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I. REPLY

A. Standard of Review

Kimball fails to properly disclose the standard of review. A default judgment is equitable in character and the relief sought should be administered in accordance with equitable principles and terms. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581-82, 599 P.2d 1289 (1979). Default judgments are *disfavored* at law because controversies should be determined on their merits. *Id.*

Washington law favors a trial on the merits to such a degree that the courts have stated emphatically “where the determination of the Trial Court results in denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues”. *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968).

Thus, it is clear that where a Court refuses to allow a trial to proceed on the merits, the appellate courts review the decision with much higher scrutiny than mere abuse of discretion as Kimball suggests.

B. The Record Before the Court Was Sufficient to Demonstrate a Prima Facie Defense of Lack of Substantial Evidence to Support the Damage Award.

The first *White v. Holm* factor regarding a prima facie defense must be viewed in consideration of the equitable standard of a motion to

vacate and the disfavor of default judgments in Washington. *White v. Holm* 73 Wn.2d 348, 438 P.2d 581 (1968).

Kimball incorrectly argues that Ichikawa failed to present evidence of a prima facie defense on the motion to vacate the default judgment. Kimball's argument fails to take into account the lack of evidentiary support of the original damage award on the default judgment.

CR 55 (b) states 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.

The amount of damages in a default judgment must be supported by substantial evidence. *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007) (citing *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 240-42, 974 P.2d 1275 (1999)). This is similar to the standard employed by other jurisdictions which require a showing that there was not substantial evidence before the court to support the award of damages in order to vacate a damage award. See *Shepard v. Helsell*, at 241 (citing *Doyle v. Barnett*, 658 N.E.2d 107, 110 (Ind. Ct.

App. 1995). If a defendant shows that there is a lack of substantial evidence to support the award of damages then the defendant has a meritorious defense for purposes of vacating the default judgment. *Id.*

White v. Holm, states that the standard is “[t]hat there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party”. As pointed out in *Calhoun v. Merritt*, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986) and the *Shepard Ambulance* case, this standard may be met by showing that the damage award was not supported by substantial evidence in the first instance.

As further addressed by the Courts in *Griggs* and *Calhoun* a finding of prima facie defense need not come directly from facts presented on the motion to vacate default judgment, where “the record elsewhere indicated facts constituting a defense” *Calhoun*, at 620. In fact the Washington Supreme Court has stated:

Bearing in mind the fundamental purpose of doing justice, the question becomes whether the trial court had before it sufficient evidence of the meritorious defense to justify vacating the judgment

Griggs, at 583.

A general damages award that is inconsistent with the special damages awarded is grounds for a meritorious defense for purposes of a motion to vacate the default judgment. *See Gutz v. Johnson*, 117 P.3d 390

(Div. 2 2005) (submitted medical documentation appears significantly inconsistent with the general damages award).

In *Shepard Ambulance*, a case concerning an attorney malpractice claim for failure to file a motion to vacate the default judgment within one year, the Court analyzed whether the motion to vacate would have been successful. The Court in citing to *Calhoun* concluded that there was insufficient evidence to support the award of damages at the default hearing, and thus the defendant had a meritorious defense to set aside the award of damages. *Shepard Ambulance*, 95 Wn. App. at 242. Specifically, the Court found that the evidence did not support a finding of fact that the plaintiff had suffered from two broken ribs. *Id.* Because the award was based on that finding, the Court found that the damage award would have been vacated. *Id.*

Similar to the *Shepard Ambulance* case, there was not substantial evidence presented in this case at the default judgment hearing to support the award of damages. In particular, the only evidence presented to support an award of future medical damages was the self-serving testimony of plaintiff that her prescription costs \$150 a month and that she would need to take it “indefinitely”. That is not substantial evidence from which a trier of fact could conclude that she has suffered permanent injury and future medication is reasonable and necessary. It certainly does not

support the speculative award of \$150 a month for 18 years found by the Court at the default judgment hearing.

Similarly, there was not substantial evidence presented to support the general damages award of \$500 a month for a period of twenty five years, as found by the Court. Specifically, the finding upon which the Court based its damage award was “it appears that her neck pain and radiculopathic pain is permanent in nature” CP 11. This finding is not supported by any evidence in the record. There was no medical testimony or other competent evidence submitted to the trial court that demonstrates that Kimball’s alleged injuries were permanent in nature.

As a result, the future special damage and general damage award were not based on substantial evidence in the record and the award must be vacated. At the very least, the above lack of evidence constitutes a sufficient prima facie defense.

Further, Kimball’s reliance on the 5-4 decision of *Little v. King* is misplaced. *Little v. King* concerned a UIM insurer’s failure to intervene in the underlying action. Moreover, in that case both the uninsured defendant and the insurer received notice of the actual suit and default hearing. In fact, the defendant showed up at the default hearing yet did not contest it.

Moreover, the prima facie defenses rejected by the Court in that case are not the defenses being asserted here. The defense proffered by the

defendant was that the damages were unreasonable based on the possibility that preexisting conditions may have contributed to the plaintiff's injury. However, the Court found that defendants provided no evidence that the plaintiff's pre-accident symptoms were related in any way to her post-accident condition.

The basis for this ruling stems simply from the burden of proof that each party bears at trial. A defense based on a pre-existing condition is an affirmative defense on which the defendant bears the ultimate burden at trial. As a result, the defendant had to submit evidence that the pre-existing condition "probably" or "more likely than not" caused the subsequent condition rather than the accident or injury. *Ugolini v. State Marine Lines*, 71 Wn.2d 404, 407, 429 P.2d 213 (1967).

The prima facie defense as to damages being asserted by Ichikawa here is much different, because it hinges on Plaintiff's failure to meet her burden of damages in the first instance. The defense is an attack on Kimball's failure to meet her burden of proof. Simply put, the amount of damages in a default judgment must be supported by substantial evidence, and in this case they were not. *Little*, 160 Wn.2d 696, 161 P.3d 345 (2007) citing *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 240-42, 974 P.2d 1275 (1999).

Furthermore, the written findings of fact entered by the Court do not make a finding to support the award of future medical damages. It is clear that future medical costs were not contemplated in these written findings. The only economic damages which were expressly ruled upon were the prior medical specials incurred. The findings state:

7. ECONOMIC DAMAGES: As a direct and proximate result of defendant Masayoshi Ichikawa's negligence, plaintiff sustained severe personal injuries, causing her to incur medical expenses in the amount of \$16,101.06, which were reasonable and necessary, copies of which were introduced at the hearing as Exhibit 'A'.

CP 10.

The Court then went on to enter an award of approximately \$48,000 in economic damages without any additional findings. CP 11. The approximate \$32,000 difference between the finding and the actual award is not supported in the written order. As a result, the future economic damage award was not supported by substantial evidence at the time the default judgment was entered.

As a result, Ichikawa presented a valid prima facie defense which is supported by evidence or rather the lack thereof in the record.

C. The Record Before the Court Was Sufficient To Demonstrate Mistake, Inadvertence, Excusable Neglect or Irregularity on the Part of Ichikawa.

The second *White v. Holm* factor must be considered in light of the equitable nature of a motion to vacate and the disfavor of default judgments generally. *Griggs*, at 581-82.

Kimball makes a technical distinction between the *Gutz* case and the instant case regarding the factor of mistake, surprise, excusable neglect, inadvertence or irregularity. However, the mistake, surprise, inadvertence factor is not applied in a highly technical manner and must be considered in the context of equity. There is no black letter rule for determining whether a movant has established mistake, inadvertence, surprise, or excusable neglect. *Griggs*, 92 Wn.2d at 582. Each case must rest on its own facts and is determined on a case by case basis. *Norton v. Brown*, 99 Wn. App. 118, 123, 992 P.2d 1019 (1999). Even where a defendant was aware of the lawsuit against him or her and failed to respond, this factor may be satisfied. *Norton*, at 124.

The *Norton* case is the most analogous illustration of how this factor is applied. In *Norton* both the insured and the insurer actually received notice of the suit. Nevertheless, the Court found mistake and excusable neglect because the defendant was able to show that the failure to appear was not willful.

In fact, the *Little v. King* case that Kimball relies on touches on this “willful” standard. There the Court stated:

If King had, indeed, made a “deliberate choice” not to defend the lawsuit, her conduct would have been inexcusable. We will not excuse a party’s willful obstruction of the orderly administration of justice. On the other hand, omissions resulting from a party’s misunderstanding or miscommunication of its legal obligations deserve more lenient treatment.

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

The *Shepard Ambulance* case further uses this “willful” standard in its analysis:

Berkins’ and Shepard’s insurance carrier discussed the injury and were negotiating a settlement in 1990. Under these circumstances, we do not presume Shepard willfully avoided appearing in Berkins’ suit. There is no evidence in the record that Shepard’s failure to properly appear in the action in the first instance was willful.

Shepard Ambulance, at 242.

The instant case does not involve an issue where there was miscommunication between the defendant and his insurer. Either the insurer or the defendant would have to have actual notice of the suit before miscommunication could have occurred. Unlike *Norton*, neither the insurer nor the defendant in this case was reasonably apprised of the proceedings.

Rather, the undisputed evidence demonstrates that suit was filed on December 8, 2009, and that Ichikawa’s insurer had been communicating with plaintiff before that date and after said date. At almost the same time

that Ichikawa's insurer's settlement offer was rejected, Plaintiff served the Secretary of State and mailed notice of service to a private mailbox and a general United States Post Office.

Ichikawa acknowledges that Washington has approved of substitute service through the Secretary of State. However, given the equitable nature of motions to vacate, substitute service coupled with an utter failure to notify a known insurer who had been actively participating in the claim, reasonably demonstrates an intent to conceal the litigation and procure an excessive default judgment.

The record does not demonstrate a reasonable likelihood that Mr. Ichikawa was ever actually notified of the lawsuit. Moreover, this intent to conceal is clear from Plaintiff's representations at the default judgment hearing regarding service. As set forth in Ichikawa's opening brief, the Court engaged in a pointed exchange with Plaintiff's counsel regarding contacting Ichikawa's insurer for purposes of service. *See* **RP 16:8-25; 17:1-8**

Despite the representations of counsel to the Court, the Declaration of Roberts makes it clear that Ichikawa's insurer was never contacted regarding the existence of the suit or the default hearing.

Rather than recognizing the inequity of Plaintiff's methods in procuring the default, the Plaintiff places the onus on the insurer to be on

guard and to randomly check Court dockets. While there is no technical statutory requirement that a plaintiff provide the tortfeasor's insurer with notice of the suit a motion to vacate lies in equity not technicalities. Where an insurer is actively negotiating settlement and does not actually receive notice of the suit, the existence of mistake, excusable neglect, inadvertence, surprise or irregularity should more readily be found.

Even assuming *arguendo* that Kimball's letter of August 18, 2010 was considered adequate notice that service would be attempted, then the failure to check the Court docket and request notice would be adequately categorized as a mistake or excusable neglect on the part of the insurer. Mistake on the part of the insurer has routinely been recognized as fulfilling the second factor by courts. *See White v. Holm, supra Norton v. Brown, supra.*

In this case the second factor was satisfied and thus it was err to deny the motion to vacate.

D. The Factors of Diligence And Lack Of Prejudice Must Be Considered in Conjunction with the First Two Factors.

Plaintiff incorrectly ends her analysis at the first two factors, as did the trial court on the motion to vacate. However, the case law is clear that although characterized as secondary, the factors of diligence and lack of

prejudice must be considered along with the first two factors of *White v.*

Holm. As the *White v. Holm* decision itself states:

The first two are the major elements to be demonstrated by the moving party, and they, *coupled* with the secondary factors' vary in dispositive significance as the circumstances of the particular case dictate.

White, at 353, 438 P.2d at 584. (emphasis added).

The Court does not operate in a vacuum as Plaintiff suggests. Rather, the varying disposition of the first two factors must be considered given the diligence of Ichikawa and lack of prejudice to plaintiff.

This is precisely the analysis of the Court in *Calhoun v. Merrit*, where it recognized the difficulty in presenting conclusive trial-like evidence on a motion to vacate an excessive general damages award when the motion was filed in a diligent manner.

Essentially this would present defendant with a perilous choice between filing a motion to vacate as soon as possible after receiving notice of the default, or waiting to file after conducting extensive discovery in order to prove his case. No Washington case has advocated a delay in filing the motion to obtain discovery.

The *White v. Holm* considerations were intended to be viewed together. The strength of the prima facie defense is to be considered in light of, not in spite of, the expedited manner in which the motion to

vacate was filed. Certainly a defense will become stronger over time after the plaintiff is deposed, evaluated by a medical professional, and discovery is conducted. However, a defendant who waits to file the motion to vacate and instead attempts to gather further facts in order to demonstrate a conclusive defense, runs the risk of disfavor by the Court on the diligence factor. The *Calhoun* Court recognized this conundrum, where it found a viable prima facie defense on the general damages award.

As the *Norton* Court pointed out, failure to consider the diligence and prejudice factors at all is grounds for abuse of discretion. *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999). This is especially true in this case where Ichikawa has set forth a prima facie defense and a valid mistake, excusable neglect, inadvertence, surprise or irregularity.

As a result, the trial Court abused its discretion in failing to consider the prejudice and diligence factors at all.

E. There Was A Clear Intent To Conceal the Existence Of The Suit Warranting Vacation of The Default Judgment.

The issue is not whether Ichikawa's insurer should have been regularly checking court dockets, or whether the vague August 18, 2010, letter adequately put Ichikawa on notice that a suit had been filed. Rather, the issue is whether Kimball inequitably concealed the existence of the suit from Ichikawa's insurer, who was known to be participating in the

claim, who was known to have the ability to assign defense counsel, and who had been in communications with Kimball since days following the accident.

The *Morin* case clearly demonstrates that active concealment from the defendant's insurer on the part of the plaintiff can be grounds for vacating the default judgment award. As previously set forth in Ichikawa's opening brief, vacating the default judgment under such circumstances is warranted in equity and under CR 60. *Morin v. Burris*, 160 Wn.2d at 759, 161 P.3d 956 (2007).

The facts remain that suit had been filed for exactly one year before Ichikawa's insurer was put on notice. Ichikawa's insurer had been in contact with Kimball and her counsel during that period regarding the claim. Kimball knew that Ichikawa's insurer was involved. Ichikawa's insurer was acting on behalf of Ichikawa when attempting to settle the claim. Ichikawa's insurer had the ability to appoint counsel to defend Ichikawa and enter a notice of appearance on behalf in the pending litigation if it would have known of the suit. And Kimball overtly represented at the default judgment hearing that she had contacted the insurer regarding service of the suit upon Ichikawa. In fact she had not done so.

The only logical conclusion is that Kimball deliberately chose not to notify Ichikawa's insurer that suit had been filed in order to procure a substantial default judgment amount. As a result, the Court erred in not vacating the judgment based on this inequitable conduct.

F. Even Assuming That Kimball Complied With the Statutory Requirements of the Non-Resident Motorist Statute, Ichikawa's Due Process Rights Were Violated.

Service statutes are designed to ensure due process. However due process still requires notice and opportunity to be heard. As with other service statutes, following the procedures in RCW 46.64.040 would normally satisfy due process. Nevertheless substitute service on a designated state agency does not satisfy due process where the defendant is not actually notified. *See Topliff v. Chicago Insurance Company*, 130 Wn. App. 301, 122 P.3d 922 (2005).

To state that a due process argument is somehow not a constitutional argument flies directly in the face of the case cited above. In fact, in *Topliff* the plaintiff complied with the statutory requirements in serving the insurance commissioner's office yet the insurer did not actually receive notice from the commissioner's office. The Court found that the defendant's due process rights had been implicated by lack of notice, and the default should be vacated. *See Generally Topliff*, 130 Wn. App. 301, 122 P.3d 922 (2005).

Here the key due process issue is whether, regardless of compliance with the statutory requirements of the non-resident motorist statute, mailing to the private mailbox of Ichikawa is sufficient to satisfy due process where there is no evidence that the Ichikawa actually received notice.

Reliance on the signature of one Stacey Larkin and an unsigned UPS service agreement does not demonstrate that Ichikawa was actually apprised of the lawsuit. Both the Trial Court and the plaintiff rely on these two documents as proof that Ichikawa actually received notice. This is misplaced where the UPS service agreement provides that UPS will essentially sign for anything that comes through the door.

The four page discussion by Plaintiff on the *Goettemoeller* case is equally not relevant. Ichikawa cited to the case, not for its dispositive ruling, but simply to show that courts have disfavored service on private mailboxes under other circumstances.

The bottom line, is simply that that service on the private mailbox and a general address for a Post Office Box was not reasonably calculated to apprise the defendant of the existence of the suit. Therefore, regardless of the formalities of the non-resident motorist statute, Ichikawa was not afforded due process in this instance.

The default judgment should be vacated.

G. The *Morin* Ruling Is Expressly Narrowed to Pre-Litigation Contacts, Thus The Analysis Under *Colacurcio* Still Applies, and Defendant Appeared for Purposes of the Appearance Doctrine.

The express holding in *Morin* narrows the ruling only to pre-litigation contacts. *Morin*, 160 Wn.2d at 745. The Court stated:

We disagree with our learned colleagues below that prelitigation communication alone is sufficient to satisfy a party's duty to appear and defend against a court case... We hold that merely showing intent to defend before a case is filed is not enough to qualify as an appearance in court.

Morin, at 749 (emphasis in original).

The dicta upon which Kimball relies is just that, dicta. Moreover, as previously pointed out, the *Morin* Court did not address the informal appearance doctrine in the context of concealment, as did *Colacurcio v. Burger* 110 Wn. App. 488, 41 P.3d 506 (Div. 1 2002). It is important here that *Colacurcio* has not been expressly overruled.

This distinguishing feature between *Morin* and *Colacurcio* is evident in this case. Unlike in *Morin*, neither Ichikawa nor his insurer knew of the filing of the lawsuit. Where the insurer does not know that litigation exists, yet is actively communicating with plaintiff following filing of the complaint, the defendant should be deemed to have appeared for purposes of notice of the default and default judgment. *Colacurcio* still supports this analysis.

As a result, because notice was not given to either the insurer or Ichikawa of the default hearing, the judgment is void.

H. Kimball's Request For Attorney Fees Should Be Denied.

Assuming arguendo that Ichikawa is not successful on appeal, Kimball should not be awarded her attorney fees under RAP 18.9(a) regarding a frivolous appeal. As pointed out in Kimball's response brief (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in **favor of appellant**; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

Ichikawa's legal and factual arguments are supported by the undisputed factual record. Moreover, where the appeal concerns vacation of a default judgment, which is equitable in nature and decided on a case by case basis, the appeal can hardly be said to be devoid of any merit.

Specifically, the fact remains that this was a significant default judgment procured without notice and deliberately in spite of participation by Ichikawa's insurer. This is not a frivolous appeal.

Ichikawa requests his attorney fees incurred in having to respond to Plaintiff's frivolous appeal claim. RCW 4.84.185.

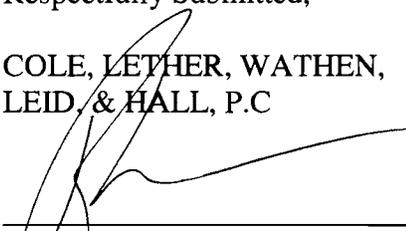
II. CONCLUSION

This Court should find that the Trial Court abused its discretion in denying Ichikawa's motion to vacate the default judgment, and remand for proceedings on the merits.

DATED this 9th day of August, 2011

Respectfully Submitted,

COLE, LETHER, WATHEN,
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CERTIFICATE

I certify that I mailed a copy of the foregoing Appellant's Reply Brief to Laurence R. Wagner, Respondent's attorneys, at 112 West 11th Street, Suite 150, Vancouver, Washington 98660, via FedEx for overnight delivery on August 9, 2011.



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Attorneys for Appellants

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