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NO. 49511-2-II  
IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY AP  
DEPUTY

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**MICHELLE BAXTER**

**Plaintiff/Appellant,**

**v.**

**RICHARD AH LOO, CATHERINE KONISETI,**

**Defendants/Respondents,**

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**APPEAL FROM THE SUPERIOR COURT OF CLARK  
COUNTY, THE HONORABLE GREG GONZALEZ, CAUSE No.  
16-2-00761-2**

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**BRIEF OF APPELLANT**

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**ASSIGNMENT OF ERROR**

The trial court erred when it entered an order vacating the Default Judgment entered in this case.

**ISSUES PRESENTED**

**Issue No. 1:** Was it manifestly unreasonable for the trial court to vacate the Default Judgment on equitable grounds, finding that the Plaintiff “inequitably attempted to conceal the existence of the litigation” from the Defendant, solely because the Plaintiff did not return a May 16, 2016 phone call from the Defendant’s insurer, when the evidence shows that: a) On May 12, four days before the non-returned phone call, and one week before the Default Judgment was entered, the Plaintiff notified the Defendant’s insurer, in writing, that there was a lawsuit and that a default judgment was pending (when no notice was required, because the Defendant had not appeared); and, b) when the Defendant’s insurer admits that, on May 16 (the date of the non-returned phone call), the Defendant’s insurer already knew about the litigation.

**Issue No. 2:** Did the Defendant, as required by *White*, show that his failure to appear was due to “excusable” neglect?

**Issue No. 3:** Did the Defendant, as required by *White*, produce a prima facie defense on the issues of: a) liability; b) damages; or, c) comparative fault?

### **STATEMENT OF THE CASE**

#### **a. The Collision**

On or around March 2, 2016, at approximately 5:20 a.m., Defendant Koniseti drove a car owned by Defendant Ah Loo. Clerks Papers, p. 63-67.

She stopped the car on an onramp to Interstate 5, in the dark. *Id.*

Or, if she did not stop directly on the onramp, she stopped her car in the outside lane of northbound traffic, close to the end of the onramp. *Id.*

The onramp allows drivers who drive in either direction on Fourth Plain Boulevard in Vancouver, Washington, to enter the northbound lanes of Interstate 5. *Id.*

Defendant Koniseti stopped because the car would not move forward. She told the investigating officer that the car “lost power.” Id., p. 66.

She said that she relied on the emergency brake to stop the car. Id.

At the same time Defendant Koniseti sat on or near the end of the onramp, the Plaintiff drove her daughter to work. CP, p. 119, ll. 20-24.

To get to her daughter’s work, the Plaintiff drove on Fourth Plain Boulevard, and then took the onramp to enter the northbound lanes of Interstate 5. Id.

As she proceeded down the onramp, the Plaintiff looked over her left shoulder. Id., p. 120, ll. 1-14.

The reason the Plaintiff looked over her left shoulder was to determine whether she needed to be mindful of any cars as she merged onto the freeway. Id.

The instant she turned her head to the left, a passenger in her car yelled, “Car!” Id.

Immediately, the Plaintiff turned her head back to the road in front of her. Id.

She saw the car driving immediately in front of her abruptly swerve to the extreme left. Id.

In the spot from where that car had just swerved, the Defendant's car sat in the road, not moving. Id.

The car was directly in front of the Plaintiff. Id.

She tried to avoid colliding into the parked car, but could not. Id., p. 120-21, ll. 13-1.

As a result, she collided into the parked car. Id., p. 121, ll. 1-15.

After the collision, first responders arrived.

An ambulance took the Plaintiff to the hospital, where it quickly became apparent that the Plaintiff was gravely injured. Id., p. 122, ll. 1-7.

At the hospital, doctors discovered that the Plaintiff had a shattered pelvis and a dislocated hip. Id., p. 123. They performed surgery.

First, doctors put pins in the Plaintiff's knee to immobilize her hip. Id., p. 122, ll. 19-22.

Second, they put two plates and eight screws into her pelvis, in an effort to reattach the Plaintiff's hip to her pelvis. *Id.*, p. 123, ll. 4-8.

The Plaintiff was in the hospital for a total of five or six nights. *Id.*, p. 123.

The Plaintiff was told by her doctors that she will need a hip replacement. *Id.*, p. 126. This includes her surgeon. See also *Id.*, p. 127.

The officer who investigated the collision cited Defendant Koniseti with negligent driving. *Id.*, p. 121-122.

In Washington, a leading driver who gets rear-ended can be found negligent if the leading driver slows down or stops on a freeway because of a foreseeable car maintenance issue. In *Ryan v. Westgard*, 12 Wn. App. 500, 505-06(1975), the defendant testified that "the collision occurred as he lost speed when he ran out of gas in his auxiliary tank and was switching to his main tank." *Id.* at 502. The jury found him negligent. *Id.* at 501. The Court of Appeals upheld the verdict, holding that the jury "could find from the evidence

that the [following driver] was not contributorily negligent.”

*Id.* 504-05.

**b. Plaintiff asked to learn the Defendant’s policy limits, but was provided none; she filed a lawsuit**

Plaintiff opened a claim with the Defendants’ insurer, Kemper Financial Indemnity Company (hereinafter, “Kemper”).

Plaintiff counsel suspected that the Plaintiff’s damages far exceeded the Defendant’s policy limits. CP, p. 60, ll. 20-21.

Which is why, on March 7, 2016, Plaintiff counsel wrote to Ms. Maria Danek, Kemper’s adjuster on the case, asking to know the Defendant’s policy limits. *Id.*, ll. 22-25.

“[P]lease seek authorization to provide me with your insured’s policy limits. Ms. Baxter received surgery to repair a fractured pelvis. She also received surgery on her knee...To me, everything indicates this is a limits case.” *Id.*, p. 73.

“If we don’t get this figured out, I will file a lawsuit,” Plaintiff’s counsel wrote. *Id.*

Finally, Plaintiff counsel gave Kemper a time limit to provide the policy limits, so that Kemper could avoid a lawsuit for its insured: "We have two weeks." Id.

On the same day, Plaintiff counsel also wrote an e-mail to Ms. Danek at Kemper. It reads in part:

*I believe we should know your insured's limits, as Ms. Baxter has a severely fractured pelvis and a fractured knee...Documentation is pending, but I want to know what we are dealing with, here. Please seek your insured's authority to reveal her policy limits.*

Id., p. 72.

No response was received. Five weeks later, on April 14, 2016, the Plaintiff filed her lawsuit. CP, p. 3,

**c. Service of process: no one disputes sufficiency**

After filing the lawsuit, the Plaintiff served the Defendant by substitute service at his usual place of abode on Saturday, April 16, 2016. CP, p. 5.

No one contests the validity of service.

**d. The Defendant does not respond to the lawsuit**

The Plaintiff waited twenty days for the Defendant to respond. During that time, no one did.

The Defendant provides no information about his efforts to respond to this lawsuit.

Instead, the Defendant merely claims that, “After I received the lawsuit, I provided it to my insurance company.” CP, p. 29, ll. 11-13.

He does not state *when* he provided it to insurer. He does not state *how* he provided it to his insurer.

Despite this, the Defendant below has made numerous claims in his motion to vacate, which simply lack basis, and which should not mislead this Court on appeal.

First, the Defendant argues that he informed Kemper of the lawsuit on May 9, 2016, by phone. CP, p. 47, ll. 14-16.

For this statement, he provides no citation. Further, no May 9 phone call appears in any declaration.

Moreover, by this time, an answer was two days past due.

Second, the Defendant argues that he notified Kemper again on May 16, by “providing a copy of the lawsuit” to Kemper. *Id.*

This statement cites paragraph 3 of the Pearson declaration, which can be found at page 36 of the Clerks Papers.

That paragraph in its entirety reads, “My office received notice of a lawsuit filed against an insured on May 16, 2016. On that date, the file was transferred from Ms. Danek to myself for handling.”

She does not declare that it was the Defendant who provided her with the lawsuit on May 16.

And, because the Plaintiff notified Kemper of the lawsuit, in writing, on May 12 (See subsection “e,” *infra*), it must not be assumed that it was the Defendant who caused Kemper to be notified by May 16.

Thus, there is no evidence of *when* the Defendant attempted to respond to this lawsuit. Instead, the Defendant merely states that, that “after” the pleadings were served, he forwarded the pleadings to his insurer.

**e. Kemper, too, fails to respond to the lawsuit**

On May 12, 2016, Plaintiff counsel twice emailed the adjuster from Kemper, Ms. Danek. CP, p. 75. He warned Ms. Danek of the lawsuit.

At this time, Ms. Danek was still assigned to the case, according to Kemper. CP, p. 36, ll. 21-23 (“My office received notice of a lawsuit filed against an insured on May 16, 2016. On that date, the file was transferred from Ms. Danek to myself for handling”).

Thus, the Plaintiff sent written notice of the lawsuit to the correct, proper adjuster for the claim. It cannot be said that the Plaintiff attempted to send the written notice to the wrong person at Kemper.

The first email read, in its entirety, “Are you guys covering this, Maria?” CP, p. 75.

The second email reads, “Ms. Danek, If no one appears within a week, we will move for default judgment.” Id.

To the second email, Plaintiff counsel attached the complaint, summons, and declaration of service. Id.

This was 26 days after service.

Ms. Danek never responded.

On May 16, 2016, which was four days after Kemper received written notice of the pending Default Judgment, Karen Pearson, a different adjuster from Kemper, called Plaintiff counsel. She left a voicemail. CP, p. 76.

The voicemail transcribes as follows:

*Hi, this is Karen Pearson with Kemper Insurance. I am calling regarding a claim that I just inherited. Your client is Michelle Baxter and I just needed to touch bases with you regarding the claim. If you could return my call, I'd appreciate it. Again, my name is Karen. My number is 800-822-8426, extension 2582. And the claim number -- the reference is B, as in boy, 009953WA16. Thanks so much. Bye, bye.*

Id.

This actual voicemail differs greatly from Ms. Pearson's description of it.

Her description:

*On May 16, 2016, I called the attorney for Ms. Baxter...and left him a voicemail stating that I had received notice of the lawsuit...I inquired as to whether there was any possibility of settling the case now without requiring me to hire an attorney or if I needed to hire an attorney to put in a notice of appearance.*

CP, p. 36-37.

Ms. Pearson, in other words, added facts to her description of the May 16 voicemail (*i.e.*, that she mentioned litigation, hiring an attorney, *etc.*), in an apparent attempt to strengthen the Defendant's argument that this was an "appearance."

She never mentioned the topics she claims to have mentioned in her voicemail. Instead, she simply called to resolve the "claim."

Thus, despite the May 12 warning from Plaintiff's counsel that a default judgment would occur if no one appeared within a week, and despite the fact that Ms. Pearson admits she knew about the lawsuit by May 16, Ms. Pearson did not cause anyone to appear during that time.

**f. Default judgment**

On May 20, 2016, at approximately 9:45 a.m., the trial court entered a default judgment against the Defendant. CP, p. 6.

The total amount of the judgment was \$1,358,972.26. Of that, \$108,972.26 was for economic damages, while \$1,250,000 was for non-economic damages. CP, p.10.

This was: 74 days after Plaintiff gave Kemper the opportunity to avoid this lawsuit by providing the Defendant's policy limits; 36 days after the lawsuit was filed; 34 days after service; and, most importantly, eight days after Kemper was warned of the Default Judgment, yet caused no one to appear during that time.

**g. The Defendant appears**

At 3:22 pm on May 20, 2016, approximately six hours after the trial court entered the Default Judgment, Ms. Pearson from Kemper called Plaintiff counsel. CP, p. 77.

She left a voicemail, asking, "if there is any possibility of getting this claim resolved or if [she] needs to get it to counsel and get an answer filed." Id.

Later, at 3:43 p.m., Ms. Pearson caused Mr. Gary Western to informally appear for the Defendants by calling Plaintiff counsel. CP, p. 62, ll. 9-11.

Immediately, Plaintiff counsel informed Mr. Western of the Default Judgment. Id.

**h. The Defendant moves to vacate**

Promptly, the Defendant moved to vacate the judgment.

In his motion, the Defendant made four arguments that deserve note on appeal.

First, the Defendant argued that his neglect was excusable because he is a layperson, while also blaming his insurer for not responding to the lawsuit:

*Here, once Mr. Loo was served with the Complaint, he promptly delivered the pleadings to his insurance company. Any mistake was on the part of the insurer, not Mr. Loo. As a layperson unfamiliar with the litigation process and the appearance requirements, Mr. Loo reasonably believed that he did not need to do anything further. The judgment obtained by Plaintiff is against Mr. Loo, not the insurance company.*

CP, p. 57, ll. 8-9. The Defendant makes no attempt to excuse Kemper's neglect.

Second, the Defendant proffered a prima facie defense based on sudden brake failure. See CP, p. 55, ll. 5-10. "...Ms. Koniseti's description of the accident is consistent with brake failure that could have occurred without any prior warning and due to no fault of her own."

Third, the Defendant, not in his motion but in a declaration in support of his motion, offers the argument that comparative fault is a prima facie defense to negligence. Decl. of Roger Bennett, CP p. 23, ll 10-12 (“...the statements of the Plaintiff alone provide facts sufficient to raise a meritorious defense of, at least, comparative liability of the Plaintiff”).

Fourth, the Defendant, not in his motion but in a declaration in support of his motion, offers the argument that no negligence can be imputed to Defendant Ah Loo because he was merely the owner of the car: “The facts alleged and presented simply fail to establish a cause of action against Ah Loo, nor an recognized basis for his liability.” CP, p. 20, ll. 9-11.

**h. The trial court vacates the judgment based solely on an “inequitable attempt to conceal litigation”**

After hearing the motion to vacate, Judge Gonzalez vacated the judgment.

He based his decision solely upon what he describes as an “inequitable attempt to conceal” the litigation from the Defendant and Kemper. CP, p. 110.

Specifically, he faults Plaintiff counsel for not returning a phone call from Kemper: "...[P]laintiff's failure to respond to the May 16<sup>th</sup> voicemail from the adjuster...appeared...to be an 'inequitable' attempt to conceal the existence of the litigation." Id.

The trial court's reasoning deserves summation: The trial court vacated the Default Judgment, reasoning that the Plaintiff, because she failed to return a voicemail left on May 16, was trying to conceal the litigation, even though, four days previous, Plaintiff counsel sent written notice of the lawsuit, including the pending default judgment, to the correct person at Kemper, and, even though, *according to Kemper's own witness*, Kemper knew about the lawsuit by May 16, when the not-returned call was made. See Pearson decl., CP p. 36, ll. 21-23 ("My office received notice of a lawsuit filed against an insured on May 16, 2016").

In other words, the trial court found that the Plaintiff tried to conceal litigation from Kemper even though: a) the Plaintiff already told Kemper about it; and, b) Kemper already knew about it according to Kemper.

The Plaintiff filed a timely notice of appeal. CP, p. 135.

### ARGUMENT

- A. The trial court abused its discretion when it vacated the Default Judgment based on what it called an “inequitable attempt to conceal litigation,” because: i) the Plaintiff gave the non-appearing Defendant unrequired, non-obligatory written notice of the Default Judgment; and, ii) Kemper claims it already knew about the litigation**

The trial court based its decision on a single factor: the Plaintiff’s “inequitable attempt to conceal the existence of the litigation” from Kemper. There is no evidence to support this, however, because: a) the Plaintiff made affirmative, non-obligatory steps to inform Kemper of the litigation, generally, and the default judgment, specifically; and, b) Kemper claims that it already knew about the litigation. Thus, the trial court abused its discretion.

A court can relieve a defendant from judgment if enforcement would be inequitable. CR 60(b)(6). In *Morin v. Burris*, 160 Wn.2d 745(2007), our Supreme Court held that, when a plaintiff attempts to conceal litigation from a defendant, it can be inequitable to enforce a default judgment. 160 Wn.2d at 759. Specifically in *Morin*, the Court

faulted the plaintiff for failing to “disclose that litigation had been commenced or that a motion for a default judgment had been taken,” when the insurer called on two occasions, both times asking to settle the case, and while “time for filing an appearance was running.” *Id.* at 758-59.

These facts from *Morin* served as the basis for Judge Gonzalez’s analysis when he vacated the judgment. Specifically, he faulted Plaintiff’s counsel for not returning a voicemail from an adjuster at Kemper. Like in *Morin*, the phone call occurred while “time for filing an appearance was running” and, again like in *Morin*, the adjuster apparently wished to resolve the claim.

There are two key differences, however, that make this case wholly unlike *Morin*. First, is that on May 12, four days before the phone call, the Plaintiff warned Kemper in writing that a default judgment was pending. The e-mail used plain language that expressed a clear intent to get a default judgment in one week. The e-mail told Kemper what Kemper needed to do to avoid the Default Judgment (which, to be clear, was simply to comply with civil procedure). *And* it

came with the complaint, summons, and declaration of service attached. Kemper does not dispute that Ms. Danek was the proper adjuster, and even confirms that, on May 12, she still had the file (in fact, that she had it until May 16). Second, according to Kemper, it *already had notice* of the lawsuit on the date of the not-returned phone call. See CP, p. 37, ll. 1-2 (“[O]n May 16, 2016, I called the attorney for [the Plaintiff]..., and left him a voicemail message stating that I had received notice of the lawsuit and asking for a return call”). Neither of these facts were present in *Morin*.

That made no difference to the trial court, however. To the trial court, a plaintiff attempts to conceal litigation when, after providing written notice of a default judgment to an insurer, the plaintiff fails to return one phone call from an adjuster, when the adjuster herself *claims that she already knew about the litigation*. It is not enough to give specific warning of a default judgment, in writing, *after* an answer is due. It is not enough to give the insurer additional time to appear (twelve days in total). Instead, a plaintiff needs to: a) return *every* phone call from an adjuster if it occurs after

litigation (again, *even if* you have already given the insurer written notice of the default judgment); and, b) confirm with the defendant's insurer that, yes, a formal appearance is required when one of its insured gets sued. So lies the trial court's expectations of plaintiffs.

This is a startling departure from the Rules of Civil Procedure. Within this departure, the duty to not conceal litigation morphs into a duty to make sure that the insurer does its job. Yet, *defendants* are charged with responding to a lawsuit, and *insurers* are required with defending their insureds. There is no requirement for a plaintiff to provide additional information, or to ensure that a defendant's insurer has the proper office processes in place to know that a lawsuit has been filed and to make a timely response. Not only does the trial court's decision invent these unwritten duties, but he also gives them priority above the written Rules of Civil Procedure. That is, a defendant can ignore its duties under the rules, but a plaintiff must go above and beyond them to succeed, *and even then* (as the Plaintiff here can attest), it might not be enough.

This must be reversed. “Judicial decisions have repeatedly held that, if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable.” *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 407(2008). “Discretion is abused when it is exercised in a manifestly unreasonable manner, or based on untenable grounds or reasons.” *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107(1994).

Here, it was Ms. Danek’s job to inform Ms. Pearson of the lawsuit, and then Ms. Pearson’s job to cause a formal appearance to occur. *At least*, it was not the Plaintiff’s job to advise Kemper’s adjusters on civil procedure. Thus, it was manifestly unreasonable for the trial court to vacate the Default Judgment because the Plaintiff failed to do what the rules of civil procedure require the *Defendant* to do: appear and defend the law suit.

Even if that were not the case, Judge Gonzalez’s decision fails to consider the full breadth of *Morin*. It is not enough for the trial court to simply label the plaintiff’s

conduct “inequitable.” Instead, the court must find that there is a causal link between the plaintiff’s inequitable conduct, on the one hand, and the defendant’s failure to appear, on the other:

**If** the [the defendant’s] representative acted with diligence, and the failure to appear was induced by [plaintiff’s] counsel’s efforts to conceal the existence of litigation...**then** the [defendant’s] failure to appear was excusable under equity and CR 60...Since the trial judge does not appear to have reached this issue we remand for further consideration.

*Morin v. Burris*, 160 Wn.2d at 759 (*internal citations omitted; emphasis added*). Here, Judge Gonzalez skipped the “if,” and went straight to “then.” He never considered whether the Defendant’s failure to appear was related to the Plaintiff’s supposedly inequitable conduct. He never apparently considered whether Kemper “acted with diligence.” The proposition seems dubious, as *Kemper admits that it already knew about the litigation* when the Plaintiff’s supposedly inequitable concealment occurred. Accordingly, if the foregoing arguments do not persuade the Court that the Plaintiff acted equitably, it must at least remand for the trial

court to decide whether the Plaintiff's conduct caused the Defendant's non-appearance.

**B. Under *White*, the Defendant: i) fails to even attempt to excuse his neglect and; and, ii) has no prima facie defense to liability or damages. The Default Judgment on these issues should be reinstated**

Because the trial court based its decision solely on equity, it did not address the *White* factors.

*These factors are: (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect...*

*White v. Holm*, 73 Wn.2d 348, 352(1968).<sup>1</sup>

**i. No excuse: neither the Defendant nor Kemper even attempt to excuse their neglect**

The Defendant offers only one "excuse" for the Defendant's neglect: that he is not a lawyer, and he thought Kemper would take care of everything.

This excuses nothing, however. Summonses are written to provide due process to lay people. They use plain, clear language, so that every person, lawyer or not, can know

exactly how to respond. Practically every defendant is a lay person, who receives the summons before having a chance to hire an attorney.

Moreover, the Defendant fails to even attempt to explain *when* he provided the lawsuit to his insurer. Layperson or not, he had a duty to respond, and he does not even describe what he did to do so, or even claim that his efforts were timely. This is not an “excuse.” It is simply a restatement of circumstances that are present in practically every case: a layperson got served with process. Unlike most cases, the Defendant here did not timely respond. For this, he has no excuse.

Kemper also fails to even attempt to explain why, when it had notice of a default judgment, it did not cause a lawyer to appear for the Defendant. In *Ahkavuz v. Moody*, the Court of Appeals rebuked an insurer for the same.

*And unlike in Berger, where the claims adjuster sent the wrong case file to the law firm, neither [the insurer] nor [the defendant's attorney] points to any 'mistake.' They provide nothing whatsoever to explain the delay of more than a year after [the Plaintiff] filed suit. There is a*

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<sup>1</sup> There are two other “Secondary” factors, which the Plaintiff concedes favor vacation of the Default Judgment.

*cryptic allusion to [the attorney of record] leaving [his firm], but the firm's attorneys do not say whether, or how, his exit contributed to the delays and inaction.*

*Ahkavuz v. Moody*, 178 Wn. App. 526, 537(2013). Courts expect an actual explanation: *why* didn't the defendant fulfill his duties?

This question remains unanswered by the Defendant and unasked by the trial court. There simply is no coherent explanation, from either the Defendant or Kemper, for their delays. Thus, the Court should decide that there is no "excusable neglect" in this case, and then turn its attention to the second primary factor under *White*: prima facie defenses.

**ii. No prima facie defenses on liability or damages**

Below, the Defendant was burdened with producing prima facie defenses on the issues decided in the Default Judgment. For a) damages, and, b) liability, the Defendant did not do so.

Consider first damages. "[A] party who moves to set aside a judgment based upon damages must present evidence of a prima facie defense to those damages." *Little v.*

*King*, 160 Wn.2d 696, 704 (2007). “It is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing.” *Id.*

Before turning to the Defendant’s defense to damages, it is important to first acknowledge that the Plaintiff’s damages are supported by substantial evidence.

*[T]he default award...could be vacated if there were not substantial evidence to support the award of damages. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.*

*Shepard Ambulance, Inc. v. Helsell*, 95 Wn. App. 231, 242 (1999). The Plaintiff’s testimony is replete with evidence that, to a “fair-minded” person, supports her damages: “They put pins in my knee,” CP, 122, ll. 19-20; “They had to put two plates and eight screws to reattach my pelvis to my hip because they were totally unattached,” CP, p. 123, ll. 4-6; “Eventually, I am going to have a hip replacement within a year...” CP p. 126, ll. 16-17; “[T]he surgeon has said that [joint replacement] would be a possibility...But even he had stated that would more than likely be something that was

going to happen,” CP p. 127 ll. 1-5. Further, the initial hospital care for these injuries had, at the time of the hearing on default, already cost more than \$100,000. Id., p. 128. Thus, there is evidence of severe, life-altering physical injuries, which will only increase over time. This suffices for the damages awarded in the Default Judgment.

In response to this substantial evidence, the Defendant, like in *Little v. King*, “produces no competent evidence of a prima facie defense to damages.” 160 Wn.2d at 704. The full extent of the Defendant’s defense on damages is:

*[T]here is no evidence of damages at this time. Plaintiff’s Default Judgment amount is based on a hearsay declaration from her attorney and a statement from her that she received medical treatment. There are no medical bills...nor did the Plaintiff submit any medical expert opinions...*

CP p 56, ll. 1-6. This argument has two fatal flaws. First, it is not true. The Plaintiff’s testimony is replete with details of her injuries that go far beyond merely claiming that she “received treatment.” It appears as though the Defendant did not review the transcript of her testimony. Second, it mistakes the burden on the Plaintiff. There merely has to be

substantial evidence, so that a rational person could agree with the damages amount. Medical testimony is not necessary. There is no defense to damages.

Accordingly, the Court of Appeals should reinstate the Default Judgment as far as it relates to damages. There is substantial evidence to support it, and the Defendant does not have a prima facie defense.

The same is true for liability. The Defendant has no prima facie defense to liability. Consider first the “brake failure” defense. This defense must conform to the holding of *Goldfarb v. Wright*, 1 Wn.App. 759(1970). In *Goldfarb*, the defendant blamed faulty brakes for a rear-end collision. *Id.*, 1 Wn. App. 759, 760. She did not, however, present any evidence of “the nature of the defect” that led to the brake failure. *Id.* Because she failed to present evidence of “the nature of the defect,” the Court of Appeals reasoned, “[t]he jury could not, in the absence of any evidence on this subject, determine if a defect was latent or patent.” *Id.* at 764. Accordingly, it held

*the jury must have facts presented to it regarding the nature of the defect causing the brakes to fail*

*if it is to determine whether or not [the defendant driver] acted reasonably in whatever inspection she made of the braking system.*

1 Wn. App. at 764. It is not enough, in other words, for the Defendant to simply present a predicate fact of the brake failure defense.

On this point, *Little v. King* provides guidance. In *Little*, our Supreme Court held that it is not enough to simply present the predicate fact of a defense, and then ask a court to assume that the next link in the chain of evidence will be established. Specifically, “[the defendants] essentially argue[d] that the damages awarded were unreasonable and that preexisting conditions may have contributed to [the plaintiff’s] injury.” 160 Wn.2d at 704. This was refused by our Supreme Court because it was only half of the defense:

*We have long held that the mere existence of a preexisting condition is an insufficient basis to infer a causal relationship between the injury complained of and the preexisting condition.*

160 Wn.2d at 705;

*The moving parties must present substantial evidence that the condition “probably” or “more likely than not” caused the subsequent condition, rather than that the accident or injury “might*

*have,* “*could have,*” or “*possibly did*” cause the subsequent condition.

*Id.* What do courts require of a prima facie defense? A *full* defense, not based on “could-haves” or “might-haves,” or “possibly-dids.”

Yet, that is exactly what the Defendant offers with his brake failure defense. His expert states that the collision is “consistent with” brake failure and that it “could have occurred” without any prior warning. CP, p. 31. The expert did not inspect the vehicle, has no idea what caused the brakes to fail, and cannot testify whether that defect could be found with reasonable inspection of the vehicle. The Defendant asks the Court of Appeals, in other words, to assume that, later on, the Defendant will find evidence of “the nature of the defect” and that, with that evidence, he will then be able to argue that he “acted reasonably in whatever inspection he made of the braking system.” Just like in *Little*, where our Supreme Court held that it was not a prima facie defense for the defendant to establish that, later on, it *might* be able to prima facie-rebut damages, the same is true, here: the Defendant has simply shown that, later on,

he *might* be able to argue that his brakes are to blame. This does not suffice.

Consider next the Defendant's attempt to use comparative fault as a defense to negligence. The argument proceeds as follows: because the Plaintiff was the following driver, the primary burden was on her to avoid the collision; because she did not avoid the collision, the Defendant is not negligent. Comparative fault, according to the Defendant, is a defense to liability.

For this, *White v. Holm* does provide inspiration. In *White*, the Court held that it was a prima facie defense to argue that a plaintiff, in a pedestrian *vs.* pedestrian collision, was contributorily negligent.

*At best their motion rests upon the slender premise that the physical characteristics of the recessed entryway and the relative positions and actions of [the plaintiff] and [the defendant] at the moment of and immediately before collision could...give rise to a factual issue revolving about either negligence on the part of [the defendant] or contributory negligence on the part of [the plaintiff], or both.*

*White v. Holm*, 73 Wn.2d at 353. It bears emphasis, however, that this was decided during the days before Washington

passed its comparative fault statute. Tort Law Revisions, Laws of 1986, ch. 305, § 401(1986)(codified as RCW 4.22.070). Thus, at that time, it *was* a complete defense to liability to argue that the plaintiff was mostly at fault. So it would make sense, if the defendant had prima facie evidence that a plaintiff was at fault, to force the plaintiff and the court to re-decide what had already been decided. Why? Because there was the real possibility that an entirely different result would occur (because, again, it was either the plaintiff or the defendant; it could not be both).

That is no longer true, however. Now, it is not a defense to negligence to argue that the plaintiff is at fault. Instead, with the operation of Washington's comparative fault statute, this argument merely changes the ultimate apportionment of fault. Thus, comparative fault is not a prima facie defense; the Defendant does not argue that he was *not liable*. He argues that, in addition to his own negligence, the Plaintiff contributed fault. This is not a defense to liability.

This point gets sharpened if you consider the practical implications. In *any* collision, a defendant will have evidence that, when viewed most favorably to the defendant, can be used to allege comparative fault. Any defendant who, for example, runs a stop sign, would have evidence that, if viewed most favorably for a defendant, could be used to argue that the plaintiff failed to keep watch, and failed to avoid the collision once the plaintiff realized the defendant would fail to yield. See *Merrick v. Stansbury*, 12 Wn. App. 900, 906(1975) (“In such cases, the favored driver has the right to rely on this assumption until such time as he actually sees...that the disfavored driver is not going to yield the right-of-way. At that instant, the favored driver is, of course, allotted a reasonable reaction time”). Because of the very nature these cases, “substantial evidence” of comparative fault comes built in to the case itself, especially when viewing the evidence to favor defendants.

When a defendant crosses the center line and collides head-on with oncoming traffic, can there be a case where, if you viewed the evidence most favorable for the defendant, he

could not argue that the plaintiff should have anticipated and reacted to the defendant's negligence earlier?

When a defendant motorist runs into a pedestrian in a crosswalk, can there be a case where, if you viewed evidence to favor the defendant, he could not argue that the plaintiff should have done a better job of looking out, or should have acted earlier, or acted differently?

What if one of these defendants produces evidence that could, at most, compel a jury to find the plaintiff liable for five percent of the damages? What if, for example, a motorist hits a bicyclist, but the bicyclist's headlamp only illuminates 490 feet, instead of the statutorily mandated 500 feet (RCW 46.61.775)? Would this be a prima facie defense, which would warrant vacating the entire judgment?

These inconsistencies disappear if, instead of treating comparative fault as a prima facie defense to the defendant's negligence, it instead gets treated as an issue altogether separate from the defendant's liability. This already happens with damages. Courts separate the issue of a prima facie defense on liability, on the one hand, and a prima facie

defense on damages, on the other hand. Consider *Showalter v. Wild Oats*, 124 Wn. App. 506(2004). In this premises liability case, the Court of Appeals held that there was a prima facie defense to both liability *and* damages.

*[T]he foregoing facts...demonstrate that [the defendant] can assert substantial evidence of a prima facie defense to [the plaintiff's] personal injury claim. [The defendant's] declarations specifically demonstrate key issues regarding foreseeability of the risk...the existence of similar preexisting injuries, and persuasively challenge the amount of damages for past and future noneconomic loss.*

*Id.* at 513.

Likewise, the Court of Appeals in *Calhoun v. Merritt* remanded the case, but only for a trial on the issue of damages. *Calhoun v. Merritt*, 46 Wn. App. 616, 619-20(1986) (“As for his responsibility for the accident, [the defendant] has presented no defense. Thus, the default judgment of liability must stand, and the only remaining question is whether the court erred in refusing to vacate the damage portion of the default judgment”).

Here, the Defendant needs to produce evidence that he was *not liable*, which is different than evidence that the

Plaintiff was negligent. And, because the Defendant says that his brakes suddenly failed, he must produce evidence that he did everything reasonable to prevent that from happening. *See Goldfarb v. Wright*, 1 Wn. App. at 763 (reaffirming that, when a defendant attempts to excuse his negligence, the defendant is “required to come forward with evidence excusing her negligence”). Arguing that the Plaintiff was negligent is different than proffering a defense to the Defendant’s negligence. It is not a prima facie defense.

Consider next the defense that, Mr. Ah Loo, as the owner of the vehicle, is not liable for the negligence of the driver, Ms. Koniseti. This is not a prima facie defense because Mr. Ah Loo, as the owner of the automobile, was charged with taking reasonable steps to ensure that the vehicle was safe to operate. The following passage from *Goldfarb* applies equally here:

*Defendant’s unsupported testimony that the brakes had functioned properly prior to the accident and then had suddenly failed for a reason unknown to her, would not permit a jury to determine whether or not she complied with the statutory standard set out in RCW 46.37.340, et seq., or whether, in the exercise of reasonable care, she should have known of the defective*

*condition of the brakes, for such determination would be dependent on knowing the nature of the defect and whether it would be discoverable by a reasonable inspection.*

*Goldfarb v. Wright*, 1 Wn. App. at 764. Thus, if Mr. Ah Loo wants to argue that he, as the mere owner of the automobile, is not negligent, he needs to produce evidence that he took reasonable steps to ensure that the brakes were working. Because he has not done so, his just-the-owner defense does not succeed.

**C. The Defendant *did* produce prima facie evidence that the Plaintiff was not fault free**

The Plaintiff concedes that the Default Judgment should be vacated, but only insofar as it relates to the Plaintiff being fault-free. The Defendant produced prima facie evidence that the Plaintiff may have contributed fault to the collision. Specifically, Ms. Koniseti's declaration that other cars passed her on the left could be used to argue that the Plaintiff was comparatively at fault. This suffices.

Accordingly, the Court should uphold the vacation of the Default Judgment, but only insofar as it relates to the Plaintiff being fault-free.

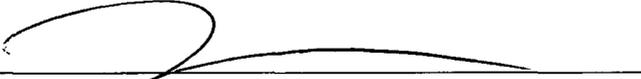
**CONCLUSION**

The Plaintiff respectfully requests the Court of Appeals to:

1. Reverse the trial court for abusing its discretion;
2. Reinstate the Default Judgment on the issues of liability and damages, because: a) the Defendant has not excused his neglect or his insurer's; and, b) because there is no prima facie defense to liability and damages;
3. Remand for trial on the issue of comparative fault.

Dated this 5<sup>th</sup> day of December, 2016.

CARON COLVEN ROBISON AND SHAFTON, P.S.



THOMAS HOJEM, WSBA No. 45344

**Declaration of Service**

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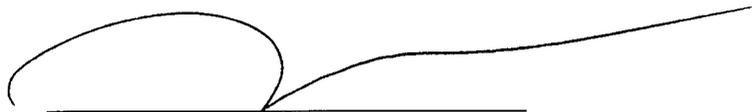
The undersigned certifies that under penalty of perjury under the Laws of the State of Washington, that on the date below I caused to be served and filed the attached documents as follows;

STATE OF WASHINGTON  
BY AP  
DEPUTY

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DATED at Vancouver, Washington, on the 5<sup>th</sup> day of December, 2016.



Thomas Hojem