

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)

REPLY BRIEF OF APPELLANTS

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I. Prima Facie Defense

Plaintiff-Respondents' ("Plaintiffs") primary argument in the Brief of Respondents ("Resp. Brief") is that *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007), *as amended on denial of reconsideration* (Oct. 3, 2007), precludes setting aside a default when the defense asserted by the defendant is directed only to damages. *See, e.g.*, Resp. Brief at 20. *Little* does not stand for that proposition. In contrast, *Little* necessarily verified that the prima facie defense element of the four-part test established by *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), can be a defense solely to damages. The defendant in *Little* did not argue any defense as to liability, but only a defense as to damages. 73 Wn.2d at 704. The *Little* Court rejected the defense to damages based on the *specific record* before it. The *Little* Court explained that the defendant had presented "no competent" evidence of a prima facie defense to damages:

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 at 704–05.

The record before this Court is very different from the record before the *Little* Court. Plaintiffs seek to minimize the discrepancies between the evidence provided to the trial court during the default process versus the evidence defendants argued at the time they sought to set the default aside. *See* Resp. Brief at 17-19. However, no amount of minimization can change the basic fact that there is evidence in this record that contradicts some of the evidence relied upon by the trial court at the time of entry of default, and that such evidence goes to the reasonable amount of damages. *See* Corrected Brief of Appellants (“C. App. Brief”) at 9-12. Unlike *Little*, where the defendant offered “no competent evidence” in support of its Motion to Vacate, defendants in this case have offered competent evidence. That evidence tends to dispute Plaintiffs’ evidence as to the length of time Plaintiff Terry Vanderstoep experienced symptoms and as to the ultimate outcome of his injuries. There is competent evidence in the record that the injuries resolved without complication and that Plaintiff Terry Vanderstoep returned to his usual activities without restriction. *See* C. App. Brief at 11-12; CP 83-84.

Plaintiffs argue that defendants failed to assert the noneconomic damages award was not supported by substantial evidence. Resp. Brief at 16. First, defendants’ position below and on appeal has consistently been that there is evidence that the noneconomic damages awarded in the

default judgment are not supportable. Second, this argument by Plaintiffs is an effort to turn the test on its head. As clearly enunciated in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), and numerous other cases, a defendant seeking to vacate a default must show “that there is substantial evidence supporting a prima facie defense.” Plaintiffs appear to take the position that in connection with seeking to vacate the defendant must *definitively prove* that the damages awarded in the default are not supported by substantial evidence. That is not what *White v. Holm* requires. In this case, defendants have complied with the requirements of *White v. Holm* by showing some competent evidence of a defense to damages. That should result in the default being vacated so that discovery may take place and damages be determined by a jury based on all the evidence.¹

Plaintiffs further argue that it is not a sufficient prima facie defense for a defendant to show he is surprised by the amount of the damages or damages might have been less at a contested hearing. Resp. Brief at 20.

¹ Plaintiffs argue that the defense is asking this Court to “substitute its judgment for that of the trial court.” Resp. Brief, at 21. To the contrary, the defense is asking this Court to reverse based on the *White v. Holm* criteria and remand for determination of damages by a jury, consistent with the principle that 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).

Little indeed makes that comment. But the *Little* Court then went on to analyze the record for any competent evidence supporting the defense to damages. The only evidence offered was a declaration by an insurance adjuster that plaintiff had experienced some symptoms prior to the accident. However, the defendant in *Little* “simply [did] not present[] any evidence that would tend to show Little’s preaccident aches, pains and depression were related in any way to her postaccident condition.” 160 Wn.2d at 704-705. This record is very different. There is evidence in this record, from Plaintiff Terry Vanderstoep’s own treating physician, that his injuries resolved without complication and that he returned to his usual activities without restriction. *See* C. App. Brief at 11-12; CP 83-84. This is very different from some of the evidence presented to the trial court at the time of entry of default. *See* C. App. Brief at 12; CP 11-14.

In a similar vein, Plaintiffs argue that defendants merely argue the award “was simply too large given the facts of the case” and that this is insufficient under *Little* because surprise as to the amount is not a prima facie defense to damages. Defendants agree that as discussed in dicta in *Little*, a defendant who merely argues surprise as to the amount, or that damages might be less in a contested hearing, would not prevail. But that does not mean that a defendant cannot make out a prima facie defense by providing some evidence that the amount of damages awarded was too

large. If Plaintiffs' argument were accepted, then a prima facie defense to damages would never be sufficient to support vacating a default judgment. That is clearly not what the case law contemplates. If a defendant can support a Motion to Vacate with a prima facie defense to damages (and the cases do not hold otherwise), then the evidence supporting that defense will always be directed to showing that the damages awarded were too high. If a defendant agrees the damages are not too high, then there would be little reason to seek to vacate.²

Finally, on this issue, Plaintiffs argue that the cases preceding *Little*, particularly *Calhoun* and *Norton*, should be completely disregarded. See Resp. Brief at 26. Yet *Little v. King* did not overrule *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986) or *Norton v. Brown*, 99 Wn. App. 118, 992 P.2d 1019 (1999), *amended*, 3 P.3d 207 (Wn. App. 2000). Those cases still have value, and, particularly have value in this setting given their factual similarities to the instant case.

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² Plaintiffs argue that an “allegation that the facts do not support the amount of an award of noneconomic is not a sufficient defense to justify vacation of a default.” Resp. Brief at 29. However, defendants here do more than *allege* the facts do not support the amount, they placed into the record *evidence* supporting the conclusion that the facts do not support the amount.

II. Mistake, Inadvertence, Excusable Neglect

On this issue, Plaintiffs rely heavily on *Akhavuz v. Moody*, 178 Wn. App. 526, 315 P.3d 572 (2013), and argue that “case is quite similar.” In *Akhavuz*, the insured promptly faxed the suit to the insurer after being served. In this case, defendants also promptly called their insurer after being served. But the similarity ends there. The insurer in *Akhavuz* was aware of the suit for months but took no action to respond because the adjuster “assumed the parties ‘were in the process of settlement negotiations.’” 178 Wn. App. at 536. In this case, while defendant called the insurer about the suit, the evidence demonstrates the information never reached the adjuster assigned to the case. There is also no evidence the insurer had the suit in its possession. The Motion to Vacate in *Akhavuz* was filed one day short of a year after the default judgment was entered. The Motion to Vacate in this case was filed approximately three months after entry of the default judgment.

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

Another case relied on by plaintiffs is *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.

Plaintiffs also again argue *Little v. King, supra*, but 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.2d at 706.

The cases relied on by plaintiffs all revolve around similar themes. In most, the insurer had the suit, but for various reasons failed to act for a lengthy period of time, or as in *Little*, the insured refused to act. In contrast, in this case, as soon as adjuster Thrush learned of the suit, counsel was retained, Notice of Appearance was given, and Motion to Vacate was filed.³

³ Plaintiffs concede both the defense’s diligence after notice of the judgment and the absence of prejudice. Instead, plaintiffs argue, citing *Pier 67 v. King County*, 89 Wn.2d 379, 385, 573 P.2d 2 (1977), that defendants are subject to an adverse inference because they did not admit into evidence a computerized internal printout that verifies defendant made calls to the insurer after served. *Pier 67* does not support such an inference. The record shows that the printout “lines” do not reveal what happened to the calls. See RP 7-29-16; see also CP 53 (Decl. of Thrush,

III. Standard Applied by the Trial Court.

The trial court expressly 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: “I think the most appropriate ruling is that disputing noneconomic damages by itself seems to be insufficient grounds for oversetting the default.” The trial court essentially made a bright line ruling that since the defendants were disputing only the noneconomic damages amount, the default judgment must necessarily stand. That bright line conclusion is inconsistent with appellate cases, including *Little v. King*, which have considered prima facie defenses on the issue of damages. Plaintiffs have not cited this Court to a case holding that a dispute as to noneconomic damages can never be a basis for vacating a default judgment.

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para. 10).

Yet, that is the argument plaintiffs propound. That is not the proper standard. If it were, the Supreme Court could easily have enunciated that in its prior decisions.

DATED this 24 day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 24 day of March, 2017, I filed the REPLY BRIEF OF APPELLANTS with the Court of Appeals by electronic filing.

I further certify that on the 24 day of March, 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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