer and Kimball after the complaint has been **filed** is sufficient to satisfy the Substantial Compliance rule identified in *Morin v. Burris*, 160 Wn.2d 745 (2007).

III. STATEMENT OF THE CASE

This case arises out of a motor vehicle accident occurring on or about June 10, 2009, between Kimball and Ichikawa. **CP 4.** Following the accident, Ichikawa reported the accident to his insurer on June 11, 2009. **CP17.** Thereafter, on behalf of Ichikawa, his insurer contacted Kimball through her counsel on June 17, 2009, June 24, 2009, August 17, 2009, October 20, 2009, February 24, 2010, June 4, 2010, and July 20, 2010, regarding the accident. **CP 17-18.** Ichikawa's insurer was informed that Kimball was treating and would submit a demand for settlement regarding damages resulting from the accident. **CP 17-18.** During the year that Ichikawa's insurer and Kimball were in contact, Kimball filed a complaint against Ichikawa on or about December 8, 2009. **CP 3.** No courtesy copy was provided to Ichikawa's insurer thereafter. **CP 17-18.** The lawsuit was filed before Kimball even made her demand for settlement.

Eight months after the filing of the lawsuit, on or about August 4, 2010, Ichikawa's insurer received a settlement demand from Kimball. The settlement demand included medical records and other documentation in support of the demand. **CP 18.** Ichikawa's insurer evaluated the claim and made a counter offer of settlement on or about August 16, 2010. **CP 18.**

In a letter dated August 18, 2010, received by Ichikawa's insurer on August 23, 2010, Kimball by and through her counsel rejected the settlement offer. **CP 18-19; CP 31.** Kimball's counsel indicated that he would not even tender the offer to his client. **CP 31.** At no time during the course of these communications did Kimball inform Ichikawa's insurer that a complaint had been filed against Ichikawa. **CP 19.**

Thereafter, Kimball on or about August 28, 2010, attempted to effectuate service on Ichikawa under the non-resident motorist statute, RCW 46.64.040, by serving the Washington Secretary of State. **CP 112.** Notice of this service was not provided to Ichikawa's insurer. **CP 19.**

Notice of this service, as required by the statute, was allegedly sent to two addresses which Kimball purports to be Ichikawa's last known addresses. To-wit: 16625 Redmond Way, #M, PMP 357, Redmond, WA 98052, and 16135 NE 85th Street, Redmond, WA 98052. **CP 79.**

Neither of these addresses is a residence or valid U.S. post office box. The first address is a private mailbox located at the UPS store in Redmond, WA. **CP 81.** The second address is the actual physical address of a United States Post Office. **CP 82.**

Kimball sent notice with return receipt requested. **CP 79.** Two receipts were returned. **CP 12.** The receipt for the first address was signed by a Ms. Stacy Larkin, who listed herself as an agent for the addressee,

Ichikawa. **CP 124.** The receipt for the second address was returned “attempted – Not Known”. **CP 122.** Neither receipt bore Ichikawa’s signature. *See CP 120-124.*

On or about November 30, 2010, Kimball filed and obtained a default order and default judgment against Ichikawa in the amount of \$199,809.90 with a principal sum of \$198,650. **CP 6-11.** During the default Judgment hearing, the Trial Judge questioned Kimball’s counsel about diligence in obtaining service on Ichikawa. **RP 16-17** The exchange was as follows:

WN: I might add though we do have a return of service and it was signed. So we do believe that he actually did, in fact, receive the papers as well.

Judge: The return of service on your mailed service?

WN: Yes.

Judge: You mailed it-

Female: We tried mailing it [inaudible-both speaking]

WN: Certified Mail.

Judge: - to the Redmond addresses or-

Female: - I believe it went to the – I think it was to the Post-or to the UPS store 16625 Redmond Way, Number –

Judge: - could you read the signature?

Female: - Stacy Larkin.

Judge: Ah-hah.

Female: L A R K I N.

Judge: And I assume you don't know who that is.

Female: She indicated she was an agent.

Judge: Okay. And I noticed there's an insurance company listed here in the police report. Do you- did you contact the insurance company to -to see if there's- if -

WN: They were not helpful.

Judge: - you- you did try to contact them and -

WN: Oh yes. Oh yes.

RP 16:8-25 ; 17:1-8

The Judge's questioning here was in the context of service of process. Kimball's counsel represented that he had contacted Ichikawa's insurer in this context. **RP 17: 1-8**. The Court relied on this exchange in determining that Kimball had exhausted all reasonable avenues before serving the secretary of state. **RP 17**.

In regard to damages, the Court found at the default judgment hearing that the Kimball had incurred medical expenses in the amount of \$16,101.06. **CP 10**. This calculation of damages was submitted as Exhibit A at the hearing on default judgment. **CP 10**. This was the only evidence submitted regarding Kimball's medical expenses actually incurred. *See CP 116*.

Likewise, Kimball did not submit any tangible expert evidence regarding future medical expenses. The Court nevertheless concluded that Kimball was entitled to \$32,400 in future medical expenses. **RP at 20: 12-21.** The Court based this determination entirely on the hearsay testimony of Kimball. **RP at 10-20.**

In particular, at the default judgment hearing, Kimball testified as follows regarding the need for future medication and the expense involved:

Q. And-okay. The Cymbalta-that was prescribed for you for the effects of this accident?

A. It's for- a nerve medicine. They give it to fibromyalgia patients too.

Q. And you still take that medication?

A. Oh daily. Yes I do.

Q. Have the physicians indicated to you how long you'll be taking that medication?

A. They said it looked like I'd be taking it the rest of my life.

RP at 10:17-25, 11:1-3.

...

Q. Your medical expenses total sixteen thousand one hundred and one dollars and six cents?

A. Um-hum

Q. And those are all for the effects of this automobile accident?

A. Right. And there's-there's probably more too because of the medicine I just picked up the other day because that Cymbalta is over a hundred and fifty dollars for a thirty-day dose. So it's – it's an expensive little –

RP 12 l. 2-10.

...

Judge: You have any medical indication on how long it's expected she'll need the Cymbalta at a hundred and fifty dollars a month?

Q: We don't have it in-other than what she's been told and she's testified to.

Judge: What were you told?

A. Indefinitely. They said indefinitely-they could see me looking –

Judge: Well –

A. - for the rest of my life. Yeah, I mean –

RP at p. 13 l. 14-23.

This was the only evidence or testimony submitted in support of any award for future medical expenses. **RP 1-20;**

No physical, testimonial, or expert evidence was submitted to support the \$150 a month figure or the medical necessity of the medication. Kimball argued at the hearing in regard to the medication expenses, that there is “no evidence to the contrary”. **RP 18: 19-20.**

As a result, the Court based its calculation entirely on Kimball's self-serving testimony that she would incur necessary future medical

expenses at a rate of \$150 a month indefinitely. **RP 20.** The Court speculated that “indefinitely” equates to approximately eighteen years or half her life expectancy. **RP 20.** As a result, the Court calculated future medical expenses by multiplying \$150 a month by eighteen years, which totaled \$32,400. **RP 20.**

This amount was added to \$16,250, which the Judge mistakenly stated was the medical specials incurred (the judgment actually lists a figure of \$16,101.06). **RP 20.** As a result, the Judge arrived at a speculated total special damages award of \$48,650. **RP 20; CP 11.** This special damages award only included compensation for past and future medical expenses. No wage loss claim was made.

As for the general damages award, Kimball requested an amount of \$150,000 in her motion for default judgment. **RP 18: 7-8.** Based solely on the testimony of Kimball, the Court speculated that Kimball would incur \$500 a month for on-going pain, disability and loss of the enjoyment of life for 25 years. **RP 19:15-25.** The Court multiplied the two figures together to arrive at a general damages award of \$150,000. **RP 19: 15-25.** The Court made a point to state that this figure was calculated independently from Kimball’s request, despite the fact that the figures were exactly the same. **RP 19.** The Court evidently used 25 years as the life expectancy estimate rather than 35, because “you know your last ten

years of your life you don't- you aren't worth much anyways". **RP 19: 22-24.**

After judgment was entered in an amount of \$199,809.90, Kimball demanded payment from Ichikawa's insurer in a letter dated December 8, 2010. **CP 32.** This letter was received by Ichikawa's insurer on December 16, 2010. **CP 32.** Promptly thereafter Ichikawa entered a notice of appearance in the matter and filed a motion to vacate the default judgment on or about January 4, 2011. **CP 14; CP 37-48.**

IV. ARGUMENT

A. Standard Of Review On Motion to Vacate Default Judgment.

A motion to vacate or set aside a default judgment is reviewed on an abuse of discretion standard. *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). However, "it is pertinent to observe that where the determination of the Trial Court results in 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". *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968) (citing *Agricultural & Livestock Credit Corp. v. McKenzie*, 157 Wn. 597, 289 P. 527 (1930); *Yeck v. Dept. of L&I*, 27 Wn.2d 92, 176 P.2d 359 (1947))

Default judgments are not favored in the law because "it is the policy of the law that controversies be determined on the merits..." *Griggs v.*

Averback Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979); *Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (Div. 3 1986). “A default judgment is one of the most drastic actions a court may take to punish disobedience to its commands”. *Griggs*, 92 Wn.2d at 581 (citing *Widicus v. Southwestern Elec. Coop., Inc.*, 167 N.E.2d 799 (Ill. Ct. App. 1960)).

A proceeding to vacate or set aside a default judgment, although not a suit in equity, is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Griggs*, 92 Wn.2d at 581-82; *White v. Holm*, 73 Wn.2d at 351. The Trial Court should exercise its authority “liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.” *Id.*

[T]he overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted....What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.

Griggs, 92 Wn.2d at 581 (citing *Widicus v. Southwestern Elec. Coop., Inc.*, 167 N.E.2d 799 (Ill. Ct. App. 1960)).

In exercising its discretion, the superior court considers four factors:

(1) The existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; (2) the reason for the party's failure to timely appear, i.e. whether it was the result of mistake, inadvertence, surprise or excusable neglect. The secondary factors are: (3) the party's diligence in asking for relief following notice of the entry of the default; and (4) the effect of vacating the judgment on the opposing party.

White, at 352; *Calhoun*, at 619.

These factors vary in dispositive significance. A strong defense requires less of a showing of excuse, provided the failure to appear was not willful. *Id.*

B. The Trial Court Abused Its Discretion In Not Finding A Prima Facie Defense On the Issue of Excessive Damages.

While generally Courts have ruled that declarations in support of motions to vacate default judgments must set out the facts constituting a defense, the Courts have also recognized the difficulty in requiring a defaulting party to develop a prima facie defense as to a damage award without the opportunity to conduct discovery. *See Calhoun v Merrit*, 46 Wn. App. at 620-21.

The requirement to set forth facts constituting at least a prima facie defense is not intended to be burdensome. *Farmers v. Waxman Indus.*, 132 Wn. App. 142, 148, 130 P.3d 874 (Div 1 2006). Rather, the question is whether anything in the record before the Trial Court demonstrates that

the defendant could “carry a decisive issue to the finder of facts in a trial on the merits”. *Id.* (citing *White*, 73 Wn.2d at 353).

The case of *Calhoun* presents a nearly identical situation to the case at bar. In *Calhoun* the plaintiff was rear-ended and hired an attorney to represent him in the damage claim against the defendant. *Calhoun*, at 617. The attorney contacted defendant’s insurer and demanded settlement in an amount of \$27,923.27. *Id.* The insurer rejected the demand by letter, stating that the claim was worth far less. *Id.*

A summons and complaint was subsequently filed against the defendant and the defendant was served. *Id.* The defendant did not answer or contact his insurer. *Calhoun*, at 617. The Court subsequently entered default. *Id.* The same day, the court held a hearing on damages and issued findings of fact, conclusions of law and a default judgment awarding the plaintiff \$50,000 for pain and suffering, plus \$2,183.27 for medical costs, \$3,080 for wages for 110 days of work, and \$206.50 for court costs. *Calhoun*, 46 Wn. App. at 618.

Plaintiff’s attorney thereafter sent a letter and copy of the judgment to the insurer demanding payment. *Id.* Within a few days thereafter, defendant entered a notice of appearance and filed a motion to vacate the default judgment. The motion was denied. *Id.*

On appeal, the Court of Appeals found that the defendant did not set forth the specific facts in his supporting affidavits as required by CR 60(e)(1). *Calhoun*, at 620. However, relying on *Griggs*, the Court excused the violation where there were sufficient facts in the record elsewhere to indicate a defense. *Id.* In particular, the Court of Appeals considered the overall equitable principles as cited in *White* in deciding this factor.

The Court reasoned:

In this context, we note that development of a defense to the damages would require the examination of [plaintiff] by a defense expert. Here, the default was entered before any such discovery could take place. Moreover, presenting a defense to damages for pain and suffering is always complicated by the subjective as opposed to objective nature of such damages. Given these circumstances, it would be inequitable and unjust to deny the motion to vacate the damage portion of the judgment on the ground that [defendant] did not present a prima facie defense. Thus, we look to the remaining considerations set out in *White*.

Calhoun, at 620-21.

The Washington Supreme Court has recognized that where the damages sought are substantial and unliquidated even a “tenuous” defense may support vacation of the default judgment when other factors are met. *White*, 73 Wn.2d at 353. *See Also Graham v. Yakima Stock Brokers, Inc.*, 192 Wn. 121, 126-27, 72 P.2d 1041 (1937).

In this case, there is more than a “tenuous” defense regarding excessive damages. First, the Trial Court awarded \$32,400 for future medical specials when there was no expert testimony to support such a finding. A medical expert is necessary to provide testimony of any future need for medication that is casually linked to the accident. Damages are only awardable for medical expenses that are reasonably certain to be necessary in the future. *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003) (citing *Leak v. U.S. Rubber Co.*, 9 Wn. App. 98, 103, 511 P.2d 88 (1973)). As a result, medical testimony is typically necessary to show that medical expenses are reasonably necessary in the future. *Id.*

Moreover, the award is exorbitant on its face. The record shows that the Court found medical specials incurred of \$16,101.06, yet awarded general damages of \$150,000.00, nearly ten times the amount of the alleged medical specials incurred.

While the Court explicitly stated it required testimony to a degree of reasonable medical certainty in order to award damages for future medical treatment, the Court nevertheless had no issue in awarding future medication expenses based solely on Kimball’s hearsay testimony. *See RP 19:8-10* (“Judge: And they don’t anticipate – you – you can’t say with a reasonable medical certainty that further therapy would be required”).

There was absolutely no competent evidence to conclude that Cymbalta (a drug to treat depression) was medically necessary as a result of the accident to a reasonable degree of medical certainty. In fact the Judge specifically asked whether there was any medical evidence in this regard:

Judge: You have any medical indication on how long it's expected she'll need to the Cymbalta at a hundred and fifty dollars a month?

Q: We don't have it in- other than what she's been told and she's testified to.

RP 13: 14-18.

The Trial Court imposed an impossible burden on Ichikawa to vacate the default. *See CP 66: 7-10* (“This court took live testimony as to Kimball’s efforts to obtain service of process, and the value of Kimball’s claim for damages. None of the testimony is refuted in Defendant’s motion and materials”)

It is evident from the record that the Court employed a “no evidence to the contrary” standard in awarding the judgment, rather than relying on the evidence actually presented. In fact, Kimball’s counsel argued that Kimball had conclusively established that she “was going to be taking the medication for the rest of her life” simply because there was

“No indication to the contrary”. RP at 18, l. 19-20. (emphasis added).

By this rationale, Kimball could have obtained a judgment for **any amount**, on the notion that evidence was unopposed.

Further, the Judge computed the amount of general damages by using an arbitrary figure of \$500 a month for the next twenty five years. Despite the Court’s disclaimer that this figure was determined independently, the figure was precisely the amount requested by Kimball. There was no medical evidence presented at the hearing that Kimball had a permanent injury that would cause her pain every day of her life. The only testimony presented was Kimball’s subjective testimony.

As a result, \$182,400 of the \$198,650 principal default sum or approximately 92 percent is attributable to future speculative damages rather than damages actually incurred or damages that were shown by reasonable certainty to be necessary in the future.

Moreover, it does not appear that the Court actually considered the evidence that was presented on Ichikawa’s motion to vacate to contradict the award of damages. Ichikawa submitted evidence in the form of Kimball’s demand package. **CP 22**. The only evidence of damages ever presented to Ichikawa by and through his insurer was this demand package. Thus, absent the benefit of discovery, this was the only means available to evaluate Kimball’s injuries. The amount of Kimball’s original

demand was well less than the award in this case. (\$115,000 compared with \$198,650).

Moreover, the settlement demand did not include a claim for future medical damages. **CP 22.** No evidence to support an award of future medical damages was submitted with the settlement demand. *Id.*

As was pointed out by the Court in *Calhoun*, to controvert Kimball's subjective testimony would require examination by an expert, deposition of Kimball, and other discovery to which Ichikawa did not have the benefit of conducting. Given the overlying considerations of equitability, presumption against default judgments, coupled with the amount of the judgment involved and the express holding in *Calhoun*, the Judge erred in finding that the meritorious defense factor had not been met as to the amount of damages.

C. Kimball's Concealment of the Filing of the Complaint Coupled with the Lack of Actual Notice constituted Mistake, Surprise, Excusable Neglect or Inadvertence.

The factors in *White v. Holm* must be viewed in the context of equity. *Griggs*, 92 Wn.2d at 581-82. Moreover, the considerations set forth in *White* are **factors**, not elements that a party must show. As a result, the Court can afford varying significance to different factors and each does not have to be shown with the same veracity. *Calhoun*, at 619.

One of the main considerations employed by the courts is simply whether the failure to appear was “willful”. See *Sacotte Construction v. National Fire & Marine Ins. Co.*, 143 Wn. App. 410, 418, 177 P.3d 1147 (Div 1 2008)(“Because NFM demonstrated a strong defense, its motion to vacate was timely, and its failure to appear was not willful, NFM is entitled to relief under CR 60(b)(1)”).

1. Concealment of the Suit.

In the case of *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), the Washington Supreme Court addressed three separate cases involving motions to vacate default judgment. The most relevant of the three cases was the appeal in *Gutz v. Johnson*, 128 Wn. App. 901, 117 P.3d 390 (2005). The *Gutz* case addressed the issue of whether a failure to inform Ichikawa’s insurer that a case had been filed while the insurer’s representative had been in communication with Kimball regarding settlement, constituted a valid excuse for failing to appear. The Court in addressing this issue stated:

Gutzes’ counsel had no duty to inform Allstate of the details of the litigation. But counsel’s failure to disclose the fact that the case had been filed and that a default judgment was pending when the Johnsons’ claim representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation. If the Johnsons’ representative acted with diligence, and the failure to appear was induced by Gutzes’

counsel's efforts to conceal the existence of litigation under the limited circumstances we have described above, *then the Johnsons' failure to appear was excusable under equity* and CR 60.

Morin, 160 Wn.2d at 759

Ultimately the Supreme Court remanded the Trial Court's decision for further consideration consistent with the Supreme Court's decision. As a result, the Trial Court's decision to deny the motion to vacate was not upheld under CR 60(b)(4). *Id.*

The Supreme Court made clear in its holding however, that concealment is not only grounds under CR 60(b)(4) to vacate a default judgment, but is grounds for excusable failure to appear in equity. *Morin*, at 759.

In this case, like in *Gutz*, Ichikawa's insurer had been in continuous contact with Kimball and Kimball's counsel from the date of the accident until the offer of settlement was rejected by Kimball. **CP 17-18.** At no time did Kimball ever notify Ichikawa's insurer that the complaint had been filed in December of 2009. **CP 18.**

As a result, The Trial Court erred in denying Ichikawa's motion to vacate where Kimball and Ichikawa's insurer were in

contact consistently over the course of more than a year and further, where the record reflects Kimball's intent to conceal.

The facts indicate concealment to the Trial Court regarding service and the insurer's opportunity to defend the case as follows:

WN: I might add though we do have a return of service and it was signed. So we do believe that he actually did, in fact, receive the papers as well.

Judge: The return of service on your mailed service?

WN: Yes.

Judge: You mailed it-

Female: We tried mailing it [inaudible-both speaking]

WN: Certified Mail.

Judge: - to the Redmond addresses or-

Female: - I believe it went to the - I think it was to the Post-or to the UPS store 16625 Redmond Way, Number -

Judge: - could you read the signature?

Female: - Stacy Larkin.

Judge: Ah-hah.

Female: L A R K I N.

Judge: And I assume you don't know who that is.

Female: She indicated she was an agent.

Judge: Okay. And I noticed there's an insurance company listed here in the police report. Do you- did you contact the insurance company to -to see if there's- if -

WN: They were not helpful.

Judge: - you- you did try to contact them and –

WN: Oh yes. Oh yes.

RP 16:8-25 ; 17:1-8

In this exchange it is evident that the Judge was concerned with whether Kimball contacted Ichikawa's insurer in order to pursue service. Although the Judge was cutoff in his questioning, the context in which the Judge was asking the questions clearly indicates that it was related to contacting the insurance company for purposes of pursuing service. Kimball's response however, is misleading.

Kimball never contacted Ichikawa's insurer for purposes of notifying it of attempted service or attempting to locate Mr. Ichikawa for purposes of service. This exchange demonstrates that Kimball intended to conceal the existence of the suit, pursue alternative service means and obtain an exorbitant default judgment. This supports at least a finding that the surprise, excusable neglect or mistake factor has been satisfied by Kimball's concealment under *Morin*.

Furthermore, even if Ichikawa's insurer had notice that a suit had been filed and to expect service, Courts have still set aside default judgments in such situations. *See Norton v. Brown*, 99 Wn. App. 118, 992 P.2d 1019 (1999).

In fact, in *Norton* **both** the insurer and the defendant received notice of the suit prior to the entry of the default judgment. Nevertheless, the Court found mistake and excusable neglect on the part of the insurer and the defendant where they were confused about how to handle the complaint and summons, and the insured, after tendering the claim, had an expectation that the insurer would handle the suit.

Certainly here, where the existence of the suit was concealed from everyone, the factor of surprise, mistake or excusable neglect is satisfied. The default should be vacated.

2. Lack of Adequate Service and Notice Ichikawa is Grounds for Excusable Neglect, Inadvertence, surprise or Irregularity in Obtaining a Judgment.

CR 60(b)(1) allows for a judgment to be vacated for "Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order". For purposes of this rule, "irregularity" has been defined as "the want of adherence to some prescribed rule or mode of proceeding; and it consists either in the omitting to do something that is

necessary for the due and orderly conducting of a suit, or in doing it in an unreasonable or improper manner”. *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978); *See Also Merritt v. Graves*, 52 Wn. 57, 59, 100 P. 164 (1909).

The “irregularity” in this case is occasioned by the fact that Kimball’s counsel did not provide adequate notice to Ichikawa or his insurer that the suit had been served on the secretary of state. Actual notice to Ichikawa or his insurer was not conclusively established by any means.

Kimball’s reliance on the private mailbox agreement and return receipt to show that Ichikawa actually received notice is not sufficient where the mailbox agreement does not require UPS to return the mail if not picked up by the customer. As a result, this information does not demonstrate that Ichikawa actually received notice of the suit, or notice of service on the Secretary of State, as required by the statute.

Moreover, communications were ongoing with Kimball for a period of several months following the filing of the complaint, yet notice of service on the secretary of state was never provided to the insurer. **CP 17-18.**

In this case, an actual summons and complaint were never received by either Ichikawa or his insurer. As a result, in consideration of the *Norton* case and the equitable principles in setting aside default judgments, there is at the very least bona-fide irregularity in service to satisfy the mistake, inadvertence, surprise, excusable neglect or irregularity factor. Thus, the Court erred in denying Ichikawa's motion to vacate on the grounds of failure to show the same.

D. The Court Abused Its Discretion By Failing to Consider the Diligence Factor in *White v. Holm*.

In its order denying the motion to vacate the default, the Court did not rule on the third factor set forth in *White*; namely; "(3) the party's diligence in asking for relief following notice of the entry of the default; *White*, at 352; *Calhoun*, at 619.

In *Norton* the Court of Appeals found that the Trial Court's failure to make findings as to the third and fourth factors was an abuse of discretion.

The Court stated:

The trial court did find that Mr. Brown presented a prima facie defense that the damage award was excessive. However, it did not find that the failure of Mr. Brown to appear was caused by mistake, inadvertence or excusable neglect. ***The court made no finding regarding Mr. Brown's diligence in seeking relief or whether or not Mr. Norton would be prejudiced if the judgment was vacated. This was an abuse of discretion.***

Norton v. Brown, at 124 (emphasis added)

In this case, diligence weighs heavily in favor of Ichikawa. Ichikawa moved to vacate the judgment less than three weeks after his insurer received notice of said judgment. Kimball did not contest this factor in response to Ichikawa's motion to vacate.

This factor should have been considered by the Court, especially in the context of its determination that Ichikawa failed to submit substantial evidence. Considering that the motion to vacate was filed less than three weeks from the first notice of said judgment, it would be difficult to impossible to prepare a complete defense regarding Kimball's injuries without the benefit of a deposition, discovery and an expert examination.

Moreover, considering that over ninety percent of Kimball's damages awarded were speculative and not supported by quantifiable evidence, the difficulty in preparing controverting evidence in that short amount of time is magnified.

Diligence is a factor that the Court is required to consider. *Norton*, 99 Wn. App. 118, 992 P.2d 1019 (1999). In this case, diligence was not considered at all. In juxtaposition, Ichikawa's diligence was considered to his detriment because he did not present evidence tantamount to a trial on his motion to vacate.

Given that evidence existed in the record to demonstrate a meritorious defense as to excessive damages and service of process, as well as excusable neglect or surprise, Ichikawa's diligence is the tipping factor in his favor. The Court abused its discretion in not even considering this factor when denying Ichikawa's motion.

E. The Court Abused Its Discretion by Failing to Consider the Lack of Prejudice to Kimball as a factor under *White v. Holm*.

As set forth above, failure to consider the third and fourth factors is grounds for abuse of discretion. *Norton*, at 124.

In regard to the prejudice factor, courts have held that while delay in the proceedings is one of the evils addressed by the motion for default judgment, vacation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits. *Johnson v. Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003)(citing *Griggs*, 92 Wn.2d at 582, 599 P.2d 1289).

There is nothing in the record demonstrating that Kimball would be prejudiced by having to present her case at trial. *See Norton*, at 125. As the case law makes clear, delay in resolution on the merits is not sufficient prejudice for purposes of denying a motion to vacate. *Griggs*, at 582. As a result, this factor should also have been considered in favor of Ichikawa.

Once again, the court abused its discretion in failing to consider this factor all together.

F. The Court Abused Its Discretion in Finding there Was no Concealment Warranting Vacation under CR 60(b)(4).

In addition to mistake, inadvertence, surprise or excusable neglect, a default judgment may be vacated under CR 60(b)(4) for:

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

As mentioned above, Washington Courts have held that a failure by Kimball's counsel to disclose the fact that a case has been filed and that a default judgment is pending when the defendant's insurer was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, can constitute an inequitable attempt to conceal the existence of the litigation. *Morin v. Burris*, 160 Wn.2d at 759.

The record reflects that Ichikawa's insurer was in consistent contact with Kimball and/or her counsel from the date the claim was initially tendered, through the filing of the complaint, and until the parties attempted to settle the matter. **CP 17-18**. For over one year, Ichikawa's insurer, acting on his behalf, was attempting to resolve the matter. During that time, Kimball never notified Ichikawa's insurer that suit had been filed in December of 2009. **CP 18**.

As previously set forth, the intent to conceal is evident from Kimball's own representations at the default judgment hearing:

Judge: Okay. And I noticed there's an insurance company listed here in the police report. Do you- did you contact the insurance company to -to see if there's- if -

WN: They were not helpful.

Judge: - you- you did try to contact them and -

WN: Oh yes. Oh yes.

RP 16.

As mentioned above, this conversation took place in the context of Kimball's efforts to notify and serve Ichikawa with the summons and complaint. Kimball's representation that Ichikawa's insurer was "not helpful" grossly misstates its actions. Rather, it was never given a chance to defend the claims on behalf of Ichikawa.

This evidence in the record confirms Kimball's intent to conceal the litigation and obtain a default judgment through tenuous service. As a result, the Court abused its discretion in failing to vacate the default on grounds of concealment under CR 60(b)(4).

G. The Default Judgment Should Be Vacated Because Due Process Rights Have Been Violated.

Ichikawa acknowledges at the outset that the Due Process argument was not addressed at the hearing before the Trial Court. Nevertheless, it should be considered by this Court as "constitutional issues may be raised

for the first time on appeal although, as a preliminary matter, they will be closely scrutinized for errors that are manifest and truly of constitutional magnitude”. *Norton v. Brown*, 99 Wn. App. 118, 122, 992 P.2d 1019 (Div. 3 1999) (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)).

Due Process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973).

It is undisputed here that Ichikawa was not personally served. Rather, service was attempted by and through the Non-Resident Motorist Statute RCW 46.64.040.

RCW 46.64.040 allows for service on non-residents or residents who cannot be found within the state after exercising due diligence. Additionally, the statute requires that notice of such service on the secretary of state be provided to defendant at his last known address. The statute provides in pertinent part:

Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years

cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. PROVIDED, That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show that the defendant received personal delivery by mail:

RCW 46.64.040

Because substitute service is in dereliction of common law, strict compliance is required. *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993).

1. Kimball did not demonstrate Due Diligence in attempting to locate Ichikawa.

“Due Diligence” requires an “honest and reasonable effort” to locate a defendant for personal service. *Martin v. Meier*, 111 Wn.2d 471, 760 P.2d 925 (1988). Not all conceivable means need to be employed, but the accident report, if any, and any other available information pertaining to

the defendant's whereabouts must be investigated with reasonable effort.

Id.

According to the affidavit of counsel regarding due diligence, Kimball attempted to serve Ichikawa at the address listed in the accident report and performed internet searches to locate additional addresses. Ichikawa was unable to be located at these additional addresses. However, at no time did Kimball attempt to contact Ichikawa's insurer about his whereabouts. **CP 17-18.**

Rather, Kimball represented at the default judgment hearing that Ichikawa's insurer was contacted for purposes of service, and the insurer was of no help in locating Ichikawa. **RP 16:8-25 ; 17:1-8** Simply put, this did not occur. **CP 17-18.**

As indicated above, the Trial Judge found this to be an important issue on whether Kimball had done her due diligence in locating Ichikawa. As a result, the Trial Court's determination that due diligence had been accomplished was based on this misleading representation. Other available information pertaining to Ichikawa's whereabouts was not investigated with reasonable effort.

Kimball did not strictly comply with the statute, and as a result due process was not afforded Ichikawa.

2. Notice of Service on the Secretary of State was Defective.

The Washington Court of Appeals has previously held that in providing notice of service under the non-resident motorist statute, something more than mere notice “sent” to the defendant at his “last known address” needs to be shown to satisfy due process. “Either the defendant’s return receipt, showing actual receipt, or endorsement by postal authorities, showing delivery was refused, must be entered as a part of the return of process”. *Bethel v. Sturmer*, 3 Wn. App. 862, 479 P.2d 131 (1970).

Since the time of *Bethel v. Sturmer* the non-resident motorist statute has changed. However, due process still requires something more than mere notice to be “sent”. Notice must still be that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973).

According to Kimball’s counsel’s “Declaration of Compliance for Service on Non-Resident” the pertinent documents that were served on the Secretary of State were mailed to two addresses, “to his [alleged] last

known addresses, to-wit: 16625 Redmond Way, #M, PMP 357, Redmond, WA 98052, and 16135 NE 85th Street, Redmond, WA 98052.” **CP 79.**

As set forth in Kimball counsel’s Declaration of Due Diligence the first address is for a UPS private mailbox store. **CP 81.** The second address is for the physical address of a United States Post Office. **CP 82.**

It is unclear here whether Kimball was serving the secretary of state based on Ichikawa’s status as a non-resident or a resident. Kimball’s counsel submitted a declaration in support that Ichikawa was a non-resident. **CP 112.** Nevertheless, in opposition to Ichikawa’s motion to vacate, Kimball argued that Ichikawa was a resident. **CP 133.**

As a result, Kimball must have provided notice of service to Ichikawa at his last known address. Kimball argued that she complied with RCW 46.64.040 by providing notice to the addresses listed above, including the private mailbox address of 16625 Redmond Way, #M, PMP 357, Redmond, WA 98052. Kimball argued that Ichikawa actually received notice based on a return receipt that was received from that address bearing the signature of a Ms. Stacy Larkin as an “agent” of the addressee, Ichikawa. **CP 124; CP 144.**

At the hearing on the motion for default judgment as well as the hearing on the motion to vacate, Kimball argued that this return receipt coupled with the UPS service agreement contract, conclusively established

that Ichikawa received actual notice under the non-resident motorist statute. **RP 16 : 8-10.** and **RP 34 : 3-10** (“And their contract also provides if you don’t get it from us after that, then it’s returned. It was never returned. It’s almost certain that Ichikawa got that certified letter that contained a copy of the Summons and Complaint on August 31st.”).

Additionally, the Court expressly relied on the UPS contract as well as the signed return receipt in denying Ichikawa’s motion. **CP 66** (“There is some evidence in the record to support a conclusion that Defendant did actually receive a mailed copy of the summons and complaint at a UPS Store in Redmond, Washington. (See January 20, 2011 declaration of Mickey Thompson, page 3)”).

Kimball and the Court’s reasoning is flawed however, where the UPS mailbox service agreement which was relied upon was not signed or executed by Ichikawa and the agreement did not require the UPS store to return mail when not picked up by the customer. The service agreement states:

As Customer’s authorized agent for receipt of mail, the Center will accept all mail, including registered, insured and certified items. Unless prior arrangements have been made, the Center shall only be obliged to accept mail, or packages delivered by commercial courier services which require a signature from the Center as a condition of delivery. Customer must accept and sign for all mail and packages upon request of the Center. Packages not picked up within five (5) days of notification will be subject to a

storage fee of \$2.00 per day per package, which must be paid before customer receives the package. *In the event Customer refuses to accept any mail or package, the Center **may** return the mail or package* to the sender and Customer will be responsible for any postage or other fees associated with such return.

CP 129. (emphasis added).

Both Kimball and the Court overlooked the plain language of the contract which demonstrates clearly that UPS is the agent for the Customer and will sign for certified documents delivered to the store regardless of whether they are accepted by the customer. If the mail is not picked up by Customer, the UPS store is **not** required to return the mail to the sender. Rather, UPS “*may*” in its discretion, return the mail to the sender.

Thus, the fact that Kimball received a return receipt from a Ms. Stacey Larkin does not demonstrate anything. It certainly does not comply with the due process requirement of notice reasonably calculated to apprise Ichikawa of the pendency of the suit. Failing to notify the defendant that the summons and complaint has been served on the Secretary of State is fatally defective. *See Omaitis v. Raber*, 56 Wn. App. 668, 785 P.2d 462 (1990).

There is nothing in the record to indicate that notice was actually received. Although the language of the non-resident motorist statute has changed over the years, the minimum requirement of due process has not.

Neither of the addresses listed in the Declaration of Due Diligence constitutes a sufficient last known address for purposes of the non-resident motorist statute. The Court of Appeals has recently held that a private UPS store address is not a sufficient “usual mailing address” for purposes of substitute service via mail. *See Goettemoeller v. Twist*, No. 64046-1-I (Div 1 Ct. App. April 11, 2011). While the issue in *Goettemoeller* was whether a private mailbox address was the defendant’s “usual mailing address” for purposes of substitute mail service, the analysis equally applies in the context of “last known address”. The *Goettemoeller* Court has nevertheless expressed its concerns over whether service at a private mailbox is sufficient for substitute service.

The UPS mailbox and physical address of the United States Post Office are insufficient for purposes of providing notice to the “last known address” as required by the Non-Resident Motorist statute RCW 46.64.040.

Further, Kimball’s counsel testified that after he attempted service at the UPS store address, he performed internet searches and “Westlaw’s People Map revealed that defendant MASAYOSHI ICHIKAWA’s last

known address was 15841 NE 98th Way, Redmond, WA 98052”. **CP 81.**

While personal service was attempted at this address, Kimball did not mail notice of service on the secretary of state to this address.

As a result the record is insufficient to show that Kimball strictly complied with the non-resident motorist statute. Personal service was never effectuated on Ichikawa and he has not been afforded Due Process.

H. Ichikawa appeared in the action by Substantially Complying with the appearance rules, thereby entitling him to notice of the motion for default and default judgment under CR 55.

In *Morin v. Burris* the Washington state Supreme Court abrogated the doctrine of informal appearance as formulated by the Court of Appeals in the years prior. The informal appearance doctrine stood for the proposition that ongoing negotiations and communications with a Kimball’s attorney regarding settlement constitutes an informal “appearance” for purposes of CR 55. *See Batterman v. Red Lion Hotels, Inc.*, 106 Wn. App. 54, 21 P.3d 1174 (Div.1 2001) *abrogated by Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007); *See also Colacurcio v. Burger*, 110 Wn. App. 488, 41 P.3d 506 (Div. 1 2002).

In *Morin v. Burris* the Washington Supreme Court specifically held “pre-litigation contacts alone are insufficient to satisfy a party’s duty to appear and defend against a court case” and “merely showing intent to

defend before a case is filed is not enough to qualify as an appearance in court”. *Morin*, 160 Wn.2d 745, 161 P.3d 956 (2007).

In the context of *Morin* all the contacts between the defendant’s insurer and Kimball were prior to filing of the summons and complaint. The Court did not expressly address the issue of whether contacts after the filing of a complaint constitute substantial compliance with the appearance rule. The Court did state in *dicta* that “it appears to us that mere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*”.

However, the dicta of the Court does not address the situation of an intent to defend, where the existence of the lawsuit has been concealed. The holding in *Morin* is expressly narrowed to pre-litigation contacts.

The Supreme Court did not refer to or overturn the Division one Court of Appeals case of *Colacurcio v. Burger*, when abrogating the informal appearance doctrine in *Batterman*. *Colacurcio* presented a situation where the contacts existed before and after filing of the suit, and where Kimball failed to inform Ichikawa’s insurer that the suit had been filed. The Court in *Colacurcio* found that ongoing negotiations and communications by the insurer on behalf of Ichikawa after suit had been filed, constituted an “appearance” for purposes of CR 55.

Moreover, this narrow holding of *Morin* has been recognized by subsequent courts. See *Sacotte Construction, Inc. v. National Fire & Marine Ins. Co.*, 143 Wn. App. 410, 415, 177 P.3d 1147 (Div 1. 2008) (“substantial compliance can be accomplished with an informal appearance if the party shows intent to defend and acknowledges the court’s jurisdiction over the matter after the summons and complaint are filed”).

In this case, there were consistent contacts before and after the filing of the complaint. *Morin* is not dispositive given its narrow holding regarding pre-litigation contacts only. Ichikawa’s insurer did not expressly acknowledge the existence of the suit, given that Kimball concealed the filing of the same. However, the contacts with Kimball on behalf of Ichikawa *after* the suit had been filed are sufficient for an appearance under CR 55. The holdings in *Morin* and *Colacurcio* can be reconciled in that regard.

Thus, as here, where a defendant’s insurer has no idea that suit has been filed, but is attempting to settle and negotiate the case after the filing of the complaint, the substantial compliance doctrine should be deemed satisfied for purposes of CR 55. As a result, Ichikawa was entitled to notice of the default and default judgment and did not receive the same. The order of default is void and thus the judgment should be vacated.

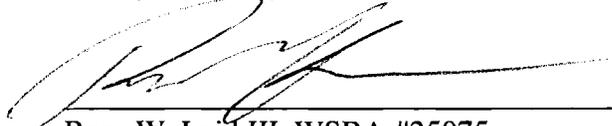
V. CONCLUSION

This Court should find that the Trial Court abused its discretion in denying Ichikawa's motion to vacate the default judgment, and remand for proceedings on the merits.

DATED this 9th day of June, 2011

Respectfully Submitted,

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NO. 41821-5-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

MASAYOSHI ICHIKAWA and JANE DOE ICHIKAWA,

Defendants/Appellants

v.

ELIZABETH YVONNE KIMBALL,

Plaintiff/Respondent.

PROOF OF SERVICE

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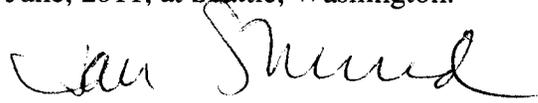
Jan Sherred, being first duly sworn on oath, deposes and says: that on the date given below, I served the following a copy of **Appellant's Opening Brief** and this Proof of Service on the following persons:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of June, 2011, at Seattle, Washington.



Jan Sherred, Legal Assistant