

FILED
NOV 14 2011
COURT OF APPEALS
DIVISION III
SPokane, WA

Div. III COA No. 313280

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

CRAIG FROST, REBECCA FROST and AIR CHARTER
PROFESSIONALS, INC., Respondent,

v.

MARK H. BROOKS, JANE DOE BROOKS and JOHN AND JANE DOE
1-10, Appellants

BRIEF OF APPELLANT

F. Dayle Andersen, WSBA 22966
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
Ph. (509)327-6100
Fax (509)340-3954

FILED
NOV 14 2011
COURT OF APPEALS
DIVISION III
SPokane, WA

Div. III COA No. 313280

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

CRAIG FROST, REBECCA FROST and AIR CHARTER
PROFESSIONALS, INC., Respondent,

v.

MARK H. BROOKS, JANE DOE BROOKS and JOHN AND JANE DOE
1-10, Appellants

BRIEF OF APPELLANT

F. Dayle Andersen, WSBA 22966
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
Ph. (509)327-6100
Fax (509)340-3954

I.	INTRODUCTION	6
II.	ASSIGNMENTS OF ERROR	7
III.	STATEMENT OF THE CASE	8
IV.	ARGUMENT	13
	A. The court’s denial of appellant’s motion to vacate the order of default was an abuse of discretion	13
	1. The appellant informally appeared and substantially complied with the appearance requirement of CR 4	13
	2. The appellant presented substantial evidence and met the four part test of <i>White v. Holm.</i>	20
	a. There was substantial evidence to support a <i>prima facie</i> defense to the claim.	21
	b. Appellant’s failure to timely appear in the action was occasioned by excuseable neglect and surprise.	23
	c. Appellant acted with due diligence after receiving notice of the default.	25
	d. No substantial hardship will result to the respondents.	26
	B. The court erred by finding that there was personal jurisdiction over the appellant.	27
	C. The court erred in denying appellant’s motion for a new trial.	32
V.	CONCLUSION	32

TABLE OF AUTHORITIES

CASES

Dloughy v. Dloughy, 55 Wn. 2d 718, 349 P. 2d 1073 (1960) 16

Tiffin v. Hendricks, 44 Wn. 2d 837, 271 P.2d 683 (1954) 16

State ex rel. LeRoy v. Superior Court, 149 Wn. 443, 271 P. 87 (1928)
. 16

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478-79, 85 L. Ed. 2d 528,
105 S. Ct. 2174 (1985) 30

CTVC v. Shinawatra, 82 Wn. App. 699, 708, 919 P.2d 1243 (Div. I, 1996)
. 28

Di Bernardo-Wallace v. Gullo, 34 Wn. App. 362, 366, 661 P.2d 991 (Div.
III, 1983) 31

Fowler v. Johnson, 167 Wn. App. 596, 602, 273 P.3d 1042 (Div.I, 2012)
. 22

Freestone Capital Partners, LP v. MKA Real Estate Opportunity, 155 Wn.
App. 643, 653, 230 P.3d 625 (Div. 1, 2010) 28

Harbison v. Garden Valley Outfitters, 69 Wn. App. 590, 599, 849 P.2d
669 (Div. I, 1993) 30

Johnson v. Cash Store, 116 Wn. App. 833, 842 (Div. III, 2003) 26

Kain v. Sylvester, 62 Wn. 151, 113 Pac. 573 (1911) 24

Lamar Outdoor Advertising v. Harwood, 162 Wn. App. 385, 394, 254
P.3d 208 (Div. III, 2011) 26

Leavitt v. DeYoung, 43 WN. 2d 701, 263 P.2d 592 (1953) 25

Little v. King, 160 Wn.2d 696, 704, 161 P.3d 345 (2007) 21

<i>Mbm Fisheries v. Bollinger Mach. Shop & Shipyard</i> , 60 Wn. App. 414, 423, 804 P.2d 627 (Div. I, 1991)	30
<i>Morin v. Burris</i> , 160 Wn. 2d 745, 161 P. 3d 956 (2007)	13, 15-17
<i>Pfaff v. State Farm</i> , 103 Wn. App. 829, 14 P.3d 837 (Div. II, 2000)	26
<i>Precision Lab. Plastics v. Micro Test</i> , 96 Wn. App. 721, 726, 981 P.2d 454 (Div. II, 1999)	30
<i>Prest v. American Bankers Life</i> , 79 Wn. App. 93, 100 (Div.II, 1995)	18
<i>Reitmer v. Siegmund</i> , 13 Wn. 624, 43 Pac. 878	24
<i>Sacotte Constr., Inc. v. Nat'l Fire & Marine Ins. Co.</i> , 143 Wn. App. 410, 416 (Div. I, 2008)	17
<i>Shute v. Carnival Cruise Lines</i> , 113 Wn.2d 763, 767, 783 P.2d 78 (1989)	29
<i>Sorb Oil v. Batalla Corp.</i> , 32 Wn.App. 296, 301, 647 P.2d 514 (Div. I, 1982)	31
<i>Trickel v. Clallam County Superior Court</i> , 52 Wn. 13, 100 P. 155 (1909)	16
<i>Warnock v. Seattle Times Co.</i> , 48 Wn. 2d 450, 294 P.2d 646 (1956)	16
<i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968)	21, 24
STATUTES	
RCW 4.28.185	27
COURT RULES	
CR 4	20

CR 4(a)(3)	15
CR 4(d)(5)	14
CR 55(a)(1)	13
CR 55(a)(3)	15
CR55(c)(1)	13

I. INTRODUCTION

This matter involves a dispute over a motorcycle with dual claims of ownership. The motorcycle was placed for sale on an online forum by the respondent Craig Frost. Sometime during January or February, 2012, the appellant phoned respondent and inquired about viewing the motorcycle. According to respondent, this phone call was taken on his Florida area cell phone while in the State of Washington.

On February 7, 2012, respondent Frost attempted to obtain a title and license the motorcycle in the state of Washington. The Department of Licensing was unable to issue a title and Frost submitted a statement to the Department that the motorcycle was a home made machine that was valued at \$8,500.

Respondent then transported the motorcycle to Lake Havasu, Arizona. Sometime thereafter, the parties met. After meeting and test-driving the motorcycle, the appellant's agent presented a legal title to the motorcycle from the state of Louisiana and the motorcycle was re-possessed by appellant.

On April 11, 2012, respondent filed an action against appellant in the Spokane County Superior Court. Appellant was served in the state of

Arizona, on May 5, 2012. The appellant failed to file a notice of appearance or answer, and the respondent obtained an order of default. Subsequently, the respondent entered judgment against appellant seeking both money damages and replevin of the motorcycle. The initial complaint filed by respondent sought only money damages.

The appellant appeared in the action pro se and motioned the court for an order vacating the judgment, vacating the default, and seeking a new trial. On February 13, 2013, counsel appeared on behalf of appellant and motioned the court for an order to show cause to respondent to establish whether the court should maintain the judgment. After oral argument, on February 22, 2013, Spokane County Superior Court Judge Annette Plese vacated the default judgment on the basis that the judgment was void.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred in denying appellant's motion to vacate the order of default.
 1. Appellant informally appeared and substantially complied with the appearance requirement of CR 4
 2. Appellant presented substantial evidence to meet the four-part test set forth in *White v. Holm*

- B. The court erred by finding that there was personal jurisdiction over the appellant and denying appellant's motion to dismiss
- C. The court erred in entry of the disputed findings of facts conclusions of law.

III. STATEMENT OF THE CASE

This action was filed in the Spokane County Superior Court on April 11, 2012. CP 1-9. Appellant was personally served in the state of Arizona on May 5, 2012. CP 11. On July 5, 2012, the respondents sought and obtained an order and judgment of default against appellant. CP 15-19. The initial complaint filed by respondents requested solely monetary relief. Attached to the complaint was a "buyer's order" indicating that the motorcycle had been "traded" for flight time with "Lake Cumberland Marine" and the value was \$185,000. CP 9. At the time of entry of judgment, respondents added a request for replevin that was not pled in the initial complaint

The respondents claim that appellant obtained the motorcycle by way of theft from respondent. The history of this motorcycle is extensive and confusing. According to respondent, he is the lawful and true owner

the motorcycle.

This motorcycle is a custom built bike that was manufactured in the state of Louisiana by Motorsport Turbine Technologies, LLC (MTT hereafter) in 2004. CP 24, 81. At some point in time, the motorcycle was transferred, without a change in title, to Lake Cumberland Marine in Somerset, Kentucky. CP 123. Title did not change because Lake Cumberland was, and is, a vehicle dealer who was not required to close title. CP 123. Lake Cumberland's owner and respondent Frost entered into an agreement whereby respondent Frost would purchase the motorcycle in exchange for flight time and training. CP 132-137. A "buyer's order" was drafted to document the intent to purchase by respondent Frost. CP 133.

With the complaint, respondents filed a copy of the buyer's order with Lake Cumberland Marine that set forth a purchase price of \$185,000.00 and has a "paid" stamp where a hand-written notation states "CK# Traded for Flight Time". CP 9. In addition, respondent attached a Washington State Department of Licensing "Vehicle Title Application/Registration Certificate" issued February 7, 2012, which is a registration only for an 11/30/2004 "KIT" with a value code of 8500. CP

8.

On or about February 1, 2012, the parties discussed the possible sale of the motorcycle over the phone. CP 2. Respondent then took the motorcycle to Lake Havasu, Arizona to negotiate the sale. CP 2. Upon Frost's arrival, February 10, 2012, appellant met with him and asked to test drive the motorcycle. CP 2. After the test drive, an associate of appellant presented the lawful title to the motorcycle to Frost and informed him that the motorcycle was being repossessed.

The motorcycle was originally titled to MTT by the state of Louisiana in 2004 as an assembled vehicle. CP 34. On February 8, 2012, the state of Arizona issued title to the motorcycle in the name of Mark Brooks. CP 49. The vehicle, prior to the entry of the default, had never been titled in the state of Washington.

After being served the complaint and summons in Arizona, appellant contacted a local Arizona attorney to assist with the claim. The attorney then contacted respondent's attorney documenting the chain of title, challenging respondents' ownership, and asking that respondent dismiss the suit . CP 102. On May 24, 2012, Arizona counsel for appellant wrote again to respondents' attorney setting forth the

jurisdictional issue, the facts which challenged ownership by Frost, and requesting that the matter be dismissed. CP 115-116. Counsel for respondents stated that his client was “out of town for 10 days. I will get a response to you when he returns”. CP 118. Appellant’s attorney then sent two additional letters requesting an update concerning the claim and the request to dismiss, on June 6, 2012, and June 12, 2012. CP 119, 121. In his letter, counsel for respondents states that Frost had the motorcycle at his Idaho home and then moved it to the state of Washington. CP 124. Without addressing the request to dismiss, counsel stated “He should consider how he is going to pay for the Bike and limit his exposure”. CP 124.

On July 5, 2012, the 61st day after service, the respondents obtained an order of default and default judgment. CP 15 - 19. In the application for default, counsel for respondent informed the court that the non-requesting party had failed to appear. CP 16. On July 10, 2012, appellant motioned the court for an order of dismissal based on lack of personal jurisdiction, *forum non conveniens*, and failure to join an indispensable party. CP 20-32. On July 18, 2012, appellant filed a motion to set aside the entry of default based on CR 55© and CR 60. CP 55-64. On July 25,

2012, based on agreement the court continued the hearing until September 14, 2012. CP 129-130. On August 1, 2012, appellant submitted the affidavit of Randall Hartman owner of Lake Cumberland Marine and purported seller to respondents Frost. CP 132-138. In his affidavit Mr. Hartmann stated that the “buyer’s order” submitted by Frost was an altered document, that the buyer’s order was not proof of sale or ownership and that Frost had not completed the terms of the purchase. CP 132-138. The specific items altered included a change from “traded for flight time” on the buyer’s order to “trade for flight time”; the purchase price was altered from \$185,000 to \$8,500. (CP 141, 144). The name of the seller has been altered and the document has been re-titled as a “Bill of sale”. (CP, *Id.*). In his affidavit, Mr. Hartmann refuted respondent’s claim to ownership and the claims that the motorcycle was not titled and a “homemade” motorcycle.

On August 17, 2012, the court heard the motion and reserved judgment. CP 165. Proposed findings of fact and conclusions of law were drafted by respondent’s attorney which were objected to by appellant. CP 166-168. Alternate findings and conclusions were submitted by appellant Frost. CP 169-176. The court denied the appellant’s motion to vacate the

default and court adopted the findings and conclusions of Frost. CP 311-314. Appellant on October 5, 2012, filed a motion for new trial, reconsideration and amendment of the judgment. CP 214-236. The court denied the motion on the basis that there was insufficient cause to alter the court's decision. CP 302-303.

On December 11, 2012 this appeal was filed. CP 304. . Upon motion of the appellant, on February 22, 2013, Spokane County Superior Court Judge Annette Plese vacated the default judgment on the basis that the judgment relief exceeded the request in the complaint and the judgment was void.

IV. ARGUMENT

A. The court's denial of appellant's motion to vacate the order of default was an abuse of discretion

1. The appellant informally appeared and substantially complied with the appearance requirement of CR 4

Orders of default are governed by CR 55 which provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appeal by motion and affidavit, a motion for default

may be made”. *Id.* CR 55(a)(1). Further, “[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b)”. *Id.* CR55(c)(1).

In *Morin v. Burriss*, 160 Wn. 2d 745, 161 P. 3d 956 (2007), the Washington Supreme Court consolidated three separate cases concerning default judgments taken against an organization that failed to appear in a litigated claim. In the first, *Morris*, the defendant, had to be served by publication. In each of the three cases, the court considered the contacts between the parties to assess whether any of the defendants had substantially complied with the appearance requirement of CR 4(d)(5), or in the alternative, whether any of the parties had “substantially complied” with the appearance requirement sufficiently to vacate the default.

In the first matter, [*Morin v. Burriss*] Defendant never appeared, communicated, or otherwise responded to the action. The only communications that had taken place prior to the litigation were settlement discussions between plaintiff and the defendant’s insurer Farmer’s Insurance Company.

The second, [*Gutz v. Johnson*] involved service of a summons and

complaint against a defendant driver for a motor vehicle claim. Similar to *Morin*, prior to the litigation, the parties had engaged in settlement discussions, however after filing the litigation the defendant was served and failed to appear, a default order and judgment was entered. Defendant subsequently claimed that she had advised her insurer of the claim over the phone, which the insurer denied.

The third case consolidated under *Morin*, [Matia Investment Fund v. City of Tacoma] the plaintiff had filed a tort claim against the City of Tacoma, after expiration of the statutory waiting period, the plaintiff served the defendant city clerk's office who failed to forward the complaint and summons to the city attorney. More than one year after entry of the default the City moved to vacate the default, which was granted by the trial court.

The court in *Morin* considered the doctrine of informal appearance and whether the trial courts ruled appropriately on the matter based on the doctrine of informal appearance. Initially, the court disagreed with the defendants claim that “**pre-litigation** contacts are sufficient to establish an appearance for purposes of CR 55(a)(3). We disagree”. *Morin* at 753, *emphasis added*. The court considered the matter by reviewing the applicable court rules. The court stated “[u]nder CR 4(a)(3), a “notice of

appearance” shall “be **in writing**, shall be **signed by the defendant or his attorney**, and shall be **served upon the person** whose name is signed on the summons.” *Id.* at 753-4, *emphasis added*.

Applying CR 55 and CR 60 liberally, this court has required defendants seeking to set aside a default judgment to be prepared to establish that they **actually appeared or substantially complied** with the appearance requirements and were thus entitled to notice. CR 60(b); *Dloughy*, 55 Wn.2d 718. 2 Or, alternately, defendants may set aside a default judgment if they meet the four part test set forth in *White*:

(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.

Morin at 755, *emphasis added*.

“[F]or over a century this court has applied the doctrine of substantial compliance. We have never exalted form over substance but have examined the defendant’s conduct to see if it was designed to and, in fact, did **apprise plaintiff of defendant’s intent to litigate the cases**”.

Morin at 755. In cases where the defendant’s conduct occurred after litigation commenced, but before entry of the default - *Trickel v. Clallam County Superior Court*, 52 Wn. 13, 100 P. 155 (1909); *Dloughy v.*

Dloughy, 55 Wn. 2d 718, 349 P. 2d 1073 (1960); *Warnock v. Seattle Times Co.*, 48 Wn. 2d 450, 294 P.2d 646 (1956); *Tiffin v. Hendricks*, 44 Wn. 2d 837, 271 P.2d 683 (1954); and, *State ex rel. LeRoy v. Superior Court*, 149 Wn. 443, 271 P. 87 (1928) - the courts found that the defendants had “informally appeared” by either appearing in court, serving interrogatories without filing an appearance, service of a demand for security, withdrawal of attorney, or appearance on a bond in an unlawful detainer matter. Based on the review of the prior case law, the *Morin* court held:

Accordingly, we hold that parties cannot substantially comply with the appearance rules through **prelitigation** contacts. **Parties must take some action acknowledging that the dispute is in court** before they are entitled to a notice of default judgment hearing, though they may still be entitled to have default judgment set aside upon other well established grounds.

Morin at 757, *emphasis added*.

The *Morin* court stated that since in both the *Morin* and *Matia* matters, [w]e find **no action in either case acknowledging that the disputes were in court**. Thus they were not entitled to notice of the default . . .”. *Id.* at 758, *emphasis added*. Pre-litigation contacts alone are not sufficient to establish an informal appearance. However, “[s]ubstantial compliance will satisfy the notice of appearance requirement.

We do not exalt form over substance, and **appearance may be accomplished informally**". *Id. emphasis added*. "[T]he test for whether a party's conduct constitutes an informal appearance is not the number of contacts made by the party, but whether the party, after the suit has commenced, has shown **intent to defend** in court". *Sacotte Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wn. App. 410, 416 (Div. I, 2008), *emphasis added*.

Distinguishing the *Morin* case is the fact that each of the appellant/defendants were either insurers, or in the case of Matia, a local governmental entity as opposed to an individual person representing themselves, as in this case. "It is an important part of the business of an insurance company to respond to legal process that is served upon it". *Prest v. American Bankers Life*, 79 Wn. App. 93, 100 (Div.II, 1995).

The respondents, in this appeal, filed their action in the Spokane County Superior Court on April 11, 2012. CP 1-9. Appellant Brooks was served by substitute service in Maricopa County, Arizona on May 5, 2012. CP 11.

On May 24, 2012, Thomas Baker, a Phoenix-area attorney, wrote to respondents' attorney indicated that he was acting on appellants behalf

and set forth the dispute regarding the allegations of the respondents in the complaint, and demanding a voluntary non-suit. CP 115-116. In response, the attorney for the respondents requested ten days to communicate with his client. CP 118. Baker wrote an additional two letters to respondent's attorney inquiring whether respondents would dismiss the suit. CP 119-122. In his most recent letter, asking whether the respondents planned to go forward with the claim, he stated, "I am simply trying to get a yes or no prior to incurring expenses". CP 122.

Respondent's attorney wrote back to Baker re-iterating the position of the respondents on June 14, 2012. CP 123-124. On July 5, 2012, the respondents sought and obtained an order of default and default judgment. CP 15-16, 17-19.

The doctrine of informal appearance has been recognized and applied by this court for over 100 years. In cases involving informal appearance, the court looks to the nature and extent of the contacts between the parties. While *Morin* appears disinclined to apply the doctrine of informal appearance to pre-litigation contacts, the cases cited favorably by the *Morin* court all involved post-litigation, pre-default contacts between the parties, such as occurred in this matter. Each of the matters

that court found to meet the informal appearance requirements all involved claims where the defaulted party had directly communicated with the plaintiff or their attorney, or in the alternative appeared at court without filing a notice of appearance. In each of these instances, the court found that the post-filing pre-default communications were sufficient to establish an informal appearance. These pre-default communications meet the requirement of substantial compliance approved by the court.

In this instance, there were multiple communications between respondents' attorney and a foreign attorney acting on the appellants' behalf. The appellant's foreign attorney clearly set forth disputed matters, and requested that appellants simply inform him of whether they planned to move forward with the litigation prior the appellant having to incur expense in a foreign jurisdiction. Respondent's attorney simply re-stated their position, set forth additional allegations, but never addressed the requested response.

The appellant, through an Arizona attorney, responded and disputed the allegations of respondents. He inquired about the likelihood of appellants proceeding with the action, and received no answer to his inquiry. These communications, occurring after the filing of the action,

constitute substantial compliance with the appearance requirements in CR

4. To that end, the entry of the order of default should be vacated.

2. The appellant presented substantial evidence and met the four part test of *White v. Holm*.

In cases involving an order of default, Washington courts have established a four part test for the trial court to consider when a party seeks to vacate an order of default. The test was set out in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968).

White provides the following four factors for consideration:

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.

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

Whether to set aside a default is a “matter of equity” and application of the *White* four part test is a “matter of equity”. *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007).

- a. There was substantial evidence to support a *prima*

facie defense to the claim.

To establish a *prima facie* defense, the moving party is not required to establish a definitive defense, simply that the defense is probable and that there is sufficient evidence to support the defense.

If the defaulting party “demonstrate[s] 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,**” so long as the motion is timely and the failure to appear was not willful. *Id.* Furthermore, if only a *prima facie* defense is shown, the remaining factors will be more heavily scrutinized. **When analyzing the existence of a *prima facie* defense, a court must ‘view the facts proffered in the light most favorable to the defendant, assuming the truth of that evidence favorable to the defendant and disregarding inconsistent or unfavorable evidence’.**

Fowler v. Johnson, 167 Wn. App. 596, 602, 273 P.3d 1042 (Div.I, 2012), *emphasis added*.

The defense submitted by the appellant was that of true ownership. After entry of the default, the appellant submitted to the court proof of ownership of the disputed motorcycle, an affidavit from the purported seller (CP 132-144) setting forth the disputed facts concerning the purchase and ownership of the vehicle along with the original vehicle title. In support of respondent’s position, respondents submitted a registration without title issued (CP 8) and an altered an unverified “buyer’s order”. CP 9. Additional documentation submitted by appellant demonstrated

respondent's attempt to title the motorcycle as a "Homemade" motorcycle (CP 42), a valuation of \$8,500 (CP 40) submitted by respondents to the Washington State Department of Licensing, a Request for Bonded Certificate of Ownership or Registration without Certificate of Ownership by respondents stating "No title or receipts for build" (CP 45), an Arizona State Certificate of Title in the name of appellant (CP 49), the original Louisiana Certificate of Title for the motorcycle (CP 81), and an affidavit from the drafter of the buyer's order and purported seller, Randall Hartman of Lake Cumberland Marina which attached the true original buyers order and the two allegedly altered buyer's order submitted by respondents. CP 133, 141, 142, and 144.

The evidence submitted by the appellant was verified by the affiants. This included an affidavit which identified and incorporated two state issued certificates of title, a copy of the original buyer's order, as well as a comparison to the document submitted by respondents. Respondents had never obtained title to the motorcycle and simply submitted a state issued registration that clearly states "THIS DOCUMENT IS NOT PROOF OF OWNERSHIP". CP 9.

The evidence supplied by appellant creates a *prima facie* defense to

the claims of the respondents. It is a strong defense buttressed by official state documents that establish ownership in someone other than the respondents.

- b. Appellant's failure to timely appear in the action was occasioned by excuseable neglect and surprise.

In this instance, the appellant failed to appear in court at the time of the entry of default. Ignoring appellants previous argument concerning the "informal appearance", the appellant, at least twice, had his local Arizona attorney write to respondents' attorney inquiring whether respondent would move forward given the disputed evidence of ownership.

As a layman, not instructed in the law, it was perfectly reasonable for appellant to rely on his local attorney to inform him of the status of the case. The communications between the lawyers would lead a reasonable party to believe that their interests are protected. Thus any neglect arising out of the failure of appellant's local Arizona counsel is reasonable.

In *White*, the court specifically addressed the reasonableness issue when comparing the current matter to past cases of the Washington Supreme Court. The *Reitmer v. Siegmund*, 13 Wn. 624, 43 Pac. 878 (1896) case cited by the *White* court involved a similar set of facts

defendant entrusted a summons to his attorney who, through

mistake, **failed to timely file an answer**. A default judgment was entered which the trial court set aside at the instance of the defendant. In sustaining the action of the trial court, we stated it would have been a great abuse of discretion for that court to have done otherwise

White at 355, *emphasis added*.

In addition to *Reitmer*, the court cited to *Kain v. Sylvester*, 62 Wn. 151, 113 Pac. 573 (1911) - [Defendant's good faith belief that he retained counsel to respond sufficient to establish excuseable neglect]; and, *Leavitt v. DeYoung*, 43 WN. 2d 701, 263 P.2d 592 (1953) - [Insurer's attorney misunderstood and inadvertently failed to appear resulting in default sufficient to establish excuseable neglect].

In this instance, similar to both the *Kain* and *Leavitt* cases, the appellant retained counsel who communicated with the respondents' attorney. The foreign attorney set forth the defenses and requested that plaintiff file a non-suit and asked specifically for a response to that request. Respondents corresponded back to the attorney setting forth concerns, but never answering the question concerning the non-suit. On the 60th day after service, and roughly three weeks after the most recent correspondence, respondents entered an order of default. CP 15-19 and 123.

The actions of the appellant constitute excuseable neglect.

- c. Appellant acted with due diligence after receiving notice of the default.

The default in this matter was entered on July 5, 2012. CP 15-16.

The appellant appeared by filing a motion to dismiss less than five days later. CP 20-54. In his motion, the appellant set forth the factual dispute between the parties, attached documentary evidence of title, and claimed lack of personal jurisdiction by the court. *Id.*

Clearly, a five day delay in responding to a default order falls within the scope of due diligence. Previously, in *Pfaff v. State Farm*, 103 Wn. App. 829, 14 P.3d 837 (Div. II, 2000) the Division Two Court of Appeals held that due diligence was met when the defendant moved to vacate a default after 16 days. Thus, appellants submissions in this matter met the due diligence requirement.

- d. No substantial hardship will result to the respondents.

Substantial hardship considers the impact of vacating the default on the non-moving party.

While delay in the proceedings is one of the evils addressed by the motion for default judgment, While delay in the proceedings is one of the evils addressed by the motion for default judgment, **vacation**

of a default judgment inequitably obtained **cannot be said to substantially prejudice** the nonmoving party merely because the resulting trial delays resolution on the merits.

Johnson v. Cash Store, 116 Wn. App. 833, 842 (Div. III, 2003), *citations omitted, emphasis added*. See also, *Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 394, 254 P.3d 208 (Div. III, 2011).

In this instance, the only hardship that can be asserted by respondents, aside from the loss of the default, which should not be considered as a factor, is the time spent preparing and submitting the default order and judgment. Thus, there is no substantial hardship to the respondents.

B. The court erred by finding that there was personal jurisdiction over the appellant.

Commencing an action in Washington state against residents of foreign states and jurisdictions is governed by RCW 4.28.185 “Personal Service out-of-state - - Acts submitting person to jurisdiction of Courts - - Saving”. This statute provides:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

- (a) The transaction of any business within this state;
- (b) The commission of a tortious act within this state;

- © The ownership, use, or possession of any property whether real or personal situated in this state;
- (d) Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (e) The act of sexual intercourse within this state with respect to which a child may have been conceived;
- (f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

RCW 4.28.185.

The standard of review on an issue of personal jurisdiction is a *de novo* standard. See, *Freestone Capital Partners, LP v. MKA Real Estate Opportunity*, 155 Wn. App. 643, 653, 230 P.3d 625 (Div. 1, 2010).

The allegations of the respondent are that the appellant contacted him by phone and asked to view the motorcycle for possible purchase. CP 4. The motorcycle was taken to Arizona where both respondent and appellant have homes. *Id.* Defendant, while in Arizona, took the motorcycle. CP 5. The allegation by respondent is that jurisdiction is based on a “contract”. CP 5. Thus, the only basis for jurisdiction submitted by respondents in their complaint is a purported contract between the parties.

Personal jurisdiction may be established either under the basis of

“general or specific personal jurisdiction over a non-resident defendant”.

General personal jurisdiction arises from “substantial and continuous business of such character as to give rise to a legal obligation” and “specific personal jurisdiction over a non-resident defendant [arises] when the defendant’s limited contacts give rise to the cause of action”. *CTVC v. Shinawatra*, 82 Wn. App. 699, 708, 919 P.2d 1243 (Div. I, 1996).

In this matter, there are no allegations to support a claim of general personal jurisdiction. The single unsupported allegation by the respondent is that the parties contracted in the state of Washington.

In order to subject nonresident defendants and foreign corporations to the in personam jurisdiction of this state under RCW 4.28.185(1)(a), the following factors must coincide:

(1) The nonresident defendant or foreign corporation must purposefully **do some act or consummate some transaction** in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 767, 783 P.2d 78 (1989), *emphasis added*.

Respondent alleges that the parties entered into a contract,

however, no contract, no agreement, no terms, nothing has been set forth by the respondent to establish any agreement between the parties. No contract has been presented by the respondent to support this allegation.

Assuming for purposes of argument that respondent allegations are sufficient to support the exercise of jurisdiction based on the transaction of some business in this state, the only allegation to support this claim is that the parties spoke on the telephone prior to respondent traveling to Arizona.

We must first determine, then, whether in dealing with MBM Bollinger engaged in purposeful activity or consummated some transaction in Washington. The mere execution of a contract with a resident of the forum state does not alone automatically fulfill the "purposeful act" requirement. Instead, the entire business transaction, including prior negotiations, contemplated future consequences, the terms of the contract and the parties' actual course of dealing, must be evaluated in determining whether the defendant purposefully established minimum contacts by entering into a contract with a resident of the forum state.

Mbm Fisheries v. Bollinger Mach. Shop & Shipyard, 60 Wn. App. 414, 423, 804 P.2d 627 (Div. I, 1991), *citing*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985).

But the mere presence of a contract alone cannot establish specific personal jurisdiction; rather, we view the nature of the contractual relationship and consider factors such as: prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing [to determine] whether the defendant purposefully established minimum contacts within the forum.

Precision Lab. Plastics v. Micro Test, 96 Wn. App. 721, 726, 981 P.2d 454 (Div. II, 1999), *emphasis added*.

The first question is whether the defendants purposefully established minimum contacts with Washington. Analysis of this question includes consideration of whether defendants purposely derived benefit from interstate activities or purposefully availed themselves of the privilege of acting within Washington, thereby invoking the benefits and protections of its laws.

Harbison v. Garden Valley Outfitters, 69 Wn. App. 590, 599, 849 P.2d 669 (Div. I, 1993).

In this matter, either one or more phone calls are the basis for the exercise of specific personal jurisdiction over the appellant, and the alleged contract. Initially, the court should note that multiple cases establish that execution, or consummation of a contract alone is insufficient to grant jurisdiction over a non-resident defendant.

Thus the alleged basis of a purported contract alone is insufficient to provide a grant of authority of specific personal jurisdiction over the appellant.

By way of further analysis, the courts also look to whether the exercise of jurisdiction “offend[s] the traditional notions of fair play and substantial justice”. *Di Bernardo-Wallace v. Gullo*, 34 Wn. App. 362, 366, 661 P.2d 991 (Div. III, 1983).

“In determining whether this third factor exists, the courts consider the **quality, nature and extent of the defendant's activity in**

Washington, the relative convenience of the plaintiff and the defendant in maintaining the action here, the benefits and protection of Washington's laws afforded the parties, and the basic equities of the situation". *Id.* at 366. The party seeking to establish specific personal jurisdiction must establish more than "*de minimis*" contacts, involving more than individual consumers. *See, Sorb Oil v. Batalla Corp.*, 32 Wn.App. 296, 301, 647 P.2d 514 (Div. I, 1982).

In this matter, the respondent has alleged that the parties entered into a contract. Respondent filed nothing to support this contention. No written contract, no terms of agreement, nothing to establish the existence of any agreement between the parties. In fact, the complaint simply states that the parties met in Arizona and that appellant took the bike. CP 5.

Under these circumstances, evidence of a phone call and the purported agreement, even if the court were to assume that the parties entered into an agreement, are insufficient, *de minimis* contacts such that exercise of personal jurisdiction over a non-resident defendant offends the traditional notions of fair play and substantial justice.

- C. The court erred in denying appellant's motion for a new trial.

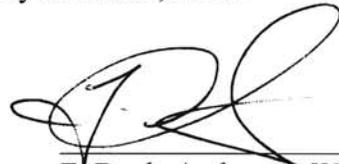
Appellant re-iterates his arguments previously set forth above.

Appellants contends that the evidence presented created substantial evidence to establish irregularity, misconduct of a party, excessive damages, and substantial justice has not been done.

V. CONCLUSION

Given the foregoing, appellant respectfully requests that this court reverse the trial court's denial of the motion to vacate default, reverse the trial court's denial of motion to dismiss based on lack of specific personal jurisdiction, and remand to the trial court for entry of an order of dismissal in this matter. By way of further relief, appellants requests that the court award fees and costs pursuant to RAP 14.2

Respectfully submitted this 10th day of March, 2013.



F. Dayle Andersen, WSBA 22966
For Appellant

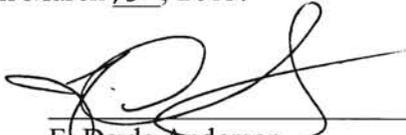
CERTIFICATE OF SERVICE

I, F. Dayle Andersen, under penalty of perjury under the laws of the state of Washington state that on March 13th, 2013, the following documents were submitted to the following individuals in the manner indicated below:

Mark Conlin, Attorney
421 W. Riverside Ave., Ste. 911
Spokane, WA 99201

First class mail
 Facsimile
 Hand Delivered

Signed in Spokane, Washington on March 13th, 2013.



F. Dayle Andersen