

No. 49597-0-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

TERRY A. VANDERSTOEP and CELESTE VANDERSTOEP,
husband and wife,

Respondents,

v.

GARY GUTHRIE and KATHLEEN GUTHRIE, as Guardians of
HOWIE I. GUTHRIE, a minor,

Appellants.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. David Gregerson)

CORRECTED OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Defendants-Appellants (“Defendants”) appeal from an August 15, 2016 Order Denying Defendants’ Motion to Set Aside the Default Order and Motion to Vacate the Default Judgment. Defendants’ Motions related to a Default Order, Findings of Fact, Conclusions of Law and Default Judgment, entered by the trial court on March 30, 2016.

II. ASSIGNMENT OF ERROR

The trial court erred in denying Defendants’ Motion to Set Aside the Default Order and Motion to Vacate the Default Judgment.

III. STATEMENT OF ISSUES

- 1) Should the default judgment have been vacated because there was a prima facie defense to damages?
- 2) Should the default judgment have been vacated because the failure to timely appear was due to mistake, inadvertence or excusable neglect?
- 3) Should the default judgment have been vacated because there was due diligence upon learning of the default and there would be no substantial hardship to plaintiffs?
- 4) Did the trial court fail to apply the appropriate standards when it refused to vacate the default judgment?

IV. STATEMENT OF THE CASE

Defendant Kathleen Guthrie and her minor son, Howie I. Guthrie, were involved in a motor vehicle accident with plaintiff Terry A. Vanderstoep on July 10, 2014. CP 101. Defendant Kathleen Guthrie promptly reported the accident to her automobile insurance carrier, American Family. CP 101. American Family began handling all communications on behalf of Defendants with Plaintiffs, their insurers, and later on, their attorney, William Robison. CP 101-102.

On January 18, 2016, Plaintiffs' counsel sent American Family claims adjuster Stacy Thrush ("Thrush") a settlement demand, to which Thrush extended a counteroffer. CP 53. On February 16, 2016, by way of a phone conference, Plaintiffs' counsel advised Thrush that he would not make a counteroffer lower than \$225,000. CP 53. Thrush advised that American Family was not willing to offer more than \$145,060.44 at that time. CP 53. Plaintiffs' counsel advised he would obtain his client's permission to file a lawsuit. CP 53.

On February 18, 2016, Plaintiffs filed suit against Defendants. CP 53. Defendant Kathleen Guthrie was served with the summons and complaint on February 27, 2016. CP 102. Plaintiffs' counsel did not advise Thrush or anyone at American Family that Plaintiffs had filed a lawsuit or that Guthrie had been served. CP 53-54.

The same day she was served, on February 27, 2016, Defendant Kathleen Guthrie called and spoke with an American Family representative and informed them she had been served with Plaintiffs' lawsuit. CP 102. The phone call lasted thirteen minutes. CP 102. During that telephone call, Defendant Guthrie gave the American Family representative, who was assigned to take such calls, the pertinent information related to the lawsuit and advised she had been served with the summons and complaint. CP 102. Defendant Guthrie answered all questions that were posed to her. CP 102.

Because Defendant Guthrie did not receive any communications from American Family, sometime between February 29, 2016 and March 1, 2016, Defendant Guthrie called American Family's general claims number, entered what she understood to be Thrush's extension number, and left a voicemail informing Thrush that she had been served. CP 102. On March 7, 2016, defendant Guthrie again called American Family's general claims number, entered what she understood to be Thrush's extension number, and left a voicemail to inform Thrush that she had been served. CP 102. Thrush never received the messages and it has not been determined why. *See* CP 53.

Plaintiffs filed a Motion for Default on March 24, 2016, without providing notice to Defendants or American Family. CP 44. On March

30, 2016, the trial court held a hearing on Plaintiffs' Motion for Default. CP 44. No notice of the hearing was provided to Defendants or American Family. CP 44. Upon reviewing Plaintiffs' Motion, supporting declaration, exhibits, and hearing Plaintiffs' testimony, the Court entered the Default Order, Findings of Fact, Conclusions of Law, and Default Judgment against Defendants the same day. CP 32-25, 44. The hearing lasted approximately 18 minutes. RP, Vol. I, 3, 15.

The Findings of Fact, Conclusions of Law, and Default Judgment awarded Plaintiffs a total of \$373,836.44 in damages: \$73,836.44 in economic damages and \$300,000 in non-economic damages. CP 32–35.

On April 21, 2016, unaware of the lawsuit and not having heard from Plaintiffs' counsel, Thrush called Plaintiffs' counsel and left a voicemail asking whether Plaintiffs had reconsidered the offer or whether they instead intended to file suit. CP 54. Thrush requested a courtesy copy of the complaint if Plaintiffs indeed filed suit. CP 54. Thrush did not receive any return phone call or other communication from Plaintiffs' counsel. CP 54. On June 7, 2016, Thrush again called Plaintiffs' counsel. CP 54. It was during this phone call that Thrush first learned about the lawsuit and default judgment. CP 54. Thrush requested Plaintiffs' counsel immediately send her a copy of the complaint. CP 54. That same day, June 7, 2016, Thrush called Defendant Guthrie to inquire whether she

had been served and to advise her that a default judgment had been entered. CP 103. Defendant Guthrie told Thrush that she had called to inform her of the lawsuit soon after she was served. CP 103. Thrush explained that she did not receive any of Guthrie's phone calls or voicemails. CP 103. Defendant Guthrie did not know American Family was unaware of the lawsuit until this phone call on June 7, 2016. CP 103.

On June 8, 2016, American Family retained attorney Megan Ferris to defend. CP 44. That same day, Ms. Ferris served a Notice of Appearance on behalf of Defendants. CP 38-39. On June 9, Ms. Ferris first contacted plaintiffs' counsel to discuss the default judgment. CP 44. As plaintiffs' counsel was unwilling to voluntarily vacate the default, on July 6, Defendants filed Defendants' Motion to Set Aside the Default Order and Motion to Vacate the Default Judgment. CP 85. Hearing on the Motion was held before the Hon. David Gregerson on July 29, 2016. RP, Vol. II. At hearing, Judge Gregerson denied the Motion and an Order to that effect was entered on August 15, 2016. RP, Vol. II, 28, CP 149-150. In denying the Motion, the trial court commented at hearing:

I'll confess that when I initially was reading the materials, I had an inclination in favor of overturning the default judgment under the circumstances, but, after the careful review of the cited cases and hearing the argument, I think the more appropriate ruling is that the disputing of the noneconomic damages by itself seems to be insufficient grounds for oversetting the default.

V. ARGUMENT

A. Standard of Review.

Trial court rulings on a motion to vacate a judgment are reviewed for abuse of discretion. *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* Default judgments “are not favored in the law.” *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). As a result, this Court is “less likely to reverse a trial court decision that sets aside a default judgment than a decision which does not.” *Showalter v. Wild Oats*, 124 Wn. App. at 511. *See also Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 391, 254 P.3d 208 (2011) (“[r]efusal to vacate a default judgment is more likely to amount to an abuse of discretion because default judgments are generally disfavored.”).

Review of discretionary decisions employs a three-part analytical test:

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). A trial court would “necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Thus, discretionary rulings must be grounded in both the correct legal standards and factual findings supported by the record.

B. Defendants met the *White v. Holms* criteria for vacating the default judgment.

In considering a Motion to Set Aside Default Judgment, the trial court concerns itself with two primary and two secondary factors:

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

The first two are the major elements to be demonstrated by the moving party, and they, coupled with the secondary factors, vary in dispositive significance as the circumstances of the particular case dictate.

White v. Holm, 73 Wn.2d 348, 352–53, 438 P.2d 581 (1968).

Default judgments are disfavored because of an overriding policy that favors resolution of disputes on the merits. *Gutz v. Johnson*, 128 Wn.

App. 901, 916, 117 P.3d 390 (2005), *aff'd sub nom. Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). “In reviewing a motion to vacate, the court’s principal inquiry should be whether the default judgment is just and equitable.” *Gutz v. Johnson*, 128 Wn. App. at 911. A trial court must take the evidence and reasonable inferences in the light most favorable to the moving party when deciding whether the moving party has presented substantial evidence of a prima facie defense. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000). A trial court lacks discretion to reject the moving party’s version of the facts, even if the evidence is not strong or conclusive, but only minimal. *Id.*

i. Prima Facie Defense

In connection with their Motion to Set Aside, Defendants presented a prima facie defense to damages.¹ The judgment entered totaled \$373,836.44, broken down as follows:

- Medical Specials (\$61,836.44), Income Loss (\$12,000), General Damages, Statutory Attorney’s Fees, and Taxable Costs: \$73,836.44
- Non-economic damages: \$300,000 (\$15,000 of which is attributed to loss of consortium on behalf of Celeste Vanderstoep). CP 78-81.

The \$300,000 in non-economic damages was 80 percent of the total judgment.

¹ Liability and economic damages were not disputed.

In *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986), the Court of Appeals analyzed the defendant's motion to vacate the default judgment damages only (liability was not an issue). The defendant failed to provide a prima facie defense to the damages in his Motion to Set Aside, but alleged in a supporting affidavit that "the damage award is questionable, without specifying facts to support his allegation." *Calhoun v. Merritt*, 46 Wn. App. at 620. Defendant's brief at the Court of Appeals pointed out the "difficulty in developing a prima facie case to a damage award for pain and suffering without opportunity for discovery." *Id.*

As discussed below, Defendants in this case did not rely on a conclusory affidavit like the defendant in *Calhoun*. Defendants presented evidence in the form of medical records that contradicted some of the assertions made by Plaintiffs in connection with obtaining their default judgment. Requiring Defendants to present more than they did, without an opportunity for discovery, is inequitable under the circumstances. As was the case in *Calhoun*, Defendants in this case did not have the opportunity to conduct full documentary discovery, to obtain a defense medical exam, or to depose the Plaintiffs. In *Calhoun*, the Court of Appeals held under similar circumstances:

The factors set out in *White*, including whether the defendant has presented a prima facie defense to the claim, must be applied in the context of the general rules cited above. That is, default judgments

are not favored, motions to vacate default judgments are essentially equitable proceedings, and the overriding concern of the courts is to do justice. *Griggs*, 92 Wash.2d at 582, 599 P.2d 1289. In this context, we note that development of a defense to the damages would require the examination of Mr. Calhoun by a defense expert. Here, the default was entered before any such discovery could take place. Moreover, presenting a defense to damages for pain and suffering is always complicated by the subjective as opposed to objective nature of such damages. Given these circumstances, it would be inequitable and unjust to deny the motion to vacate the damage portion of the judgment on the ground that Mr. Merritt did not present a prima facie defense.

Calhoun v. Merritt, 46 Wn. App. at 620–21; *see also Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999); *Gutz v. Johnson*, 128 Wn. App. at 917-918 (defendant provided a prima facie defense by demonstrating discrepancies between the evidence and plaintiff’s testimony).

Noneconomic damages and loss of consortium damages are complicated and subjective in nature. “Noneconomic damages” means:

[S]ubjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship.

RCW 4.56.250(1)(b). “Loss of consortium” means: “a ‘loss of society, affection, assistance and conjugal fellowship, and ... loss or impairment of sexual relations’ in the marital relationship.” *See Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 773, 733 P.2d 530 (1987). While it is difficult to present any defense on these issues without the benefit of at

least limited discovery, Defendants in this case did offer a prima facie defense to noneconomic damages by admission of certain medical records as described below. *See* CP 83-84.

On February 3, 2015, plaintiff's physician, Dr. Brett, performed a "bilateral L3-4 decompressive lam/disc with posterior Coflex stabilization" [surgery at the lower back] on plaintiff. CP 83. On February 12, 2015, approximately nine days after surgery, Dr. Brett noted the following:

- "[plaintiff's] right leg radicular complaints have resolved, and he is happy about this.... [H]e is returning to his usual daily activities without difficulty."
- "Patient is doing well after lumbar surgery."
- "He will be reassessed in one month with lumbar BAK films when we hope to release him to work without restrictions." CP 83.

On March 11, 2015, a little over a month after plaintiff's back surgery, Dr. Brett made the following observations in his chart notes:

- That plaintiff's "right leg radicular pain has resolved, and [plaintiff] is happy about this."
- "He has only occasional low back discomfort but is much better than prior to surgery."
- "He has discontinued his pain medication or muscle relaxants. He is returning to his usual daily activities without difficulty."
- "Patient is doing well after lumbar surgery. We discussed lifting and activity restrictions. He can perform light exercise program and can play golf." CP 84.

Dr. Brett's chart notes are evidence that Plaintiff Terry A.

Vanderstoep's surgery substantially resolved the pain and injuries that he

claims were attributed to the subject accident and he was returning to his usual activities as early as nine days after the surgery. CP 83-84. Dr. Brett's notes do not indicate that Plaintiff Vanderstoep would have any future issues related to his injuries. CP 83-84. Dr. Brett's chart notes are inconsistent with Plaintiffs' counsel's declaration in support of the Default Judgment, which alleges continuous pain, stating that Plaintiff Vanderstoep:

- “[C]ould no longer get down on his knees to work on the greens”
- “[W]as suffering more pain and was concerned that he might be reinjured”
- Could no longer perform some of his work responsibilities
- Retired
- “[W]akes up with a variety of aches and pains each morning primarily to this collision”
- “[C]ontinues to have hip pain and plans to see a doctor soon” CP 11-14.

There is contradictory evidence as to the length of time Plaintiff Vanderstoep experienced symptoms and as to the ultimate outcome of the injury. As a result, there is a defense to noneconomic damages since noneconomic damages turn on the past and probable future pain, suffering, disability, and similar other subjective elements. In a case where there is some evidence that the injuries have resolved without complication and the Plaintiff was returning to his “usual activities without restriction” there is a defense to a claim for \$285,000 in noneconomic damages. There is

similarly a defense to the \$15,000 loss of consortium award given the evidence of a relatively short recovery period.

Plaintiffs argued to the trial court that a defense related to the amount of noneconomic damages is insufficient to warrant vacating a default judgment. *See* CP 113-115. Plaintiffs cite *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007) in support of this argument and assert that *Calhoun* and *Norton* “would have been decided differently after *Little v. King*.” CP 115. First, this argument by plaintiff necessarily concedes an essential point—that the instant case is substantially similar to *Calhoun* and *Norton*, cases where the Court of Appeals found an abuse of discretion and reversed the trial court’s order denying a defendant’s motion to set aside the default judgment related to damages. *Calhoun v. Merritt*, 46 Wn. App. at 622; *Norton v. Brown*, 99 Wn. App. at 126. Second, neither *Little v. King*, nor any other case, has overruled *Calhoun* or *Norton*. Third, *Little v. King* is wholly distinguishable from the instant case. The *Little* Court noted that the defendant presented “no competent” evidence of a prima facie defense to damages:

King and St. Paul essentially argue that the damages awarded were unreasonable and that preexisting conditions may have contributed to Little's injury.

The defendants provided *no* competent evidence of a prima facie defense to damages. The only thing offered was a declaration from an insurance adjuster stating that the adjuster had reviewed Little's medical records and found reports of headaches, hip pain, and depression before the collisions. But the moving parties have simply not presented any evidence that would tend to show that Little's preaccident aches, pains, and depression were related in any way to her postaccident condition. Even viewed in the light most favorable to the parties moving to set aside the default judgment, mere speculation is not substantial evidence of a defense.

Little v. King, 160 Wn. 2d 696, 704–05.

In stark contrast to *Calhoun*, Defendants in this case *have presented* some evidence of a prima facie defense to damages. Defendants have provided medical records that contradict some of the assertions made to the trial court at the time of the default hearing. This is evidence that bears on the reasonable amount of noneconomic damages. Defendants in this case provided more than what was provided in *Little*, and indeed, provided more than what was provided in *Calhoun*. *See also Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 974 P.2d 1275 (1999) (“a trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense is established”).²

² Plaintiffs also rely on *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 196 P.3d 711 (2008). That case does not assist Plaintiffs as it involved evaluation of whether the defendant had a defense to liability, not damages, and the Court noted that “Nightrunners baldly states that it had presented a prima facie defense, but does not

ii. Mistake, Inadvertence, Excusable Neglect

A court may set aside a default judgment for a variety of reasons including, but not limited to, “[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” CR 60(b)(1)³; *see generally* *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. at 239 (holding that where the moving party is unable to show a strong or conclusive defense, but is able to properly 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 court will analyze excusable neglect more closely). A “genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a mistake for purposes of vacating a default judgment.” *Gutz v. Johnson*, 128 Wn. App. at 919; *Norton v. Brown*, 99 Wn. App. at 124- 125; *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987); *Calhoun v. Merritt*, 46 Wn. App. at 621 (finding excusable neglect when the insurer was already involved with the case and handling the

explain how the facts support a legally cognizable defense.”

³ “On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” CR 60(b).

communications and negotiations because those actions caused the defendant to believe the insurer already knew of the lawsuit and would respond to it).

In analyzing excusable neglect or mistake, the trial court properly focuses on the actions of the defendant who is requesting the default judgment be vacated. *Norton v. Brown*, 99 Wn. App. at 125 (holding that the trial court erroneously focused more on the insurance company's failure to contact the defendant than on the defendant's actions). Here, Defendant Guthrie reasonably believed that speaking with an American Family representative immediately after being served and leaving two voicemails with her adjuster in the weeks following was sufficient to inform American Family of the lawsuit and did not require further action on her part. CP 103; *Gutz v. Johnson*, 128 Wn. App. at 919 (finding a mistake and excusable neglect when defendant reasonably believed that promptly leaving a voicemail with his insured was sufficient to protect his interest with respect to the complaint and when the insurer asserts he does not remember receiving a voicemail and was not aware of the lawsuit until a month later); *Norton v. Brown*, 99 Wn. App. at 124- 125; *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. at 312; *Calhoun v. Merritt*, 46 Wn. App. at 621. Defendant Guthrie believed that her interests were being protected by American Family as they had been before the lawsuit was

filed. CP 103; *Norton v. Brown*, 99 Wn. App. at 124.

Plaintiffs argued to the trial court that the failure to answer the Complaint was due to a “breakdown in office procedures” which cannot serve as a basis to set aside a default judgment. CP 121. The record does not establish a breakdown in office procedures.⁴ The evidence is that American Family representative Thrush told Defendant Guthrie to call when served. Defendant Guthrie called when served, spoke once with an American Family representative who answered the phone, and subsequently left two messages for claims representative Thrush. The messages were not received by Thrush. Why they were not received is not known, but there is certainly an inference of mistake, inadvertence, or excusable neglect. Many things could have happened. The record of the original call could have been mistakenly assigned the wrong claim number or routed to the wrong adjuster such that it did not reach Thrush. In that case, the procedure would have been fine, but human error intervened. Defendant Guthrie might have left her messages at the wrong extension, at an inactive extension, or the messages could have been inadvertently deleted before retrieved. Again, the procedure would have been fine, but mistake or inadvertence in this particular case resulted in counsel not

⁴ Plaintiffs brief to the trial court essentially argued for an inference that there was a breakdown in office procedures. However, in connection with a CR 60(b) motion, the evidence should be viewed in the light most favorable to the moving party. *See Gutz*, *supra*, 128 Wn. App. at 917.

being timely assigned to respond to the Complaint.⁵

Moreover, the cases relied on by Plaintiffs in connection with their arguments about “breakdown of office procedures” (CP 119- 122) are all distinguishable. They involved either a failure to have a procedure in place to address a lawsuit or the defendant or their insurer simply chose to ignore the lawsuit. Those cases are:

Prest v. American Bankers Life, 79 Wn. App. 93, 900 P.2d 595 (1995)—In *Prest*, there was evidence that defendant insurer was properly served, but that the General Counsel designated to respond to legal process had been reassigned and no one new had been assigned his duties.

Johnson v. Cash Store, 116 Wn. App. 833, 68 P.3d 1099 (2003)—In *Johnson*, defendant’s manager was served, but she thought the documents were irrelevant, so never forwarded them to the company’s administration or legal counsel. She also did not respond to a notice of default hearing.

Smith v. Arnold, 127 Wn. App 98, 110 P.3d 257 (2005)—In *Smith*, defendant was served, but did not respond or forward the documents to its

⁵ Plaintiffs argued to the trial court that Defendant Guthrie should have continued to follow-up with American Family beyond her three phone calls. This is not a reason to deny Defendants an opportunity to reach the merits of this case. *See Gutz v. Johnson*, 128 Wn. App. at 919 (“Although in hindsight Mr. Johnson should have clarified Allstate’s receipt of his call and assured himself of its knowledge of the Gutzes’ complaint, his failure to do so is not an equitable and just reason to deny him the opportunity for a trial on the merits when has satisfied the additional factors for relief under CR 60(b).”)

insurer because it was “quite low on [their] list of priorities.” Once they did provide the suit to the insurer, the insurer did not respond in a timely manner because the claim adjuster was on vacation.

TMT Bear Creek Shopping Center v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 165 P.3d 1271 (2007)—In *TMT*, there was evidence that the defendant failed to ensure that the applicable deadline was entered in the calendaring system by the legal assistant before she left on vacation, failed to ensure that the employees hired to replace the legal assistant were trained on the calendaring system, and failed to ensure that the defendant’s general counsel received notice of the dispute.

Rosander v. Nightrunners Transportation, Ltd., 147 Wn. App. 392, 196 P.3d 711 (2008)—In *Rosander*, defendants were served and notified their insurer. The insurer was also given notice of the default hearing, but despite receiving these notices, the insurer did not retain counsel to file a Notice of Appearance or appear at the default hearing.

Trinity v. Universal Underwriters of Kansas, 176 Wn. App. 185, 312 P.3d 976 (2013)—In *Trinity*, defendant insurer was served through the insurance commissioner and while it argued the insurance commissioner did not properly transmit the summons and complaint to its registered agent, there was evidence in the form of a stamped return receipt to demonstrate it did. Defendant insurer also filed its Motion to Vacate more

than one year after entry of the default.

Akhavuz v. Moody, 178 Wn. App. 526, 315 P.3d 572 (2013)—In *Akhavuz*, the insured promptly faxed the suit to the insurer after served. The insurer had the suit for months but took no action to respond because the adjuster “assumed the parties ‘were in the process of settlement negotiations.’” The Motion to Default was filed one day short of a year after the default judgment was entered.⁶

iii. Due Diligence

Defendants acted diligently to vacate the default judgment upon learning it had been entered. Defendants learned of the Default Judgment on June 7, 2016. On June 8, 2016, Defendants’ counsel formally appeared in this case. Defendants filed their Motion on July 6, 2016, less than a month after receiving notice of the default judgment. *See Gutz v. Johnson*, 128 Wn. App at 919 (a party that moves to vacate the default judgment within one month of receiving notice satisfies the due diligence factor under CR 60(b)).

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⁶ To the extent Plaintiffs rely on *Little v. King, supra*, on the issue of mistake and excusable neglect, it must be noted that *Little* is wholly distinguishable. In *Little*, the defendant was aware of the suit and aware of the default proceedings and “made the deliberate choice, after being told of the consequences by the trial judge, not to prevent the default judgment by filing an Answer.” 160 Wn.2s at 706.

iv. Substantial Hardship

Plaintiffs will not suffer substantial hardship if the default judgment is vacated because should the default be vacated, the parties will proceed to litigate in due course.⁷

C. The trial court did not apply the relevant standards in reaching its decision to deny the Motion to Set Aside.

The trial court appears to have made its decision not to vacate the default based on its conclusion that a defense to noneconomic damages alone was not sufficient. *See* RP, Vo. II, 28. First, that is not a legally sufficient basis to deny Defendants' Motion to Vacate. Numerous cases have held that a defense to damages can serve as the basis for setting aside a default. *See, e.g., Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094. Second, the trial court did not specifically address the four *White v. Holm* factors, either in the hearing on the Motion to Vacate or in its Order denying the Motion. The trial court did not comment on any of the four factors, other than the prima facie defense factor. The trial court did not make any findings with regard to whether there was mistake, inadvertence

⁷ A default judgment is only proper when the adversary process has been halted by the defendant's unresponsiveness. The procedure seeks to prevent parties from completely failing to respond. A defendant's failure to timely answer a complaint does not halt the adversary process when the defendant has engaged in negotiations for over a year, as that demonstrates an intent to defend the action. *See Norton v. Brown*, 99 Wn. App. 118, 126.

or excusable neglect. The trial court did not make any findings with regard to the secondary factors of due diligence and substantial hardship.

D. Equities Weigh in Favor of Vacating the Judgment

American Family, via claims representative Thrush, repeatedly contacted or attempted to contact Plaintiffs' counsel both before and after Plaintiffs filed suit. Plaintiffs' counsel communicated and negotiated exclusively with American Family and knew American Family was handling the matter for Defendants. Plaintiffs' counsel, with very little effort, could have notified American Family of the lawsuit. At the very least, Plaintiffs' counsel could have notified American Family that he planned to file, or had filed, a Motion for Default. While he may not have been required to do so under the applicable rules, the equities would seem to favor taking such a step.

VI. CONCLUSION

In connection with their Motion to Vacate, Defendants provided evidence on each of the four *White v. Holm* factors. Defendants provided evidence of a prima facie defense to the amount of damages. Defendants provided evidence that the failure to timely appear was due to mistake, inadvertence, or excusable neglect.

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Defendants provided evidence that they acted diligently after notice of entry of the default judgment and that no substantial hardship will result from setting aside the default judgment with regard to the amount of noneconomic damages so that discovery can occur on that issue, and if necessary, the amount on noneconomic damages determined at trial. For the reasons stated, this Court should reverse the trial court's decision, and set aside the Default Order and vacate the Default Judgment.

DATED this 17th day of January, 2017.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 17th day of January, 2017, I filed the
CORRECTED OPENING BRIEF OF APPELLANTS with the Court of
Appeals by electronic filing.

I further certify that on the 17th day of January, 2017, I caused the
foregoing to be served upon the following counsel of record by emailing a
true and correct copy thereof per stipulation of the parties to the attorneys
as shown below on the date set forth above.

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January 17, 2017 - 9:43 AM

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