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COURT OF APPEALS
DIVISION II

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No. 49511-2-II STATE OF WASHINGTON

COURT OF APPEALS ^{AP}
OF THE STATE OF WASHINGTON ^{DEPUTY}
DIVISION TWO

MICHELLE BAXTER,

Plaintiff/Appellant,

v.

RICHARD AH LOO

Defendant/Respondent, and

CATHERINE KONISETI,

Defendant.

***BRIEF OF RESPONDENT RICHARD AH LOO and
MOTION FOR SANCTIONS UNDER RAP 18.9***

CLARK COUNTY SUPERIOR COURT
CAUSE NO. 16-2-00761-2
HONORABLE GREGORY GONZALEZ

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I. INTRODUCTION AND SUMMARY OF AH LOO'S OPPOSITION TO THIS APPEAL

On March 2, 2016, Michelle Baxter rear-ended the car Catherine Koniseti was driving. Richard Ah Loo owned the car Baxter rear-ended. Just over two months later, Baxter obtained a default judgment against Ah Loo for over \$1.35 million. Ah Loo appeared through counsel later the same day the default was entered and moved to vacate a few court days after that. The trial court vacated the default judgment. This Court should affirm and award sanctions to Ah Loo under RAP 18.9.

On March 2, 2016, Catherine Koniseti was stopped on a freeway on-ramp and was unable to move her car. She had her emergency blinkers flashing; and cars were driving around Koniseti's disabled vehicle without incident¹ -- except Michele Baxter, who was not watching the traffic ahead of her and rear-ended Koniseti.² Nevertheless, Baxter claimed that Koniseti was solely at fault for the collision. Six weeks later, on April 14, 2016, Baxter filed suit against Koniseti and Richard Ah Loo, who allegedly owned the car that Baxter rear-ended.³ Baxter served Ah Loo on April 16, 2016, but did not serve Koniseti.⁴

¹ CP 25-26.

² CP 68-69.

³ CP 1-5.

⁴ *Id.*; CP 116.

The Complaint contained a single allegation concerning Ah Loo: “the motor vehicle driven by Ms. Catherine Koniseti was owned by Defendant Richard Ah Loo.” It did not identify a single cause of action against Ah Loo or allege any other facts to support one. On its face, that Complaint failed to make out a cause of action against Ah Loo.

Baxter’s attorney, Thomas Hojem, knew that Merastar Insurance (“Kemper”) was responding to the Baxter lawsuit on behalf of Ah Loo. On May 12, 2016, he emailed Kemper and stated he would “bring a motion for default in a week.”⁵ During the following week, a Kemper adjuster repeatedly attempted to speak with Baxter’s attorney in direct response to that email.⁶ Hojem declined to take or return her calls; and never disclosed that contrary to his misleading email, he had already set a hearing date for entry of a default judgment against Ah Loo – May 20, 2016.⁷

On May 20, 2016, Kemper again attempted to discuss the case with Mr. Hojem by phone. Kemper again was told Mr. Hojem was not available⁸ – possibly because he was appearing in open court to present a motion for entry of an order of default and, at the very same time, an *ex parte* judgment for \$1.35 million against Ah Loo. Like the Complaint, the proposed findings of

⁵ CP 75.

⁶ CP 36-38.

⁷ CP 106.

⁸ CP 36-38.

fact, conclusions of law and judgment recited a single – and legally insufficient -- basis for Ah Loo’s ostensible liability:

*Defendant AH LOO is liable as the owner of the car.*⁹

Hojem submitted a sworn declaration in support of the proposed default judgment, telling the trial court that “no one has... made any indication – written or not” that Ah Loo would respond to Baxter’s lawsuit:

*No one has appeared, or made any indication – written or not – that they intend to defend the case.*¹⁰

Relying on that less than candid representation, on the morning of May 20, 2016, Clark County Superior Court Judge Gregory Gonzalez entered a default judgment against Ah Loo for over \$1.35 million – based solely on Baxter’s brief testimony about her injuries and one sentence of hearsay about her medical expenses.¹¹ Other than an unauthenticated, unexplained, photocopied x-ray, Baxter did not produce a single medical record or bill, or testimony from a single treating physician or expert. Koniseti still had not been served or notified of the default hearing; and the only stated basis for Ah Loo’s liability remained the one sentence recitation that he owned the vehicle that Baxter rear-ended, while Koniseti was at the wheel, on March 2, 2016.¹²

⁹ CP 8.

¹⁰ CP 146; CP 153

¹¹ CP 122-31; CP 154; CP 178-80; CP 184-85.

¹² CP 6-11.CP 114-134; CP 146-85.

Later on the same day, May 20, 2016, Kemper called Hojem again. Still hearing no response, Kemper had defense counsel formally appear for Ah Loo. In the afternoon on May 20, 2016, Mr. Hojem finally answered the phone to speak with defense counsel – to advise that he was a few hours too late to avoid entry of a default; and to refuse to vacate the default judgment.¹³

Just a few days later, and about five weeks after the commencement of the lawsuit, Ah Loo filed his motion to vacate under CR 60.¹⁴ The collision had occurred fewer than three months earlier.

In the motion to vacate, Judge Gonzalez learned for the first time that Baxter's counsel had stonewalled Kemper during the week leading up to entry of the default judgment. Judge Gonzalez also learned that Ah Loo has strong or conclusive defenses to Baxter's claim against him; that Ah Loo's defense counsel appeared hours after the default was entered; that Ah Loo filed his motion to vacate a few court days later; and that vacating the default judgment in response to Ah Loo's prompt motion under CR 60 would not unduly delay or prejudice Baxter's pursuit of her claims -- on the merits.¹⁵

On this record, the trial court, acting in equity, properly exercised its broad discretion under CR 60, and under the relevant factors described in

¹³ CP 12; CP 36-38; CP 40-41.

¹⁴ CP 43-58.

¹⁵ *See generally* CP 25 – 58 (motion to vacate and supporting declarations).

*White v. Holm*¹⁶ and its progeny, to vacate the default judgment.¹⁷ This Court should *affirm* Judge Gonzalez's order under CR 60.

Furthermore, as Baxter's attorney, Mr. Hojem had "a duty as an officer of the court to use, but not abuse the judicial process."¹⁸ Taking a default judgment hurriedly, furtively and through deception of an opposing party and the trial court, as was done here, was an abuse of the process, not a proper use of it. Given the sharp practice that resulted in the entry of judgment by default against Ah Loo in the first instance, the attempt to reinstate that ill-gotten windfall on appeal should be sanctioned – particularly where, as here, Baxter has not offered any reasonable basis for reversal.¹⁹

Ah Loo therefore asks the Court to find that this appeal is frivolous and has been brought for an improper purpose within the meaning of RAP 18.9; and to *award his attorney fees and costs on appeal* under that Rule, in an amount to be established after a decision on the merits, and in a manner consistent with the requirements of RAP 18.1.

¹⁶ 73 Wn.2d 348, 438 P.2d 581 (1968).

¹⁷ CP 106-113 is the trial court's July 7, 2016 memorandum of decision. The trial court's order vacating default judgment, entered on July 22, 2016, does not appear to be included in Baxter's designation of clerk's papers and may not have been appended to her notice of appeal. CP 135 – 140.

¹⁸ *Sacotte Constr. v. Nat'l Fire & Marine Ins. Co.*, 143 Wn.App. 410, 417-18, 177 P.3d 1147, *rev. denied by Heights at Issaquah Ridge Owners Ass'n v. Scottsdale Ins. Co.*, 164 Wn.2d 1026, 195 P.3d 957 (2008).

¹⁹ RAP 18.9; *Johnson v. Mermis*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998).

II. RESPONDENT'S STATEMENT OF THE ISSUES

1. Did Superior Court Judge Gregory Gonzalez properly exercise the trial court's discretion under CR 60, and under *White v. Holm* and its progeny, to vacate the default order and judgment, which Judge Gonzalez himself had entered hours before counsel appeared for Ah Loo, and just a few days before Ah Loo brought his motion to vacate the judgment?

Ah Loo submits the answer to this question is "yes," and that this Court should affirm the trial court order vacating the default order and judgment against him.

2. Was the default judgment entered against Ah Loo under CR 55 fatally defective, because neither the Baxter Complaint nor the application for entry of a default judgment alleged facts or a legal theory sufficient to state a cause of action against Ah Loo?

Ah Loo submits the answer to this question is "yes," and that as a result, this Court should affirm the trial court order vacating the default order and judgment against him.

3. Is this appeal frivolous and a use of the appellate process for an improper purpose that should be sanctioned under RAP 18.9, because there is no reasonable argument that the trial court abused its discretion in vacating the default judgment against Ah Loo on these facts; and when the record demonstrates the judgment was taken through dishonest and inequitable conduct on the part of plaintiff's counsel in the first instance?

Ah Loo submits the answer to this question also is "yes," and that the Court of Appeals should award Ah Loo his attorney fees and costs reasonably incurred in response to Baxter's appeal.

III. RESPONDENT'S STATEMENT OF THE CASE

1. Michelle Baxter rear-ended the Koniseti vehicle on March 2, 2016.

On March 2, 2016, Catherine Koniseti was driving Richard Ah Loo's car. At about 5:00 a.m., she was headed home and was on an I-5 on-ramp when the brakes locked up and the car stopped.²⁰

Unable to move the car to the shoulder, Koniseti turned on her emergency flashers. She stayed in the car as many cars slowed down behind, maneuvered around her and continued along the highway.²¹

Michelle Baxter was driving along the same on-ramp on the morning of March 2, 2016. According to her own sworn testimony, Baxter was looking away -- over her left shoulder -- and not paying attention to the traffic in front of her as her car approached Koniseti's car. She did not turn her gaze forward until her daughter, sitting in the passenger seat, yelled out "car!" "Upon returning my eyes to the road in front of me," Baxter was unable to stop in time to avoid a collision with the rear-end of the Koniseti car. Baxter later claimed Koniseti's car was "dark" and had no lights on.²²

²⁰ CP 25-26.

²¹ *Id.*

²² CP 69.

A police officer arrived at the scene and allegedly told Baxter “I was not at fault.”²³ The police report states that the car Koniseti was driving was registered to “Ruiz, Denisse.”²⁴

2. *Baxter commenced her lawsuit against Koniseti and Ah Loo on or about April 16, 2016.*

Just days after the collision, Baxter had retained counsel, Thomas Hojem, who communicated with Kemper concerning “Insured: Denisse Ruiz.”²⁵ Kemper promptly acknowledged Hojem’s communication; referenced Richard Ah Loo as its insured; and asked for an explanation of Baxter’s “theory of liability.”²⁶ Hojem told Kemper that Baxter would “sue” if Kemper had not paid unspecified limits of coverage within two weeks, but did not explain why either Koniseti or Ah Loo should be liable for the accident, or provide any documentation to support Baxter’s damages claim.²⁷

Baxter filed her Complaint against Koniseti and Ah Loo on or about April 14, 2016; and made substitute service on Richard Ah Loo on or about April 16, 2016,²⁸ just six weeks after the collision. The allegations of the

²³ *Id.* It also appears the officer who arrived after the accident and prepared the report believed that Koniseti had applied her emergency brake and had “slowed abruptly and rotated” just a moment before Baxter rear-ended her. CP 66. This is seemingly inconsistent with the Baxter and Koniseti testimony in the record. CP 25-26; CP 68 – 69.

²⁴ CP 63.

²⁵ CP 73.

²⁶ CP 159-66.

²⁷ CP 73; CP 170 (“I suggest you look at the police report”).

²⁸ CP 1-5. Koniseti was not served. CP 116.

Complaint consist of eight numbered one-sentence paragraphs. There is precisely one factual allegation concerning Richard Ah Loo:

Defendant AH LOO is the owner of the vehicle that was driven by Defendant KONISETI.²⁹

The Complaint prayed for “judgment against the Defendants” for unspecified “general and special damages.”³⁰ It did not assert a cause of action against Ah Loo, or contain any factual allegations, other than ownership of the vehicle, to support any such cause of action.

3. *Kemper attempted to communicate with Baxter’s counsel in response to the lawsuit repeatedly during the week prior to entry of an ex parte order and judgment of default.*

Well aware that Kemper knew of the lawsuit and was responding to Baxter’s claims on behalf of Ah Loo, Mr. Hojem sent an email to Kemper on May 12, 2016, stating:

If no one appears within one week, we will move for default judgment.³¹

Having just sent that email stating that he would not bring a motion for default during a one-week grace period, Mr. Hojem immediately noted a hearing date to present an *ex parte* order of default and a default judgment.

A week prior to May 20, 2016, the court was notified through the court’s judicial assistant that plaintiff wanted to present an *ex parte* order of default and default judgment.³²

²⁹ CP 4.

³⁰ *Id.*

³¹ CP 75.

³² CP 106.

During the week that followed Hojem's email, Kemper repeatedly attempted to communicate with him in response to his email and the Baxter lawsuit. Hojem repeatedly declined to respond.³³ One week later, assuming a motion for default would not yet have been commenced, and certainly not yet decided -- as one would conclude based on Hojem's earlier email -- Kemper called once again in response to the lawsuit.³⁴ Yet again, Mr. Hojem declined to respond. A short time later, Kemper's adjuster left one last voicemail:

I am calling again regarding your client, Michelle Baxter. I have been trying to reach you regarding the suit that was filed on this case. I just needed to touch bases and see if there's any possibility of getting this claim resolved or if I need to get it to counsel to get an answer filed.³⁵

When Hojem still gave no response, Kemper contacted outside defense counsel for Ah Loo, who promptly emailed a notice of appearance to Hojem; filed the notice with the trial court; and called Hojem -- all in the afternoon on May 20, 2016.³⁶

³³ CP 37.

³⁴ Until recently, the trial court file also did not contain the motion papers Hojem submitted in support of Baxter's motion, which are dated May 19, 2016. Those documents were not part of the public record or the record on review until recently, when Ah Loo's counsel took the initiative to supplement and correct the record. CP 141-43.

³⁵ CP 77-78.

³⁶ CP 40-41.

4. *Baxter obtained an ex parte default order and judgment against Ah Loo on the morning of May 20, 2016 – after counsel told the trial court no one had responded to his May 12, 2016 email.*

What neither Kemper, Ah Loo nor defense counsel knew was that Baxter had presented an order of default, and a massive default money judgment, for entry *ex parte* on the morning of May 20, 2016. In a declaration submitted to the Court in support of the default judgment, dated May 19, 2016, Baxter's counsel told the trial court:

*No one has appeared or made any indication - written or not - that they intend to defend the case.*³⁷

At the outset of the *ex parte* hearing on Friday, May 20, Judge Gonzalez pressed counsel further on this point:

THE COURT: We are 34 days past the date of service. And you've not had a response?

MR. HOJEM: Correct, Your Honor. In my declaration I explain that I actually went above and beyond the requirements... I emailed the Complaint, the Summons and the Declaration of Service to... Mr. Ah Loo's adjuster... *I asked in one email if they are going to be defending the case. I did not receive a response.*³⁸

Never did Mr. Hojem advise Judge Gonzalez that "Ah Loo's adjuster" had indeed attempted to respond directly to "the email asking if they are going to be defending the case" – and on more than one occasion. Instead, counsel stood on his unqualified representation that "I did not receive a response... written or not." That statement quite simply was not true.

³⁷ CP 153.

³⁸ CP 117-18.

Relying on counsel's (mis)representation, Judge Gonzalez proceeded to hold an *ex parte* "prima facie hearing."

5. *Baxter obtained a default judgment against Ah Loo before Koniseti had been served; and without alleging facts or stating a legal theory sufficient to state a claim against Ah Loo for Koniseti's alleged negligence.*

At the hearing, with no opposition, Baxter relied on her claim that Koniseti's car was dark and that no stop lights, headlights or emergency lights were on -- to substantiate her claim that she had not been negligent, as the following driver, when she plowed into the rear end of Koniseti's vehicle, just a moment after taking her eyes off the road in front of her. Without anyone present to object to the admissibility of the police report, she relied on that report and the traffic citation issued to Koniseti as the sole evidence that Koniseti was at fault.³⁹ And since Koniseti never had been served, she had not appeared or answered and had no notice or opportunity to respond to allegations about her own allegedly negligent conduct or Baxter's claimed damages.⁴⁰ As a result, nothing will bar Koniseti herself from litigating those issues in the future.

There was no allegation in the Complaint, and no evidence offered at the *prima facie* hearing, that Ah Loo committed any act or omission that could

³⁹ CP 63-67; CP 153-54; CP 173-77. As Washington law makes clear, neither the report, nor the issuance or nonissuance of a traffic citation, should be admitted in evidence. RCW 46.52.080; *Kappelman v. Lutz*, 141 Wn. App. 580, 587, 170 P.3d 1189 (2007), citing *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967).

⁴⁰ CP 116.

have caused or contributed to Baxter's injury. The only factual reference to Ah Loo offered in support of the entry of a default judgment was the same one made in the Complaint:

*The motor vehicle driven by Ms. CATHERINE KONISETI was owned by defendant RICHARD AH LOO.*⁴¹

Furthermore, the only ostensible legal basis proffered for entry of a default judgment against Ah Loo was set forth in a one sentence Conclusion of Law:

*Defendant AH LOO is liable as the owner of the car.*⁴²

Without opposition, Baxter presented her claim for medical expenses based purely on hearsay: Mr. Hojem told the Court that he had been told over the phone that Baxter had medical bills of \$108,972.⁴³ With no medical records or testimony, and no competent evidence concerning the effect of the injury on Baxter's future employment, on her future medical needs, past or future wage loss, disability or other relevant factors, special damages were fixed at \$1.25 million, just as Baxter requested.⁴⁴

By mid-morning on May 20, 2016, just 34 days after service on Ah Loo, and after Kemper had repeatedly attempted to communicate with Baxter's counsel in direct response to the lawsuit, a default judgment was entered

⁴¹ CP 7; CP 154 at ¶ 9.

⁴² CP 8.

⁴³ CP 154 at ¶ 8.

⁴⁴ CP 7-8; CP 131 (awarding \$1.25 million "based upon the nature and extent of the injuries...").

against Ah Loo for \$1,358,972.26, with interest at 12% per annum – based on the bare allegation that Ah Loo owned the car that Baxter rear-ended on March 2, 2016 and, without any further factual support or viable legal theory, should be derivatively liable for Koniseti’s alleged negligence.⁴⁵

6. *Counsel appeared for Ah Loo hours after the default judgment was entered; and promptly moved to vacate the judgment.*

When Hojem received a call from defense counsel about the Baxter claim on the afternoon of May 20, 2016, he took the call promptly – to advise Ah Loo’s lawyer that he was a few hours too late, and that a default judgment of over \$1.35 million had been entered against Ah Loo that same morning.⁴⁶

Defense counsel immediately went to work to prepare and file a motion to vacate the default order and judgment under CR 60. The motion to vacate was on file, along with a complement of supporting lay and expert declarations, on Thursday, May 26, 2016 – shy of three months after the collision.⁴⁷

The motion to vacate demonstrated that Ah Loo had strong or conclusive defenses to liability – and, in fact, that Baxter’s Complaint and the trial

⁴⁵ CP 10 – 11. The interest rate also is improper under RCW 4.56.110(3)(b). The statute sets the interest rate for judgments predicated on tort liability at two percentage points above the Federal Reserve’s prime rate on the first day of the month the judgment is entered – making the proper judgment rate about 5.5%.

⁴⁶ CP 40-41.

⁴⁷ CP 43 – 58; supporting declarations at 15 – 23 (Roger A. Bennett, former Clark County Superior Court Judge); CP 25 – 26 (Catherine Koniseti); CP 28 – 29 (Richard Ah Loo); CP 31 -34 (Michael Schoenecker, auto mechanics expert); CP 36 – 38 (Karen Pearson, Kemper claims adjuster); CP 40 – 41 (Gary Western, Ah Loo defense counsel).

court's findings and conclusions in support of the default judgment failed to state a cognizable tort claim against Ah Loo at all.⁴⁸

Furthermore, Koniseti – who had not been served with the lawsuit, was not notified of and did not appear at the recent default hearing -- established that she had been stopped on the on-ramp with her emergency lights flashing because of a mechanical failure she did not cause or anticipate.⁴⁹ Baxter's own testimony established that she was not watching the road ahead and rear-ended Koniseti because of her own inattention and breach of her duties of care as the following driver.⁵⁰

The motion to vacate also showed that Kemper, acting on behalf of Ah Loo, had been trying to address the lawsuit with Baxter's counsel repeatedly during the week before the *ex parte* hearing on May 20 -- precisely for the purpose of averting a default, after Baxter's counsel had stated he would not "move for default" during a one week grace period.⁵¹

Further, it was beyond dispute that Ah Loo had appeared and moved to vacate immediately after the default was entered; that the default had been entered not long after an answer was due; and that vacating the default would

⁴⁸ CP 1-9.

⁴⁹ CP 25-26

⁵⁰ CP 68-69; CP 21, citing 6 Wash. Prac.; Wash. Pattern Jury Instr. Civ. WPI 70.04, and case law regarding the primary duty of the following driver to avoid a collision with the car ahead.

⁵¹ CP 36-38.

not unduly delay discovery and trial on the merits of Baxter's claims or prejudice her in any way – other than to compel her to prove her case.⁵²

Judge González issued a memorandum decision before entering an order vacating the judgment.⁵³ The trial court concluded that Baxter had obtained the default by virtue of the inequitable conduct of her counsel – indicating to Kemper that he would not bring a motion for default for a week; immediately setting a hearing for entry of default; and failing to reveal, when the trial court inquired, that Kemper had repeatedly contacted him to respond to the lawsuit during the week prior to the *ex parte* hearing on May 20, 2016.⁵⁴

This appeal followed.⁵⁵

IV. ARGUMENT AND AUTHORITIES

1. **The trial court's order granting Ah Loo's motion to vacate is reviewed only for an abuse of discretion; an abuse will more readily be found when a court has declined to vacate a default judgment instead of granting relief from judgment by default; and the trial court's order should be affirmed on any grounds supported by the record.**

Default judgments are not favored under Washington law. Judgment by default is a drastic action because "[i]t is the policy of the law that controversies be determined on the merits rather than by default."⁵⁶

⁵² See CP 15 - 23 (Judge Bennett's recap of the facts in the record, law and grounds for vacating judgment).

⁵³ CP 106-113. It appears Baxter has not placed the trial court's order vacating default in the appellate record and may not have appended the order to her notice of appeal.

⁵⁴ CP 106-108; CP 111 – 112.

⁵⁵ CP 135.

A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles.⁵⁷ 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.*"⁵⁸ In the context of an order or judgment of default, "[j]ustice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted."⁵⁹ Thus, the trial court must balance the requirement that each party follow procedural rules with the interest of the courts and parties in resolving disputes through a trial on the merits.⁶⁰

A motion to vacate is addressed to the sound discretion of the trial court and on appellate review, this Court should not disturb the trial court's disposition unless it clearly appears that discretion has been abused.⁶¹ An abuse of discretion exists only when *no reasonable person would take the position adopted by the trial court.*⁶² In reviewing the trial court's decision to vacate a default order or judgment, this Court considers the unique facts and

⁵⁶ *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960).

⁵⁷ *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968).

⁵⁸ *Id.* at 351 (emphasis ours).

⁵⁹ *Showalter v. Wild Oats*, 124 Wn.App. 506, 510-511, 101 P.3d 867 (2004), quoting *Johnson v. Cash Store*, 116 Wn.App. 833, 841, 68 P.3d 1099, *rev. denied*, 150 Wn.2d 1020 (2003).

⁶⁰ *Id.*

⁶¹ *Calhoun v. Merritt*, 46 Wn.App. 616, 619, 731 P.2d 1094 (1986).

⁶² *Morgan v. Burks*, 17 Wn. App. 193, 198, 563 P.2d 1260 (1977).

circumstances of each case – there are no hard and fast rules of decision that apply in every case.⁶³

Because judgment by default is strongly disfavored, “an abuse of discretion is less likely to be found when a default judgment has been set aside.”⁶⁴ Furthermore, this Court may sustain the trial court’s decision on any correct ground supported by the record, even though that ground was not expressly considered or relied upon by the trial court.⁶⁵

In addition, because a proceeding to vacate a default judgment is equitable in character, “a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable.”⁶⁶

In reviewing a trial court order on a motion to vacate a default judgment, Washington appellate courts long have considered a four-part test, derived from the Supreme Court’s 1968 decision in *White v. Holm*:

The primary factors are: (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,

⁶³ *Showalter*, 124 Wn. App. at 511, citing *Calhoun v. Merritt*, 46 Wn.App. at 619.

⁶⁴ *White v. Holm*, *supra* at 351-52.

⁶⁵ *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986), citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965).

⁶⁶ *Sacotte Constr., Inc. v. Nat’l Fire & Marine Ins. Co.*, 143 Wn.App. 410, 416-417, 177 P.3d 1147, *rev. denied by Heights at Issaquah ridge Owners Ass’n v. Scottsdale Ins. Co.*, 164 Wn.2d 1026, 195 P.3d 957 (2008); citing *Old Republic National Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wn.App. 71, 174 P.3d 133 (2008); *see also*, *Gutz v. Johnson*, 128 Wn.App. 901, 117 P.3d 390 (2005), *aff’d, in part*, *Morin v. Burriss*, 160 Wn.2d 745, 758, 161 P.3d 956 (2007) (plaintiff’s concealment of status of litigation may provide grounds for vacating judgment under *White v. Holm* and/or CR 60(b)).

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.⁶⁷

The third and fourth of the *White v. Holm* factors do not appear to be in dispute here. Ah Loo formally appeared and took steps to present a motion to vacate the Baxter default judgment within hours after the judgment was entered. And, as the lawsuit was commenced just weeks after the collision, and the default was taken just over 30 days after service on one of the two defendants, the order vacating the default cannot result in undue delay of discovery and trial on the merits, loss of evidence because of the passage of time or other prejudice to Baxter. This appeal is the only source of delay.

This leaves only the first two *White v. Holm* factors. The importance of each of the four factors will vary depending on the facts in each case, on something of a sliding scale. As the Court explained in *White v. Holm*:

*Thus, where the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default... On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to merely demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care...*⁶⁸

⁶⁷ *Showalter*, 124 Wn.App. at 511 (emphasis ours) (reciting the four factors described in *White v. Holm*, 73 Wn.2d at 352).

⁶⁸ *White v. Holm*, 73 Wn.2d at 352-53.

Once again, the *White v. Holm* Court stressed that the decision to vacate a default judgment “is, in the first instance, addressed to the sound judicial discretion of the trial court, and... this court, sitting in appellate review, will not disturb the trial court’s disposition of the motion unless it be made to plainly appear that sound discretion has been abused.”⁶⁹

Viewing all of the facts and circumstances concerning the accident that gives rise to Baxter’s claim against Ah Loo; the facts and circumstances surrounding the entry of Baxter’s default judgment; and Ah Loo’s prompt effort to vacate the judgment, it cannot be said that “no reasonable person would have adopted the position taken by the trial court.”⁷⁰ Judge Gonzalez reasonably exercised the trial court’s “sound judicial discretion” to vacate a default judgment that Baxter hurriedly and furtively took against Ah Loo – a judgment that lacked any factual basis or sound legal theory to support it when it was entered.

⁶⁹ *White v. Holm*, 73 Wn.2d at 351 (emphasis ours), citing *Yeck v. Dept. of Labor & Indus.*, 27 Wn.2d 92, 176 P.2d 359 (1947) (“courts look first to the showing made as to the existence of a meritorious defense. The more conclusive this showing is, the more readily will the court vacate the default judgment”); and *Borg-Warner Acceptance Corp. v. McKinsey*, 71 Wn.2d 650, 430 P.2d 584 (1967) (which adopted *Yeck*, and the principal that “a conclusive defense requires little excuse on a prompt motion to vacate an order of default”).

⁷⁰ *Morgan v. Burks*, cited at n. 62, *supra*.

2. Ah Loo demonstrated that he has strong or conclusive defenses to Baxter's claims against him; and, in fact, that the order and judgment of default was legally deficient when it was entered.

a. The allegations of Baxter's Complaint and the facts she presented to support a default judgment against Ah Loo failed to state a claim for which relief may be granted; the default judgment lacked an adequate factual and legal basis at the outset; and thus the trial court properly vacated that judgment.

The bare, rudimentary allegations of the Baxter Complaint failed to state a claim against Ah Loo for which relief can be granted under Washington law. The Findings of Fact and Conclusions of Law that ostensibly supported the \$1.35 million default judgment against Ah Loo provided no legally cognizable grounds for judgment against Ah Loo – because mere ownership of a vehicle, without more, does not make the owner liable for the conduct of others operating the vehicle.

As a result, the trial court could and should have declined to enter the proposed judgment in the first instance. Having entered judgment by default here nonetheless, the trial court properly vacated the deficient default judgment on Ah Loo's prompt motion, made mere days after entry of the judgment.

The law is clear that failure to appear, and the resulting entry of an order of default, do not automatically entitle plaintiffs to a default judgment. Where the facts alleged by a plaintiff are insufficient to support a legally cognizable

claim, a trial court will not err by declining to enter a default judgment⁷¹ or by vacating a default judgment predicated on a legally deficient claim.⁷²

A default is not "an absolute confession by the defendant of his liability and of the plaintiff's right to recover," but is *only* "an admission of *the facts* cited in the Complaint, which by themselves may or may not be sufficient to establish a defendant's liability."⁷³ A defaulting party does not admit mere unsupported *conclusions of law*.⁷⁴ Thus, "even after default it remains for the trial court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law."⁷⁵ Ultimately "a default judgment cannot stand on a complaint that fails to state a claim."⁷⁶

This Court applied those basic principles to affirm the trial court order vacating a default judgment in *Caouette v. Martinez*,⁷⁷ a reported decision from Division Two in a case quite similar to our own. In *Caouette*, the

⁷¹ *Kaye v. Lowe's HIW, Inc.*, 158 Wn.App. 320, 242 P.3d 27 (2010).

⁷² *Caouette v. Martinez*, 71 Wn.App. 69, 856 P.2d 725 (1993).

⁷³ *Pitts ex rel. Pitts v. Seneca Sports, Inc.*, 321 F. Supp.2d 1353, 1357 (S.D. Ga. 2004) (emphasis ours); see also *Descent v. Kolitsidas*, 396 F. Supp.2d 1315, 1316 (M.D. Fla. 2005) ("the defendants' default notwithstanding, the plaintiff is entitled to a default judgment *only* if the complaint states a claim for relief"); *GMAC Commercial Mortg. Corp. v. Maitland Hotel Associates, Ltd.*, 218 F. Supp.2d 1355, 1359 (M.D. Fla. 2002) (default judgment is appropriate *only* if court finds sufficient basis in pleadings for judgment to be entered, and that complaint states a claim).

⁷⁴ *Kelly v. Carr*, 567 F.Supp. 831, 840 (W.D.Mich.1983).

⁷⁵ *Id.* (quoting 10 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2688, at 477-478).

⁷⁶ *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1370 n.41 (11th Cir. 1997).

⁷⁷ 71 Wn.App. 69, 856 P.2d 725 (1993).

plaintiff's complaint alleged that Angelico Martinez was liable for "negligent entrustment" of his car to Augustine Martinez, after Augustine allegedly caused an auto accident. However, the complaint did not allege any *facts* to support the negligent entrustment claim.

When the plaintiff in *Caouette* moved for entry of a default judgment, her supporting affidavits, much like those offered to support the Baxter judgment, merely reiterated the conclusory allegation that Angelico was the owner of the vehicle Augustine was driving at the time of the collision, and was therefore liable for Augustine's negligence because he had "negligently entrusted" the vehicle to Augustine.⁷⁸ The trial court vacated the judgment against Angelico under CR 60(b)(11) on the grounds the judgment had no factual foundation.

This Court affirmed, noting that to state a claim for negligent entrustment, the plaintiff had to allege facts to show that Angelico "knew, or should have known, in the exercise of ordinary care, that the person to whom the vehicle was entrusted was reckless, heedless or incompetent."⁷⁹ The bare allegation that Angelico was "liable for negligent entrustment," without factual allegations to support the elements of a negligent entrustment cause of action, could not support a proper default judgment under CR 55.

Here, Baxter did not even state a legal theory for Ah Loo's liability, much less allege facts to support a cognizable cause of action which could

⁷⁸ *Id.*, 71 Wn.App. at 71-72.

⁷⁹ *Id.* at 78-79, citing *Mejia v. Erwin*, 45 Wn.App. 700, 704, 726 P.2d 1032 (1986).

render Ah Loo liable for *Koniseti's* alleged negligence. The Complaint alleged only that Ah Loo owned the vehicle Koniseti was driving; followed by the bare conclusion that both he and Koniseti should be liable for Baxter's damages.

In *Kaye v. Lowes HIW, Inc.*,⁸⁰ Division One held that the trial court had properly declined to enter a default judgment under CR 55 when the plaintiff seeking the judgment failed to produce facts to support his claim that Lowes was derivatively liable for the negligence of a driver under the plaintiff's theories of negligent entrustment and *respondeat superior*. The *Kaye* decision relied on a consistent line of authorities under Fed. R. Civ. P. 55, including the *Pitts v. Seneca Sports* and *Kelley v. Carr* cases cited above; and held, consistent with the federal case law, that "entry of default judgment is improper... where the party seeking default fails to properly state a claim upon which relief can be granted."⁸¹ The *Kaye* decision noted that to read Washington's CR 55(b) to require entry of a default judgment when the complaint and application for default fail to state a cognizable claim would lead to "absurd results" – like the unfounded default judgment entered against Ah Loo. *Kaye* also opined that its reading of CR 55(b) is consistent with this Court's application of CR 60(b) in *Caouette v. Martinez*.⁸²

⁸⁰ 158 Wn.App. 320, 242 P.3d 27 (2010).

⁸¹ *Kaye*, 158 Wn.App. at 329, (citing numerous federal authorities, including the *Chudasama v. Mazda Motor Corp.* decision quoted at page 20, above).

⁸² *Kaye*, 158 Wn.App. at 329, citing *Caouette*, 71 Wn.App. at 78.

In *Seneca Sports*,⁸³ the plaintiff's complaint alleged that Seneca manufactured a product that caused her injury, but did not contain any factual allegations to show that the product was defective, or that such defect was the proximate cause of her harm. The court held this was insufficient to support a default judgment -- because even when accepted as true, the *facts* alleged in the complaint and proffered in support of plaintiff's application for a default judgment were not sufficient to establish a *prima facie* product liability claim against the defaulting defendant. *Seneca Sports* opined that even though a complaint may fulfill the liberal notice pleading requirements of Fed. R. Civ. P. 8, if it does not allege specific facts sufficient to state a cognizable cause of action, a court should not enter a default judgment based on that complaint under Rule 55:

The well-pleaded allegations of the Complaint are to be accepted as true. However the Complaint must state a cause of action. In other words, judgment may be granted only for such relief as may lawfully be granted upon the well-pleaded facts alleged in the Complaint.⁸⁴

In our own case, the Baxter Complaint contained only one allegation as to Ah Loo: that he owned the vehicle involved in the collision. That allegation standing alone -- and accepted as true -- does not state a valid cause of action against Ah Loo. The Complaint does not allege agency, negligent entrustment, *respondeat superior*, or any other legal theory that could render

⁸³ 321 F. Supp.2d 1353, 1357 (S.D. Ga. 2004), cited with approval in *Kaye*, 158 Wn.App. at 326.

⁸⁴ *Seneca Sports*, 321 F.Supp.2d 1358, quoting *Patray v. Northwest Publ.*, 931 F. Supp. 865, 868 (S.D.Ga. 1996).

Ah Loo vicariously liable for Koniseti's alleged negligence; nor does the Complaint allege any facts which would support any of those theories of liability.⁸⁵

Similarly, when Baxter presented her application for a default judgment, she offered no further facts and articulated no cognizable grounds for liability as to Ah Loo. The Findings of Fact and Conclusions of Law each contain just one curt statement concerning Ah Loo: "The motor vehicle driven by Ms. Catherine Koniseti was owned by Defendant Richard Ah Loo" (in the Findings of Fact); and "Defendant Ah Loo is liable as the owner of the car" (in the Conclusions of Law).

Neither in her motion for default; nor her opposition to Ah Loo's motion to vacate the default; nor in her Brief of Appellant, has Baxter ever offered one word of argument, or cited a single authority, for the proposition that mere ownership of a vehicle involved in a collision, standing alone, renders

⁸⁵ To assert a viable claim for negligent entrustment, Baxter's complaint would need to allege facts to show that Ah Loo entrusted the vehicle to Koniseti when he knew, or should have known, that Koniseti was reckless, heedless or incompetent. *Mejia v. Erwin*, 45 Wn.App. 700, 704, 726 P.2d 1032 (1986). To state a viable claim based on *respondeat superior* liability, Baxter would need to allege facts to show that Koniseti was acting within the course and scope of her employment by Ah Loo at the time of the collision. *Breedlove v. Stout*, 104 Wn.App. 67, 69, 14 P.3d 897 (2001). To state a claim based on an agency theory, Baxter would need to allege facts to show that Ah Loo had an express or implied agreement that Koniseti would perform services for him, as principal, subject to Ah Loo's control or right to control the manner and means of performing those services. See 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 50.01 (6th ed.) (citing numerous consistent Washington authorities to support pattern instruction on agency in comments).

the vehicle owner liable for the negligence of the driver of the vehicle. Indeed, there is no such authority and no such cause of action.⁸⁶

In short, the default judgment against Ah Loo never should have been entered in the first instance under CR 55. The judgment creates what the *Caouette* and *Kaye* decisions acknowledge to be an absurd result: a substantial liability imposed on Ah Loo, by default, in the absence of any allegation or evidence of negligence or other fault on his part.

Instead, Ah Loo's alleged liability is purely derivative – the judgment holds him vicariously liable for the alleged conduct of Koniseti, absent any factual or legal basis for such derivative liability. But at the same time, Koniseti was not served and cannot be subject to the default judgment. Thus, Koniseti may yet prove that she is not the at-fault driver, or at least that Baxter bears substantial comparative fault. Koniseti also may well prove that Baxter's damages are far less than the amount that was set by default, based on the scantiest hearsay evidence, as to Ah Loo.

A default judgment should not have been entered against Ah Loo under CR 55. Having been entered, that judgment by default could not reasonably

⁸⁶ *After* entry of judgment by default and Ah Loo's motion to vacate, Baxter has attempted to argue an entirely new theory – not raised by the allegations in the Complaint or the findings and conclusions that supported the default judgment: that Ah Loo should be held liable for providing Koniseti with a vehicle with defective brakes. *See* Brief of Appellant at 38-39. However, a plaintiff may not amend her pleadings or supplement the record submitted in support of a default judgment *post hoc* in order to cure the judgment's vulnerability to a motion to vacate. *Seneca Sports*, 321 F.Supp.2d at 1358. If Baxter needs to amend her Complaint to state a cause of action, she must file and serve an amended complaint on Ah Loo, and Ah Loo must have an opportunity to appear and answer it, before she can obtain a default judgment based on the allegations of the complaint *as amended*. *Id.*

withstand a challenge under CR 60, *regardless of the circumstances that occasioned the entry of default, and regardless of Koniseti's negligence or lack thereof* – because the record has never contained any allegation or evidence sufficient to hold *Ah Loo* vicariously liable for Koniseti's allegedly tortious conduct or Baxter's alleged damages.

b. *The record established that Koniseti has strong defenses to Baxter's negligence claim; and therefore the trial court properly vacated the default judgment against Ah Loo, which was based solely on his ownership of the vehicle Koniseti was driving when Baxter rear-ended it.*

Baxter should be presumptively liable for the March 2, 2016 collision because she indisputably rear-ended the car Koniseti was driving – and she has admitted that because she was not paying attention to the road ahead, she was unable to stop in time to avoid the collision. In his motion to vacate the default judgment, *Ah Loo* showed that Baxter's attempt to hold Koniseti primarily liable for the accident stands the facts and the law on their heads.

As she did below, Baxter now argues that under *Goldfarb v. Wright*,⁸⁷ “the Defendant has no *prima facie* defense to liability.”⁸⁸ That argument fails for a number of reasons.

First, Baxter blows right past the fact that the default judgment was entered against “the Defendant” *Ah Loo*, and not Koniseti. As we already have demonstrated, the default judgment against *Ah Loo* was fatally flawed the moment it was entered, regardless of Koniseti's “fault” for the collision,

⁸⁷ 1 Wn. App. 759, 463 P.2d 669 (1970).

⁸⁸ Brief of Appellant at 30.

because Ah Loo's liability is purely derivative – and Baxter failed to allege facts that make out a cognizable vicarious liability claim against Ah Loo.

Second, Baxter has seriously misconstrued *Goldfarb v. Wright*. The defendant in that reported case rear-ended the plaintiff when she stopped for a traffic light that had turned red – the opposite of our case. The defendant asserted that his brakes failed as a way to exculpate himself from liability as the following driver, and for breach of his statutory duty, under RCW 46.60.230, to stop “when facing a traffic control signal showing ‘red’.”

In our case, *Baxter* rear-ended Koniseti. Koniseti testified that she had her emergency flashers on to warn approaching drivers. *Baxter* admitted that she was not looking at the traffic ahead and that as a result of her own inattention to the road ahead, she had no time to stop when she finally looked in her own direction of travel. Koniseti's “defense” is not predicated on brake failure – it is based on Baxter's own damning admission of her own negligent failure to watch the road in front of her.⁸⁹ *Baxter* is now offering Koniseti's brake failure as a defense to her own negligence, not the other way around.

The following driver's burden of production to take a “brake failure” defense to the jury in *Goldfarb v. Wright* does not apply here.

Third, to determine whether a defendant has a *prima facie* defense sufficient to support an order vacating a default judgment, all facts should be

⁸⁹ Furthermore, the only “evidence” of Koniseti's negligence that Baxter has offered is the inadmissible police report and the similarly inadmissible traffic citation issued to Koniseti after the collision. Neither the report, nor the issuance or nonissuance of a traffic citation, is admissible to prove Koniseti was negligent. RCW 46.52.080; *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967).

viewed in favor of the party seeking relief from the default.⁹⁰ Here, there are disputed facts concerning how an accident occurred and who caused it that are more than sufficient to create a jury question; and if the jury accepts the admissible evidence favorable to Koniseti as true – including Baxter’s own admission against interest – the jury could easily find that Baxter bears all or the overwhelming majority of the fault for this accident.

Fourth, Baxter appears to argue that a defense sufficient to justify vacating a default judgment must completely avoid all fault or liability to constitute a *prima facie* defense, much less a “strong or conclusive” one; and that somehow the Legislature’s adoption of comparative fault means anything less cannot be a defense to liability for the purposes of the *White v. Holm* four-part test under CR 60.⁹¹ Baxter cites no authority for this proposition – because there is none; and because the proposition is directly contrary to Washington law. Our cases consistently hold that a strong or *prima facie* defense to a substantial portion of the plaintiff’s claim will support an order vacating a default judgment under CR 60.⁹²

⁹⁰ *Ha v. Signal Elec., Inc. Ha v. Signal Elec. Inc.*, 182 Wn.App. 436, 449, 332 P.3d 991 (2014), *rev. denied*, 182 Wn.2d 1006, 342 P.3d 327 (2015).

⁹¹ Brief of Appellant at 33-38. Baxter finds “inspiration” for this argument in *White v. Holm*. No Washington court ever has been thus inspired.

⁹² *See Ha v. Signal Elec., Inc.*, 182 Wn.App. at 450 (defendant is *not* required “to conclusively establish ... the sole cause” of plaintiff’s injury to state a *prima facie* defense sufficient to vacate a judgment under CR 60); *see also Sacotte*, 143 Wn. App. at 418-19 (“additional insurer” defendant stated a “strong or conclusive defense” to a default judgment for a general contractor’s liability for all damages at a condominium project, when insurer’s coverage would extend, at most, to damages arising from the work of the defendant’s named insured subcontractor).

3. *The trial court properly exercised its discretion to vacate the default judgment as to liability and damages.*

The default judgment against Ah Loo was fatally defective *ab initio*, because the judgment was based on a Complaint, and on skimpy affidavits, findings and conclusions, that contained nothing more than the bare allegation that Ah Loo owned the car that Koniseti drove on March 2, 2016. That was legally insufficient to state a claim against Ah Loo for which relief can be granted; and that was all that was required for the trial court and this Court to vacate the judgment under *Caouette, Kaye*, and the consistent line of Federal authorities cited and adopted in both of those Washington cases.

Nevertheless, Baxter now suggests, for the first time, that the trial court should permit Ah Loo to litigate “comparative fault,” but that the award of damages by default should stand.⁹³ She does not cite a single authority for this bizarre proposition – and, instead, relies on Washington authorities that have held a trial court may *vacate an award of damages* to permit the defaulting defendant to challenge the plaintiff’s damages claims – *even when there is no defense to liability whatsoever*.

For example, in *Calhoun v. Merritt*,⁹⁴ Merritt rear-ended Calhoun when Calhoun was stopped at an intersection. About a year later, Calhoun served Merritt with a tort lawsuit. A month later, Calhoun moved for default and offered evidence to support an award of special and general damages. The

⁹³ Brief of Appellant at 39-40.

⁹⁴ 46 Wn.App. 616, 731 P.2d 1094 (1986).

trial court declined to vacate the judgment as to both liability and damages. On appeal, Division Three agreed with the trial court that the defendant could not offer any defense to liability; and thus the trial court properly let the default judgment stand as to liability. However, the Court of Appeals held that under the circumstances, the trial court had erred by declining to vacate the award of damages. Division Three noted that Merritt had not willfully delayed responding to the lawsuit; he was justified in thinking his insurer was involved in the case and was protecting his interests; the default had been entered shortly after the time for an appearance and answer had run; and in fairness, Merritt could not be expected to put on a damages defense without any opportunity for discovery, particularly where the bulk of the damages awarded consisted of purely subjective “general damages.”⁹⁵

In short, *Calhoun v. Merritt* could very well be our own case – except that here, Ah Loo also has a conclusive defense to liability because he was not involved in a motor vehicle accident with Baxter, and there are no valid grounds for holding him vicariously liable for the accident.

Indeed, Ah Loo presented a far stronger case for vacating the judgment as to *liability and damages*. The accident had occurred just a few months before Baxter sought her judgment by default – not a year before, as in *Merritt*. Furthermore, Ah Loo’s liability, if any, is merely derivative of Koniseti’s. And, because Koniseti was not served before Baxter obtained

⁹⁵ *Calhoun v. Merritt*, 46 Wn.App. at 620-21.

judgment by default, she will be free to obtain discovery and to challenge the damages award anyway. Thus, it would be an absurd result to hold Ah Loo to an award of damages that is purely the product of a hastily taken default, while the allegedly at-fault driver herself remains free to litigate the very same damages claim.

Nor does *Shepard Ambulance v. Helsell*⁹⁶ offer any support for Baxter's argument. In *Shepard Ambulance*, the plaintiff obtained a default judgment against Shepard for injuries he allegedly incurred in a fall while being moved out of an ambulance. Ten months later, Shepard went to the Helsell law firm and asked its attorneys to move to vacate. Helsell failed to bring a motion for six months – four months past the 1-year limit for such motions under CR 60(b)(1). The case went on appeal after the trial court's ruling on cross-motions for summary judgment in Shepard's malpractice suit against Helsell. As a result, the Court of Appeals reviewed the trial court ruling *de novo*, and not under the deferential abuse of discretion standard that applies here.

Division One agreed with the trial court that Helsell's negligence had not forfeited Shepard's right to vacate the default as to liability, because Shepard had no *prima facie* defense to liability. However, the *Helsell* opinion also held that Shepard probably would have been able to vacate and mount a challenge to the damages award – even ten months after it was entered. While the reported decision does not describe the evidence in detail, it appears that

⁹⁶ 95 Wn.App. 231, 974 P.2d 1275 (1999).

like the damages Baxter obtained by default, the plaintiff's default judgment in *Shepard Ambulance* was based solely on his own declaration concerning the nature and extent of his injuries and his future prognosis.

The decision concerning the damages award in *Shepard Ambulance* relied on the same basic principle applied in *Calhoun v. Merritt*:

A trial court has discretion to vacate the damages portion of a default judgment *even where no meritorious defense was presented. ...*

The *Calhoun* court held that it would be inequitable and unjust to deny a motion to vacate the damages portion of the default judgment on the ground that the defendant failed to present a valid defense *where the pain and suffering award warranted further discovery.*⁹⁷

Baxter's attempt to rely on *Shepard Ambulance* as authority for the argument that the damages awarded to her by default should stand, regardless of Ah Loo's defenses to liability, is not merely illogical - it is frivolous.

Similarly, Baxter's attempt to rely on *Little v. King*⁹⁸ completely ignores the very different facts in that case. The defendant King rear-ended Little's car going about 60 miles per hour on the freeway in a clear liability case. Three years later, Little served her summons and complaint on King and provided a copy to her own UIM insurer, St. Paul, because King was uninsured. St. Paul apparently failed to inquire further into the progress of the case and declined to intervene.

⁹⁷ *Shepard Ambulance*, 95 Wn.App. at 241 (emphasis ours), citing *Calhoun*, 46 Wn. App. at 620-21.

⁹⁸ 160 Wn.2d 696, 161 P.3d 345 (2007), Brief of Appellant at 27-28.

More than a year after the lawsuit was filed, and eleven months after King and St. Paul received the summons and complaint, no one had answered. Little moved for a default judgment.⁹⁹ With liability uncontested, the trial court held a damages hearing -- more than four years after the collision. King was provided notice and attended the hearing. St. Paul still did nothing. Little presented medical bills, declarations from numerous treating physicians concerning her course of treatment and prognosis, disability certifications and other solid, detailed evidence. At the hearing, the trial judge invited King to file an answer and stated the court would not enter a default judgment if King filed an answer within a reasonable time.¹⁰⁰ The court still did not enter a default judgment, concerned the record was insufficient to support a substantial damages award. Later, after considering additional damages evidence, the trial court finally entered judgment for \$2.15 million, specifically allocated to past economic damages, future economic damages and general damages.

Weeks later, St. Paul finally intervened and moved to vacate the judgment. There still was no defense to liability. The only "defense" St. Paul offered to Little's claimed damages was contained in the affidavit of an adjuster who had reviewed the voluminous medical records and speculated

⁹⁹ *Id.* at 700 – 702.

¹⁰⁰ *Id.*

that Little's pre-accident complaints of "headache" and "hip pain" could mean she had a "pre-existing condition."¹⁰¹

On that flimsy showing from St. Paul, a different trial judge later vacated the award of damages by default -- well over four years after the accident.¹⁰² On appeal, the Supreme Court reversed, holding in a 5-4 decision that the trial court had abused its discretion by vacating the damages award.¹⁰³

However, even under the extreme facts in *Little v. King*, the Supreme Court's decision was a close call. Four of the nine Justices opined that because the trial court has broad discretion to grant relief from default, and because appellate review of an order vacating a default should be extremely limited, the Supreme Court should have affirmed the order vacating the award of damages by default.¹⁰⁴

We need not belabor the glaring differences between *Little v. King* and our case. Baxter brought suit weeks after the collision -- not years. She hurriedly and furtively obtained a default a few weeks after service on Ah Loo -- not a year later. The default was taken with no notice to Koniseti, Ah Loo or Kemper -- not with Ah Loo or Koniseti at the hearing and offered a chance to answer. Ah Loo has a conclusive defense to his own liability and offered at least a *prima facie* defense to Baxter's tort claim against Koniseti --

¹⁰¹ *Id.* at 704-705.

¹⁰² *Id.* at 702.

¹⁰³ *Id.* at 705-708.

¹⁰⁴ *Id.* at 708-727 (Madsen, J., dissenting).

not undisputed liability. Finally, unlike the plaintiff in *Little v. King*, Baxter did not submit any medical testimony, records, bills, disability reports, or other evidence to support her claim for medical expenses and a massive, undifferentiated award of general damages.

Read together, the decisions in *Calhoun v. Merritt*, *Shepard Ambulance v. Helsell*, and *Little v. King* could not lead a reasonable reader to any other conclusion: the trial court in this case did not abuse its broad discretion by vacating the default judgment against Ah Loo in its entirety. Indeed, the trial court would have committed a manifest abuse of discretion if it had declined to vacate the judgment. Not a single case cited in Baxter's opening brief – nor a single reported Washington decision of which we are aware – has held, or ever should hold, that a defendant who has demonstrated a *prima facie*, strong or conclusive defense to liability, sufficient to obtain relief under CR 60, has nevertheless forfeited his right to challenge the plaintiff's damages.

4. *The record demonstrates that Baxter wrongfully obtained a default judgment by means of deceptive and inequitable conduct that misled Ah Loo's insurer and the trial court; and therefore the trial court properly exercised its broad discretion to vacate the default judgment to avoid injustice.*

Under *White v. Holm*, because Ah Loo has demonstrated a conclusive defense to Baxter's claims – her failure to state a viable claim for vicarious liability against him -- “scant time [should] be spent inquiring into the reasons which occasioned the entry of the default...”¹⁰⁵

¹⁰⁵ *White v. Holm*, 73 Wn.2d at 352.

Nevertheless, Baxter argues that the trial court erred by vacating her default judgment against Ah Loo because “there is no coherent explanation for their [Ah Loo and Kemper’s] delay.”¹⁰⁶

The facts in the record prove Baxter wrong. The record amply demonstrates that Ah Loo reasonably expected Kemper would respond to the Baxter lawsuit; and that Baxter’s counsel hurriedly obtained a money judgment by default, a mere 34 days after service on Ah Loo – in what turned out to be a race to the courthouse that Ah Loo’s defense counsel lost by a matter of hours. Baxter’s counsel obtained the judgment by stonewalling Kemper’s efforts to respond to his communications about the lawsuit; and by misleading Judge Gonzalez about Kemper’s efforts to respond, on Ah Loo’s behalf, to his communications about the lawsuit.

Our courts consistently hold that the trial court’s task in considering a motion to vacate a default is to do justice. There is a strong policy in favor of deciding cases on the merits; and while egregious and willful delay and failure to appear and answer is not tolerated, cases should not be decided as a result of sharp practice and procedural gamesmanship.¹⁰⁷

The record here is clear: Baxter’s counsel rushed to file a lawsuit shortly after the collision; he misled Kemper and the trial court to obtain a massive money judgment by default, on scant evidence, with notice to no one, 34 days after service on Ah Loo, who was not involved in the collision and against

¹⁰⁶ Brief of Appellant at 27.

¹⁰⁷ *Sacotte*, 143 Wn. App. at 414-15 and at 417-18.

whom Baxter had not even stated a viable vicarious liability claim. He also did so before serving process or notice of the default hearing on Koniseti, the driver Baxter rear-ended, and who will assert substantial defenses to her own alleged fault in the collision and to Baxter's claimed damages.¹⁰⁸

While the trial court's ruling may be affirmed on any grounds supported by the record on review,¹⁰⁹ Judge Gonzalez's memorandum decision provides its own compelling reason for vacating the Baxter default judgment against Ah Loo. As Judge Gonzalez explained, the trial court concluded Baxter's attorney had played an unfair, misleading game with Kemper, and had been untruthful with the trial court, in order to hurriedly obtain an *ex parte* default judgment shortly after the time for an answer had run.

Judge Gonzalez looked to this Court's decision in *Gutz v. Johnson*,¹¹⁰ which the Supreme Court reviewed as one of the cases consolidated in *Morin v. Burris*,¹¹¹ for an analogous case involving an attorney's effort to game an insurer intent on defending a claim against its insured, through concealment of the pendency of a default proceeding.¹¹²

¹⁰⁸ Before the default judgment was entered, the trial court file did not contain a record of the relief that Baxter was seeking – the default motion papers were not placed in the court file until months later. CP 141-43.

¹⁰⁹ *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012), citing *Nast v. Michaels*, 107 Wn.2d at 308; *Ha v. Signal Elec. Inc.*, 182 Wn.App. at 446.

¹¹⁰ 128 Wn.App. 901, 117 P.3d 390 (2005).

¹¹¹ 160 Wn.2d 745, 161 P.3d 956 (2007).

¹¹² CP 109-112.

In *Gutz*, the plaintiff's counsel hid the existence of litigation from the insurer who was communicating with him in an effort to resolve plaintiff's claim. This Court held the insurer's extensive pre-suit communications constituted an "informal appearance" that required notice prior to a hearing to enter a default – which had not been given. As a result, this Court vacated the default judgment as void *ab initio*, reversing the trial court.¹¹³

In reviewing *Gutz*, the Supreme Court announced a new rule: that pre-suit communications, standing alone, will not constitute an appearance requiring notice under CR 55.¹¹⁴ However, the Supreme Court also noted that the record showed communications between the insurer and the plaintiff's counsel, *after* suit was filed, that were consistent with *Gutz*'s intent to defend, and which likely misled the insurer about the status of the lawsuit. As this Court's reported decision in *Gutz* also explained, plaintiff's counsel had not been forthcoming with information about the pendency of a motion for default or the existence of an *ex parte* default judgment. The Supreme Court remanded to Division Two to determine whether, on those facts, equitable considerations would still justify vacating the default.¹¹⁵

Here, while Kemper was aware of the litigation when it received Hojem's May 12, 2016 email, it did not know that Baxter's counsel already had noted a hearing date for entry of a default judgment. For the next week,

¹¹³ *Gutz*, 128 Wn.App at 395-97.

¹¹⁴ *Morin*, 160 Wn.2d at 755-760.

¹¹⁵ *Morin*, 160 Wn.2d at 758-59.

Hojem repeatedly ducked calls from Kemper – apparently because if they couldn't ask, he would not have to tell. To make matters worse, Hojem's declaration in support of the entry of a seven figure *ex parte* default judgment falsely assured the trial court that no one had responded to the lawsuit *in any way, written or oral* – and counsel affirmed that misrepresentation on the record in response to the trial court's questioning.¹¹⁶

Baxter attempts to argue the trial court misapplied *Gutz* because, unlike the insurer in that case, Kemper was aware of the lawsuit. Baxter also disingenuously states, repeatedly, that her counsel gave Kemper “notice that a default judgment was pending,”¹¹⁷ when her counsel's May 12, 2016 email said nothing of the sort, and in fact said just the opposite. The record shows that on multiple occasions during the following week, Kemper attempted to respond to Hojem's email to resolve the claim (given the limits of coverage are only \$25,000 per person/\$50,000 per accident) or to advise Hojem that defense counsel would appear to answer and avert a default judgment if the case was not settled.¹¹⁸ At the very least, Hojem's email, and his later refusal to respond to Kemper's calls, while furtively noting a default hearing, created the same sort of confusion about the status of the litigation and pendency of a motion for default that was at issue in *Gutz*.

¹¹⁶ CP 117-19; CP 146-47. CP 153.

¹¹⁷ Brief of Appellant at 3, 19.

¹¹⁸ CP 36-38; CP 40-41.

Judge Gonzalez was not born yesterday and saw this for exactly what it was: a concerted effort to string Kemper along until a default judgment had been entered. The record supports the trial court's conclusion, to which this Court should defer on appeal from an order vacating default judgment.

Furthermore, since the Supreme Court decided *Morin*, a number of cases have found similarly inequitable conduct on the part of plaintiff counsel justified relief from default. For example, in *Sacotte v. National Fire & Marine*,¹¹⁹ the defendant ("NFM") was an insurer, usually represented in coverage matters by Jerry Sale. However, Sale could not represent NFM in the plaintiff's lawsuit for additional insured coverage and "bad faith" because another attorney in his firm represented the plaintiff in another matter – a conflict that Sale had earlier agreed to waive. Sale testified that he contacted plaintiff counsel, Greg Harper, to request that he not take a default, and to advise that NFM would be retaining other counsel to formally appear and defend the insurance coverage/bad faith action, since Sale had a conflict. Days later, without notice, the plaintiff took a multimillion dollar default judgment. When NFM moved to vacate, Harper denied he had spoken with Sale and asserted that his standard practice was not to honor "informal appearances" anyway. The trial court declined to vacate the default.

¹¹⁹ Full citation at n. 18. *supra*.

On appeal, Division One reversed and directed the trial court to vacate the judgment. The Court took aim at Harper's inequitable conduct, standing alone, as sufficient justification to vacate the hastily taken default:

As an attorney, Harper has a "duty as an officer of the court to use, but not abuse the judicial process." This duty includes employing an acceptable level of professional courtesy to fellow attorneys and their clients. ... "Vigorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate."¹²⁰

There is no sugar coating it: Hojem's conduct here was not legitimate advocacy. In a short telephone discussion – had Hojem been playing fair and being honest -- Kemper would have learned a date had been set for a default hearing. There is no question Kemper would have retained counsel for Ah Loo then and there to avert the entry of default. Hojem avoided that outcome by stonewalling Kemper for a week; and then concealed his conduct from the trial court when he appeared for the default hearing.

Judge Gonzalez understandably was disturbed by this conduct; and understandably decided this conduct standing alone was sufficient to vacate the ill-gotten default judgment in the interest of justice, regardless of the other more than adequate grounds for relief under CR 60.

5. *This appeal is frivolous; and as a result, the Court should award sanctions to Ah Loo under RAP 18.9.*

The default judgment against Ah Loo was obtained through inequitable conduct. That judgment was based on a fatally defective claim, unsupported

¹²⁰ *Sacotte*, 143 Wn.App. at 417-18 (citations omitted).

by any alleged facts other than his ownership of the motor vehicle Baxter rear-ended, or by a stated cause of action. The judgment should not have been entered against Ah Loo in the first instance, because no matter what the evidence concerning *Koniseti's* conduct, the Complaint and the motion for default failed to state a claim against *Ah Loo*, and the default was obtained before Baxter had even served Koniseti.

This was a classic case of a default taken in a hurry – a lawsuit commenced mere weeks after the collision between Koniseti and Baxter; a default taken days after the time to appear and answer had passed, and taken while Ah Loo's insurer was seeking to communicate with Baxter's counsel in direct response to the lawsuit.

And, it presented a classic scenario for relief from default – Ah Loo appeared hours after the default was entered, moved to vacate days later, and presented an iron-clad defense to his own liability -- as well as, at the very least, a *prima facie* defense to the absent driver Koniseti's liability. Furthermore, the judgment included a massive award of damages that had been entered without a single medical opinion or medical record to support it.

Counsel's conduct in obtaining the default, by deceiving Kemper and the trial court, was inequitable and unconscionable. Attempting to revive that default on appeal, given the trial court's broad discretion to grant equitable relief under CR 60, the deferential standard of review of appeal, and the lack

of authority to support the relief Baxter now asks the Court to grant, is taking the entire game a giant step too far.

This appeal is frivolous within the meaning of RAP 18.9. “An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised.”¹²¹

The law is well-settled: a trial court has broad discretion to grant a motion to vacate, and does so based on equitable considerations; the law favors resolution of claims on the merits, not by default; and an abuse of discretion will only be found when no reasonable person could reach the result the trial court did. The record in this case does not permit a reasonable person to conclude that the trial court abused its discretion. Indeed, on this record, the most reasonable conclusion is that the trial court erred when it entered a default judgment in the first instance, because Baxter’s Complaint and motion for default failed, on their face, to state a cause of action against Ah Loo or to provide substantial evidence to support Baxter’s claimed damages.

Ah Loo therefore asks the Court to award the reasonable attorney fees and costs incurred in responding to this appeal, in an amount to be established as required under RAP 18.1.

¹²¹ *Johnson v. Mermis*, 91 Wn. App. 127, 137, 955 P.2d 826 (1998), quoting *Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200, rev. denied, 132 Wn.2d 1010, 940 P.2d 654 (1997).

V. CONCLUSION

Judge Gonzalez properly exercised the trial court's broad discretion to vacate the default judgment against Ah Loo under CR 60 – a judgment the Judge himself had entered days before Ah Loo moved to vacate, and which did not meet the requirements of CR 55 in the first instance.

Ah Loo therefore asks this Court to affirm the trial court order vacating the default judgment against Ah Loo and in favor of Baxter; and to remand this matter for discovery and trial on the merits. Ah Loo also asks the Court for an award of reasonable attorney fees and costs on appeal, pursuant to RAP 18.9.

DATED and respectfully submitted this 3rd day of February, 2017.

By /s/ David M. Jacobi, WSBA #13524

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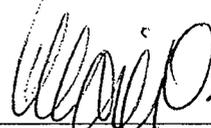
The undersigned certifies, under penalty of perjury ^{BY AP} ~~under the laws of~~ the State of Washington, that on the below date I caused to be filed with Division II of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing Brief of Respondent Ah Loo and Motion for Sanctions under RAP 18.9, upon the following:

By electronic and U.S. Mail

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DATED at Seattle, Washington this 3rd day of February, 2017.



Alicia Ossenkop