91271-8

Court of Appeals No. 71166-1

SUPREME COURT OF THE STATE OF WASHINGTON

WANNA CHOI,
an individual,

Petitioner,

v.

ASHLEY YOUNG,
an individual,

Respondent.

ANSWER TO PETITION FOR REVIEW BY THE SUPREME COURT

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A. IDENTITY OF RESPONDENT

The Respondent is Ashley Young, who is the defendant in the trial court below.

B. COURT OF APPEALS DECISION

Petitioner has correctly identified the Court of Appeals' decision.

C. ISSUES PRESENTED FOR REVIEW

1. Under RAP 2.5(a), isn't the Court of Appeals entitled to consider for the first time on review the undisputed fact that Petitioner's Motion for Default and Motion for Default Judgment were not filed with the King County Superior Court Clerk until several months after Defendant's Notice of Appearance was filed?

2. Does the Petition actually demonstrate error by the Court of Appeals in finding that there was no abuse of discretion by the trial court in vacating the default judgment, given the long-settled case law disfavoring default judgments and the equitable nature of such proceedings, where Respondent's counsel

appeared orally and then via a formal notice of appearance before the motion for default judgment was filed in the Ex Parte Department?

3. Did the Court of Appeals err in finding the trial court did not abuse its discretion in considering settlement discussions between Plaintiff and Defendant Young's insurer, USAA, demonstrating that USAA and Young intended to settle or litigate the case?

4. Did the Court of Appeals err in finding that the trial court did not abuse its discretion in finding that Young had demonstrated the prima facie defenses of (a) defective service of process and (b) insufficient evidence of damages, one of the primary factors justifying vacating a default judgment?

5. Did the Court of Appeals err in finding the trial court did not abuse its discretion in finding that Young had demonstrated (a) excusable neglect and (2) due diligence?

D. STATEMENT OF THE CASE

The record before the Court of Appeals demonstrated that

when Choi's counsel filed her summons and complaint and provided a copy to Young's insurer, USAA, on March 26, 2013:

> [Wade] Langston called immediately to discuss settlement. After the call, the attorney sent Langston a letter dated March 26th agreeing not to serve Young for 30 days and 'to notify you prior to service of process upon Ms. Young.'

Opinion at 1. On May 2, 2013, Langston wrote to Choi's attorney, requesting that Choi submit a counter-offer, "so we may continue to move this claim forward to an amicable settlement." Id. at 2. However, without notice to USAA, on May 30, 2013, Choi attempted to serve Young and, on June 4, 2013, Choi filed a declaration of service. Id. at 2.

Without notice to USAA, on June 27, 2013 Choi obtained an ex parte order of default against Young. However, as the Court of Appeals found, the undisputed record shows Choi did not file "Plaintiff's Amended Motion for Order of Default Against Defendant" and the supporting papers until more than six months later, on January 10, 2014. Id. at 4.

On June 28, 2013, Langston sent a second settlement offer to Choi's attorney, which she rejected. She finally informed Langston that Young had been served, but did not mention the June 27, 2013 order of default. Id. at 4. Choi's attorney invited further settlement discussions. Id.

On July 16, 2013, Langston learned of the order of default and asked Choi's attorney to vacate it, which she refused. Id. at 4. That same day, an attorney representing USAA and Young contacted Choi's attorney to request a copy of the order of default and proof of service, and then filed and served a notice of appearance on July 17, 2013. Id.

On July 30, 2013, without notice to USAA or Young's attorney, Choi's attorney obtained an ex parte default judgment against Young in the amount of $134,744. Id. at 4. It is undisputed that Choi's attorney filed Plaintiff's Motion for Entry of Default Judgment and the Declaration of Wanna Choi in Support of Plaintiff's Motion for Entry of Default Judgment only with the Ex Parte Department, but did not file the motion or

declaration with the King County Superior Court Clerk until January 10, 2014. Id. at 4-5.

On September 12, 2013, Young moved to vacate the order of default, based on the declarations of Defendant Ashley Young and Lindsay Kester. Id. at 5. In her declaration, Young stated she had never been served with Choi's summons and complaint. Id. In her declaration, Kester declared that it was she, not Young, who was handed the lawsuit papers while Kester was temporarily in Young's apartment. Id. at 6.

Also in support of the motion to vacate the order of default, Young's attorney stated that when he spoke to Choi's attorney on July 16, 2013, she told him that no default judgment had been entered. Id. at 6. He further declared that had he received notice of a motion for default judgment, he would have opposed it with evidence of a prima facie defense on damages. Id. at 6-7. He further declared that he was recovering from two cancer surgeries at the time and dealing with his mother's stroke. Id. at 7 and f.n. 3.

On October 8, 2013, Young filed a motion to vacate both the order of default and the default judgment. In support, she filed the declaration of USAA claim representative Wade Langston, in which Langston confirmed that Choi's counsel never notified him prior to serving process upon Ms. Young. Id. at 8. In addition, Young argued inconsistencies between the documentation submitted by Choi to support her default judgment and the amount of damages. Id. Young further argued that she had established excusable neglect in delaying her motion to vacate the order of default and default judgment as well as reasonable diligence in seeking to vacate them once she learned of them. Id.

On October 22, 2013 the lower court vacated the default judgment because (1) it was entered without notice to Young after her attorney had filed a Notice of Appearance and (2) Choi's damages claim was for an amount uncertain, requiring an evidentiary hearing. Id. at 8-9. In addition, the trial court found Young presented a prima facie issue of lack of personal

jurisdiction and scheduled an evidentiary hearing on service of process for November 15, 2013. Id. at 9. Following the evidentiary hearing, the court denied Young's motion to vacate the order of default as to liability, but ruled Young was entitled to a trial on damages. Id.

E. ARGUMENT

Choi has quoted narrowly and selectively from the Supreme Court's decision in *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007), overlooking the Morin Court's fundamental ruling, as quoted by the Court of Appeals below:

> [F]or over a century this court has applied the doctrine of substantial compliance.... We have not exalted form over substance but have examined the defendants' conduct to see if it was designed to and, in fact, did apprise the plaintiffs of the defendants' intent to litigate the cases. However, where we have applied the substantial compliance doctrine, the defendant's relevant conduct occurred after litigation was commenced.

Opinion at 8 citing *Morin*, 160 Wn.2d at 755. Petitioner also

disregards this language in *Morin*:

> Applying CR 55 and CR 60 liberally, this court has required defendants seeking to set aside a default judgment to be prepared to establish that they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice. CR 60(b); *Dlouhy*, 55 Wn.2d 718. Or, alternately, defendants may set aside a default judgment if they meet the four-part test set forth in *White [v. Holm]*, 73 Wn.2d 348, 352, 338 P.2d 581 (1969).

Id. The Court of Appeals' decision is plainly not in conflict with *Morin v. Burris* and the Petition should be denied.

Choi also argues that the decision of the Court of Appeals involves an issue of substantial public interest because it allegedly changes the law upon which all three divisions of the Court of Appeals have relied. To the contrary, the Court of Appeals cited decisions from the other divisions which reach conclusions similar to that reached in the instant matter.

1. Choi Mistakenly Characterizes the Court's Decision as Being Based on an Informal Appearance After Service.

Surprisingly, Choi misquoted from *Morin*, leaving out key language that warranted vacating the default judgment here:

> Parties must take some action acknowledging that the dispute ***is*** in court before they are entitled to a notice of default judgment hearing, ***though they still may be entitled to have default judgment set aside upon other well-established grounds.***

Id. at 757 (emphasis supplied for the language omitted from the quotation in the Petition at 11). Plainly, here, the evidence relied upon by the trial court and the Court of Appeals showed extensive pre-litigation contacts as well as post-litigation contacts, including but not limited to exchanges of settlement offers, an oral notice of appearance and a written notice of appearance by defense counsel, all before the default judgment was entered.

Here, the evidence was that the defendant had, indeed, acknowledged that a dispute existed in court, just as required in *Morin*, 160 Wn.2d at 756. In two of the three appellate court decisions being reviewed in *Morin*, the Court stated, "[W]e find no

action in either case acknowledging that the disputes were in court." To the contrary, just as the Court of Appeals concluded, Young did acknowledge the dispute was in court, through the USAA settlement negotiations, the correspondence between Choi's counsel and USAA and the oral and written notices of appearance by defense counsel prior to entry of the default judgment.

Choi attempts to distinguish *Meade v. Nelson*, 174 Wn.App. 740, 749, 300 P.3d 828 (Div. II, 2013), relied upon by the Court of Appeals, id. at 8, on the basis that in *Meade*, the settlement discussions were between Plaintiff and defense counsel, not the non-party insurer. Petition at 12. No such distinction was drawn by the Court in *Meade* but, rather, based on its review of *Morin*, the Meade Court announced the following rule that Young clearly meets:

> In the aftermath of Morin, whether a plaintiff is "reasonably harbor[ing] illusions about whether the opposing party intends to defend" is not dispositive. 160 Wn.2d at 762 (Bridge

> J., concurring in part/dissenting in part). Instead, in light of the fact that "litigation is inherently formal," a party must convey that it intends to defend the suit and perform some act, formal or informal, acknowledging the jurisdiction of the court after litigation has commenced. Morin, 160 Wn.2d at 757. Tompkins's unanswered offer of settlement referencing the case and potential evidentiary issues satisfies this requirement. Accordingly, we hold that Tompkins was entitled to notice of the default hearing.

Id. At 751

Choi mistakenly relies upon *Rosander v. Night Runners Transportation, Ltd.*, 147 Wn.App. 392, 196 P.3d 711 (Div. 2, 2008) for the rule that settlement negotiations never constitute an appearance. However, in *Rosander* it was undisputed that neither the defendant's insurer nor the defendant made any court appearance at any time. Id. at 399-400. Further, it was undisputed that defendant Night Runners actually received from the plaintiff prior written notice that the matter would be brought on for hearing on a specific date and time but still failed to

appear. Id. Consequently, *Rosander* has little to say about this case, where USAA engaged in pre and post filing settlement negotiations, acknowledged the lawsuit, and defense counsel appeared orally and in writing prior to the default judgment being entered, but received no prior notice of the motion for default judgment.

Similarly, Choi cites *Aecon v. Bldgs., Inc. v. Vandermolen Const. Co., Inc.*, 115 Wn.App. 733, 230 P.3d 594 (2009) for the self-evident proposition that a general contractor's failure to notify its subcontractor's insurer of a lawsuit was not a basis to vacate a default judgment. Choi fails to note the Aecon Court's specific finding that (1) Aecon and the subcontractor's insurer were never attempting to settle the claim and (2) at the time of any contact between plaintiff Aecon and its subcontractor's insurer, that subcontractor had not been named in the lawsuit. Id. at 740. The insurer's complete disregard for the lawsuit in *Aecon* has little to do with the instant matter.

Surprisingly, plaintiff relies on the Court of Appeals decision in *Caouette v. Martinez*, 71 Wn.App. 69, 856 P.2d 725

(Div. II, 1993). This pre-*Morin* decision has little precedential value now that *Morin* has been decided. Nevertheless, the Caouette Court determined it was an insufficient basis to vacate a default order and judgment solely because plaintiff had not notified the defendant's insurer. Missing from *Caouette* were (1) ongoing settlement negotiations between plaintiff and the insurer and (2) any appearance by defense counsel before the entry of the default judgment. *Caouette* offers no authority for this Petition.

2. The Court of Appeals Properly Considered Young's Argument about Choi's Failure to File her Motion for Default Judgment Raised for the First Time on Appeal.

In determining that it would review the issue of Choi's untimely filing of her Motion for Default Judgment, the Court of Appeals cited RAP 2.5(a), which provides in pertinent part: "A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." The Court of Appeals also cited *Caulfield v. Kitsap County*, 108 Wn.App. 242, 250, 29 P.3d 738 (Div. 2, 2007), which cites that same rule to

justify consideration of issues not raised by a party in the trial court. Apparently, Choi contends that both RAP 2.5(a) and *Caulfield* are not adequate authority to justify this decision. Choi is in error. *LaMon v. Butler*, 112 Wn2d 193, 200-01, 770 P.2d 1027, *cert. denied* 493 U.S. 814 (1989) plainly supports the rule that an appellate court may affirm a trial court's decision on any ground the record adequately supports.

To support this argument, Choi cites *Northwest Land and Investors v. New West Federal Savings & Loan Association*, 64 Wn.App. 938, 827 P.2d 334 (Div. 3, 1992). That decision simply addresses the abuse of discretion standard and does not address RAP 2.5(a).

Choi also cites *Jones v. City of Seattle*, 179 Wn.2d 322, 337-38, 314 P.3d 380 (2013), allegedly for the rule that the court of appeals should never address arguments not made to the trial court. Again, Choi is in error. Instead, the holding in *Jones* was limited to the proposition that the City of Seattle's challenges to the lower court's refusal to exclude witnesses would not be disturbed absent clear abuse of discretion. Id. at 337. This has

nothing to do with whether the Court of Appeals in this case could consider an argument made for the first time on appeal.

Choi argues that Young waived any right to point out Choi's failure to file her motion for default and motion for default judgment, but cites no authority for that proposition. Choi further argues that it, "makes no substantive difference whether the motion for default was filed with the clerk of the court" because the Court Commissioner filed the default order and, therefore, Young knew of the default order. Choi's argument misses the mark. Instead, as the Court of Appeals stated: "Because Young filed a Notice of Appearance before the Motion [for default] was filed with the King County Superior Court Clerk, she was entitled to notice of the Motion for an Order of Default." Opinion at 8. In essence, the Court of Appeals held that since the order of default was void for failure to file it, Defendant Young's notice of appearance was filed prior to the filing of the motion for default and, therefore, Defendant Young was entitled to notice prior to Choi's filing of the motion

for default judgment.

3. Young Presented a Prima Facie Defense as to Personal Jurisdiction Damages and Showed Due Diligence and Excusable Neglect.

Under *White v. Holm*, 73 Wn.2d 348, 352-53, 438 P.2d 581 (1968) a default judgment may be vacated if (1) there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

a. Young Presented a Prima Facie Defense on Personal Jurisdiction.

The Court of Appeals found that Young had presented a prima facie defense on lack of personal jurisdiction:

> Choi contends the court erred in finding that Young "demonstrated a prima facie issue of lack of personal jurisdiction." We disagree. In support of the motion to vacate the order of

> default, Young argued she was not served with the summons and complaint. In support, Young submitted her own declaration and the declaration of Kester. Viewed in the light most favorable to Young, substantial evidence supports the finding that Young presented a prima facie defense of lack of personal jurisdiction that required scheduling an evidentiary hearing on service of process.

Id. at 9.

b. Young Presented a Prime Facie Defense on Damages.

In addition, the Court of Appeals also found that Choi presented a prima facie defense as to damages, stating in pertinent part:

> Choi also contends Young did not present a prima facie defense as to damages or show due diligence and excusable neglect. Again, we disagree. A trial court may vacate a default judgment "if there [is] not substantial evidence to support the award of damages."

Id. at 9. Young plainly met the prima facie defense requirement of *White v. Holm.*

c. Young Showed Excusable Neglect and Due Diligence.

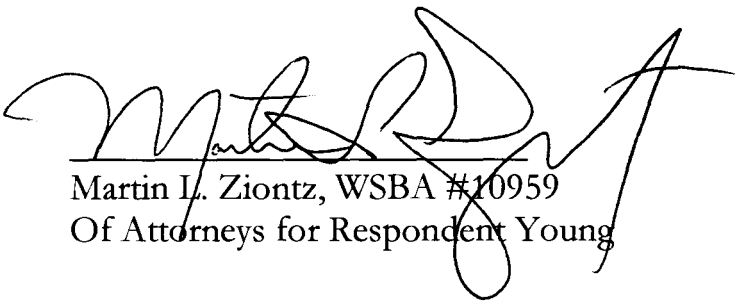
Finally, the Court of Appeals properly found that substantial evidence supported the trial court's findings of excusable neglect and due diligence. The Court's explanations of its findings are sufficient and are not repeated here. Id. at 10. Again, Young plainly met the requirements of *White v. Holm.*

F. CONCLUSIONS

For the foregoing reasons, the Court of Appeals properly affirmed the lower court's decision to vacate Choi's default judgment and the Court should deny the Petition for Review.

DATED this 23rd day of February, 2015.

PEIZER & ZIONTZ, P.S.



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