

71166-1

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No. 71166-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

WANNA CHOI,
an individual,

Appellant,

v.

ASHLEY YOUNG,
an individual,

Respondent.

BRIEF OF APPELLANT WANNA CHOI

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I. ASSIGNMENTS OF ERROR

The trial court erred in entering its October 22, 2013 Order Granting Ashley Young's Motion to Vacate the Default Judgment entered on July 30, 2013. The trial court also erred in entering its January 3, 2014 Order Granting Plaintiff's Motion for Award of Attorney's Fees and Costs, awarding Ashley Choi only \$1,873.97 in fees and costs.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The appeal concerns the trial court's vacation of a default judgment that was entered on July 30, 2013 because notice of the hearing on the motion for default judgment was not given to Ashley Young's counsel. Ashley Young did not appear before the motion for default was filed on June 27, 2013. On July 17, 2013, USAA's appointed defense counsel, Alan Peizer, filed a notice of appearance on behalf of Young. Although Choi's counsel had sent Peizer a copy of the Order of Default, for the next three months he never contacted Choi's counsel and took no action to vacate the default order. On July 30, 2013, the court entered a default judgment. Under CR 55(a)(2) and (3), Young was not entitled to notice of the motion for default judgment and had no right to respond to the pleading or otherwise defend without leave of court.

Should this court reverse the trial court's order vacating the default judgment because once a defendant has been adjudged to be in default, that party is not entitled to notice of any subsequent proceedings, including a motion for entry of default judgment?

2. Under Civil Rule 60(b) and Washington case law, the court may condition the vacation of a default order or judgment by requiring the moving party to pay the costs and attorney's fees incurred by the opposing party. Wanna Choi submitted a Declaration setting forth the amount of time spent drafting and responding to Young's two motions to vacate, and for attending two hearings on Young's motions to vacate, which totaled \$12,361.44. On January 3, 2014, the trial court entered an Order granting Wanna Choi an award of only the fees and costs for the initial preparation of the motion for default *order*, which totaled only \$1,873.97. If this court reverses the trial court's order vacating the default judgment and reinstates the default judgment, should this court award Wanna Choi all of her fees and costs relating to Young's motions to vacate of \$12,361.44?

III. STATEMENT OF THE CASE

On March 22, 2013, Appellant Wanna Choi ("Choi") filed a Summons and Complaint for Damages against Respondent Ashley

Young ("Young") alleging injuries resulting from a multiple car automobile accident which occurred on March 25, 2010 on southbound Interstate 5 in Seattle, Washington. (CP 1-3). Young was following Choi's vehicle too closely and lost control of her brakes and slammed into the rear of Choi's vehicle, pushing Choi's vehicle forward into the vehicle in front of her. (CP 1-3). Choi sustained permanent injuries as a result of the accident which required medical treatment. (CP 632-636; CP 662-669)

In April 2012, Choi's counsel notified Young's automobile liability insurer, Wade Langston of USAA, of Choi's claim for damages relating to the motor vehicle accident which occurred on March 25, 2010. (CP 237-238). For the next seven months, no one from USAA even acknowledged Choi's claim. (CP 45-46). It was not until November 6, 2012, that Elizabeth Allen of USAA finally acknowledged the claim and noted that the statute of limitations is rapidly approaching. (CP 45-46; CP 129). Subsequently, Wade Langston became involved again in the claim and for the next four months, he did nothing but continually request additional documentation from Wanna Choi, without making a single settlement offer. (CP 45-46). It is believed that Wade Langston was intentionally delaying making any settlement offer in the hope

that Choi would fail to file her Complaint within the three year statute of limitations. (CP 45-46).

On March 26, 2013, Choi's counsel sent a courtesy copy of the Summons and Complaint to Wade Langston at USAA. (CP 45-46; CP 131-141). This same date, March 26, 2013, Wade Langston telephoned Choi's counsel, Eileen McKillop, and requested that she agree not to serve Ashley Young with the Summons and Complaint for 30 days. (CP 45-47). McKillop advised Langston that she would agree to not serve Ashley Young with the Summons and Complaint for only 30 days, but that she would have to serve her with the Summons and Complaint within 90 days of the filing of the Complaint, and specifically told him that the deadline for service of process was June 19, 2013. (CP 45-47). At no time did McKillop agree or represent that she would not serve Young after this 30 day deadline had expired. (CP 45-47). The 30 day deadline expired on April 25, 2013. Langston never contacted McKillop at any time during this 30 day period. (CP 45-47).

Three weeks after the 30 day deadline had expired, on May 17, 2013, Choi's counsel sent Wade Langston a letter stating:

Unless we can resolve this claim quickly, we will serve your insured with the Summons and Complaint and let the court or a trier of fact determine Ms. Choi's damages. There is no question that your insured is liable for this accident."

(CP 45-47; CP 143-145).

Langston never responded to Choi's counsel's May 17, 2013 letter. (CP 45-47). On May 30, 2013, Choi personally served Ashley Young with the summons and complaint at her residence at 750 North 143rd Street, Unit 108, Seattle, WA. (CP 45-47; CP 146-147).

Approximately one month later, on June 27, 2013, Choi filed a Motion for Order of Default against Young. (CP 613-631). On June 27, 2013, the court entered an order declaring Ashley Young to be in default for failing to file and serve her answer in this action. (CP 7-8). On July 11, 2013, Choi's counsel reminded Wade Langston that Ashley Young had been served with the Summons and Complaint on May 30, 2013. (CP 45-49; CP 198).

On July 16, 2013, Wade Langston checked the trial docket online and saw the order of default. That same date, Langston called Choi's counsel and asked her if she would agree to vacate the default order entered on June 27, 2013, which she refused to do. (CP 45-49).

On July 17, 2013, Ashley Young appeared through USAA's appointed defense counsel, Alan Peizer. (CP 9-10). For the next three months, Peizer never contacted Choi's counsel and took no action whatsoever to vacate the default order. (CP 45-49).

On July 30, 2013, the court entered an Order Granting Choi's Motion for Default Judgment with findings of fact and conclusions of law, and a Default Judgment for \$134,269.99. (CP 632-701; CP 11-12; CP 13-17). Choi's default judgment was based on declarations from Wanna Choi and her medical records and income tax statements, and letters from Wanna Choi's employers documenting her wage loss. (CP 662-701). The court commissioner found that Choi was without fault and that Young is liable for this accident as a matter of law. (CP 13-17). The court commissioner awarded special damages of \$33,744.00, general damages of \$100,000, and statutory fees and costs of \$525.99. (CP 13-17).

More than a month later, on September 12, 2013, Young filed a motion for an order to show cause why the order of default against Ashley Young should not be vacated. (CP 18-26). The motion did not request that the default judgment be vacated. The motion was improperly noted in the Ex Parte Department and the

court commissioner subsequently refused to consider the motion. (CP 242-243).

Almost a month later, on October 8, 2013, Young filed a Motion to Vacate the Default Order and Default Judgment. (CP 222-235). Young's motion argued that the order of default and default judgment should be vacated because (1) Ashley Young was never served with the summons and complaint and the court lacks personal jurisdiction; (2) although Ashley Young appeared in this action *after* the entry of the order of default, she was still entitled to notice of the motion for default judgment; (3) CR 55(b)(2) requires the trial court to conduct a hearing to establish Plaintiff's damages; and (4) the damage award is excessive. (CP 222-235).

On October 16, 2013, Choi filed an opposition to the motion to vacate the default order and default judgment arguing that (1) Young failed to present clear and convincing evidence refuting the affidavit of service, which is presumed valid; (2) Young failed to provide any evidence of a prima facie defense to liability or damages; (3) Young cannot show good cause to set aside the default judgment; (4) Young's failure to timely appear and answer was due to inexcusable neglect; and (5) Choi had no obligation to provide notice to Young or her counsel of the motion for default

judgment because Young failed to appear *prior to the filing of the motion for default* and never moved to set aside the order of default pursuant to CR 55(c)(1). (CP 236-433).

On October 22, 2013, the trial court vacated the default judgment entered on July 30, 2013 on the sole basis that Ashley Young's counsel was not provided notice of the default judgment hearing. (CP 434-436). The trial court also ruled that the motion to vacate the default order will be considered at an evidentiary hearing scheduled for November 15, 2013. (CP 434-436).

On November 15, 2013, after hearing the testimony of witnesses and the admitted exhibits, the trial court denied Young's motion to vacate the default order finding that Young had not shown by clear and convincing evidence that she was not properly served with process on May 30, 2013. (CP 437-439). The trial court ruled that the default as to liability stands but not as to damages, and that Young is entitled to a hearing or jury trial on the issue of damages and causation of damages only. (CP 437-439). The parties have not appealed the trial court's decision denying Young's motion to vacate the default order.

On November 7, 2013, Choi filed the Declaration of Eileen McKillop in support of the court's award of attorney's fees and costs

for the default orders. (CP 434-435; CP 521-528). The total amount of attorney's fees and costs incurred defending Young's first motion to vacate the default order filed on 09/12/13 is \$9,448.70. (CP 521-526). The total amount of attorney's fees and costs incurred defending Young's second motion to vacate the default order and default judgment is \$2,912.74, which does not include the time spent at the evidentiary hearing. (CP 521-526). On November 12, 2013, Young submitted the Declaration of Alan Peizer in opposition to Choi's attorney's fees and costs declaration. (CP 708-712). Peizer merely asserts without citing any facts or legal authority, that Ms. McKillop's hourly rate is unreasonable high and that a fee award would be unfair. (CP 708-712). Choi argued that the fees and costs are reasonable under the Lodestar method, and that Choi should be awarded all of her fees and costs associated with defending the default motions. (CP 529-610). On January 3, 2014, the trial court entered an order awarding Choi only her initial attorney's fees for the preparation of the default motion on 6/20/13 of \$1,650 and costs in the amount of \$223.97. (CP 611-612). The costs awarded include:

06/21/13	King County Ex Parte Fee	\$32.49
	Legal Courier/Process Service	\$83.50
07/11/13	King County Ex Parte Fee	\$32.49

08/12/13	King County Ex Parte Fee	\$32.49
	Legal Courier/Process Service	<u>\$43.00</u>

	TOTAL	\$223.97
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(CP 521-526).

IV. SUMMARY OF ARGUMENT

Under CR 55(a)(2), if a party has not appeared before the motion for default is *filed*, that party may only respond to the pleading or otherwise defend by leave of court. Moreover, under CR 55(a)(3), if a party has not appeared before the motion for default is filed, that party is not entitled to notice of the motion for default or a motion for default judgment. Here, the record clearly reflects that Ashley Young never appeared for purposes of CR 55(a)(3) at any time before the motion for default was filed, and thus was not entitled to notice of the motion for default. The entry of an order of default deprives a defendant of the right to notice of subsequent proceedings, including a motion for default judgment. *J-U-B Engineers, Inc. v. Routsen*, 69 Wn.App. 148, 848 P.2d 733 (1993); *See also Pedersen v. Klinkert*, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960). Since Ashley Young failed to appear in this action before the motion for default was filed, she was not entitled to notice of a default judgment hearing.

Nor did she establish any evidence to justify setting aside the default judgment based on the factors identified in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). She never presented even a prima facie defense to liability or damages. In fact, the trial court ruled that Ashley Young is liable for the accident and refused to vacate the default as to liability. Young did not establish mistake, surprise, or excusable neglect as required by *White*. She admitted that she had actual notice of the summons and complaint on May 30, 2013, but chose not to answer or appear. After an evidentiary hearing, the trial court ruled that Ashley Young failed to present clear and convincing evidence refuting the affidavit of service, which is presumed valid. Furthermore, Young's counsel did not act with due diligence after notice of the default order or the default judgment. Young filed a motion to vacate the default order *two months* after learning of the default order. By this time, a default judgment had been entered. Even after Young's counsel learned of the default judgment, it took another *month* before he filed the motion to vacate the default judgment. Young presented no reasonable evidence to excuse the lengthy delay. This court should reverse and remand for reinstatement of the default judgment.

The trial court erred in granting Choi an award of only her initial fees and costs for drafting the motion for default order. Choi should have been awarded all of her fees and costs incurred in defending Young's motions to vacate. If this court reverses and remands for reinstatement of the default judgment, then Choi is entitled to an award of all of her fees and costs incurred in defending Young's motions for vacate, which total \$12,361.44.

V. ARGUMENT

A. STANDARD OF REVIEW

The court reviews a ruling on a motion to vacate a default judgment for abuses of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). An abuse of discretion occurs when the trial court exercises its discretion on untenable grounds or for untenable reasons. *Showalter v. Wild Oats*, 124 Wn.App. 506, 510, 101 P.3d 867 (2004). In deciding whether to vacate a default judgment, the fundamental guiding principle is whether justice is being done. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).

B. A DEFAULTING DEFENDANT IS NOT ENTITLED TO NOTICE OF PRESENTATION OF A DEFAULT JUDGMENT

The only reason the trial court vacated the default judgment was because Young's counsel was not given notice of the motion for default judgment. The record clearly indicates that Young failed to file a notice of appearance as required by RCW 4.28.010 and CR 4(a)(3) prior to the filing of the motion for default. CR 55(a)(3) provides that a defendant who fails to enter an appearance **prior to filing of the motion for default** is not entitled to notice of either an order of default or entry of a default judgment. *Morin v. Burris*, 160 Wn.2d 745, 762, 161 P.3d 956 (2007); *See also Conner v. Universal Utilities*, 105 Wn.2d 168, 171, 712 P.2d 849 (1986).

No rule or statute requires notice to a defaulting defendant of a motion for default judgment, regardless of whether the party appears after the filing of the motion for default. CR 55(a)(3) states that "Any party may respond to any pleading or otherwise defend at any time **before a motion for default and supporting affidavit is filed**, whether the party previously has appeared or not ... If the party has not appeared before the motion is filed he may not respond to the pleading nor otherwise defend without leave of court." Once a defendant has been adjudged to be in default, that

party is not entitled to notice of any subsequent proceedings, including a motion for entry of default judgment. *Conner v. Universal Utilities*, 105 Wn.2d 168, 173-74, 712 P.2d 849 (1986); *J-U-B Engineers, Inc. v. Routsen*, 69 Wn.App. 148, 848 P.2d 733 (1993) (defaulting defendant not entitled to notice of hearing to establish amount of damages); *C. Rhyne & Associates v. Swanson*, 41 Wn.App. 323, 704 P.2d 164 (1985) (defaulting defendant not entitled to notice of presentation of the default judgment). In *Pedersen v. Klinkert*, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960), the court ruled that when a defendant has failed to appear, “service of notice or papers in the ordinary proceedings in an action need not be made upon him.” In this case, Young did not appear before the filing of the motion for default and was not entitled to notice of motion for default judgment hearing. Young was also not entitled to respond or even defend the motion for default or the motion for default judgment without leave of court.

Furthermore, Choi had no duty to notify Young’s insurer of the details of the litigation, because the insurer is not a party to the suit. *Morin v. Burris*, 160 Wn.2d 745, 759, 161 P.3d 956 (2007). There is no dispute that within a couple days of filing the Complaint, Choi’s counsel provided a courtesy copy of the Summons and

Complaint to Young's insurer, Wade Langston at USAA. Langston was also notified by Choi's counsel that she was going to serve Young with the Summons and Complaint. Choi had no duty to notify a nonparty insurer that she had served the Summons and Complaint on its insured. *Morin v. Burris*, 160 Wn.2d 745, 758-59, 161 P.3d 956 (2007). In *Caouette v. Martinez*, 71 Wn.App. 69, 856 P.2d 725 (1993), the trial court vacated a default judgment because the defendants' insurer did not receive notice of the motion to obtain a default judgment. 71 Wn.App. at 77, 856 P.2d 725. Division Two of the Court of Appeals determined that no case law supported the proposition that it is inequitable to enter a default judgment without notifying the insurer. 71 Wn.App. at 78, 856 P.2d 725. The court stated, "We do not believe that a plaintiff's failure to notify a nonparty insurer of her intention to obtain a default judgment against an insured is a basis for vacation of a default order and judgment." *Id.*

The Washington Supreme Court in *Morin v. Burris*, 160 Wn.2d 745, 762, 161 P.3d 956 (2007), rejected the "manifested intent to defend" doctrine whereby courts would look to whether substantial evidence supported a finding that the plaintiff could have "reasonably harbored illusion about whether the defendant

intended to defend a matter.” 160 Wn.2d at 762, 161 P.3d 956. Instead, the *Morin* court held that a mere intent to defend, whether shown before or after a case is filed, is not enough, the defendant must go beyond merely acknowledging that a dispute exist and instead acknowledge that a dispute exists in court. 160 Wn.2d at 756, 161 P.3d 956. The record clearly indicates that Young did not file a notice of appearance before the motion for default was filed. Thus, Choi had no obligation to provide notice to Young or her insurer of the motion for default or the motion for default judgment. The trial court erred in vacating the default judgment pursuant to CR 60(b).

C. STANDARDS FOR REVIEW OF A MOTION TO SET ASIDE A DEFAULT JUDGMENT

The Superior Court Civil Rules provide different standards for setting aside orders of default and default judgments. CR 55(c)(1), CR 60(b). A party against whom a default judgment has been entered may move for vacation of the judgment pursuant to CR 60. The requirements for setting aside a default judgment are (1) there is substantial evidence to support a prima facie defense; (2) the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable negligent; (3) the

moving party acted with due diligence after notice of the default judgment; and (4) no substantial hardship will result to the opposing party if the default judgment is vacated. CR 60(b); *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). Factors (1) and (2) are primary; factors (3) and (4) are secondary. *White*, 73 Wn.2d at 352-53, 438 P.2d 581.

1. **Young did not present any evidence of a prima fascia defense and the trial court did not vacate the default as to liability.**

Young did not even argue a defense to liability. Under the "following driver rule" where two cars are traveling in the same direction, the primary duty of avoiding a collision rests with the following driver and, absent an emergency or unusual condition, he is negligent if he runs into the car ahead. RCW 46.61.165. Here, Young struck Choi's vehicle from the rear while Choi's vehicle was stopped for traffic on Interstate 5. Young is clearly liable for this accident. The trial court ruled that Young did not present a prima facie defense sufficient to carry the issue of liability to trial, and that the default as to liability stands.

2. **Young did not show good cause to set aside the default judgment.**

Nor did Young meet her burden under the second primary element of *White*: that the moving party's failure to timely appear in

this action was occasioned by mistake, inadvertence, surprise, or excusable neglect. When a defendant fails to establish a prima facie defense, stronger evidence of inexcusable neglect that was willful, or was not diligent is required. *Johnson v. Cash Store*, 116 Wn.App. 833, 848, 68 P.3d 1099 (2003).

Young provided no facts that would constitute mistake or excusable negligence to justify her failure to appear. Young admitted that she had actual notice of the summons and complaint on May 30, 2013. Choi complied with the rules for notifying a defendant of the commencement of an action. CR 4. The heading of the complaint clearly states "COMPLAINT FOR DAMAGES". The Summons clearly informed Young that if she did not answer within 20 days, a default judgment could be entered without notice, and that if she entered a notice of appearance, she would be entitled to notice before entry of a default judgment. Young chose not to answer or appear, having been informed of the consequences. The failure to read or understand the law is not excusable neglect. *People State Bank v. Hickey*, 55 Wn.App. 367, 777 P.2d 1056 (1989)(court rejected defendant's argument that default judgment should have been vacated because she was an unsophisticated person who did not understand the significant of

the complaint when she received a copy of it); *Hwang v. McMahon*, 103 Wn.App. 945, 15 P.3d 172 (2000) (tenant's claim that she was upset and did not understand the summons and complaint did not justify vacating a default judgment in an unlawful detainer action).

Young contended that Peizer's medical condition is grounds for excusable neglect. However, Peizer's partner, Martin Ziontz, was the one that filed the motion to vacate the default order. Ziontz also drafted and filed the motion to vacate the default judgment. Peizer was not involved in drafting either motion.

The trial court vacated the default judgment ruling that due process requires notice to a defaulting defendant of a damages hearing before entry of a default judgment. Even assuming the trial court had considered the factors identified in *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968), Young failed to establish any prima facie defense to Choi's claims and did not satisfy her burden of demonstrating that her failure to appear and answer was occasioned by mistake, inadvertence or excusable negligence.

3. The Defendant did not act with due diligence after notice of the default order and default judgment.

A party must use diligence in asking for relief following notice of the entry of the default. *Calhoun v. Merritt*, 46 Wn.App. 616, 619,

731 P.2d 1094 (1986). Due diligence after discovery of a default judgment contemplates the prompt filing of a motion to vacate. *Calhoun v. Merritt*, 46 Wn.App. 616, 621, 731 P.2d 1094 (1986). The courts have found that a party that has received notice of a default order or judgment and does nothing for three months has failed to demonstrate due diligence. *In Re Estate of Stevens*, 94 Wn.App. 20, 35, 971 P.2d 58 (1999). Here, Young's counsel had actual notice of the order of default on July 16, 2013, and did nothing for two months. Even after the first motion to vacate the default order was stricken, he waited another month to file a motion to vacate the default order and default judgment. There is no reasonable basis for Young's and her counsel's unreasonable delay. Young failed to demonstrate due diligence.

4. Plaintiff will suffer substantial hardship if the default judgment is vacated.

Choi will sustain substantial hardship if the default judgment is not reversed and reinstated. The vacation of the default judgment under these circumstances unjustly grants Young a trial on the merits when she has presented no evidence of any credible defense to damages. Moreover, Choi is desperately in need of medical treatment for her injuries, and the original trial date of

June 30, 2014 has now been stricken from the trial court's docket. If the default judgment is not reinstated, then this case will have to be reset for trial, which will most likely not be for another year and a half. This would mean that Choi will have to wait another year and a half before she could receive any medical treatment for her injuries, since she does not have medical insurance or the financial ability to pay for her medical treatment.

D. THE TRIAL COURT HELD AN EVIDENTIARY HEARING AND RULED THAT YOUNG DID NOT SHOW BY CLEAR AND CONVINCING EVIDENCE THAT SHE WAS NOT PROPERLY SERVED.

Young moved to vacate the default judgment for lack of personal service, claiming that she had never been served with process and that her friend, Lindsey Kester, was the one that was served. Choi's attorney responded by filing the Affidavit of Service and Declaration of the ABC Legal Messenger which stated that he personally delivered the summons and complaint to Ashley Young at her residence. The trial court granted the motion to vacate the default judgment on the basis of lack of notice of the damages hearing, but reserved its ruling on the motion to vacate the default order pending an evidentiary hearing on the service of process issue. After the evidentiary hearing, the trial court ruled that Young

did not show by clear and convincing evidence that she was not properly served with process on May 30, 2013, and denied the motion to vacate the default order. The trial court ruled that the default as to liability stands but not as to damages, and that Young is entitled to a hearing or jury on the issue of damages and causation of damages only. Young did not appeal the trial court's order denying her motion to vacate the default order.

The trial court's ruling clearly shows that it did not grant the motion to vacate the default judgment based on lack of personal service.

E. CR 55(b)(2) GIVES THE TRIAL COURT DISCRETION TO DETERMINE THE AMOUNT OF DAMAGES.

Young also argued that the default judgment should be vacated under CR 55(b)(2) because the amount was uncertain and Choi did not present "live testimony" of her damages. CR 55(b)(2) provides as follows:

(2) When Amount Uncertain. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury. Findings of fact and

conclusions of law are required under this subsection.

CR 55(b)(2) specifies that a court “may conduct such hearings as are deemed necessary.” Even where damages are uncertain, the trial court has considerable discretion in determining the extent of proof needed. *Miller v. Patterson*, 45 Wn.App. 450, 460, 725 P.2d 1016 (1986). Presentation of live testimony is not required. *Miller v. Patterson*, 45 Wn.App. 450, 725 P.2d 1016 (1986) (emphasizing language in CR 55(b)(2) stating that “the court may conduct such hearings as are deemed necessary”); *See also Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn.App. 185, 312 P.3d 976, 988 (2013). The court’s judgment may be based on affidavits or declarations. *Id.*

The standard for when to vacate damages awards from a default judgment is the same as the standard for setting aside awards of damages from trials. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn.App. 231, 241-42, 974 P.2d 1275 (1999). A party moving to set aside a judgment based upon damages must present evidence of a prima facie defense to those damages. CR 60(c)(1); *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007). It is not prima facie defense to

damages that a defendant is surprised by the amount awarded in the default judgment or that the damages might have been less in a contested hearing. *Id.* Even if viewed in the light most favorable to the parties moving to set aside a default judgment, mere speculation is not substantial evidence of a defense. *Id.*

Here, the default judgment in the amount of \$134,269.99 was based on Wanna Choi's declaration, her medical records, her federal tax returns, and documentation from her employers verifying her time loss as a result of this accident. Young provided *no* competent evidence of a prima facie defense to damages. Young merely argued that Choi's total medical bills were only \$1,822 and that Choi presented only "dubious evidence of wage loss in 2010" and that she only has wage loss and depression in 2010. Choi's declaration establishes in detail the ongoing injuries she has suffered as a result of this accident, and the problems she continues to have with her persistent low back pain and tingling and weakness in her right arm. Choi had to go to the emergency room at Harborview Medical Center in May 2012 due to her low back pain and numbness in her right arm. Choi also discussed the ongoing depression she has experienced, and the fact that she

developed hypertension due to the stress and has changed her entire lifestyle.

Young's mere speculation that her evidence is "dubious" does not amount to substantial evidence of a prima facie defense to damages.

F. CHOI IS ENTITLED TO AN AWARD HER ATTORNEYS FEES AND COSTS INCURRED IN DEFENSE OF THE MOTIONS TO VACATE.

CR 60(b) partly states: "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 [.]" "If there is sufficient justification, a trial court may impose sanctions pursuant to the above-quoted language." *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 403, 622 P.2d 1270 (1981). "The decision to impose terms as a condition on an order setting aside a judgment lies within the discretion of the court." *Knapp v. S.L. Savidge*, 32 Wn.App. 754, 756, 649 P.2d 175 (1982) (citing *Pamelin*, 95 Wn.2d at 403, 622 P.2d 1270; *Hendrix v. Hendrix*, 101 Wash. 535, 172 P. 819 (1918)). The reasonableness of an award of attorney fees is reviewed under an abuse of discretion standard. *Rettkowski v. Dep't. of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

Although the trial court's decision to require the moving party to pay the other party's fees and costs is discretionary, such a decision should be on terms that are just. CR 60(b). In this case,

the trial court erred in vacating the default judgment, and awarded Choi only \$1,873.97 in fees and costs to draft the motion to vacate. The award does not include any fees and costs incurred by Choi in defending Young's two motions to vacate. If this court reverses and reinstates the default judgment, then Choi should be awarded all of her fees and costs incurred in defending Young's motions to vacate, which total \$12,361.44. Justice requires that Young pay Choi's fees and costs that were needlessly incurred because of Young's motions to vacate the default order and the default judgment.

G. CHOI SHOULD BE AWARDED HER FEES AND COSTS ON APPEAL PURSUANT TO RAP 18.1(a).

An award of attorney fees under CR 60(b) is an appropriate remedial sanction for the unnecessary expense that Young and her attorney have caused Choi in filing two motions to vacate. The necessity and cost of this appeal are attributable to the same unnecessary motions. For these same reasons, this Court should include an award of attorney fees on appeal in the attorney fees to be awarded to Choi on remand. See RAP 18.1(a).

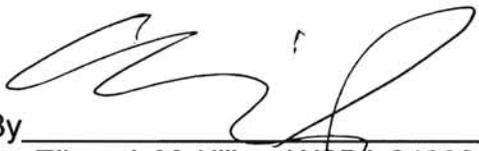
VI. CONCLUSION

The trial court error in vacating the default judgment. Due process does not require notice to a defaulting defendant of a

damages hearing before entry of a default judgment. Thus, this court should reverse the trial court's order vacating the default judgment and reinstate the default judgment. The trial court also erred in granting Choi an award of only her initial fees and costs for drafting the motion for default order. Choi is entitled to an award of all of her fees and costs incurred in defending Young's motions to vacate. This court should reverse the trial court's order and award Choi her fees and costs of \$12,361.44. Finally, this court should grant Choi an award of her attorney fees and costs incurred on appeal pursuant to RAP 18.1(a).

DATED this 31 day of January, 2014.

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