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65207-9

No. 65207-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

COURT FILED
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AMBER FOWLER, M.D., Appellant,

v.

DONALD RUSSELL JOHNSON, M.D., and JANE DOE RUSSELL,
husband and wife and the marital community comprised thereof,
and ISLAND COUNTY DERMATOLOGY, PLLC, a Washington
professional limited liability corporation, D/B/A FIDALGO
DERMATOLOGY, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY
09-2-01188-8

OPENING BRIEF OF APPELLANT

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INTRODUCTION

May a trial court vacate only part of a default judgment? Skagit County Superior Court Judge David Needy concluded he could not vacate an award of double damages without overturning the entire default judgment.

Five causes of action were pled in the Amended filed by Plaintiff on July 7, 2009. Various degrees of defenses were set forth in the Motion to Vacate Default to these claims. This Court finds that Defendant(s) demonstrated a strong or virtually conclusive defense to the third cause of action. Specifically, as it relates to the willful and intentional requirements of RCW 49.52.050.

The remaining four causes of action remain subject to the four prong analysis resulting in the previous ruling denying the Motion to Vacate Default and Default Judgment.

I can find no authority allowing vacation of the default on one cause of action and maintaining it on the other four. The complaint and ensuing default must be decided on an all or nothing basis.

(5/18/10 Letter Ruling; CP 473) (Appendix A).

Trial courts do have the authority to vacate only part of a default judgment. First, established caselaw allows for vacation of a damage award *while leaving the default judgment on liability intact*. Calhoun v. Merritt, 46 Wn. App. 616, 620, 731 P.2d 1094 (1986) ("the default judgment of liability must stand, and the

only remaining question is whether the court erred in refusing to vacate the damage portion of the default judgment”); Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 242, 974 P.2d 1275 (1999) (“the standard for vacating awards of damages from default judgments is the same as the standard for setting aside awards of damages from trials”).

Second, under CR 55 and CR 60, the trial court may set aside a default judgment “upon such terms as the court deems just”. CR 55(c)(1). Here, the trial court had authority to limit vacating the default judgment solely to the defense at issue: whether defendant D. Russell Johnson, M.D., willfully or intentionally withheld plaintiff Amber Fowler, M.D.’s back wages, subjecting him to double damages. The judgment for back wages, and other damages, \$163,997.80, remains intact. The only issue for trial is whether the trial court should double that amount with interest, costs and reasonable attorneys’ fees to \$363,535.07.

Third, the trial court in equity may vacate only part of a default judgment. Cf. Johnson v. Cash Store, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003) (“in determining whether a default judgment should be vacated, the court applies equitable principles to ensure that substantial rights are preserved and justice is done”).

Like crafting any equitable relief, the trial court has authority and discretion to vacate the award of double damages while leaving the underlying judgment for liability and damages in place.

Because the trial court erred by vacating the entire default judgment, Appellant Dr. Fowler respectfully requests this Court to reverse the order vacating the judgment, remand for entry of judgment on the four unaffected claims, and order trial on double damages.

I. ASSIGNMENTS OF ERROR

Dr. Fowler assigns error to the trial court's (1) Order Granting Defendant's Motion for Reconsideration Re: Motion for Order to Vacate Default (CP 480-481) (Appendix B); (2) May 18, 2010 Letter Ruling Granting Defendant's Motion For Reconsideration (CP 473-474); and (3) August 19, 2010 Letter Ruling Denying Plaintiff's Motion For Reconsideration (CP 560) (Appendix C).

Specific assignments of error are:

A. The Court erred as a matter of law by granting reconsideration of its earlier lawful Order Denying Defendants' Motion To Vacate Default Judgment. (Order Granting Defendants' Motion for Reconsideration; CP 480-481).

B. The Court erred as a matter of law by concluding that “no authority allow[s] vacation of the default on one cause of action and maintaining it on the other four.” (5/18/10 Letter Ruling; CP 473-474).

C. The Court erred as a matter of law by denying Plaintiff’s Motion For Reconsideration. (8/19/10 Letter Ruling; CP 560).

Issues pertaining to these assignments of error are:

D. When a defaulting party fails to present a defense to liability, the trial court may leave the liability judgment intact and vacate the damage award. Calhoun v. Merritt, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986). Here, on four claims Dr. Johnson raised only a prima facie defense to liability, and the trial court found no excusable neglect sufficient to vacate. Does the trial court have discretion to vacate judgment solely on the fifth claim, the only one subject to the strong defense on double damages?

E. Under CR 55(c), “for good cause shown *and under 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 CR 60(b). CR 55(c) (emphasis added). Although terms often involve monetary

sanctions, they may also be “conditions or stipulations limiting what is proposed to be granted or done.” Garner, B., A Dictionary of Modern Legal Usage, page 872 (2d. Ed. 1995). Do CR 55(c) and CR 60 give the trial court authority to vacate only part of a default judgment if those terms are just?

F. “A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms.” Morin v. Burris, 160 Wn.2d 745, 754, 161 P.3d 956 (2007). Does the trial court’s equitable power include authority to vacate only that part of the default judgment that imposes double damages?

II. STATEMENT OF FACTS

A. Dr. Johnson Failed To Pay Dr. Fowler’s Wages And Commissions.

This case began as a wage dispute between two dermatologists. Dr. D. Russell Johnson owns Island County Dermatology, PLLC, which operates clinics and medical spas in Coupeville and Anacortes. (Fowler Dec. ¶ 2; CP 40-41). In August 2006, Dr. Johnson hired Dr. Amber Fowler to work primarily in the Anacortes clinic. This was Dr. Fowler’s first job after completing

her residency at the University of Michigan, Ann Arbor. (Fowler Dec. ¶ 2; CP 40-41).

Because Dr. Fowler was an employee, not a partner in the clinic, the two doctors agreed on a compensation formula. Dr. Fowler would receive a percentage of her receivables – what patients actually paid for her services.

I was initially paid 45% of receivables from dermatology and surgical services that I provided to patients, plus I was to be paid a referral fee of 20% of all spa-related fees and services incurred by patients that I referred to Island Medical Spa for spa cosmetic procedures. Because I was paid from receivables, as opposed to billings, I did not typically receive my wages from a specific service for approximately three to six months after the service was provided. The three to six month lag in receipt of wages caused an initial hardship when I first started at Island County Dermatology in August, 2006, because I was not owed any wages for an extended period during the start-up phase of my dermatology practice. Over time, however, my cash flow from wages improved significantly once receivables started to be received on a regular basis. In July 2007, Island County Dermatology increased the percentage from 45% to 50%.

(Fowler Dec. ¶ 3; CP 41).

As her practice grew, so did Dr. Fowler's compensation. In 2007, her wages totaled \$533,994. (Fowler Dec. ¶ 4; CP 41-42). In 2008, she grossed \$802,159.18, despite taking September off for maternity leave.

During my 11.5 months as an employee in 2008, I earned \$802,159.18 for an average monthly wage of \$69,753. The monthly average would have been higher if I had not taken maternity leave in September to give birth to my second child. Obviously, this had the adverse impact of bringing my monthly average down. Upon my return from maternity leave in October 2008, my patient schedule was significantly busier than normal until my departure on December 12, 2008.

(Fowler Dec. ¶ 5; CP 42)

Although Dr. Fowler's practice was booming, Dr. Johnson's business was not. In November 2008, Dr. Fowler decided to leave Island County Dermatology and start her own practice.

I had become increasingly concerned about Dr. Johnson's business practices, the clinic's financial position, and his personal conduct. I notified Dr. Johnson in late November 2008 that I intended to leave in December 2008 to start a separate dermatology practice. He did not react positively. It was obvious that he wanted me to leave quickly. When we met to discuss my departure on November 24, 2008, he and I reviewed my financial status with Island County Dermatology, at which time he confirmed in writing the prior wage agreement.

(Fowler Dec. ¶ 6; CP 42-43).

At issue were two types of compensation: wages and spa referral fees. Given her earlier 2008 monthly average of \$69,753, a conservative estimate of Dr. Fowler's wages owing for October through December, 2008 is three times \$69,753 or \$209,259.

(Fowler Dec. ¶ 9; CP 44). Dr. Johnson paid Dr. Fowler only three checks after she left -- \$28,183.99, \$17,077.21, and \$12,991.65 -- all of which bounced. (Fowler Dec. ¶ 10; CP 44-45) ("all three checks for wages were returned by Whidbey Island Bank due to insufficient funds"). Eventually, Dr. Johnson wrote valid checks totaling \$45,261.20, reducing the wages owed to \$163,997.80. (Fowler Dec. ¶ 11; CP 45).

As for spa referral fees, Dr. Fowler agreed to accept \$26,000 paid in three monthly installments of \$8,666. Dr. Johnson paid two of these installments and defaulted on the third, owing \$8,666. (Fowler Dec. ¶ 12; CP 45). From January until May 2009, the parties through counsel tried to resolve their dispute. When negotiations proved unsuccessful, on June 3, 2009, Dr. Fowler sued for breach of contract, unpaid wages, and violations of RCW 62A.3-501 et seq. (Summons, CP ___*; Complaint, CP 13-20). She later amended her complaint to add a claim for tortious interference with business expectancy.

* Appellant has designated the information in a supplemental designation of clerk's papers. A CP citation does not yet exist.

B. Dr. Johnson Received The Summons And Complaint And Did Nothing With It.

On June 9, 2009, a process server delivered two copies of the summons and complaint to Dr. Johnson personally. The Declaration of Service states,

I duly served the above described documents upon Donald Russell Johnson, M.D., by leaving the above described documents with Donald Russell Johnson, M.D., Male, light skin, 40's, tall, medium build, balding.

(Declarations of Service; Exhibit 1 to 7/15/09 Karlberg Dec.; CP 36-37). Dr. Johnson acknowledges that he received the two copies in person. (10/2/09 Johnson Dec. ¶ 6; CP 128).

Despite receiving the summons and complaint, Dr. Johnson did nothing with them. In fact, he did not open them. As he concedes in his declaration,

on or about June 15, 2009, I was served with paperwork from Ms. Fowler's attorney. I later learned this was a copy of the summons and complaint.

(10/2/09 Johnson Dec. ¶ 6; CP 128). Dr. Johnson offered two reasons why he did not look at or respond to the summons and complaint. First, he assumed that his attorney received copies and would deal with it.

I believed that because I had retained Mr. Skinner and because he had advised me that he had been

corresponding back and forth with Ms. Robinson [Dr. Fowler's attorney], that he had also received a copy of the summons and complaint, and that he would prepare and file any necessary response.

(10/2/09 Johnson Dec. ¶ 6; 128). Dr. Johnson's counsel did not receive copies.

Second, Dr. Johnson was preoccupied with his second wife's mental condition.

During the time, we were literally in survival mode and not reading all of the mail being sent and delivered. Because of the severity of her condition, I was often out of the office, attending to my wife and checking on her well-being. I was extremely preoccupied with Marianne's medical condition and related symptoms and treatment. As a result, I did not pay close attention to the nature of the pleadings served on me.

(10/2/09 Johnson Dec. ¶ 8; 129).

C. After Initially Refusing To Vacate The Default Judgment, The Trial Court Reconsidered On An All-Or-Nothing Basis

As a result of his inattention, Dr. Johnson did not file an answer within 20 days of receiving the summons and complaint. On July 2, 2009, Dr. Fowler's counsel called Christon Skinner, the attorney who had represented Dr. Johnson in negotiations.

I contacted his office on July 2, 2009 to determine if Mr. Skinner had been retained to represent Defendants in the lawsuit, and if so, why an answer had not been filed. Mr. Skinner was not available to take my call, but his office indicated that he would

return the call at his earliest opportunity. I have not been contacted by Mr. Skinner, his office, or anyone representing Defendants.

(7/15/09 Karlberg Dec. ¶ 4; CP 34). Despite personal service on Dr. Johnson and a message to his attorney, no one answered Dr. Fowler's complaint.

On July 15, 2009, Dr. Fowler moved for a default judgment, noting the motion for July 24, 2009. Even though not required under the rules, counsel for Dr. Fowler mailed copies of the pleadings to Dr. Johnson and allowed 9 days for a response. Again, Dr. Johnson failed to file an answer or respond to the motion.

On the 24th, Dr. Johnson did not appear and the court entered its order of default. (Order of Default; CP 38-39). Because the court under CR 55(b)(2) required evidence of Dr. Fowler's damages, on August 7, 2009, the trial court held a hearing before entering findings of fact and conclusions of law. (Findings and Conclusions; CP 96-104). On August 28, 2009, the court entered final judgment for \$363,535.07, which Dr. Fowler recorded in Island County on September 15, 2009. (Judgment, Auditor's File #4260110; CP 105-113).

Dr. Johnson finally responded to this lawsuit after he received a writ on garnishment. On October 2, 2009, he moved to vacate the default judgment, arguing excusable neglect. (Motion to Vacate; CP 116-118). On November 25, 2009, Superior Court Judge David Needy denied the motion, finding that Dr. Johnson had failed to provide a sufficient reason for his default.

The reasons offered by defendant Dr. Johnson are that he thought his attorney was getting a copy of everything he was receiving, he thought the wage dispute was resolved, he had been served with other documents not requiring a response, and his wife had a serious medical condition during this time frame which caused him to be preoccupied and less attentive to the contents of the summons and complaint.

This Court's review of the rules and associated case law lead to the conclusion that none of these explanations/circumstances rise to the accepted level of mistake, inadvertence, surprise or excusable neglect.

(11/25/09 Letter Ruling at 2; CP 345-347). On February 26, 2010, the court entered its formal order denying the motion to vacate. (Order Denying Motion to Vacate; CP 432-440). Dr. Johnson initially appealed from this order, but on October 26, 2010 voluntarily dismissed his appeal.

Dr. Johnson moved for reconsideration, arguing in part that he did not act willfully or with intent to deprive Dr. Fowler of her

wages. (Motion for Reconsideration; CP 414-426). This is a defense under RCW 49.52.070 to an award of double damages. On May 18, 2010, Judge Needy reconsidered his ruling, concluding that Dr. Johnson had demonstrated “a strong or virtually conclusive defense to the third cause of action...specifically, as it relates to the willful and intentional requirements of RCW 49.52.050.” (5/18/10 Letter Ruling at 1; CP 473).

The court reaffirmed that the other four causes of action “remain subject to the four prong analysis resulting in the previous ruling denying the Motion to Vacate Default and Default Judgment.” (5/18/10 Letter Ruling at 1; CP 473). But the Court vacated the entire default judgment. On August 20, 2010, the court denied Dr. Fowler’s motion for reconsideration. (8/20/10 Letter Ruling; CP 560).

Dr. Fowler now appeals.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court’s decision for an abuse of discretion.

We review a trial court’s ruling on a motion to vacate a default judgment for an abuse of discretion. A trial court abuses its discretion only when its decision is

manifestly unreasonable or based on untenable grounds, or for untenable reasons.

TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 199, 165 P.3d 1271 (2007) (citations and quotation omitted).

The failure to apply the correct legal standard is an untenable reason, requiring reversal.

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.

Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (emphasis added).

IV. THE TRIAL COURT VACATED THE DEFAULT JUDGMENT ON UNTENABLE GROUNDS

A. Trial Courts May Vacate Only Part Of A Default Judgment

Judge Needy made the grounds for his final ruling clear. Even though default judgment was appropriate on four out of five causes of action, the court could not vacate only part of the judgment.

I can find no authority allowing vacation of the default on one cause of action and maintaining it on the other four. The complaint and ensuing default must be decided on an all or nothing basis.

(5/18/10 Letter Ruling at 1; CP 473-474). The court underestimates its power.

For three reasons trial courts may vacate default judgment on one claim while leaving default judgment on independent claims in place. First, courts may conclude a party defaulted on liability while requiring a trial on damages. In other words, courts may enter default judgments on specific elements of a claim.

In Calhoun v. Merritt, 46 Wn. App. 616, 731 P.2d 1094 (1987), Douglas Merritt rear-ended Roger Calhoun at an intersection. Calhoun sued, and Merritt failed to answer because his insurer did not respond. The Court found this a reasonable excuse, but vacated the default judgment only on damages.

As for his responsibility for the accident, Mr. Merritt has presented no defense. Thus, *the default judgment on liability must stand*, and the only remaining question is whether the court erred in refusing to vacate the damage portion of the default judgment.

Calhoun, 46 Wn. App. at 619-20 (emphasis added). The Court did not reopen the entire default judgment and conclude that Merritt

had conceded liability. Instead, it left the default judgment on liability untouched, reopening only the issue of damages.

The Court of Appeals refined this authority in Shepard Ambulance v. Helsell Fetterman, et al., 95 Wn. App. 231, 974 P.2d 1275 (1999). Shepard involved the “case within a case” presented by a legal malpractice claim. Plaintiff Shepard argued that defendant Helsell committed malpractice by failing to file a timely motion to vacate a default judgment. The question was whether a judge would have granted the motion -- had Helsell filed it.

To answer, the Court “set forth a standard as to when default damages should be vacated.” Shepard, 95 Wn. App. at 241. “[T]he standard for vacating awards of damages from default judgments is the same as the standard for setting aside awards of damages from trials.” Shepard, 95 Wn. App. at 242. Applying that standard to Helsell’s hypothetical motion, the Court concluded it would have led to vacating the damage award.

Had the motion to vacate been filed earlier, Shepard’s neglect would not have been inexcusable, it would have acted with due diligence, and Berkins would not have suffered a substantial hardship by a trial on the merits as to damages.

* * * *

Under the special circumstances of this case, we thus hold that an earlier filed motion to vacate would have been granted as to damages, and reverse.

Shepard, 95 Wn. App. at 244-45.

The same analysis applies to the causes of actions here. The trial court found a strong, virtually conclusive defense on one element of damages only: double damages from willfully or intentionally withholding Dr. Fowlers' wages. This was a unique aspect of Dr. Fowlers' third cause of action, violation of RCW 49.52.070. The other claims – breach of contract (wages), breach of contract (spa referral fees), violating RCW 62A.3-501 (writing NSF checks), and tortious interference with business expectancy – do not require proof of willfulness or intent. They are separate from, and unaffected by, a trial on whether Dr. Johnson willfully or intentionally withheld Dr. Fowler's wages.

Dr. Johnson may argue that since he offered a prima facie defense to the four other claims, the trial court must reopen the entire default judgment. Washington courts have consistently rejected this argument.

This court will not relieve a defendant from a judgment taken against him due to his willful disregard of process, or due to his inattention or neglect in a case such as this where there has been

no more than a prima facie showing of a defense on the merits.

Commercial Courier Service, Inc. v. Miller, 13 Wn. App. 98, 106, 533 P.2d 852 (1975).

Judge Needy concluded that “none of the explanations/ circumstances presented by defendants rise to the accepted level of mistake, inadvertence, surprise or excusable neglect.” (Order Denying Motion to Vacate Default, Conclusion No. 8; CP 440). He reaffirmed this ruling in his letter ruling granting reconsideration. (5/18/09 Letter Ruling; CP 473). Because Dr. Johnson has not appealed these rulings, he may not challenge them on appeal.

Trial courts may vacate only part of a default judgment, whether on a particular element or a particular claim. It is not an “all or nothing” decision.

B. CR 55 and CR 60 Allow Trial Courts To Set Terms On Reopening A Default Judgment

Both CR 55(c) and CR 60(b) expressly authorize trial courts to modify default judgments on “terms as are just.” Reported cases do not define what the rules include as terms, focusing instead on the reasonableness of a monetary sanction. 4 Tegland, Washington Practice CR 60 § 18 (5th Ed.) (“generally, the terms consist of payments to the opposing party for expenses incurred by

that party”); Pamelin Industries, Inc. v. Sheen-U. S. A., Inc., 95 Wn.2d 398, 404, 622 P.2d 1270 (1981) (“on the record before it, the trial judge had sufficient justification to impose conditions on the order setting aside the default judgment”).

A reasonable term or condition here is to reopen only that portion of a default judgment subject to Dr. Johnson’s strong, virtually conclusive defense. By allowing Dr. Johnson to reopen the entire judgment based on one defense to double damages, the trial court did not enter “such terms as are just.” Both CR 55(c) and CR 60(b) expressly authorize trial courts to reopen only part of a default judgment.

C. The Trial Court’s Equitable Powers Allow It To Reopen Only The Double Damages Claim

In addition to its authority under the rules, the trial court had broad equitable powers to reopen only part of its default judgment.

Our primary concern in reviewing a trial court’s decision on a motion to vacate is whether that decision is just and equitable. Calhoun v. Merritt, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986). “Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted.” Johnson v. Cash Store, 116 Wn. App. 833, 841, 68 P.3d 1099 (2003). This system is flexible because what is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.

TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 200, 165 P.3d 1271 (2007) (citation omitted).

Within these equitable powers is the trial court's authority to vacate its default judgment on only one of Dr. Fowlers' five claims. "In matters of equity, trial courts have broad discretionary power to fashion equitable remedies." Sorenson v. Pyeatt, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). Judge Needy was understandably reluctant to act without a reported appellate decision, but the trial court's *authority* to do so is clear. As a logical consequence of the four-part test in White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968), Judge Needy concluded that Dr. Johnson had a compelling defense on only one claim. The trial court's equitable powers allowed it to vacate default judgment only on that claim.

In sum, the trial court vacated its entire default judgment on untenable grounds. Contrary to the trial court's written conclusion, Washington law and court rules allow trial judges to vacate default judgment on one claim out of five. It is not an all or nothing decision. Therefore, the trial court abused its discretion by granting Dr. Johnson's motion for reconsideration.

V. DR. FOWLER IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS' FEES

Under RCW 62A.3-515, Dr. Fowler is entitled to an award of reasonable attorneys' fees on appeal.

[I]n the event of court action on the [dishonored] check, the court, after notice and the expiration of the fifteen days, shall award reasonable attorneys' fees, and three times the face amount of the check or three hundred dollars, whichever is less, as part of the damages payable to the person enforcing the check.

RCW 62A.3-515. By reinstating default judgment on Dr. Fowlers' fourth cause of action, she becomes the prevailing party, entitled to fees. Northwest Motors, Ltd. v. James, 57 Wn. App. 364, 374, 788 P.2d 584 (1990) (awarding reasonable attorneys' fees on appeal).

CONCLUSION

Dr. D. Russell Johnson ignored two copies of summons and complaint and notice of default judgment. He did this at the risk of losing his right to defend his actions in court. The trial court initially found no compelling reason to vacate the default judgment. Although on reconsideration Dr. Johnson raised a compelling defense to double damages, that alone did not require the trial court to vacate the entire default judgment.

Appellant Dr. Amber Fowler respectfully requests this Court to reverse the trial court's order vacating the entire default

judgment, and remand for entry of judgment on four of the five claims in her complaint. A trial on the merits is appropriate only on Dr. Fowler's claim for double damages under RCW 49.52.070.

DATED this 2nd day of February, 2011.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the Opening Brief of Appellant to:

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DATED this 2ND day of February, 2011.



Heidi Main

APPENDIX A



Skagit County Superior Court

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Re: Fowler v. Johnson, et ux., et al. #09-2-01188-8

Dear Counsel:

I apologize for the delay in getting this ruling to you on the refocused Motion for Reconsideration. I have been trying to determine if the Default Order is an all or nothing entity or if the individual issues contained therein can be dealt with separately.

Five causes of action were pled in the Amended Complaint filed by Plaintiff on July 7, 2009. Various degrees of defenses were set forth in the Motion to Vacate Default to these claims. This Court finds that Defendant(s) demonstrated a strong or virtually conclusive defense to the third cause of action. Specifically, as it relates to the willful and intentional requirements of RCW 49.52.050.

The remaining four causes of action remain subject to the four prong analysis resulting in the previous ruling denying the Motion to Vacate Default and Default Judgment.

I can find no authority allowing vacation of the default on one cause of action and maintaining it on the other four. The complaint and ensuing default must be decided on an all or nothing basis.

Kenneth L. Karlberg
Christon C. Skinner
May 18, 2010
Page Two

Therefore, since the Defendant is entitled to vacation of the default on the third cause of action, the Motion for Reconsideration is granted. The Motion to Vacate Default and Default Judgment is granted. Mr. Skinner, please prepare the necessary order and/or note the matter for presentation.

Sincerely,



Dave Needy
Judge, Department Four

DN:mb

APPENDIX B

2010 JUL -7 AM 9:42

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2
3
4
5
6
7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF SKAGIT**
9

10 AMBER D. FOWLER, M.D., an individual,

11 Plaintiff,

12 v.

13 DONALD RUSSELL JOHNSON, M.D. and
14 JANE DOE JOHNSON, husband and wife
15 and the marital community comprised
16 thereof, and ISLAND COUNTY
17 DERMATOLOGY, PLLC, a Washington
18 professional limited liability company, D/B/A
19 FIDALGO DERMATOLOGY,

18 Defendants,

19 WHIDBEY ISLAND BANK,

20 Gamishee Defendant.
21

Case No. 09-2-01188-8

**ORDER GRANTING
DEFENDANTS' MOTION FOR
RECONSIDERATION RE:
MOTION FOR ORDER TO
VACATE DEFAULT**

22 This matter came before the Court on Defendants' timely Motion for
23 Reconsideration pursuant to Skagit County Local Superior Court Rule 59. Although no
24 oral argument was considered, the Defendants appeared through their attorney,
25 Christon C. Skinner of Skinner & Saar, P.S.; the Plaintiff appeared through her
26 attorney, Kenneth Karlberg of Barron, Smith and Daugert, Inc.

1 The court considered (1) the Defendants' Motion for Reconsideration made
2 pursuant to CR 59, (2) the Plaintiff's Brief in Opposition to Defendants' Motion for
3 Reconsideration, (3) the Defendants' Reply to Plaintiff's Brief in Opposition to
4 Defendants' Motion for Reconsideration, (4) Defendants' Supplemental Brief - Motion
5 for Reconsideration, (5) Plaintiff's Supplemental Brief in Opposition to Defendants'
6 Motion for Reconsideration, and the pleadings and files herein. Deeming itself fully
7 advised on the issues and the Court having concluded that the court made an error of
8 law when it initially denied the Defendants' Motion to Vacate the order of default and
9 default judgment previously entered in this case; NOW THEREFORE,

*
*

ORDER

10 IT IS HEREBY ORDERED that Defendants' Motion for Reconsideration
11 regarding the court's earlier ruling to deny the Defendants' motion to vacate the order
12 of default and default judgment is GRANTED. ^{as specifically provided in the court's} It is further ^{memorandum opinion}
13 ^{dated 5/18/2010.}

14 ORDERED, that upon presentation, the court will enter an order vacating the
15 prior order denying the motion to vacate the default and enter an order granting the
16 defendants' motion to vacate the default and default judgment.

17 DATED this 7 day of July, 2010.

18 Dave Neede
HONORABLE DAVE NEEDE

19 Presented by:

20 [Signature]
21 CHRISTON C. SKINNER/#9515
22 Attorney for Defendants

* The court specifically finds, as
part of its decision on the motion
for reconsideration, that there is
no evidence in the record to establish
that the defendant acted willfully &
intentionally as required by R.C.W.
49.52.050.

[Signature]
[Signature]

24 Approved as to form:

25 [Signature]
26 KENNETH L. KARLBERG/#18781
Attorneys for Plaintiff

APPENDIX C



Skagit County Superior Court

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY WA
JUGED AUG 19 11

Skagit County Courthouse
205 West Kincaid Street, Room 202
Mount Vernon, WA 98273

Phone: (360)336-9320
Fax: (360)336-9340
E-mail: superiorcourt@co.skagit.wa.us

JOHN M. MEYER
JUDGE, DEPARTMENT NO. 1

MICHAEL E. RICKERT
JUDGE, DEPARTMENT NO. 2

SUSAN K. COOK
JUDGE, DEPARTMENT NO. 3

DAVE NEEDY
JUDGE, DEPARTMENT NO. 4

G. BRIAN PAXTON
COURT COMMISSIONER

DELLAH M. GEORGE
COURT ADMINISTRATOR

August 19, 2010

Kenneth L. Karlberg
Attorney at Law
P.O. Box 5008
Bellingham, WA 98227

Christon C. Skinner
Attorney at Law
740 SE Pioneer Way
Oak Harbor, WA 98277

RECEIVED

AUG 24 2010

Barron Smith Daugert, PLLC

Re: Fowler v. Johnson, et ux., et al. #09-2-01188-8

Dear Counsel:

This matter comes before the Court on Plaintiff's Motion for Reconsideration. The Court has reviewed the submittals and the file herein. The Motion for Reconsideration is hereby denied.

Sincerely,

Dave Needy
Dave Needy
Judge, Department Four

DN:mb