

65207-9

65207-9

No. 65207-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SKAGIT COUNTY
THE HONORABLE DAVID NEEDY

BRIEF OF RESPONDENTS

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I. RESTATEMENT OF ISSUES

1. Whether a trial court abuses its discretion by vacating a default judgment in its entirety when it is undisputed that the defendant has a strong, virtually conclusive defense to one of plaintiff's five closely related claims?

2. Whether a trial court abuses its discretion in vacating a default judgment when: (1) the defendant presents un rebutted evidence refuting plaintiff's damages, (2) defendant failed to answer on the reasonable belief that the matter was being handled by his attorney, (3) defendant appeared the day he received notice of the default and moved to vacate the judgment less than a week later, and (4) there is no prejudice to the plaintiff in vacating the judgment?

II. RESTATEMENT OF THE CASE

A. Standard Of Review.

As the prevailing party, Dr. Johnson is entitled to have the evidence viewed in the light most favorable to him. *Lopez v. Reynoso*, 129 Wn. App. 165, 170, 118 P.3d 398 (2005), *rev. denied*, 157 Wn.2d 1003 (2006). This court "may affirm the trial court on any grounds established by the pleadings and supported

by the record.” *Otis Housing Ass’n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009); RAP 2.5(a).

B. When Dr. Fowler Left Dr. Johnson’s Clinics In December 2008 After Two Years, A Dispute Arose Over How Much Compensation She Was Owed. Both Parties Retained Counsel To Resolve The Dispute.

Defendant Russ Johnson is a dermatologist and owner of Island County Dermatology, PLLC, (“ICD”), which operated clinics in Anacortes and Coupeville, as well as a medical spa. (CP 41) Plaintiff Amber Fowler worked at ICD as a dermatologist for 28 months. (CP 40-41) Dr. Fowler’s compensation was based on a percentage of her receivables and spa referrals. (CP 41, 60) Because of this pay scheme, the exact amount owing to Dr. Fowler at any given time was difficult to determine. (CP 41, 307; *see also* CP 5)

On December 12, 2008, Dr. Fowler left ICD to operate her own dermatology clinic. (CP 42, 60) Dr. Johnson issued three checks to Dr. Fowler, and although Dr. Johnson had sufficient funds to honor the checks, a bookkeeping error resulted in their dishonor. (CP 327) Dr. Johnson subsequently paid Dr. Fowler for the amounts in two of the three checks (\$17,077.21 and \$28,183.99), but refused to honor a third check for \$12,991.65

because he believed it was an overpayment. (CP 44-45, 148-49, 307; BA 8)

Dr. Fowler continued to believe that she was owed additional compensation, and retained counsel Amy Robinson from the firm of Barron, Smith, Daugert to represent her. In January and February 2009, Ms. Robinson sent several demand letters to Dr. Johnson on Dr. Fowler's behalf. (CP 45, 84, 88-89, 91, 145-46) Dr. Johnson hired his own counsel, Christon Skinner. (CP 84, 138, 288) After learning that Mr. Skinner represented Dr. Johnson, Ms. Robinson contacted Mr. Skinner directly and forwarded prior communications with Dr. Johnson to him. (CP 92-93, 95, 141-42)

In her initial letter to Mr. Skinner, Ms. Robinson stated, "I remain hopeful that with your intervention, we may yet avoid a lawsuit between our respective clients, and am committed to working with you to amicably resolve this matter if at all possible." (CP 93; *see also* CP 147 ("I am encouraged by your confirmed involvement in this matter.)) Mr. Skinner responded to Ms. Robinson's letter and expressly advised her that he had been retained to resolve their clients' compensation dispute. (CP 138, 148, 287; *see also* CP 6) Mr. Skinner asked Ms. Robinson to

“direct any further correspondence or contact about this matter to me.” (CP 148)

Mr. Skinner and Ms. Robinson communicated many times throughout March and April 2009, discussing the best way for Dr. Fowler to access the records she claimed were necessary to calculate any amounts owed. (CP 92-93, 95, 141-3, 147-49, 151-52, 154-55) On April 13, 2009, Mr. Skinner sent Ms. Robinson a letter offering to let Dr. Fowler inspect Dr. Johnson’s records and suggesting she contact Dr. Johnson’s officer manager. (CP 151-55) That same day, Ms. Robinson responded by email asking that the records be compiled for Dr. Fowler and advising that Dr. Fowler would present the previously dishonored check. (CP 154)

C. Without Serving Counsel, Dr. Fowler Filed A Complaint And Obtained A Default Judgment Against Dr. Johnson.

Dr. Fowler filed suit against Dr. Johnson on June 3, 2009. (CP 13-20, 138, 288; BA 8) She filed an amended complaint on July 7, 2009, alleging five causes of action: two breach of contract claims, an unpaid wages claim under RCW 49.52.050, a claim for violating 62A.3-50 *et seq.* (dishonored checks), and a tortious interference claim. (CP 21-29)

Prior to filing suit, Ms. Robinson did not follow up on her April 2009 email or indicate to Mr. Skinner in any other manner that Dr. Fowler planned to file suit against Dr. Johnson. (CP 138, 287-88) The complaint was signed by Ms. Robinson and by Ken Karlberg, another attorney at the Barron, Smith firm representing Dr. Fowler. (CP 20) Like Ms. Robinson, Mr. Karlberg was aware that Mr. Skinner represented Dr. Johnson. (CP 174, 289)

Dr. Johnson did not formally respond, and on July 15, 2009, Dr. Fowler moved for default. (CP 30-32) Prior to moving for default, Mr. Karlberg called Mr. Skinner's office. (CP 174-75) Mr. Skinner was out of town when Mr. Karlberg called; Mr. Karlberg left a message. (CP 138, 200, 288-89) Mr. Skinner had dealt exclusively with Ms. Robinson, and did not know who Mr. Karlberg was. (CP 289; *compare* CP 34, 174-75, 199, 201 *with* CP 138, 200, 288-89; *see also* CP 6) Mr. Karlberg's message did not "describe[] the fact that a lawsuit had been filed by Dr. Fowler against Dr. Johnson" or that a motion for default was pending. (CP 288)

The trial court granted the motion for default on July 24, 2009. (CP 38-39) The court held a hearing pursuant to CR 55(b)(2) and entered findings of fact and conclusions of law (96-

104), which were subsequently amended. (CP 105-115) The court found that Dr. Johnson owed Dr. Fowler \$163,997.80. (CP 110) The court further found that this debt constituted wrongfully withheld wages that could support an award of double damages and attorney's fees under RCW 49.52.050(2) and RCW 49.52.070. (CP 112) The court entered a total amended default judgment for \$363,535.07 on August 28, 2009. (CP 106)

D. Dr. Johnson Received The Summons And Complaint But Believed That His Counsel Had Been Served With The Complaint And Was Responding To It On His Behalf.

Dr. Johnson had been served with the summons and complaint on June 9, 2009, (CP 37) but disputes that he received the motion for default. (CP 290, 306, 309-10) Dr. Johnson did not appreciate the nature of the papers served on him, or that he was required to respond. Since Dr. Johnson had retained Mr. Skinner specifically to deal with the dispute with Dr. Fowler, and based on the extensive pre-suit negotiation between the parties' attorneys, Dr. Johnson assumed that Mr. Skinner was also served with the summons and complaint and would respond. (CP 128, 288, 306; *see also* CP 7)

E. Upon Learning That A Default Judgment Had Been Entered, Dr. Johnson's Counsel Formally Appeared And Immediately Moved To Vacate The Default Judgment.

Mr. Skinner and Dr. Johnson only became aware of the default judgment when they received a writ of garnishment on September 25, 2009. (CP 129, 138) Mr. Skinner immediately appeared formally (CP 114) and filed a motion to vacate the default judgment on October 2, 2009, a week after notice of the default and scarcely a month after the amended default judgment was entered. (CP 116-129, 139)

The trial court entered an initial order denying the motion to vacate (CP 4-12). In its initial order the court found that:

1. Dr. Fowler's counsel was aware that Mr. Skinner represented Dr. Johnson "on these specific employment compensation issues,"
2. Mr. Skinner was never notified in writing that suit had been filed,
3. "The time and expense that would have been incurred in the preparation of a short letter . . . notifying Mr. Skinner of the deadline for answering prior to seeking the default order, seem insignificant in light of litigation costs if Mr. Karlberg's real intent was to give clear notice of the pending action,"
4. Dr. Fowler's counsel never informed the court that prior to filing suit they had been communicating with Dr. Johnson's counsel on "the same issues

and subject matter addressed in the plaintiff's case.

5. "Substantial evidentiary support was provided to support the defendants' assertion of a defense on the merits to the plaintiff's claims," and
6. No "substantial hardship would be imposed upon the plaintiff if the judgment were to be vacated."

(CP 6-11; see *also* CP 200)

Dr. Johnson moved for reconsideration. In a letter ruling the trial court found that Dr. Johnson "demonstrated a strong or virtually conclusive defense" to Dr. Fowler's claim for double damages under RCW 49.52.070. (CP 473) The trial court vacated the entire judgment based on Dr. Johnson's strong defense to the claim for double damages. (CP 474) In its order vacating the default judgment (CP 482-84) the trial court found that Dr. Johnson had acted with due diligence after notice of the entry of default and that Dr. Fowler would not suffer substantial hardship from setting aside the default. (CP 483)

The trial court denied Dr. Fowler's motion for reconsideration of the order vacating default. (CP 560) Dr. Fowler appeals, but concedes that the award of double damages should be vacated. (BA 3-4, 19, 21-22)

III. ARGUMENT

“Default judgments are not favored in the law.” *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). An appellate court’s review of a decision to vacate a default judgment is extremely deferential, and the decision will be reversed only for a clear abuse of discretion. 92 Wn.2d at 582. “Abuse of discretion is less likely to be found if the default judgment is set aside.” *Griggs*, 92 Wn.2d at 582; see also *Bank of the West v. F & H Farms, LLC*, 123 Wn. App. 502, 505, 98 P.3d 532 (2004) (“We are very deferential when we pass upon a court’s decision to set aside a default judgment because we want parties to have an opportunity to defend on the merits.”) Here, the trial court reached the correct result by vacating the entire judgment under *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). Whether it could have vacated only part of the judgment is irrelevant, as it is undisputed that Dr. Johnson has a strong, virtually conclusive defense to one of five closely related claims.

A. The Trial Court Correctly Vacated The Entire Default Judgment Under *White v. Holm*.

Dr. Fowler frames the issue on appeal as whether a trial court has the power to vacate only part of a default judgment.

Regardless of its power to vacate only part of the judgment, the trial court was justified in vacating the entire default judgment here under ***White v. Holm***.

When exercising its discretion to set aside a default judgment under CR 60(b), the court must consider four 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.

White, 73 Wn.2d at 352. Each factor “var[ies] in dispositive significance as the circumstances of the particular case dictate.”

White, 73 Wn.2d at 352; *see also Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019, 3 P.3d 207, *rev. denied*, 142 Wn.2d 1004 (2000) (“These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors.”). The first two factors are the more important ones. 73 Wn.2d at 352. Considering only a

single factor is error. ***State v. A.N.W. Seed Corp.***, 44 Wn. App. 604, 608, 722 P.2d 815 (1986).

1. Dr. Johnson Has A Strong Defense To All Of Dr. Fowler's Claims.

"[I]n determining whether a party is entitled to vacation of a default judgment, a trial court's initial inquiry is whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff's claims." ***TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.***, 140 Wn. App. 191, 201, 165 P.3d 1271 (2007). 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. ***White***, 73 Wn.2d at 352.

If the moving party shows only a "prima facie defense," the reasons for failing to timely appear "will be scrutinized with greater care," "as will the seasonability of his application and the element of potential hardship on the opposing party." 73 Wn.2d at 352-53. 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.” 140 Wn. App. at 203.

Here, Dr. Fowler concedes that Dr. Johnson demonstrated a virtually conclusive defense to her claim for double damages under RCW 49.52.070, and that this claim should be remanded. (BA 3-4, 19, 21-22; *see also* CP 308, 424-25) Moreover, Dr. Johnson demonstrated a virtually conclusive defense on Dr. Fowler’s breach of contract claims. Dr. Johnson submitted un rebutted declarations that a full review of his billing records showed that Dr. Fowler was paid in full and, in fact, was overpaid. (CP 307, 326-28) Dr. Fowler submitted no evidence to rebut these factual assertions below, but instead chose to stand behind the assertions in her initial complaint. (CP 443-44)

There being no evidence to the contrary, Dr. Johnson has established a “strong or virtually conclusive” defense to Dr. Fowler’s contract claims. Dr. Johnson as a consequence has also demonstrated a defense to Dr. Fowler’s claims under RCW 62A.3-50 *et seq.* *See Vancouver Nat. Bank v. Katz*, 142 Wash. 306, 313, 252 P. 934 (1927) (“As between the maker and the payee, a promissory note is but a simple contract to pay money. It is

obligatory only on the same terms and conditions that other simple contracts of a like purport are obligatory. It may be defended against for want of consideration, for fraud and deceit, and for any of the other causes which will avoid simple contracts.”); see *also Canam Hambro Systems, Inc. v. Horbach*, 33 Wn. App. 452, 455, 655 P.2d 1182 (1982).

On her claim for intentional interference with a business expectancy, Dr. Fowler was required to show that Dr. Johnson intentionally interfered with Dr. Fowler’s business expectancy for an improper purpose. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). The court found, and Dr. Fowler concedes, that there was a virtually conclusive defense that Dr. Johnson did not act intentionally under RCW 49.52.050. (CP 473, BA 3-4, 19, 21-22; see *also* CP 308, 424-25) This lack of intentionality is also fatal to Dr. Fowler’s business expectancy claim; without such evidence she cannot prove either the intentional interference or improper purpose elements of her claim.

Dr. Fowler also was required to submit evidence that Dr. Johnson’s intentional interference caused Dr. Fowler damages. Dr. Fowler did not do so. (See CP 105-13 (no findings of fact

supporting damages for intentional interference with a business expectancy))

Finally, where damages are significant and complicated, as here, a court should be more lenient when considering whether a defendant has presented a strong or virtually conclusive defense, as the evidence necessary to create such a defense is difficult to obtain without discovery. *Calhoun v. Merritt*, 46 Wn. App. 616, 620-21, 731 P.2d 1094 (1986) (complicated nature of damages and necessity of discovery supported vacating default judgment). In its initial order, the trial court explicitly found that “[b]ecause plaintiff was not a straight forward hourly wage employee, it would take considerable testimony before any trier of fact could determine the correct amount of unpaid wages.” (CP 5) Dr. Fowler acknowledges that the amount at stake is significant. (CP 213)

2. Dr. Johnson’s Reasonable Belief That His Counsel Was Handling The Suit Establish Mistake And Excusable Neglect In Failing To Answer.

Because Dr. Johnson has demonstrated a strong defense on each of Dr. Fowler’s claims, “scant time” should be “spent inquiring into the reasons which occasioned entry of the default.” *White*, 73 Wn.2d at 352. Even assuming, *arguendo*, that Dr. Johnson had only demonstrated a prima facie defense to Dr. Fowler’s claims, his

failure to answer was due to excusable neglect and thus the trial court was still correct to vacate the entire default judgment.¹

Washington courts have routinely found that a party's reasonable belief that an attorney was handling a suit on his behalf is excusable neglect. See *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577, *rev. denied*, 130 Wn.2d 1005 (1996); *Norton*, 99 Wn. App. 118; *A.N.W. Seed Corp.*, 44 Wn. App. 604, 609-10 (excusable neglect where the default defendant believed he had retained a law firm to defend him before leaving on extended international trip); *Calhoun*, 46 Wn. App. at 621 (excusable neglect where default defendant believed that insurer was handling the suit based on pre-suit negotiations); *Gutz v. Johnson*, 128 Wn. App. 901, 918-19, 117 P.3d 390 (2005), *aff'd by Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007) (excusable neglect where insured was served with complaint, informed insurer of suit but did not

¹ Contrary to Dr. Fowler's assertion (BA 18), Dr. Johnson was not required to appeal the trial court's initial conclusion that there was no excusable neglect in order to argue this the court should affirm based on a proper application of *White*. A trial court may be affirmed on any ground supported by the record and pleadings. RAP 2.5(a); *Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). A party need cross-appeal only when seeking affirmative relief. *State v. Bobic*, 140 Wn.2d 250, 257, 996 P.2d 610 (2000) ("[R]espondent, . . . was not obliged to cross-appeal because it sought no further affirmative relief from the Court of Appeals.").

confirm that insurer had retained attorney to defend him); ***Kain v. Sylvester***, 62 Wash. 151, 152, 113 P. 573 (1911) (trial court did not abuse discretion by vacating default where defendant “believed in good faith that he had employed an attorney to appear in the action”).

In ***Hardesty*** for example, the plaintiff filed a complaint for medical negligence against her physician, the University of Washington, and the State. The plaintiff then filed a second complaint against the same defendants. 82 Wn. App. at 257. An assistant attorney general (Milam) appointed outside counsel (Leedom). 82 Wn. App. at 257. Leedom appeared in the first action, but not the second. The plaintiff did not formally serve Leedom with the summons and complaint in the second action or notify him of her motion for default. 82 Wn. App. at 264-65. Milam assumed that Leedom had been served in the second suit and did not file an answer.

The trial court later vacated the default judgment that was entered. On appeal, the court affirmed and held that Milam’s assumption that Leedom was served in the second action was reasonable. ***Hardesty***, 82 Wn. App. at 264. The court noted that the cases “involved the same parties and issues.” 82 Wn. App. at

264-65. The court rejected the plaintiff's argument that because it had no formal obligation to serve Leedom, the defendants' failure to answer was inexcusable neglect. The court stated, "Although perhaps technically correct, we reject this argument in light of [plaintiff]'s knowledge that the defendants were Leedom's clients in [the first suit]" 82 Wn. App. at 265. The court also relied on the fact that the plaintiff's "attorneys could have easily informed the attorneys whom they knew to be representing the defendants of the motion for a default judgment." 82 Wn. App. at 265.

A similar result was reached in *Norton*. The plaintiff (Norton) sued the defendant (Brown) after a car accident. Brown informed his insurer of the accident, who began settlement negotiations with Norton's counsel. A settlement was not reached and Norton filed suit. Norton personally served Brown and also sent a courtesy copy to Brown's insurer with a letter stating that the papers were "out for service." 99 Wn. App. at 120. Brown did not notify his insurer when he received the summons and complaint because he believed his insurer was already handling the claim on his behalf. The insurer did not answer and Norton obtained a default judgment, which Brown later moved to vacate.

The trial court refused to vacate the default judgment and held that Brown's failure to appear and defend was inexcusable neglect. **Norton**, 99 Wn. App. at 122. The court of appeals reversed. 99 Wn. App. at 126. The court held that Brown's failure to defend was excusable neglect, because "Brown was under the impression that his interests were being protected by his insurer through settlement negotiations." 99 Wn. App. at 124. The court relied on the parties' extensive negotiations in reversing the trial court's refusal to vacate the default judgment:

This is not a case where Mr. Brown completely failed to respond to Mr. Norton's request for compensation for his injuries. Nor had the adversary process ground to a halt due to Mr. Brown's intransigence. Mr. Brown's insurance company negotiated with Mr. Norton for more than a year in trying to reach a settlement agreement. It was only when the insurer's final offer was deemed unacceptable that Mr. Norton filed his complaint for damages in court. This being the case, Mr. Norton should have understood that Mr. Brown clearly intended to defend the action.

99 Wn. App. at 126.

Hardesty and **Norton** control the present case. It is undisputed that Dr. Fowler's counsel knew that Mr. Skinner represented Dr. Johnson on the exact issues at dispute in Dr. Fowler's complaint. (CP 138, 142, 147, 174, 287-289; see also CP 6) Indeed, counsel negotiated for two months (CP 92, 95, 141-3,

147-49, 151-52, 154-55) and exchanged “many letters [and] conferences” (CP 84). Mr. Skinner explicitly asked that any further contact be directed to him. (CP 148) Here, as in *Hardesty*, Dr. Fowler may not have had a formal obligation to serve Mr. Skinner, but based on the extensive negotiations between Dr. Fowler’s counsel and Mr. Skinner, Dr. Johnson had a reasonable belief that Mr. Skinner was served with the complaint. (CP 128, 306; *see also* CP 7) This court, as the *Hardesty* court did, should reject Dr. Fowler’s argument, which while “technically correct,” ignores her knowledge that Mr. Skinner represented Dr. Johnson on the precise issues involved in her complaint. 82 Wn. App. at 265.

Nor can Mr. Karlberg’s message to Mr. Skinner substitute for proper service. Mr. Skinner had never previously dealt with Mr. Karlberg and thus had no knowledge who he was. (CP 289) Moreover, the parties heavily dispute the content of the message. (*Compare* CP 34, 174-75, 199, 201 *with* CP 138, 200, 288-89; *see also* CP 6) As the trial court initially found, “The time and expense . . . of a short letter . . . notifying Mr. Skinner of the deadline for answering prior to seeking the default order, seem insignificant in light of litigation costs if Mr. Karlberg’s real intent was to give clear notice of the pending action.” (CP 7) As in

Hardesty, Dr. Fowler's counsel could have "easily informed" Mr. Skinner of both the initial complaint and the motion for default. 82 Wn. App. at 265. Dr. Johnson should not be punished for their failure to do so.

Further, as in **Norton**, Dr. Johnson's belief that the matter was in good hands was reasonable. Dr. Johnson retained Mr. Skinner to deal with the precise issues in Dr. Fowler's complaint. (CP 128, 288, 306; see *also* CP 6) Mr. Skinner then proceeded to engage in extensive negotiations on his behalf. (CP 92, 95, 141-43, 147-49, 151-52, 154-55) Dr. Johnson did not inform Mr. Skinner of the complaint, because, as in **Norton**, he believed that his interests were being protected through settlement negotiations. **Norton**, 99 Wn. App. at 124. Likewise, this is not a case where Dr. Johnson "completely failed to respond" to Dr. Fowler's request for compensation. 99 Wn. App. at 126. Dr. Johnson made initial payments he believed Dr. Fowler was owed and then retained an attorney to settle the remaining disputes. (CP 148-49) The adversary process had not "ground to a halt." 99 Wn. App. at 126. Given the extensive negotiations, Dr. Fowler should have understood that Dr. Johnson "clearly intended to defend the action." 99 Wn. App. at 126.

3. Dr. Johnson Acted Diligently After Learning Of The Default, Appearing The Day He Received Notice And Filing A Motion To Vacate A Week Later.

Where a defendant shows only a prima facie defense, in addition to analyzing the excuse for neglect more closely, a court must also analyze more closely the defendant's diligence in seeking to vacate the default. *White*, 73 Wn.2d at 353. Dr. Johnson resolutely believes he has a strong defense to each of Dr. Fowler's claims, and thus the court need not analyze this factor. However, again assuming, *arguendo*, that Dr. Johnson has demonstrated only a prima facie defense, his diligence in seeking to vacate the default judgment supports the court's decision to vacate the judgment.

"Due diligence after discovery of a default judgment contemplates the prompt filing of a motion to vacate." *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 243, 974 P.2d 1275 (1999), *rev. denied*, 140 Wn.2d 1007 (2000). "[A] party that moves to vacate a default judgment within one month of notice satisfies CR 60(b)'s diligence prong." *Gutz*, 128 Wn. App. at 919; *see also Boss Logger, Inc. v. Aetna Cas. & Sur. Co.*, 93 Wn. App. 682, 689-90,

970 P.2d 755 (1998) (defendant was diligent where counsel appeared eight days after first receiving notice of default and moved to vacate two weeks after notice).

Mr. Skinner appeared the same day he and Dr. Johnson received notice of the default (CP 114) and filed a motion to vacate the default judgment a week later (CP 116-129, 139). Barely a month passed from when the amended default judgment was entered and the motion to vacate was filed. (CP 113, 139) Dr. Johnson offered compensation to Dr. Fowler for voluntarily setting aside the default. (CP 200) Dr. Fowler refused. (CP 201) Dr. Johnson was more than diligent in seeking to vacate the default judgment.

4. Dr. Fowler Would Not Suffer Substantial Hardship From Vacating The Default.

“The possibility of a trial is an insufficient basis for the court to find substantial hardship on the non-moving party.” *Gutz*, 128 Wn. App. at 920. If there is prejudice from having to pay attorney’s fees, the court may award the plaintiff her fees associated with vacating the default. *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 313, 748 P.2d 241 (1987); *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 306, 616 P.2d 1223 (1980); *White*, 73 Wn.2d

at 357. If such fees are awarded, there is no prejudice to support maintaining the default. **Berger**, 50 Wn. App. at 313.

Here, there is no prejudice to Dr. Fowler from vacating the default. While it is true that Dr. Fowler will have to prove her claims at trial, this is not prejudice. **Gutz**, 128 Wn. App. at 919. Likewise, incurring attorney's fees is not sufficient to support maintaining a default. **Berger**, 50 Wn. App. at 313. As with the other factors, this factor supports the trial court's decision to vacate the default.

B. A Trial Court Has Discretion To Vacate An Entire Default Judgment Based On A Strong Defense To One Claim.

Even on its own terms, Dr. Fowler's argument that the trial court should have vacated only part of the default fails. Dr. Fowler concedes that a motion to vacate is reviewed for abuse of discretion (BA 13-14) and that Dr. Johnson has a strong, virtually conclusive defense on the claim for double damages under RCW 49.52.070. (BA 3-4, 19, 21-22) The cases cited by Dr. Fowler do not support finding an abuse of discretion where, as here, there is a strong defense to a claim that is closely related to the other claims asserted in the complaint. The trial court's decision to vacate the entire default judgment should be affirmed.

Neither *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986) nor *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 974 P.2d 1275 (1999) supports Dr. Fowler's argument that the trial court erred by vacating the entire judgment. In *Calhoun*, the court allowed a default on liability to stand, but vacated the default on the issue of damages and remanded for trial. 46 Wn. App. at 622. *Shepard* was a legal malpractice case that likewise held that the vacation of a default judgment on damages, but not liability, was appropriate. 95 Wn. App. at 244-45. Neither *Calhoun* or *Shepard* addresses vacating one of several closely related claims. Rather they address vacating damages, but affirming liability, on a single claim.

Despite Dr. Fowler's protestations to the contrary, her claim for damages under RCW 49.52.070 was not "unique." (BA 17) Her claim for intentional interference with a business expectancy similarly required proof of intentional conduct, and her contract and dishonored check claims both encompass the same wages at issue in her unpaid wage claim. Unlike here, in both the cases relied upon by Dr. Fowler, the default defendant failed to present any convincing evidence of a defense on liability. *Calhoun*, 46 Wn. App. at 619-20; *Shepard*, 95 Wn. App. at 239-40. In *Calhoun*, the

defendant presented no defense at all. 46 Wn. App. at 619-20. And in **Shepard**, the defendant's defense was belied by its own allegations. 95 Wn. App. at 240. In the present case, unlike **Calhoun** and **Shepard**, Dr. Johnson has submitted substantial evidence to support a defense to each of Dr. Fowler's claims. (See section III.A.1) Despite this evidence, Dr. Fowler asks the court to affirm a default on the entirety of four claims. Neither **Calhoun** nor **Shepard** supports such a result.

Dr. Fowler argues that a reasonable application of CR 55 and CR 60 would be to open only the award of double damages. (BA 18-19) Contrary to Dr. Fowler's assertions, the rules do not "expressly authorize," nor compel, the drastic result of allowing a default on all but one cause of action when all causes of action are closely related. Depriving Dr. Johnson of his day in court would be neither just under the rules nor an equitable exercise of the court's powers.

C. Dr. Fowler Is Not Entitled To Attorney's Fees.

This court should affirm the trial court's discretionary decision to vacate the entire default judgment. Without the default judgment, her claim under RCW 62A.3-515 fails and she is not entitled to recover attorney's fees.

IV. CONCLUSION

The trial court's order vacating the entire default judgment should be affirmed.

Dated this 6th day of April, 2011.

SMITH GOODFRIEND, P.S.

By: 
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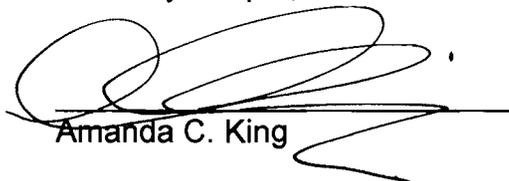
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 6, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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DATED at Seattle, Washington this 6th day of April, 2011.


Amanda C. King