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No. 68008-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DOUG KRUGER,
Respondent,

v.

MICHAEL MOI,
Appellant.

BRIEF OF APPELLANT

William John Crittenden
Attorney at Law
300 East Pine Street
Seattle, Washington 98122
(206) 361-5972
wjcrittenden@comcast.net

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COURT OF APPEALS
STATE OF WASHINGTON

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I. INTRODUCTION

These consolidated appeals arise out of the same failed business relationship between appellant Michael Moi and respondent Doug Kruger. Moi and Kruger orally agreed to purchase real property in Seattle and divide that property into two parcels, each retaining one parcel. The parties jointly borrowed \$160,000 to purchase the property. The parties agreed to share the expenses of the purchase of the property.

Disputes erupted between the parties, and Moi fell behind on his share of the loan payments. In October 2006, Kruger sued Moi, and obtained a default judgment against Moi for approximately \$44,000 in February 2007. Moi does not dispute that he owed Kruger some amount of money, and he does not challenge the judgment in the 2006 case.

Kruger also obtained a court order, in the February 2007 judgment, requiring the parties to convey the newly subdivided parcels to each other, so that Kruger would own Parcel A and Moi would own Parcel B (as the parties had agreed). Pursuant to that order, Parcel A was quitclaimed to Kruger in April 2009. But Kruger, who obtained the court order to convey the parcels, has never complied with that order. In the 2006 case, Moi appeals from the trial court's inexplicable refusal to compel Kruger to comply with the prior order by conveying Parcel B to Moi.

This case became a train wreck when Kruger, represented by his current attorney (Rick Wathen), filed a second lawsuit in 2009 based on the same underlying dispute, and obtained another default order for approximately \$79,000 in February 2010. That default order, obtained *ex parte*, was supported by a virtually unreadable spreadsheet that included more than \$30,000 in attorney fees even though there was no legal basis for Kruger to recover attorney fees in this case. When Moi learned about the 2009 lawsuit and the new default order he contacted an attorney, Michael Malnati. Malnati contacted Kruger's attorney, Mr. Wathen, in an attempt to resolve the issue.

Two weeks later, without notice to Moi or Malnati, Kruger returned to the *ex parte* court to obtain an amended default order for **\$214,903.56**, nearly *three times* the amount of the default Kruger had obtained just ten weeks earlier. This default order included the entire \$160,000 loan principal that was jointly borrowed by Kruger and Moi, even though that money was owed to the bank, not Kruger, and even though half that amount (\$80,000) was owed by Kruger, not Moi. The amended default order also included more than \$30,000 in attorney fees to which Kruger was not entitled, as well as tens of thousands of dollars of improper and undocumented expenses.

Upon discovering the outrageously inflated judgment obtained by Kruger, Moi filed for bankruptcy to stop Kruger and his attorney from executing on Moi's properties until both improper default judgments could be dealt with. The bankruptcy court ultimately determined that the default judgments should be addressed in the state court.

Moi dismissed his bankruptcy case and filed a motion in the superior court to set aside the default judgments improperly obtained by Kruger. Despite the obvious evidence of Kruger's fraud and misrepresentation, the trial court declined to set aside the default judgments, erroneously concluding (a) that Malnati had not informally appeared in the case, and (b) that Moi's motion was untimely. The trial court also denied Moi's motion, in the 2006 case, to compel Kruger to convey parcel B to Moi based on an untenable determination that it would be "inequitable" to require Kruger to comply with a court order he obtained until Moi paid the money judgment.

Since this appeal was filed, Moi has been unable to supersede the judgment(s) improperly obtained by Kruger, in large part because of the clouds on Moi's title to Parcel B, and other properties, created by Kruger. Adding insult to injury, parcel B, which Kruger should have conveyed to Moi more than three years ago, **was sold to Kruger** at a sheriff's sale on May 25, 2012, at an enormous loss to Moi. The combined effect of

Kruger's *ex parte* misconduct and the trial court's erroneous rulings has resulted in Kruger taking Moi's property while leaving Moi liable to both Kruger and the lender for twice the amount of the entire principal of the loan.

Moi asks this Court to unwind this travesty by vacating the 2010 default judgments, ordering Kruger to convey Parcel B to Moi, and awarding Moi his attorney fees under CR 11.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred in issuing the *Order Denying Motion to Set Aside Orders Granting Default Judgment* dated November 28, 2011 in King County Super. Ct. No. 09-2-36968-2 SEA. CP (09) 1108-1111.¹

Issues Pertaining to Assignment of Error No. 1:

A. Whether the trial court erred in failing to vacate the default judgments improperly obtained by Kruger in February 2010 and May 2010 where those judgments were obtained without notice to Moi, through fraud and misrepresentation, and awarded substantially greater and different relief than was sought in the complaint.

¹ There are two sets of clerk's papers in this consolidated appeal. "CP (06) ###" refers to the clerk's papers filed under King Co. Super. Ct. No. 06-2-32029-8 SEA. "CP (09) ###" refers to the clerk's papers filed under King Co. Super. Ct. No. 09-2-36968-2 SEA.

B. Whether the trial court erred in failing to award Moi attorney fees under CR 11.

Assignment of Error No. 2: The trial court erred in issuing the *Order Denying Motion to Enforce Judgment* dated November 28, 2011 in King County Super. Ct. No. 06-2-32029-8 SEA. CP (06) 220-21.

Issue Pertaining to Assignment of Error No. 2:

C. Whether the trial court erred in failing to enforce its own prior order requiring Kruger to transfer Parcel B to Moi where the prior order did not place any conditions upon the requirement that Kruger transfer the property and where Kruger's refusal to transfer the property eventually caused the property to be sold at a sheriff's sale to Kruger under highly inequitable circumstances.

Assignment of Error No. 3: The trial court erred in issuing the *Order Granting Plaintiff's Motion to Correct Amended Default Judgment* dated February 7, 2012, and the *Order Granting Plaintiff Kruger's Motion for Order to Clerk for Issuance of Writ* dated March 22, 2012, both in King County Super. Ct. No. 09-2-36968-2 SEA. CP (09) 1194-97; CP (09) 1276-79.

Issue Pertaining to Assignment of Error No. 3:

D. Whether Kruger is entitled to attorney fees where there is no contractual, statutory or equitable basis for fees, and where any claim for attorney fees is barred by res judicata.

Note: In addition to this above assignments of error, this Court must resolve Moi's *Motion to Deny Entry of Corrected Amended Default Judgment*, filed with this Court on March 8, 2012. On March 22, 2012, the Commissioner referred Moi's motion to the panel that considers this appeal on the merits. *Notation Ruling*, March 22, 2012. The facts relating to that Motion are discussed in Section III(J) below, and the disposition of Moi's motion is addressed in Section IV(D) (below).

III. STATEMENT OF THE CASE

A. Parties' Agreement to Purchase Magnolia Property

These consolidated appeals arise out of two lawsuits filed by Kruger against Moi. Both cases involve the same underlying failed business relationship in which Kruger and Moi jointly purchased property in the Magnolia neighborhood of Seattle, and subdivided the property into two parcels. The parties agreed that Kruger would acquire Parcel A and Moi would acquire Parcel B. CP (06) 108-110. The parties' agreement was only an oral agreement, and certain details of the agreement are disputed. CP (09) 550, 582-583, 588.

In 2003 the parties jointly borrowed \$160,000 against the property to pay off the original seller of the original combined parcels. CP (09) 550, 557-63. The parties agreed that each of them was to pay half the loan and half the expenses relating to Parcels A and B because each of them would ultimately obtain one parcel each. CP (09) 550-51.

Moi lived in the existing house on the property for a brief period, pursuant to an oral agreement that Moi pay all the loan payments while Moi lived there. CP (09) 5, 551. Moi paid 100% of the loan interest payments until September 2005. Neither Kruger nor Moi paid on the loan from October 2005 until Kruger paid the past due interest payments current in February of 2006. CP (09) 38, 551. In June 2006, the house was demolished. CP (09) 551-552.

Kruger made all the loan payments from February 2006 to June 2011. Moi started paying his half of the payments in July 2011. CP (09) 551. Moi agrees that he is responsible for 50% of the legitimate payments, expenses and taxes that Kruger has made towards the property while Moi was not contributing. Moi also admits that he is responsible for 50% (\$80,000) of the principal payment of the loan. CP (09) 551.

B. First (2006) Lawsuit and Default Judgment

Kruger filed the first lawsuit (*Kruger v. Moi*, No. 06-2-32029-8 SEA) in October 2006. CP (06) 1-10. On February 16, 2007, Kruger

obtained a default judgment for approximately \$44,000.² The judgment awarded **only** “statutory attorney fees and costs in the amount of \$390.95.” CP (06) 14. The judgment also ordered the parties to convey the respective parcels to each other, so that each would hold title to one parcel (subject to the \$160,000 loan). CP (06) 12-13.

C. Order to Quitclaim Parcel A to Kruger

In March 2009, Kruger obtained an order requiring Moi to convey Kruger’s parcel (Parcel A) to Kruger as provided in the February 2007 default order. CP (06) 75-76. A quitclaim deed to Kruger was executed on April 1, 2009. CP (06) 176-178. However, Kruger has never transferred Parcel B to Moi as the February 2007 order obtained by Kruger clearly required. CP (06) 75-76, 108-110, 220-221. As a result, both parcels remained titled in Kruger’s name.

D. Second (2009) Lawsuit and Default Order

Kruger filed the second lawsuit (*Kruger v. Moi*, King Co. Case No. 09-2-36968-2 SEA) in October 2009. CP (09) 1-7. The 2009 complaint is almost identical to the complaint in the earlier 2006 case. *Compare* CP (06) 3-10; CP (09) 3-7. Kruger’s 2009 complaint does not state any contractual, statutory or equitable basis for an award of attorney fees. Nor

² This default judgment for approximately \$44,000 in the 2006 case is not challenged by Moi.

does the complaint set forth the amount that Moi allegedly owed Kruger. CP (09) 3-7. On February 23, 2010, Kruger obtained an order of default of approximately \$79,000. CP (09) 50-51.³

Kruger's motion for default did not assert any legal basis for an award of attorney fees. Kruger's motion advised the *ex parte* court of the earlier judgment in the 2006 case, but Kruger failed to advise the court that the first judgment awarded only statutory attorney fees of \$125.00. CP (09) 34. Instead, the motion asserted that Kruger had incurred various "costs and fees" allegedly caused by Moi's breach, without identifying those fees as attorney fees. CP (09) 34. These amounts were set forth in a virtually unreadable spreadsheet attached to Kruger's declaration, which included more than \$30,000 in attorney fees. CP (09) 39-40. Like Kruger's motion pleadings, the trial court default order contained no mention of attorney fees, and simply awarded a lump sum. CP (09) 50-51.

E. Amended Default Judgment

When Moi learned about the default judgment in the second lawsuit, he contacted attorney Michael Malnati. On April 16, 2010, Malnati contacted Kruger's attorney about resolving the lawsuits. The attorneys had a conversation, and e-mailed each other. CP (09) 118-126.

³ Moi denies that he was properly served in the 2009 case. However, the trial court ruled that he was served. CP (09) 1108-09. That ruling is not challenged in this appeal.

Two weeks later, despite having received an informal appearance by Malnati on behalf of Moi, Kruger filed an *ex parte* motion for an amended default judgment without notice to Moi or Malnati. **Kruger asked for a judgment of \$214,903.72, nearly *three times* the amount of the default order he had obtained just ten weeks earlier.** This second default order included the entire \$160,000 jointly borrowed by Kruger and Moi, even though that money was owed to the bank, not Kruger, and even though half that amount (\$80,000) was owed by Kruger, not Moi. CP (09) 52-56. It also included 100% of thousands of dollars of costs associated with both parcels, even though the parties' agreement provided that each would be responsible for 50% of those costs. CP (09) 575-77.

Once again, Kruger's motion for amended default judgment did not assert any legal basis for an award of attorney fees. Nor did his motion alert the *ex parte* court that he was seeking an award of attorney fees. Kruger again asserted that he had incurred various "costs and fees" allegedly caused by Moi, without identifying those fees as attorney fees. CP (09) 56. These amounts were set forth in the same virtually unreadable spreadsheet attached to Kruger's declaration. CP (09) 61-62. The spreadsheet again includes more than \$30,000 in attorney fees. CP (09) 524-525, 573-575.

The *ex parte* court granted the motion, awarding Kruger \$214,903.56 as “damages...for a sum certain.” CP (09) 73. Like the two previous orders, the order did not mention attorney fees or make any finding whatsoever with respect to the basis for, or the reasonableness of, the award of attorney fees. *Id.*

F. Moi Bankruptcy

Moi learned about the May 3, 2010 amended default judgment shortly before he filed for bankruptcy on May 20, 2010. *See In re Michael Reid Moi*, U.S. Bankruptcy Court, W. Dist. of Wash., No. 10-15781; CP (09) 555. Moi hoped to resolve the issues with Kruger’s default judgments in the bankruptcy court, and his bankruptcy counsel attempted to do so. CP (09) 620-624. However, Kruger argued that the state court had jurisdiction over the issue. CP (09) 843. Ultimately the bankruptcy court ruled that Moi needed to resolve those issues in state court. CP (09) 555, 933.

G. Motion to Set Aside Default Orders (2009 Case)

In May 2011, Moi brought a motion in the superior court to set aside the default judgment(s) based on Kruger’s *ex parte* misconduct, including his improperly inflated claims for damages, including \$30,000 in attorney fees in the judgment, the failure to advise the Court that Kruger had included the entire \$160,000 loan, including the \$80,000 owed by

Kruger, in the judgment, and obtaining the amended default judgment without notice to Moi. CP (09) 83-117. In response, Kruger argued, *inter alia*, that the motion was improper because Moi was still in bankruptcy. CP (09) 152-174.

Based on Kruger's objection, Moi struck the pending motion. CP (09) 511-513. Moi then moved the bankruptcy court to voluntarily dismiss his bankruptcy case. The motion to dismiss was granted, over Kruger's objections, on May 31, 2011. The bankruptcy case was closed on July 12, 2011. CP (09) 555. Moi was now able to address the default orders in the superior court.

In August 2011, Moi again moved to set aside the default judgment(s) based on Kruger's improperly inflated claims for damages as well as the misconduct of Kruger's counsel in obtaining the amended default judgment without notice to Moi. Moi explained, *inter alia*, that Kruger was not entitled to an award of attorney fees or an award for 100% of the \$160,000 principal due on the loan and other associated costs of the property. Moi noted that the 2007 default judgment only awarded statutory fees and costs of \$390.95, that the 2009 complaint (which dealt with the same oral contract between the parties) did not state any basis for an award of attorney fees, that Kruger failed to provide any documentation to support an award of attorney fees, that Kruger had misrepresented the

alleged attorney fees as part of his alleged “damages,” that Kruger had never established any legal basis for an award of attorney fees, and that any claim for fees in the 2009 case was barred by *res judicata*. CP (09) 516-46.

On November 28, 2011, the trial court denied Moi’s motion to set aside the default orders. The trial court erroneously concluded, *inter alia*, that Malnati had not appeared on behalf of Moi, that Kruger’s attorney had not committed misconduct in obtaining the default judgments, and that Moi’s motion was untimely. The trial court did not address the attorney fee issue. It did not explain why Kruger was entitled to attorney fees as damages, did not state that Kruger was indeed entitled to recover such fees, and did not award any additional fees. Nor did the trial court address Moi’s argument that Kruger was not entitled to 100% of the \$160,000 principal due on the loan and other associated costs of the property. CP (09) 1108-1111.

H. Motion to Enforce Order to Convey Parcel B

At the same time as Moi’s motion to set aside the default judgments (in the 2009 case), Moi also moved the trial court to enforce the February 2007 order (in the 2006 case) which required Kruger to convey Parcel B to Moi. Moi explained that Kruger’s willful violation of the 2007

order, which Kruger himself obtained, was preventing Moi from selling Parcel B, thus preventing Moi from paying Kruger. CP (06) 107-122.

In response, Kruger admitted that he had not transferred Parcel B to Moi, but stated that he would do so as soon as Moi paid the outstanding judgment. CP (06) 197-198. In reply, Moi pointed out that the 2007 order did not place any conditions upon the requirement that Kruger transfer Parcel B to Moi. CP (06) 208-213.

Nevertheless, the trial court denied Moi's motion, based on Kruger's argument that it would be "inequitable" to enforce the order against Kruger until Moi paid the judgment to Kruger. CP (06) 220-221. This ruling placed Moi in the impossible situation of not being able to pay or supersede the judgment because of the cloud on his title. As a result, Moi's half of the property was sold at a sheriff's sale on May 25, 2012. CP (06) ____.⁴

I. Moi Appeals

On December 1, 2011, Moi filed notices of appeal in both cases. CP (06) 222-225; CP (09) 1116-1121. Over Kruger's objections, this Court consolidated these appeals. *Notation Ruling* (January 12, 2012).

⁴ See *Sheriff's Return on Sale of Real Property* dated May 25, 2012, King County Super. Ct. No. 06-2-32029-8 SEA (Sub. No. 135). A supplemental designation of clerk's papers will be filed along with this brief.

J. “Corrected” Amended Default Judgment; Pending RAP 7.2 Motion

On January 27, 2012, after this appeal was filed, Kruger filed a motion in the trial court for entry of a judgment summary. Kruger argued that the lack of a judgment summary in the existing default judgment was merely a “clerical error” for purposes of CR 60(a). The judgment summary in Kruger’s proposed “corrected” amended default judgment separated the existing order for judgment in the amount of \$214,903.56 in damages into separate awards for \$180,290.13 in damages and \$34,613.43 in attorney fees and costs. CP (09) 1140-1151. Kruger did not provide any legal basis for awarding attorney fees. *Id.*

Moi opposed the motion, arguing, *inter alia*, that the lack of a judgment summary in the existing judgment was not a clerical error for purposes of CR 60(a) because the trial court never determined that Kruger was entitled to attorney fees (or that his alleged fees were reasonable and necessary), and that the amended judgment requested by Kruger could not be formally entered in the trial court without first obtaining permission from this Court pursuant to RAP 7.2(e). CP (09) 1122-1130.

The trial court granted Kruger’s motion on February 7, 2012.⁵ CP (09) 1194-1197. On March 8, 2012, Moi filed his *Motion to Deny Entry*

⁵ Out of an abundance of caution, Moi filed an *Amended Notice of Appeal* on February 17, 2012.

of Corrected Amended Default Judgment in this Court. By order dated March 22, 2012, the Commissioner ruled that Moi's motion would be referred to the panel that considers this appeal on the merits. *Notation Ruling*, March 22, 2012.

K. Additional Proceedings: Supersedeas Rulings, Writ of Execution

On March 12, 2012, Kruger filed a motion in the trial court for a writ of execution (in the 2009 case). Kruger's motion requested over \$100,000 in additional attorney fees. CP (09) 1200-1208. Moi opposed the motion, arguing, *inter alia*, that there was no basis for any award of attorney fees to Kruger. CP (09) 1227-1228.

The trial court granted Kruger's motion for the writ by order dated March 21, 2012. CP (09) 1276-1279. The trial court reserved ruling on Kruger's request for attorney fees, but erroneously included \$10,000 in attorney fees and costs associated with the writ of execution. CP (09) 1277. On April 4, 2012, the trial court issued an order *nunc pro tunc*, deleting the erroneous award of attorney fees, and reducing the amount of the writ accordingly. CP (09) 1625-1626.⁶

⁶ The order *nunc pro tunc* was issued on April 4, 2012, but for unknown reasons was not filed until April 17, 2012. CP (09) 1625-1626. Moi filed an *Amended Notice of Appeal* on April 12, 2012, before Moi received the order *nunc pro tunc*. CP (09) 1607-1624.

Moi filed a motion in the trial court to supersede the 2009 judgment by providing alternate security (in the form of a deed of trust on the Magnolia property). CP (09) 1280-1301. The trial court required Moi to post a bond. CP (09) 1605-1606. Unable to secure a bond, in large part because of the fact that Parcel B could not be sold as it was still titled in Kruger's name, Moi sought review in this Court. *See Motion for Review of Trial Court Decision on Supersedeas* (April 26, 2012) at 16-17. On May 18, 2012, the Commissioner upheld the trial court's decision. Moi's properties were sold to Kruger, at vast discounts, at a sheriff's sale on May 25, 2012.⁷

L. Trial Court Denies Kruger's Motion For Attorney Fees

On March 29, 2012, Kruger filed a motion for an additional \$116,000 in attorney fees. CP (09) 1335-1344. Moi opposed the motion, again arguing, *inter alia*, that there is no basis for an award of attorney fees in this case. CP (09) 1560-1563.

On May 29, 2012, the trial court denied Kruger's motion, agreeing with Moi that there is no basis for awarding attorney fees in this case. The trial court wrote:

Plaintiff Kruger's Motion for fees is denied without prejudice. The underlying complaint did not allege the existence of an attorneys' fee provision in the agreement

⁷ See note 4, *infra*.

between the parties. It is clear from a reading of the record and pleadings that attorneys' fees have been entered by the Commissioners in the 2/23/10 & 5/03/10 Default Judgments. **However, no legal basis was set out for such.**

The 2/7/12 Order amending the default judgment clarified the prior orders, but again, made no finding for the basis of the award of attorneys' fees. This court understands that all of this is pending before the Court of Appeals and that parallel litigation would be wasteful, and potentially render inconsistent results. Without direction by the Court of Appeals, the undersigned declines to make an award of attorneys' fees. (Emphasis added).

CP 1631-32.

IV. ARGUMENT

A. The trial court erred in failing to vacate the default judgments improperly obtained by Kruger in February 2010 and May 2010.

Moi asks this Court to vacate the default judgments improperly obtained by Kruger in the 2009 case pursuant to CR 60(b).⁸ That rule provides, in relevant part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ...

(4) Fraud (whether heretofore denominated intrinsic

⁸ In the trial court Moi argued that the default orders obtained by Kruger were not "judgments", and that CR 55 was applicable. CP (09) 533-534, 1046-1049. After the trial court pleadings were filed the Supreme Court issued its opinion in *Bank of America N.A. v. Owens*, 173 Wn.2d 40, 266 P.3d 211 (October 27, 2011), which held that certain orders constituted "judgments." In light of that case, Moi seeks relief only under CR 60(b).

or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void; ...

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken...

CR 60. Default judgments are disfavored, and courts prefer to have controversies determined on their merits. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007).

An appellate court reviews a trial court's decision on a motion for default judgment for abuse of discretion. *Morin*, 160 Wn.2d at 753. "A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

The default judgments obtained by Kruger in February 2010 and May 2010 should be set aside for several reasons. First, Kruger obtained the amended default judgment (May 3, 2010) without notice to Moi after attorney Michael Malnati informally appeared for Moi.⁹ Second, Kruger

⁹ Moi denies that he was served in the 2009 case. However, the trial court ruled that he was served, CP (09) 1108-09, and that ruling is not challenged in this appeal.

committed fraud and misrepresentation in the *ex parte* proceedings in order to obtain vastly inflated damages and attorney fees to which Kruger was not entitled. Third, Kruger improperly obtained greater and substantially different relief than he sought in the complaint, and the judgments were, therefore, void. The trial court's refusal to vacate the default judgments was a clear abuse of discretion and must be reversed.

1. The amended default judgment issued on May 3, 2010 must be vacated because the judgment was obtained without notice to Moi after an attorney, Michael Malnati, informally appeared for Moi.

It is well-established that a defendant who has appeared in an action is entitled to notice of a motion for default. *Professional Marine Co. v. Lloyd's*, 118 Wn. App. 694, 708, 77 P.3d 658 (2003); CR 55(a)(3).

Ordinarily, a party "appears" in an action when it "answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance." RCW 4.28.210. But the methods set forth in RCW 4.28.210 are not exclusive, and informal acts may also constitute an appearance.

Professional Marine, 118 Wn. App. at 708 (citing *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn. App. 40, 45, 863 P.2d 573 (1993)). Informal actions, such as attorney Michael Malnati's e-mail and telephone conversation with Kruger's attorney, Mr. Wathen, constitute an appearance that entitled Moi to notice of Kruger's motion for an amended default judgment. *See, e.g., Sacotte Const., Inc. v. National Fire &*

Marine Ins. Co., 143 Wn. App. 410, 415, 177 P.3d 1147 (2008) (defense attorney's informal appearance in single telephone call to plaintiffs counsel after lawsuit was filed substantially complied with appearance requirements and entitled defendant to notice of default). Allowing Kruger to obtain a default order under these circumstances is inequitable. See *Old Republic Nat. Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC*, 142 Wn. App. 71, 73, 174 P.3d 133 (2007) (vacating default judgment obtained after defendant's attorney made a telephone call to plaintiff's attorney).

The record clearly shows that attorney Michael Malnati informally appeared on behalf of Moi before Kruger obtained the amended default judgment (without notice to Moi). Moi submitted a declaration from Malnati which recounts how Moi met with Malnati, Malnati e-mailed Kruger's attorney, Mr. Wathen, and Malnati later spoke with Wathen about various issues in the case. Malnati considered his communications with Wathen to be an informal appearance on behalf of Moi, and Malnati was completely surprised to learn that Kruger had obtained an amended default judgment without notice to Moi. CP (09) 119-121. Moi also submitted an invoice showing that Malnati had charged Moi for legal services in April 2010, before Kruger obtained the amended default judgment. CP (09) 1037.

Nonetheless, the trial court erroneously concluded that Malnati had *not* appeared on behalf of Moi prior to the entry of the amended default judgment on May 3, 2010. CP (09) 1110. The trial court gave two reasons for this decision, neither of which is supported by the record.

First, the trial court stated that the e-mail from Malnati to Kruger on April 16, 2010 “suggests Malnati was corresponding on behalf of one of his ‘lender clients,’ who was seeking to lend money to Moi.” CP (09) 1110. The actual e-mail states:

One of my lender clients sent Michael Moi to me today to review the Kruger lawsuits and judgments. I don't pretend to be up to speed, but I would like to talk to you about this, and have a few items to bring to your attention. The attached declaration of service in the 2009 lawsuit describes a Middle Eastern man with black hair. This isn't Mr. Moi, who didn't learn of the new lawsuit and default judgment until he saw it on a title report ordered by the lender. I've also seen the recent writ of execution of the 2006 judgment. I would appreciate knowing the basis for \$22,000 in post judgment attorney fees in a case based on an oral contract.

The overall goal is to get Mr. Kruger paid what is legitimately owed. That was the reason Moi went to the lender. If that's something that can be explored, I would like to try it. Thanks.

CP (09) 123. The trial court's interpretation of this e-mail is untenable. The e-mail explains that one of Malnati's existing clients referred Moi to Malnati. Nothing in the e-mail suggests that Moi himself was not the client. Malnati explicitly questioned Kruger's service of process and

claim for attorney fees. It makes no sense to conclude that Malnati would raise such substantive issues if he merely represented a prospective lender.

Second, the trial court stated that there was no documentary evidence of Malnati's representation before May 3, 2010, and that the only evidence provided by Moi was "an invoice for legal work performed *after* May 3, 2010." CP (09) 1110. The trial court failed to note that the May 2010 invoice submitted by Moi shows a "Previous Balance" of over \$2000 from April 2010. CP (09) 1037. In other words, the invoice clearly shows that Malnati was representing Moi in April 2010, *before* Kruger obtained the amended default judgment.

It is unclear whether the trial court simply accepted Wathen's self-serving version of his telephone conversation with Malnati, in which Malnati allegedly told Wathen that he did not represent Moi. CP (09) 146, 677. But Wathen's statements are not only self-serving, incompetent, hearsay, RPC 3.7(a), ER 801(c), they are impossible to reconcile with the documentary evidence. On May 5, 2010, only two days after Kruger obtained the amended default judgment, Malnati made a detailed settlement offer on behalf of Moi, and told Wathen that Moi would have to file for bankruptcy if a settlement was not reached. CP (09) 126.

In sum, the trial court's ruling is contrary to the record and must be reversed. Malnati informally appeared for Moi on April 16, 2010, and

Moi was entitled to notice of Kruger's motion for an amended default judgment. Kruger's failure to provide such notice requires the amended default judgment to be vacated under CR 60(b)(1). Furthermore, because the record suggests that Kruger intentionally failed to notify Moi about Kruger's motion for an amended default judgment (in order to have the judgment entered before Moi filed for bankruptcy), the judgment should be vacated under CR 60(b)(4). *See Morin*, 160 Wn.2d at 758 (record supported inference that plaintiff's counsel actively concealed fact that case was pending).

2. Both default judgments were obtained by fraud, misrepresentation, and the misconduct of Kruger and his attorney.

The *ex parte* court justifiably places great reliance on the representations of counsel and parties that appear before it, and counsel is subject to a heightened duty of candor when appearing *ex parte*. *See* RPC 3.3(f) ("In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.") Unfortunately, that duty was breached in this case. Both default judgments in the 2009 case were obtained by fraud, misrepresentation and the misconduct of Kruger and his attorney. Both default judgments must be vacated under CR 60(b)(4).

that have already passed into judgment as between the parties to the litigation and their successors”).

Kruger’s 2009 motions for default did *not* assert any legal basis for an award of attorney fees. Nor did Kruger advise the *ex parte* court that the first judgment (in the 2006 case) awarded only statutory attorney fees of \$125.00. CP (06) 12; CP (09) 34. Nor did Kruger provide any documentation of his alleged attorney fees, describe the legal services provided, or establish the reasonableness or necessity of any fees. *Id.*

Nevertheless, Kruger included more than \$30,000 in attorney fees in both default judgments. These amounts were set forth in a virtually unreadable spreadsheet attached to Kruger’s declaration. CP (09) 39-40. The spreadsheet included attorney fees charged to Kruger by five attorneys from March 2007 through December 2009, including fees for Kruger’s attorney in the 2006 lawsuit (Joseph Rockne) CP (09) 573. The following example shows how Kruger included such fees in the virtually unreadable spreadsheet.

57	07.02.14	Receipt for Legal Defense	Attorney Costs	807.80	DK	2272	Legal Defense
58	07.03.07	Joseph Rockne	delinquent payment on moi's behalf	203.14	DK	2277	Legal Defense
59	07.03.10	Receipt for Loan Payment (WA MU)	Attorney Costs	202.50	DK	2286	Legal Defense
60	07.03.29	Joseph Rockne	delinquent payment on moi's behalf	41.22	DK	2288	Legal Defense

CP (09) 39. Kruger’s motion misleadingly characterized these attorney fees as various “costs and fees” allegedly caused by Moi’s breach. CP (09) 34. Neither of Kruger’s motions made any reference to “attorney”

fees. CP (09) 31-36, 52-56. Kruger misrepresented his attorney fees as damages in order to obtain an inflated default judgment.

It is possible that Mr. Kruger himself is not aware that attorney fees are not normally recoverable. However, it is *not* possible that Kruger's attorney, Mr. Wathen, was unaware of the American rule on attorney fees. In fact, attorney Malnati, representing Mr. Moi, specifically questioned Kruger's recovery of attorney fees in his e-mail dated April 16, 2010, two weeks before Wathen obtained the amended default judgment. CP (09) 123. The default judgments drafted and obtained by Wathen did not mention attorney fees or make any findings that any attorney fees were reasonable or necessary. Kruger's careful avoidance of any reference whatsoever to attorney fees in the moving papers and in the body of Kruger's declarations demonstrate an effort to conceal the fact that Kruger had included attorney fees in his calculations of damages. Such concealment was necessary because there is no legitimate basis for the award of more than statutory attorneys fees, let alone \$30,000 of fees.

- ii. **Kruger improperly charged Moi \$80,000 for Kruger's half of the loan even though the money was not owed by Moi and had not been paid by Kruger.**

In his motion for an amended default judgment, Kruger charged Moi for 100% of the principal of the loan made jointly to the parties for the entire property, Parcels A and B:

Moi has failed to make payments on this loan, which was necessary to secure the subject property in the first place, thereby forcing Plaintiff Kruger to pay the loan in full. **As a result, Mr. Kruger is entitled not only to judgment in the amounts that he has already paid to keep the loan from default to avoid foreclosure, but also to the amount necessary to pay the principle** [sic]. As a result, Mr. Kruger asks that the Court vacate the February 23, 2010 Judgment and enter a new Amended Default Judgment in the amount set forth below.

CP (09) 54-55. Kruger's accompanying declaration listed the entire \$160,000 principal of the loan as "damages" suffered by Kruger. CP (09) 58. Astonishingly, with the above paragraph, Kruger demanded that this Court award him, *ex parte*, the entire amount of the loan principal despite the facts that (1) Kruger's *Complaint* admits that "the debt ... was jointly owed by both parties," and (2) Kruger had *not* paid off the principal of the loan. CP (09) 6; 549, 556, 564-570. Kruger failed to advise *ex parte* that the loan was **joint** and covered **both** Moi's Parcel B and Kruger's Parcel A.

As a result, Kruger obtained a default judgment of at least \$80,000 for money owed by Kruger to the bank as his half of the mortgage, covering the parcel he received. CP (09) 73. Furthermore, the order obtained by Kruger does *not* require Kruger to use the judgment against Moi to pay off the loan. *Id.* Kruger can collect the judgment against Moi while leaving Moi still liable for 100% of the loan as co-borrower. CP (09) 556. And to make matters even worse, Kruger never transferred Parcel B to Moi as the February 2007 order obtained by Kruger clearly required. CP (06) 108-110, 221. This exacerbated the situation because Moi could not sell his parcel, due to the cloud on his title, in order to pay or the judgment. The result has been that Kruger has now purchased Moi's parcel in a sheriff's sale. As a result, Kruger has obtained both parcels as well as a judgment against Moi for the entire loan against both parcels—and Moi still owes the Bank on the loan, as well.

iii. Kruger charged Moi \$61,000 in damages for which Kruger provided no basis whatsoever.

In his declaration in support of the amended default judgment, Kruger asserted that his “direct and proximate” damages were the “Total Money Paid Out-of-Pocket through Original Default Judgment.” CP (09) 58. This amount alleged totaled \$141,379.59. *Id.* The \$141,379.59 figure allegedly was supported by a spreadsheet set forth as an exhibit to

Kruger's declaration. CP (09) 56, 58, 62. But the spreadsheet provided in support of Kruger's \$141,379.59 claim adds up to only about \$80,000. CP (09) 572-573. This spreadsheet is identical to the spreadsheet provided with Kruger's original motion for damages of \$79,244.36, including the same attorney fees and the same other charges. *Id.*, compare CP (09) 39-40 with CP (09) 61-62.

If the *ex parte* court had checked Kruger's spreadsheet, it would have learned that over \$61,000 of Kruger's "Total Money" claim was completely unsupported; contrary to the statements in Kruger's declaration. This results in an excess default judgment of at least \$61,000.

It is possible that the *ex parte* court did not review the numbers because Kruger's spreadsheet was virtually unreadable due to tiny font and degradation from faxing. A demonstrative portion of the spreadsheet is shown here:

01/22/2010 16:11 2862838586		KRUGER PRINTEP		PAGE 09/09			
142	08 12 12	Receipt for Loan Payment (AKA MCI)	debt payment on note 08/12/12	890.48	OK	2782	Loan
143	08 11 12	Receipt for Loan Payment (AKA MCI)	debt payment on note 08/11/12	813.43	OK	2978	Loan
144	08 01 12	Receipt for Loan Payment (AKA MCI)	debt payment on note 08/01/12	1081.52	OK	2778	Loan
145	08 01 10	Debit Advice (ATM)	ATM cash withdrawal on note 08/01/10	21.03	OK	2741	Att fees
146	08 02 12	Receipt for Loan Payment (AKA MCI)	debt payment on note 08/02/12	1118.38	OK	2777	Loan
147	08 02 11	Receipt for Loan Payment (AKA MCI)	debt payment on note 08/02/11	472.45	OK	2747	Loan

CP (09) 62. Indeed, there is clear evidence that counsel for Kruger knew the spreadsheet was unreadable, because the GR 17 declaration accompanying the Kruger declaration only asserts that the first three pages of the declaration are "legible" and does not reference the last two pages

of the declaration, which are the spreadsheet. CP (09) 60. Kruger and his attorney, Mr. Wathen, used the unreadable spreadsheet to obtain a vastly inflated default judgment.

iv. Kruger charged Moi approximately \$31,000 in additional unsupported claims for damages.

In addition to overcharging Moi for loan principal in the amount of \$80,000, the unsupported \$61,000, and about \$30,000 in attorney fees, Kruger also made unsupported claims for \$6,386.69 for “Amounts Incurred on Property Since Judgment,” \$13,743.24 in loan payments, \$9,847.76 in property taxes, \$500.00 for principal on the original loan and \$582.45 for utilities. CP (09) 575-577. These claims are unsupported because they apparently represent 100% of the amounts due, rather than the 50% properly credited to Moi’s account. In addition, there is no documentary evidence in the record supporting those figures.

In sum, Kruger has perpetrated a fraud on the court. The first default judgment obtained by Kruger for approximately \$79,000 included tens of thousands of dollars for unsupported “damages” and attorney fees that Kruger was not entitled to recover. CP (09) 51. Only ten weeks later, after attorney Malnati informally appeared, Kruger fraudulently inflated his alleged damages to \$214,903.72, nearly *three times* the amount of the default order he had obtained just ten weeks earlier. CP (09) 73.

Inexplicably, the trial court denied Moi's motion, blandly stating that "[t]here is no evidence before the court that either Kruger or his counsel abused the *ex parte* process by presenting misleading documents, nor that they committed a fraud upon the court." CP (09) 1111. It is unclear how the trial court reached this conclusion. The trial court did not specifically address any of the unsupported and excessive claims for damages that were documented by Moi. The trial court's ruling is not supported by the record and is simply untenable. Indeed, its ruling is contradicted by its own May 29, 2012 Order that finally correctly observed that "[t]he underlying complaint did not allege the existence of an attorneys' fee provision..." and "no legal basis" has been provided for any award of attorney fees. CP (09) 1632.

The trial court clearly abused its discretion. This Court must vacate the default judgments under CR 60(b)(4).

3. Both default judgments in the 2009 case are void because those judgments provided greater and significantly different relief than Kruger sought in the complaint.

The default judgments obtained by Kruger in February 2010 and May 2010 must be vacated under CR 60(b)(5) because those judgments provided greater and significantly different relief than Kruger sought in the complaint.

It is a well-settled rule that “one has a right to assume that the relief granted on default will not exceed or substantially differ from that described in the complaint and may safely allow a default to be taken in reliance upon this assumption.” ...

The principle upon which such a rule rests is that the court is without jurisdiction to grant relief beyond that which the allegations and prayer of the complaint may seek.

A judgment entered without notice and opportunity to be heard is void. (Citations omitted).

Columbia Val. Credit Ex., Inc. v. Lampson, 12 Wn. App. 952, 954-55, 533 P.2d 152 (1975) (quoting *Sceva Steel Buildings, Inc. v. Weitz*, 66 Wn.2d 260, 262, 401 P.2d 980 (1965); *State ex rel. Adams v. Superior Court*, 36 Wn.2d 868, 872, 220 P.2d 1081 (1950)). A void judgment may be vacated under CR 60(b)(5). *Columbia Val. Credit Ex., Inc.*, 12 Wn. App. at 956.

As a threshold matter, Kruger’s 2009 complaint does not claim any specific amount of money. It is silent as to the amount and nature of the damages. Under such circumstances, Kruger was required by CR 55(b)(2) to request that the trial court undertake a hearing, and prepare findings of fact and conclusions of law regarding the amount of damages. Indeed, if a hearing had been held, and findings prepared, pursuant to CR 55(b)(2), some of this mess might have been avoided. But no such hearing was held, and even a default order for \$100 would have been invalid.

More importantly, Kruger’s 2009 complaint did not give Moi notice that Kruger would seek a judgment for the entire \$160,000 principal

of the loan. The complaint merely states that Moi had failed to make certain loan, tax and insurance payments, and that Kruger had “paid the loan current.” CP (09) 6. The complaint did not provide any notice to Moi that Kruger would seek a judgment for the entire unpaid loan principal, including the \$80,000 half of that loan owed by Kruger. The award of \$160,000 for the loan principal was substantially greater and different in kind than the relief sought in the complaint. Consequently, the amended default judgment obtained on May 3, 2010 (CP (09) 72-73) is void.

Nor did Kruger’s complaint provide notice to Moi that Kruger would seek to recover attorney fees. The complaint includes a generic request for attorney fees and costs “as allowed by law.” CP (09) 7. But the complaint does not allege the existence of any contractual, equitable, or legal basis for an award of attorney fees. Given that the first default judgment (in the 2006 case) awarded only “statutory attorney fees and costs in the amount of \$390.95,” CP (06) 14, Moi was not given fair notice that Kruger would seek to recover more than \$30,000 in attorney fees in a virtually identical case. The improper award of more than \$30,000 in attorney fees was substantially greater and different in kind than the relief sought in the complaint. Consequently, both the February 2010 default judgment and the May 2010 amended default judgment are void.

Even if Moi were served with the 2009 complaint and failed to respond, Moi had the right to assume that the court would only award the relief sought in the complaint. *Columbia Val. Credit Ex., Inc.*, 12 Wn. App. at 954-55. Moi also had the right to assume that the attorney representing Kruger would obey RPC 3.3(f) and not mislead the *ex parte* court into awarding Kruger relief that Kruger did not request in the complaint, and to which he was not entitled.

The trial court did not even address this issue in its decision denying Moi's motion to vacate the default judgments. CP (09) 1108-1111. That ruling is untenable, contrary to both the law and the facts, and must be reversed. Both default judgments in the 2009 case provided greater and significantly different relief than Kruger sought in the complaint. Both of those judgments must be vacated under CR 60(b).

4. Moi's motion to set aside the default judgments was timely, and Kruger has not shown any prejudice.

In denying Moi's motion to set aside the default judgments, the trial court stated that Moi's motion was untimely because Moi "did not act with due diligence" and Kruger would be prejudiced due to the passage of time. CP (09) 1110-1111. That ruling is patently erroneous.

As a threshold matter, it is unclear whether the trial court concluded that Moi's motion was untimely because the motion was filed

more than one year after the default judgments had been entered. The court mentioned the chronology in its ruling, but did not clearly state that the one-year rule applied. CP (09) 1110. To the extent the trial court's decision was based on the passage of one year, that ruling was erroneous as a matter of law because the one-year limitation in CR 60(b) does not apply to motions brought under CR 60(b)(4), (5) or (11). In addition, Moi was in bankruptcy from May 2010 to early July, 2011. Given the automatic stay imposed by the bankruptcy court over proceedings in other courts, Moi brought his motion to vacate default orders within a few months of the issuance of those orders once the stay period is excluded.¹⁰

The trial court's conclusion that Moi was not diligent is entirely unsupported and an abuse of discretion. Attorney Malnati promptly contacted Kruger's attorney after learning of the February 2010 default judgment. CP (09) 123. That occurred before Kruger even obtained the amended default judgment. On May 5, 2010, only two days after Kruger obtained the amended default judgment, Malnati told Wathen that Moi would have to file for bankruptcy if a settlement was not reached. CP (09)

¹⁰ The effect of the bankruptcy stay is shown by Moi's redemption of the property sold at a sheriff's sale on November 13, 2009 (in the 2006 case). CP (06) 77. Pursuant to RCW 6.23.020, Moi had one year—until November 13, 2010—to redeem the property. CP (06) 92. However, because Moi was in bankruptcy he was able to redeem the property on December 29, 2012, more than a year after the sale. *See In re Halas*, 194 B.R. 605, 612-613 (N.D. Ill. 1996).

126. And when Moi learned that Wathen had made another trip to the *ex parte* department to nearly *triple* the amount of the default judgment, Moi immediately filed for bankruptcy, exactly as Malnati had informed Wathen he would do. CP (09) 555. At that point the action in superior court was stayed.

Furthermore, in the bankruptcy court, Kruger argued that the state court had jurisdiction over the default judgment issues. CP (09) 843. When the bankruptcy court agreed that the default judgments should be addressed in state court, Moi promptly filed his first motion in state court. CP (09) 83-117. In response, Kruger argued, *inter alia*, that the motion was improper because Moi was still in bankruptcy. CP (09) 152-174. So Moi dismissed his bankruptcy, and then re-filed his motion in superior court a few weeks later. CP (09) 511-513, 555. Once the period of Moi's bankruptcy is subtracted, only a few months elapsed between the first default judgment and the motion to vacate. Only eight (8) weeks elapsed between the amended default judgment and the motion to vacate. The suggestion that Moi was not diligent is absurd.

The trial court opined that Moi "strategically" chose to pursue bankruptcy, that Kruger would be prejudiced by vacating the default judgments because Kruger had already expended "substantial costs" in the bankruptcy case, and that it would be "unfair" to require Kruger to start

anew in state court. CP (09) 1110-1111. There is no legal basis whatsoever for a superior court to question the wisdom of Moi's bankruptcy, or to hold that a party's filing for bankruptcy constitutes a lack of diligence for purposes of CR 60(b). Nor are the attorney fees incurred in bankruptcy of any concern to the superior court.

Finally, Kruger has not shown any actual prejudice to his ability to respond to Moi's motion to vacate the default judgment or to fairly litigate the merits. Kruger merely complains about the legal costs and the passage of time, both of which were substantially caused by Kruger. In any event, "vacation of a default 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, 68 P.3d 1099 (2003). Kruger has been aware of Moi's objections to the default orders throughout the bankruptcy and state court litigation, and any change in his position was taken at his own peril. Kruger has not been prejudiced in any legal sense. Kruger merely wishes to retain the fruits of the default judgments that he improperly obtained. The trial court's ruling was a clear abuse of discretion, unsupported by the facts or law, and must be reversed.

For all these reasons the trial court's refusal to vacate the default judgments was a clear abuse of discretion and must be reversed.

Under CR 11, Mr. Wathen's signature constitutes his certificate that he read the pleadings and that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

If a pleading is signed in violation of CR 11, the court, upon motion or upon its own initiative, may impose upon the person who signed it an appropriate sanction, which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney fee.

In an *ex parte* proceeding, an attorney is required to inform the tribunal of all relevant facts known to the attorney that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse. RPC 3.3(f). An attorney's duty of candor is at its

highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument:

[W]e view misrepresentations to the court in *ex parte* proceedings with particular disfavor. The duty of candor in an *ex parte* proceeding directly influences the administration of justice. We cannot, and will not, tolerate any deviation from the strictest adherence to this duty.

In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582, 595, 48 P.3d 311 (2002).

CR 11 and the Rules of Professional Conduct are designed to protect the integrity of the legal system and the ability of courts to function as courts. Wathen violated his duties, and he and his client, Kruger, should have been required to pay Moi for all the fees and costs incurred in vacating the wrongfully obtained default judgments. The trial court's ruling on CR 11 should be reversed, and this matter should be remanded to the trial court for an award of attorney fees to Moi.

C. The trial court erred in failing to enforce its own prior order requiring Kruger to transfer Parcel B to Moi.

Moi also moved the trial court to enforce the February 2007 order (in the 2006 case) which required Kruger to convey Parcel B to Moi. Moi explained that Kruger's willful violation of the 2007 order, which Kruger himself obtained, was preventing Moi from selling Parcel B, thus preventing Moi from paying Kruger. CP (06) 107-122. In response, Kruger admitted that he had not transferred Parcel B to Moi, but stated

that he would do so as soon as Moi paid the outstanding judgment. CP (06) 197-198. In reply, Moi pointed out that the 2007 order did not place any conditions upon the requirement that Kruger transfer Parcel B to Moi. CP (06) 208-213.

Nevertheless, the trial court denied Moi's motion, based on Kruger's argument that it would be "inequitable" to enforce the order against Kruger until Moi paid the judgment to Kruger. CP (06) 220-221. There was no legal or equitable basis for the trial court to excuse Kruger's willful noncompliance with a court order or to allow Kruger to hold Parcel B hostage until Moi paid an ordinary money judgment. If the trial court had ordered Kruger to convey Parcel B to Moi, Moi could have used that property to pay or supersede the judgment in this case. The judgment lien would have protected Kruger's rights upon sale by Moi. Instead, the trial court's erroneous ruling resulted in Parcel B being sold to Kruger at a sheriff's sale for a fraction of its value. Truly, the inequity in this matter is the fact that Kruger enjoyed every benefit of the judgment while Moi was not allowed the benefit of that portion of the judgment that would have allowed him to pay the judgment. Kruger received clear title to Parcel A notwithstanding the fact that he refused to convey Parcel B and he was able to execute on the money judgment as well. As a result, Kruger now owns both parcels A and B (subject to Moi's redemption right on B) and

Moi is liable for double the debt on both properties, \$180,000 still owed to the lender and the other \$180,000 that is wrapped up in the amended default judgment.

Even though Parcel B was sold to Kruger on May 25, 2012, this issue is *not* moot because Moi has the statutory right to redeem the property. RCW 6.23.020. This Court must reverse the trial court's erroneous ruling and remand this case to the trial court with instructions to enforce the conveyance of Parcel B as required by the judgment dated February 16, 2007. CP (06) 14-15.

D. Kruger is *not* entitled to any award of attorney fees in this case.

The issue of whether Kruger is entitled to recover attorney fees in this case has arisen a number of times, both before and after this appeal was filed.

The trial court erroneously upheld the default judgments obtained by Kruger in 2010, which included at least \$30,000 in attorney fees. CP (09) 1108-1111. But the trial court did not address the attorney fee issue. The trial court did not explain why Kruger was entitled to attorney fees as damages, did not state that Kruger was indeed entitled to recover such fees, and did not award any additional fees. *Id.*

After this appeal was filed, the trial court granted Kruger's motion for a "corrected" amended default judgment. CP (09) 1194-1197. That

order did not increase the amount of fees improperly awarded to Kruger, but it erroneously implied that Kruger was entitled to recover attorney fees in this case. *Id.* Out of an abundance of caution, Moi filed an *Amended Notice of Appeal* from that order on February 17, 2012. Moi also filed his *Motion to Deny Entry of Corrected Amended Default Judgment* in this Court. By order dated March 22, 2012, the Commissioner ruled that Moi's motion would be referred to the panel that considers this appeal on the merits. *Notation Ruling*, March 22, 2012.

On March 21, 2012, the trial court erroneously awarded \$10,000 in attorney fees in its order for issuance of a writ of execution. CP (09) 1276-1279. However, on April 4, 2012, the trial court issued an order *nunc pro tunc*, deleting the erroneous award of attorney fees, and reducing the amount of the writ accordingly. CP (09) 1625-1626.

On March 29, 2012, Kruger moved for the award of an additional \$116,084.96 of attorney fees. CP (09) 1335-44. On May 29, 2012, the trial court correctly denied Kruger's motion for additional fees. CP (09) 1632. As set forth in section IV(A)(i)—and as the trial court stated in its May 29, 2012 order—Kruger has never established any legal basis for recovering his attorney fees from Moi. **The American rule applies to this case; Kruger has no right to recover attorney fees from Moi.**

Kruger's improper recovery of \$30,000 in attorney fees in the default judgments was without any legal basis.

Kruger has repeatedly cited the default judgments and the "corrected" amended default judgment entered on February 7, 2012 as support for his frivolous claims that Kruger is entitled to recover attorney fees in this case. *See Respondent Kruger's Response ... to Pet. Motion to Deny Entry of Corrected Amended Default Judgment* (March 19, 2012); CP (09) 1335-1344. Out of an abundance of caution, and to ensure that Kruger does not continue to seek attorney fees in this case, Moi asks this Court to explicitly reverse all of the trial court orders to the extent those orders erroneously indicate that Kruger is entitled to recover attorney fees in this case. Therefore, in addition to vacating the 2010 default judgments, the Court should also grant Moi's pending *Motion to Deny Entry of Corrected Amended Default Judgment*, and reversed the order and judgment entered on February 7, 2012. CP (09) 1194-1197, 1627-1630.

E. Moi requests an award of attorney fees pursuant to CR 11 and RAP 18.1(a)

As set forth in section IV(B), Moi should have been awarded attorney fees under CR 11 as an appropriate remedial sanction for the misconduct of Kruger and his attorney in obtaining the improper default

judgments. The necessity and cost of this appeal are attributable to the same misconduct. For the same reasons, this Court should include an award of attorney fees on appeal in the attorney fees to be awarded to Moi on remand. *See* RAP 18.1(i).

V. CONCLUSION

For all these reasons, the trial court's orders should be reversed. This case should be remanded to the trial court to vacate the default judgments, award attorney fees to Moi, including attorney fees on appeal, and for further proceedings.

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RESPECTFULLY SUBMITTED this 8th day of June, 2012.

By: 
William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN
Attorney at Law
300 East Pine Street
Seattle, Washington 98122
(206) 361-5972
wjcrittenden@comcast.net

Attorney for Appellant Michael Moi

Certificate of Service

I, the undersigned, certify that on the 8th day of June, 2012, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:
rwathen@cwllaw.com

By First Class mail To:

Rick Wathen
Cole, Wathen, Leid & Hall PC
1000 Second Ave, Ste 1300
Seattle WA 98104-1082


William John Crittenden, WSBA No. 22033

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