

No. 68008-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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DOUG KRUGER,  
*Respondent / Cross-Appellant,*

v.

MICHAEL MOI,  
*Appellant / Cross Respondent.*

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REPLY BRIEF OF APPELLANT / CROSS RESPONDENT

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STATE OF WASHINGTON  
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## I. INTRODUCTION

Moi has documented how Kruger and his attorney obtained vastly inflated default judgments against Moi. In *ex parte* proceedings, Kruger included tens of thousands of dollars in attorney fees as “damages” even though Kruger never alleged or proved any legal basis for recovering such fees, and his claims for such fees are barred by *res judicata*. Kruger also obtained an “amended” default judgment for the entire \$160,000 unpaid principal on the parties’ joint loan, including the \$80,000 half owed by Kruger, even though Kruger had not actually paid the loan. Finally, Kruger’s default judgments included more than \$60,000 in additional damages for which Kruger had no basis whatsoever.

Moi admits that he fell behind in his payments to Kruger, and that he owes Kruger some amount of money in addition to the 2007 default judgment for \$44,000. But Moi had the right to assume that another default judgment would only award Kruger the additional relief to which he was actually entitled. Instead, Kruger financially destroyed Moi with massively inflated claims for damages while failing to transfer half of the property to Moi as required by the prior court order obtained by Kruger. As a result, Moi’s half of the property has been sold to Kruger at an enormous loss, Moi is still liable to the bank on the underlying loan, and Kruger still seeks to recover judgments against Moi in excess of \$300,000.

Kruger's brief is largely a smoke screen, which fails to directly respond to Moi's claims. Kruger makes no attempt to explain why his claim for attorney fees under an alleged written contract is not barred by res judicata. Kruger provides no plausible legal theory under which Moi could be liable to Kruger for the entire \$160,000 principal which Moi did not owe and which Kruger had not paid. Kruger simply ignores the fact that the default judgments included at least \$60,000 in baseless damages. Kruger relies on conclusory allegations of delay and prejudice to justify the trial court's failure to set aside the improper default judgments.

Rather than directly address the actual issues in this appeal, Kruger raises irrelevant issues and hurls irrelevant allegations at Moi. Kruger hopes that this Court, like the trial court, will be so confused and overwhelmed by these irrelevant matters that it will fail to notice that Kruger has committed massive fraud upon the courts and Moi.

## **II. REPLY TO STATEMENT OF THE CASE**

Many of the allegations in Kruger's "Statement of the Case" are both disputed and irrelevant. Kruger devotes two pages to various allegations of Moi's breach of the agreement, and the filing of the 2006 lawsuit. *Resp. Br.* at 3-5. Those allegations are disputed, and Kruger cites only his own declarations as support. *Id.* Those allegations are also irrelevant because, as Moi's brief clearly states, Moi does not challenge

the \$44,000 default judgment in the 2006 case. *App. Br.* at 1, 8 n. 2.

Kruger then devotes more pages to an irrelevant discussion of an earlier motion to set aside the default judgment in the 2006 case. *Resp. Br.* at 5-7. Again, these allegations are irrelevant because Moi does not challenge that default judgment in this appeal. Tellingly, Kruger neglects to mention the **relevant** fact that the first default judgment awarded only statutory attorney fees and costs of \$390.95, CP (06) 14, because Kruger never alleged or established the existence of a written contract with an attorney fee provision. CP (06) 3-10.

With respect to the 2009 case, Kruger recounts the bare facts that Kruger, now represented by Wathen, filed the 2009 case, that Moi defaulted, that Kruger obtained a default judgment on February 23, 2010, and that Kruger obtained an “amended” default judgment on May 3, 2010. *Resp. Br.* at 7-8. But Kruger fails to explain why he “amended” the default judgment to nearly **three times** the amount of the judgment obtained just ten weeks earlier. *Id.* Nor does Kruger explain how Moi suddenly became liable to Kruger for the entire \$160,000 unpaid principal on the parties’ joint loan immediately after Kruger’s attorney, Wathen, spoke with attorney Michael Malnati. *Id.*

Kruger enjoys counting how many attorneys have represented Moi in this case, *Resp. Br.* at 5, 11, 15, 18, but Kruger’s tally is not accurate.

Moi has had *five* attorneys, including Michael Malnati who informally appeared for Moi in April 2010, just before Kruger obtained the “amended” default judgment without notice to Malnati. *See* section II(C).

**A. There is no written contract between the parties. Kruger presented his written contract theory for the first time in the bankruptcy case. No court has ever held that Kruger is entitled to attorney fees pursuant to a written contract.**

Under the innocuous heading “Overview,” Kruger asserts that the parties had a written agreement with an attorney fee provision, and that Moi has wrongfully refused to sign or acknowledge the agreement. *Resp. Br.* at 1-3. Moi denies that the parties ever had a written agreement. Kruger’s statements are mere allegations, presented by Kruger for the first time during the bankruptcy case. The relevant chronology is as follows:

**October 3, 2006.** Kruger’s original complaint did *not* allege the existence of any written agreement, and did *not* state any legal basis for an award of attorney fees. CP (06) 3-10.

**February 16, 2007.** The default judgment in 2006 case awarded only “statutory attorney fees” of \$125 (as part of a total award of \$390.95 in costs). CP (06) 12, 14.

**October 12, 2009.** Kruger filed second lawsuit. Kruger’s complaint did *not* allege the existence of any written agreement, and did *not* state any legal basis for an award of attorney fees. CP (09) 3-7.

**February 23, 2010.** Kruger's motion for default judgment did *not* allege any written agreement, and did *not* state any legal basis for an award of attorney fees. CP (09) 31-40. Kruger's motion failed to inform the court that the 2007 judgment awarded only statutory fees of \$125. *Id.* Nevertheless, Kruger included more than \$30,000 in attorney fees in an unreadable spreadsheet of alleged damages. CP (09) 39-40.

**April 16, 2010.** Attorney Michael Malnati questioned Kruger's attorney (Wathen) about the basis for an award of attorney fees "in a case based on an oral contract." CP (09) 123.

**April 30, 2010.** Kruger's motion for an "amended" default judgment did *not* allege the existence of any written agreement, and did *not* state any legal basis for an award of attorney fees. CP (09) 52-62. Again, Kruger included more than \$30,000 in attorney fees in an unreadable spreadsheet of alleged damages. CP (09) 61-62.

**August 2, 2010.** Kruger testified in the bankruptcy case that the parties never had any written agreement. CP (09) 582-83.

**April 7, 2011.** In his second motion for summary judgment in the bankruptcy case, Kruger alleged, *for the first time*, that the parties had a written agreement with an attorney fee provision. CP (09) 848-849. The motion was never ruled upon.

Kruger's allegations regarding a written agreement, *Resp. Br. at 2-*

3, are entirely based on pleadings filed by Kruger during or after the bankruptcy case. *See* CP (09) 655-656, 891-906, 927-929, 1028-1031.

The alleged attorney fee provision quoted on page 2 of Kruger's brief (and attached as an appendix) is taken from a draft agreement that was never signed. CP (09) 891-904. The letters from the attorney (Lawless) who created the draft agreement states that the parties should come up with an agreement specifically tailored to their needs. CP (09) 905-06. By letter dated March 29, 2011, Lawless told Wathen that the agreement was only a draft. CP (09) 907.<sup>1</sup>

In his deposition in the bankruptcy case on August 2, 2010, Kruger unambiguously stated that there was no written agreement:

Q. Now, as I went through your documents, there didn't seem to be any agreements between you and Mr. Moi. Is there another one somewhere that I'm missing?

A. No.

Q. So there really was no written agreement?

A. No.

CP (09) 582-83. Later in the deposition Kruger confirmed that the parties

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<sup>1</sup> Kruger also asserts that a 1994 letter from Lawless shows that the parties had a written contract. *Resp. Br.* at 3. This letter, which purports to respond to a note and telephone conversation, neither of which are in the record, indicates that Pam Kruger would have remedies under some unspecified agreement. CP (09) 1031. The letter does not indicate whether the draft contract circulated four years earlier was ever signed, or whether Lawless had any personal knowledge of such facts. *Id.*

had no written agreement that would allow Kruger to recover attorney fees. CP (09) 588. In sum, Kruger's allegation of a written contract was concocted long after the default judgments were issued, is based on dubious evidence, and is inconsistent with Kruger's own testimony.<sup>2</sup>

Finally, Kruger misleadingly asserts that the trial court awarded his "fees and costs" in the May 3, 2010 default judgment. *Resp. Br.* at 8. In fact, Kruger's motions for default never asserted any legal basis for an award of attorney fees. Kruger simply included such fees in the unreadable spreadsheets that supported his claims for damages. CP (09) 34, 39-40, 56, 61-62. As the trial court noted, no court has ever found a legal basis for awarding attorney fees to Kruger. CP (09) 1631-32.

**B. Kruger has failed to transfer Parcel B to Moi as required by the February 2007 order obtained by Kruger.**

The default judgment obtained by Kruger on February 16, 2007, required **both parties** to convey the respective parcels to each other, so that each would hold title to one parcel (with both parcels subject to the \$160,000 loan). CP (06) 12-15. Kruger notes that he later obtained a court order requiring Moi to transfer Parcel A to Kruger, CP (06) 75-76,

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<sup>2</sup> Not surprisingly, Kruger later attempted to explain away his own deposition testimony, asserting that he was only referring to the lack of a written agreement in 1990-1991. CP (09) 928. But the deposition clearly shows that attorney Stern had reviewed all of Kruger's documents, and then asked Kruger to confirm that there was no written agreement. CP (09) 580-583.

but neglects to mention that Kruger has refused to comply with the original order by transferring Parcel B to Moi. *Resp. Br.* at 6-7. Kruger's unsupported assertion that Moi "remains in contempt" is false. *Id.*

**C. Attorney Michael Malnati informally appeared for Moi in April 2010, before Kruger obtained the Amended Default Judgment.**

It is undisputed that attorney Michael Malnati never **formally** appeared on behalf of Moi, and Kruger's lengthy discussion of that point is irrelevant. *Resp. Br.* at 9-11. The record clearly shows that Malnati **informally** appeared on behalf of Moi. Kruger's arguments regarding Malnati's informal appearance are addressed in section III(B)(1).

Kruger mischaracterizes the email from Malnati to Wathen on April 16, 2010, and entirely relies on Wathen's self-serving version of events, which is not consistent with the contemporaneous documentation. Kruger erroneously asserts that Malnati's declaration does not indicate that Moi was actually Malnati's client, or that Malnati informed Wathen of that fact. *Resp. Br.* at 10. Malnati's declaration states that Moi was **referred** to Malnati by a lender client, and that Moi sought legal assistance from Malnati:

In April, 2010, **Mr. Moi was referred to me** by a hard money lender client... [The payoff figure given to the lender client] **prompted the Mois to seek assistance from me.** (Emphasis added).

CP (09) 120. The email from Malnati to Wathen confirms that the lender client merely referred Moi to Malnati. CP (09) 123. Nothing in that email supports Kruger's assertion that Moi was not the client. Malnati's declaration also recounts how Malnati met with Moi on April 16, 2012, and how the attorneys subsequently discussed the merits of the case, including service, the accounting issues, the cloud on Moi's title, and possible settlement. CP (09) 120-121. Malnati's declaration also states that Malnati was surprised to discover that Wathen had obtained another default order without notice to Malnati. CP (09) 121.

Kruger erroneously asserts that nothing in Malnati's invoice indicates that Malnati's services were provided on behalf of Moi in this case. *Resp. Br.* at 10.<sup>3</sup> As Moi has explained, *App. Br.* at 22-23, the billing statement (invoice) shows a previous balance for work performed by Malnati in April 2010, before Kruger obtained the amended default judgment on May 3, 2010. CP (09) 1037. That invoice identifies "Michael Moi" as the client, identifies "Kruger" as the matter, and lists the previous balance along with time entries for May 2010 that clearly relate to this case. CP (09) 1037. In sum, the record clearly shows that Malnati **informally** appeared on behalf of Moi in April 2010.

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<sup>3</sup> Kruger notes that the invoice was submitted with Moi's reply declaration, but does not explain why that matters. *Resp. Br.* at 10, n.1 2. The primary purpose of a reply pleading is to rebut false statements in a responsive pleading.

Finally, Kruger erroneously asserts that Malnati took no steps on behalf of Moi to set aside the default judgment. *Resp. Br.* at 11. The invoice shows that, after Malnati learned about the amended default judgment he conferred with Moi and his bankruptcy attorney, Stern, about the “imminent bankruptcy filing” in response to the amended judgment. CP (09) 1037. Moi filed for bankruptcy on May 20, 2010, staying all proceedings in state court until July 12, 2011. CP (09) 621, 943.

**D. Kruger’s allegations regarding the bankruptcy proceeding are intentionally misleading. The bankruptcy court never ruled on the merits of Moi’s challenge to the default judgments.**

Kruger devotes much of his Statement of the Case to an intentionally misleading discussion of a summary judgment hearing in the bankruptcy case. *Resp. Br.* at 11-14. Taking bits of the transcript out of context, Kruger attempts to create the false impression that the bankruptcy court addressed the merits of Moi’s challenge to the default orders. *Resp. Br.* at 13. In fact it did not do so. Kruger made the same misleading allegations in his *Response ... To Petitioner’s Motion to Deny Entry of Corrected Amended Default Judgment* (March 13, 2012) at 5-6.

While Moi was in bankruptcy, Moi’s bankruptcy attorney (Stern) asserted various claims against Kruger and his attorney, Wathen, based on Wathen’s misconduct in obtaining the default orders at issue. The claims against Wathen were dismissed, not because they lacked factual merit, but

because the bankruptcy court held that Wathen was absolutely immune. CP (09) 992-993; CP (09) 1003-1004. The bankruptcy court never ruled on the merits of the default orders, stating that those issues should be addressed in state court. CP (09) 992-993.

Nor did the bankruptcy court suggest that the allegations of misconduct against Kruger and Wathen lacked merit, as Kruger misleadingly implies. The quotations in Kruger's brief are taken out of context from the portion of the transcript in which Kruger's motion for sanctions was denied. *Resp. Br.* at 13. The bankruptcy court declined to impose sanctions, finding that the underlying allegations against Kruger and Wathen were made in good faith. However, the court admonished Stern for not adequately considering the doctrine of absolute immunity:

**I think that there were certainly good-faith allegations of at least inappropriate action made as to what happened in superior court.** But translating those into your various causes of action, including causes of action against Mr. Wathen here, were, at best, dicey and not well conceived or thought through. And so even though I don't think the case overall had bad faith, I would strongly admonish you to think through your complaints more and do some research on the causes of action you're asserting... (Emphasis added).

CP (09) 996. Moi then retained an attorney to challenge the improper default orders in state court, as the court suggested. CP (09) 992-993.

Kruger also devotes almost two pages of his brief to an irrelevant

argument about various issues in the bankruptcy case, including Moi's indigency, criminal history, and discovery disputes. *Resp. Br.* at 11-12. Kruger does not even attempt to explain how this material might be relevant to the issues in this appeal. The bankruptcy case has been dismissed, and the bankruptcy court denied Kruger's request for sanctions.

Kruger devotes much of his brief to these irrelevant matters in an attempt to draw the Court's attention away from the actual issues in this appeal. Kruger would rather throw mud at Moi than explain why Kruger was entitled to an "amended" default judgment for the entire \$160,000 unpaid principal on the parties' joint loan.

**E. Kruger's allegations regarding Moi's motions to set aside the default judgments are both inaccurate and irrelevant.**

Kruger erroneously asserts that Moi dismissed the bankruptcy case to avoid a ruling on summary judgment. *Resp. Br.* at 14. Kruger cites no factual basis for this self-serving assertion other than his own pleading (a 2012 motion for a writ of execution). *Id.* (citing CP (09) 1201). Moi dismissed the bankruptcy case because the bankruptcy court indicated that Moi needed to challenge the default judgments in state court. CP (09) 992-993. Kruger's assertion that the bankruptcy case was a "nullity," *Resp. Br.* at 14, 16, is erroneous legal argument. *See* section III(B)(4).

Kruger asserts that Moi waited four months before re-filing his

motion to vacate the default judgments (in fact it was only three months), and that Moi “knowingly waited” sixteen months before moving to vacate. *Resp. Br.* at 17. In fact, Moi filed for bankruptcy immediately after he learned that Kruger had obtained the “amended” default judgment without notice to Moi or Malnati. CP (09) 555, 943. Moi struck his first motion to vacate (filed in May 2011) because Kruger objected that the bankruptcy case was still pending. CP (09) 152. Moi then voluntarily dismissed the bankruptcy case, over Kruger’s objections, and re-filed his motion to vacate in the superior court only one month after the bankruptcy case was closed. CP (09) 516-543, 621.

Kruger repeats his misleading assertion that the claims in Moi’s motion to vacate were “dismissed” and “rejected” by the bankruptcy court. *Resp. Br.* at 17, 18. As explained above, the bankruptcy court never ruled on the merits of the default orders, stating that those issues should be addressed in state court. CP (09) 992-993. And although the bankruptcy court dismissed the claims against Wathen based on absolute immunity, that court declined to impose sanctions on Moi (or Stern) because the underlying allegations against Kruger and Wathen were made in good faith. CP (09) 992-993, 996; CP (09) 1003-1004.

Kruger also argues about whether Moi was served in the 2009 case even though Moi’s brief clearly states that Moi has not appealed the trial

court's ruling on that issue. *App. Br.* at 9 n.3; *Resp. Br.* at 15. Kruger also asserts that Moi's first motion to vacate made "representations which were easily disproven." *Resp. Br.* at 16. Kruger's allegations are disputed, and Moi's statements were never "disproven" as Kruger asserts. Moi's first motion was never ruled upon, and the trial court never addressed the matters that Kruger asserts were "disproven." CP (09) 1108-1111. Kruger should have used that part of his brief to explain why Kruger was entitled to an "amended" default judgment for the entire \$160,000 unpaid principal on the parties' joint loan. Instead, Kruger attempts to conceal his fraud behind a dense thicket of irrelevant and unproven allegations.

### III. REPLY ARGUMENT

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

A court may not award attorney fees as a cost of litigation in the absence of a contract, statute, or recognized ground of equity providing for an award of fees. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994). Kruger never pleaded the existence of a written agreement in either the 2006 or 2009 case. CP (06) 3-10; CP (09) 3-7. In obtaining the default judgments in 2007 and 2010, Kruger never alleged or established a written contract or any other legal basis for an award of attorney fees. CP (06) 16-37; CP (09) 31-40, 52-62. Even after attorney Malnati questioned the basis for Kruger's recovery of attorney fees, CP

(09) 123, Kruger’s motion for an amended default judgment failed to establish any legal basis for recovering such fees. CP (09) 52-62, 72-73.

Instead of establishing a legal right to recover attorney fees, Kruger improperly included attorney fees as “damages” in the various default judgments. CP (09) 39-40; 61-62. As the trial court correctly noted, Kruger has *never* established a legal basis for an award of attorney fees in this case. CP (09) 1631-1632.<sup>4</sup>

Kruger characterizes the trial court’s most recent ruling as a request for “guidance” from this Court, and seeks to have this Court decide the disputed factual issue of whether the parties had a written contract. *Resp. Br.* at 1, 3, 8, 29. Kruger’s attempt to prove the existence of a written contract for the first time on appeal must be rejected.

**1. Kruger’s claims for attorney fees are barred by res judicata.**

As Moi has already explained, Kruger did not plead or establish the existence of a written contract or any other legal basis for recovering attorney fees in the 2006 case. The default judgment in that case awarded only “statutory attorney fees and costs in the amount of \$390.95.” CP (06)

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<sup>4</sup> Kruger asserts that the trial court did not “abuse its discretion in twice awarding Kruger his fees and costs.” *Resp. Br.* at 32. This argument is meaningless because the trial court never had or exercised such discretion, and it never ruled that Kruger was entitled to attorney fees in this case. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002), cited by Kruger for the irrelevant proposition that a trial court may award certain damages without making findings or legal conclusions, has nothing to do with this case.

14. As a result, Kruger's claims for attorney fees pursuant to the alleged written contract are barred by res judicata. *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986) (res judicata prevents litigation of a claim that could have and should have been determined in a prior action involving the same subject matter and parties); *Karlberg v. Otten*, 167 Wn. App. 522, 535, 280 P.3d 1123 (2012) (same).<sup>5</sup>

Moi has explained, in both the trial court and this Court, that Kruger's claim for attorney fees is barred by res judicata and merger. CP (09) 540-541, 1042; *App. Br.* at 13, 25. Yet Kruger completely failed to address this issue in his trial court pleadings, CP (09) 653-685, and he has ignored the issue in his brief.<sup>6</sup> Kruger has ignored this issue because he has no valid argument. The default judgment obtained by Kruger in 2006 precludes any claim for attorney fees under the alleged written contract.

**2. Kruger cannot attempt to prove the existence of a written contract for the first time on appeal.**

Even if Kruger's claim was not barred by res judicata (and merger), Kruger cannot ask this Court to find, as a matter of disputed fact,

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<sup>5</sup> Kruger's claims for attorney fees are also barred by the doctrine of merger. *Aine & Weiner v. Barker*, 42 Wn. App. 835, 837, 713 P.2d 1133 (1986) ("The merger rule is based in part upon the need to prevent vexatious re-litigation of matters that have already passed into judgment as between the parties to the litigation and their successors").

<sup>6</sup> Kruger may not address the issues of res judicata and merger for the first time on appeal or for the first time in a reply brief. *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006); *Cowiche Canyon Cons. v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

that there was a written contract between the parties. As the party alleging the breach of a written contract, Kruger had the burden to prove that such a contract existed. *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 765, 162 P.3d 1153 (2007). If Kruger wanted to recover attorney fees from Moi, Kruger was required to plead and prove the existence of a written contract, with an attorney fee provision, in the 2006 case. He did not do so. Nor did Kruger establish any basis for attorney fees in the default judgments in the 2009 case. As set forth above, *none* of the default judgments obtained by Kruger establish any legal basis for an award of attorney fees.

In his recent motion for attorney fees, Kruger did *not* ask the trial court to find, either on summary judgment or after a hearing, that the parties had a written contract. CP (09) 1335-1344. Nor did Kruger attempt to explain how, as a procedural matter, Kruger could even present such a new claim at that late stage of the case. *Id.* Instead, Kruger chose to rely on his patently false assertions that the court had “previously awarded” Kruger attorney fees pursuant to the alleged contract. CP (09) 1335-36, 1338. The trial court correctly denied Kruger’s motion, noting that Kruger has *never* established a legal basis for an award of attorney fees in this case. CP (09) 1631-1632.

On appeal, Kruger continues to rely on his false statements that the trial court has already awarded attorney fees and costs pursuant to that alleged contract. *Resp. Br.* at 30-32, 34. That is simply not true, and Kruger blithely ignores the trial court's clear statement that Kruger has not established any legal basis for an award of attorney fees in this case. CP (09) 1631-32. Furthermore, although Kruger purports to have cross-appealed from the trial court's May 29, 2012 order denying attorney fees, Kruger has not addressed the substance of the trial court's ruling or argued that any part of that ruling was erroneous. In the absence of any argument that the trial court erred in denying attorney fees, Kruger cannot argue that the trial court's ruling was error.

Kruger characterizes the trial court's ruling as a request for "guidance," and asks this Court to "rule," for the first time on appeal, that Kruger is entitled to attorney fees. *Resp. Br.* at 29. Kruger fails to recognize that (i) the existence of a written contract is a disputed issue of fact on which Kruger had the burden of proof in the trial court, (ii) that Kruger has never properly presented that issue in the trial court, and (iii) that the trial court never found that such a contract existed. **There is no legal doctrine or rule of appellate procedure that would allow this Court to "rule," for the first time on appeal, that Kruger is entitled to attorney fees pursuant to a disputed contract.** *Resp. Br.* at 30. Because

Kruger never asked the trial court to find that the parties had a written contract with an attorney fee provision, Kruger cannot raise that issue on appeal. RAP 2.5(a); *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006). This Court must reject Kruger’s claims for attorney fees.<sup>7</sup>

**3. There is no recognized ground of equity for an award of attorney fees.**

Kruger also argues that he is entitled to attorney fees pursuant to unspecified “equitable principles,” allegedly based on Moi’s breach and “unreasonable conduct.” *Resp. Br.* at 8, 29, 31, 34, 42. In Washington, a court may not award attorney fees as a cost of litigation in the absence of a contract, statute, or **recognized ground of equity** providing for an award of fees. *Dayton*, 124 Wn.2d at 77. Such “recognized grounds of equity” include, for example, the creation of a common fund, equitable indemnity, and the private attorney general doctrine. *See, e.g., Bowles v. Dept. of Retirement Systems*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993); *Tradewell*

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<sup>7</sup> Moi has moved to dismiss Kruger’s cross appeal because Kruger is not aggrieved by the trial court’s order denying Kruger’s motion without prejudice, and because Kruger’s brief (i) does not properly assign error, (ii) does not address the substance of the trial court’s ruling, and (iii) never argues that the any part of the trial court’s ruling was erroneous. *Motion to Dismiss Cross Appeal* (September 10, 2012). A commissioner of this Court denied the motion, stating that the issues raised by Moi “are best resolved by the panel that considers the appeal on the merits.” *Notation Ruling* (October 3, 2012). Moi respectfully disagrees. However, the commissioner correctly noted that Kruger’s reply brief must be limited to the issues raised in his cross appeal. *Id.*; RAP 10.1(c). More importantly, Kruger may not raise any new issues in his reply brief, including but not limited to, res judicata or any argument that the trial court’s ruling was erroneous. *Cowiche Canyon Conservancy*, 118 Wn.2d at 828.

*Group, Inc. v. Mavis*, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993);  
*Wright v. Jeckle*, 121 Wn. App. 624, 632-633, 90 P.3d 65 (2004).

There is no free-floating “equitable” exception to the American rule on attorney fees, and Kruger has not identified any recognized ground of equity that would allow an award of attorney fees. If litigation itself were a recognized ground of equity providing for attorney fees, as Kruger erroneously assumes, such an exception would swallow the American rule whole. In both the trial court and on appeal, Kruger has failed to identify or analyze any specific “recognized ground in equity” that applies in this case. The cases cited by Kruger are inapplicable.<sup>8</sup> Kruger’s equity argument is not supported by argument or authority, and must be rejected. *Holland v. Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

Nor is there any merit to Kruger’s allegations regarding Moi’s “unreasonable conduct” in this case. *Resp. Br.* at 31, 33, 34, 42. No court has ever imposed sanctions on Moi in this case.<sup>9</sup> The bankruptcy court declined to award sanctions to Kruger. CP (09) 996.

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<sup>8</sup> See *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 79 n.2, 272 P.3d 827 (2012) (addressing attorney fees in maritime claim for maintenance and cure); *Summit Valley Indus. v. Local 112*, 456 U.S. 717, 721, 102 S.Ct. 2112, 72 L.Ed.2d 511 (1982) (denying attorney fees in prior proceedings before NLRB); *In re Guardianship of Wells*, 150 Wn. App. 491, 501, 208 P.3d 1126 (2009) (allowing attorney fees based on promissory note); *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999) (awarding fees under CR 11 and RAP 18.9).

<sup>9</sup> Kruger cites a superfluous, erroneous finding in the February 7, 2012, order granting the “corrected” amended default judgment. *Resp. Br.* at 39 n.8. In that order the ex parte

**4. Kruger is not entitled to attorney fees on appeal.**

Kruger's request for attorney fees on appeal must be denied. *Resp. Br.* at 42-43. Kruger's claims of a written contract are barred by res judicata, and there is no recognized ground of equity for an award of fees.

Kruger also requests attorney fees under RAP 18.9(a) based on the absurd allegation that Moi appealed in order to "prolong the litigation." *Resp. Br.* at 42. Kruger has made such allegations many times, but he has never explained why Moi or his attorneys would engage in a strategy of intentionally increasing the cost or duration of this litigation. Kruger's allegations are a fantasy, intended to draw attention away from the improper conduct of Kruger and his attorney, Wathen.

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

As Kruger notes, a trial court's decision to deny a motion to vacate a default judgment is reviewed under the abuse of discretion standard. *Resp. Br.* at 18-19 (citing various cases). However, a trial court abuses its discretion when its decision is manifestly unreasonable, based on

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court *denied* Kruger's latest tiresome request for sanctions. CP (09) 1195. Given that sanctions were denied, it is obvious that the court simply forgot to cross out Kruger's proposed finding that "sanctions are appropriate." *Id.* Moi has never bothered to appeal or seek correction of that superfluous finding because it has no legal effect. Nor has Moi engaged in "misrepresentation," *Resp. Br.* at 39 n.8, as to whether the trial court previously awarded attorney fees. Kruger simply refuses to acknowledge the fact that, although Kruger improperly included attorney fees as damages in the default judgments, no court has ever held that Kruger is entitled to attorney fees in this case. CP (09) 1632.

untenable grounds, or exercised for untenable reasons.” *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006). Abuse of discretion is less likely to be found if the default is set aside. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).<sup>10</sup>

Courts consider four factors in deciding whether to vacate a default judgment: (i) the existence of a valid defense, (ii) the defendant’s reasons for failing to appear, (iii) the defendant’s diligence in seeking relief after notice of the default, and (iv) hardship (or prejudice) to the other party. *Resp. Br.* at 19; *see White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The first factor—existence of a valid defense—is easily established. Moi has explained and documented how Kruger obtained vastly inflated default judgments that improperly included attorney fees, over \$61,000 in unsupported claims for damages, and the entire \$160,000 unpaid principal on the parties’ joint loan. *See* sections III(B)(2) and (3).

Kruger argues, without any legal authority or analysis whatsoever, that Moi has no defense because Moi admits that he breached the contract and owes Kruger some amount of money. *Resp. Br.* at 25. While Moi

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<sup>10</sup> Kruger cites *Shepard Ambulance, Inc., v. Helsell, Fetterman*, 95 Wn. App. 231, 242, 974 P.2d 1275 (1999), for a black letter explanation of the substantial evidence test. *Resp. Br.* at 19. The substantial evidence test is not applicable in this appeal because Kruger does not identify any finding of fact that would be reviewed under that test. Kruger asserts that, based on substantial evidence, the trial court “concluded” (not found) that Moi was served. *Resp. Br.* at 25. But Moi has not challenged that ruling on appeal. *App. Br.* at 9, n.3.

admits he owes some amount of money, Moi was never liable for the outrageously inflated judgments obtained by Kruger. If Kruger's argument were correct, a court could not set aside a default judgment for \$1,000,000 if the defendant admitted that he owed the plaintiff one dollar.

The second factor—Moi's reason for failing to appear before default—is not relevant in this case. Kruger does not argue otherwise. It is undisputed that Moi did not appear in the 2009 case before Kruger obtained the default judgment in February 2010. But Moi had the right to assume that a default judgment would only award the relief sought in the complaint. *Columbia Val. Credit Ex., Inc. v. Lampson*, 12 Wn. App. 952, 954-55, 533 P.2d 152 (1975). Again, Kruger does not argue otherwise.

Moi informally appeared through attorney Malnati before Kruger obtained the "amended" default judgment in May 2010. *See* section III(B)(1) (below). But even if Moi had not appeared, Moi still had the right to assume that a default judgment would only award the relief sought in the complaint. Either way, Moi's reasons for failing to appear in the 2009 case are irrelevant.<sup>11</sup> A failure to appear can not, and does not, excuse the entry of a vastly inflated default judgment.

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<sup>11</sup> The trial court ruled that Moi was served in the 2009 case but did not address Moi's reasons for failing to appear before a default judgment was entered. CP (09) 1108-09. Similarly, Kruger argues that Moi was served but does not address Moi's reasons for failing to appear. *Resp. Br.* at 25.

Finally, the third and fourth factors require the default judgments to be vacated. Moi acted with diligence in response to the default judgments. Moi met with attorney Malnati after he learned about the default judgment, and Moi filed for bankruptcy after Kruger improperly obtained the “amended” default judgment. Once the bankruptcy case was over, Moi promptly moved to set aside the default judgments. Kruger has not been prejudiced because he became aware of Moi’s objections to the default judgments shortly after he obtained those judgments. Kruger’s complaints about the cost and delay, which are the result of Kruger’s own misconduct, are not prejudice in the legal sense. *See* section III(B)(4).

**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.**

As explained in Moi’s brief (App. Br. at 21-24) and in section II(C) (above), attorney Malnati *informally* appeared for Moi in April 2010, before Kruger obtained the “amended” default judgment. Rather than address the issue directly, Kruger’s response begins with two irrelevant arguments. First, Kruger argues that Moi was served. *Resp. Br.* at 25. Kruger’s argument is irrelevant because Moi concedes he was served. *App. Br.* at 9 n. 3. Second, Kruger notes that Moi did not file a written notice of appearance until April 2011. *Resp. Br.* at 25-26. That is

also irrelevant; the issue is whether Malnati *informally* appeared.<sup>12</sup>

Kruger cites *Smith v. Arnold*, 127 Wn. App. 98, 105, 110 P.3d 257 (2005) for the proposition that an informal appearance must manifest an unquestionable intent to appear and defend the matter. *Resp. Br.* at 27. Malnati manifested such an intent. In his email to Wathen, Malnati indicated that Moi intended to question service of process, the amounts owed to Kruger, and the award of attorney fees. CP (09) 123.

Where, as here, the record consists of documentary evidence, this Court stands in the same position as the trial court and may determine the facts *de novo*. *PAWS v. UW*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). The trial court misinterpreted the documentary evidence to conclude that Malnati represented a lender client, not Moi. CP (09) 1110.

First, the trial court erroneously stated that the April 16, 2010 email suggests that Malnati was corresponding on behalf of a lender client. *Id.* But the email actually says that Moi was “sent to” (referred to) Malnati by an existing client. CP (09) 123. That is consistent with Malnati’s declaration and supporting documentation, which clearly shows

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<sup>12</sup> The cases cited by Kruger are also irrelevant. *Leen v. Demopolis*, 62 Wn. App. 473, 480-481, 815 P.2d 269 (1991), held that a document filed by the defendant did not constitute an appearance because it was not served on the plaintiff. *In re dependency of A. G.*, 93 Wn. App. 268, 968 P.2d 424 (1998), addresses only service of process. *Shreve v. Chamberlin*, 66 Wn. App. 728, 733, 832 P.2d 1355 (1992), held that a garnishee defendant’s timely answers to prior writs of garnishment constituted an appearance such that the defendant was entitled to notice before a default could be taken on a new writ.

that Moi was the client. CP (09) 118-126. In addition, as noted in Moi's opening brief, Malnati's email questioned service of process and the award of attorney fees. It makes no sense to conclude that Malnati would raise such substantive issues if Moi were not his client. *App. Br.* at 23. Kruger has completely ignored this important point.

Second, the trial court erroneously stated that there was no documentary evidence of Malnati's representation before May 3, 2010. CP (09) 1110. Again, the trial court simply misinterpreted the documentary evidence. As explained in section II(C), Malnati's invoice indicates that "Michael Moi" was the client, that "Kruger" was the legal matter, and that Malnati provided legal services in April 2010. CP (09) 1037. In addition, Malnati's declaration clearly indicates that Moi was "referred" to Malnati by another client, that Moi sought assistance from Malnati, and that Malnati was representing Moi in attempting to resolve the case. CP (09) 118-126. Kruger's assertion that there is no evidence that Malnati had been retained by Moi, *Resp. Br.* at 27, is simply false. In contrast, there is no documentary evidence to support Kruger's self-serving claim that Malnati did not represent Moi.<sup>13</sup>

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<sup>13</sup> Taking a piece of Malnati's email out of context, Kruger misleadingly asserts that a title report obtained by Malnati was from a lender client. *Resp. Br.* at 27. Malnati's email states that Moi did not find out about the default judgment "until he saw it on a title report ordered by the lender." This statement explains how Moi came to seek assistance from Malnati; it does not support Kruger's assertion that Malnati did not represent Moi.

Kruger erroneously cites *Smith*, 127 Wn. App. at 108, for the proposition that an informal appearance “requires some communication with the court after the action is filed.” *Resp. Br.* at 28. ***Smith does not say that.*** The cited passage in *Smith* criticizes another case, *Ellison v. Process Systems*, 112 Wn. App. 636, 50 P.3d 658 (2002), which dealt with whether an informal appearance can occur before a lawsuit is filed. *Smith*, 127 Wn. App. at 107-08. Kruger’s assertion that a party’s attorney must communicate with the court is taken out of context from non-Washington cases. *Id.* There is no requirement in Washington law that Malnati also communicate his informal appearance to the court. A single telephone call to the plaintiff’s counsel is a sufficient informal appearance to avoid a default judgment without notice. *Sacotte Const., Inc. v. National Fire & Marine Ins. Co.*, 143 Wn. App. 410, 415-416, 177 P.3d 1147 (2008).

Because Malnati informally appeared for Moi on April 16, 2010, Moi was entitled to notice of Kruger’s motion for an amended default judgment. That judgment must be vacated under CR 60(b)(1).

2. **Both default judgments in the 2009 case were obtained by fraud, misrepresentation, and the misconduct of Kruger and his attorney.**

Moi has carefully explained and documented, in both the trial court and on appeal, how Kruger obtained the default judgments in the 2009 case through fraud, misrepresentation and the misconduct of Kruger and

his attorney, Wathen. *App. Br.* at 24-32. Nevertheless, the trial court denied Moi's motion without specifically addressing any of the evidence submitted by Moi. CP (09) 1111.

Like the trial court, Kruger fails to squarely address any of Moi's specific claims of fraud, misrepresentation and misconduct. Kruger blandly asserts that he "provided supporting documentation" for his damages, that Kruger was entitled to recover his damages from Moi's breach, and that he "submitted a spreadsheet outlining these amounts." *Resp. Br.* at 32-33. But Kruger's arguments are devoid of detailed analysis and/or citations to the record. *Resp. Br.* at 32-34. Indeed, Kruger's only citation to the record is to a summary of Kruger's alleged damages in Kruger's own declaration. *Resp. Br. at 33* (citing CP (09) 58). Kruger likewise failed to specifically address Moi's claims in the trial court, and Moi highlighted this fact in the trial court. CP (09) 653-685; 1040-1041. Rather than respond to Moi's arguments, Kruger relies on conclusory assertions that Moi's allegations are false, and on irrelevant allegations of "unreasonable conduct" by Moi. *Resp. Br.* at 32-33.

Kruger gratuitously asserts that Moi is attempting to "distract" the Court from Moi's own wrongdoing. *Resp. Br.* at 32. But Moi concedes that he breached the agreement and that he owes Kruger some amount of money. *App. Br.* at 1. As the appellant, Moi has focused on the relevant

issues of Kruger's misconduct in obtaining the default judgments and the improper amount of damages Kruger included in those judgments. **In contrast, Kruger has attempted to distract this Court with numerous irrelevant matters**, including the default judgment in the 2006 case, the 2008 motion to vacate, whether Malnati filed a written notice of appearance, procedural issues in the bankruptcy case, whether Moi was served, and whether Kruger properly obtained writs of execution. *Resp. Br.* at 3-5, 5-7, 9-11, 11-12, 15, 25, and 40-42 (*see* section III(F) (below)).

Kruger argues, for the first time on appeal, that a party seeking relief under CR 60(b)(4) must submit proof of misconduct that is "clear, cogent and convincing." *Resp. Br.* at 23-24. In addition to violating RAP 2.5(a), Kruger's new argument fails because Kruger has not explained how the "clear, cogent and convincing" standard matters in this case. *Dalton v. State*, 130 Wn. App. 653, 667, 124 P.3d 305 (2005), cited by Kruger, held that the testimony of one witness met that standard even though all the other witnesses contradicted her testimony. In this case, there is no issue of the credibility of witnesses; the evidence of Kruger's ex parte misconduct consists of Kruger's own pleadings. That evidence is not merely clear, cogent and convincing, but uncontroverted.<sup>14</sup>

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<sup>14</sup> Nor is there any merit to Kruger's assertion that Moi's claims of fraud are "asserted at large." *Resp. Br.* at 24. Moi has explained in detail how Kruger and Wathen committed their fraud and misconduct. *App. Br.* at 24-32. Only Kruger's denials are "at large."

Kruger also argues, for the first time on appeal, that Moi must prove nine discrete elements of fraud. *Resp. Br.* at 24. This argument violates RAP 2.5(a) and is unsupported by authority. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008), cited by Kruger, addresses the elements of a *cause of action* for fraud, which must be specially pleaded under CR 9(b). *Adams* has nothing to do with CR 60(b)(4), which allows a court to vacate a judgment procured by fraud, misrepresentation or other misconduct.

**i. Kruger’ improperly included non-recoverable attorney fees as “damages.”**

As explained in section III(A), Kruger has never established a legal basis for recovering attorney fees in this case, and his claims for attorney fees are barred by res judicata. Moi has documented how Kruger included attorney fees in the 2010 default judgments through fraud and misrepresentation. *App. Br.* at 25-27. Specifically, Kruger failed to advise the *ex parte* court that the default judgment in the 2006 case awarded only statutory attorney fees of \$125. CP (09) 34. Kruger does not deny this. Kruger did not assert any legal basis for an award of attorney fees. *Id.* Kruger mischaracterized his attorney fees as merely “costs and fees,” and Kruger’s pleadings avoided any reference to “attorney” fees in order to recover such fees as “damages.” CP (09) 31-36, 52-56. Kruger does not

deny this. The spreadsheets of alleged damages submitted by Wathen are virtually unreadable, concealing Kruger's attorney's billings in a tiny font. CP (09) 39-40, 61-62. An exacting analysis is required to discover the fact that the spreadsheets include attorney charges. Kruger took advantage of the expedited procedure employed in the *ex parte* courts to charge Moi for attorney fees to which Kruger was not entitled.

**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.**

Moi has documented how Kruger obtained an "amended" default judgment for the entire \$160,000 unpaid principal of the parties' joint loan through fraud and misrepresentation. *App. Br.* at 28-29. Kruger's declaration mischaracterized the loan principal as "damages" resulting from Moi's breach even though (i) half the principal was owed by Kruger, not Moi, and (ii) Kruger had not actually paid off the loan. CP (09) 58. Kruger also falsely stated that Kruger was "solely responsible" for the loan, *Id.*, even though Kruger admits that Moi is still jointly liable. *Resp. Br.* at 34. Kruger's omissions and misrepresentations allowed Kruger to obtain an "amended" default judgment for \$160,000 that Moi did not owe and Kruger had not actually paid.

It is undisputed that Kruger had *not* actually paid off the loan

principal when Kruger obtained an “amended” default judgment for that entire amount in May 2010. CP (09) 58, 549, 556, 564-570. On page 34 of his brief, Kruger finally attempts to explain why he was entitled to an “amended” default judgment against Moi for the entire \$160,000 unpaid principal of the parties’ joint loan. Kruger states:

Moi also erroneously argues that Kruger is not entitled to recover the principle of the loan, in the amount of \$160,000.00. However, due to Moi’s breach, Kruger has become solely responsible for the principle in order to avoid foreclosure. Kruger is the only party making any payments at all on the property. Further, from the bank’s perspective, Moi and Kruger are jointly and severally liable for the loan. As a result, Kruger is entitled to seek the total principle amount from Moi.

*Resp. Br.* at 34. Notably, Kruger makes no attempt to explain what, if anything, had changed in the ten weeks between the first default judgment in February 2010 and the “amended” judgment in May 2010. The record shows that the only thing that happened during that period of time was Malnati’s informal appearance for Moi. *See* section III(B)(1).

Kruger’s creative argument (above) has no basis in law or fact. Kruger has never cited any legal authority that would allow Kruger to obtain a judgment for money owed to a third party (the bank) that Kruger never actually paid. Because Kruger had not actually paid off the loan principal, Kruger’s characterization of the unpaid loan principal as “damages” caused by Moi was patently false. CP (09) 58.

Contrary to Kruger's argument, Moi's breach did not make Kruger "solely responsible" for the loan. *Resp. Br.* at 34. Not only were both parties liable to the bank, the loan was secured by the property. CP (09) 557. The parties' joint liability to the bank did not make Moi liable to Kruger. The money was owed to the bank, whose interest was secured by the property. To make matters worse, the judgment obtained by Kruger did not require Kruger to use the judgment against Moi to pay off the loan.

Furthermore, the parties' agreement only required Moi to pay one half of the joint expenses. There was no basis whatsoever for Kruger to force Moi to pay for Kruger's half of the property or to obtain a judgment for that amount. Kruger has never explained why Moi was liable for Kruger's half of the loan.

Even if Kruger were entitled to a judgment against Moi for **one half** of the loan principal, the parties' agreement also required Kruger to transfer Parcel B to Moi. But Kruger has refused to do so. *See* section III(D). Instead, Kruger used the improper judgment to force a sheriff's sale of Moi's Parcel to Kruger. CP (06) 1633-1657.

In sum, Kruger's argument regarding the unpaid principal of the loan is a flimsy excuse for inexcusable misconduct. Kruger's misleading pleadings enabled Kruger to obtain both parcels as well as a default judgment against Moi for the entire amount of the unpaid loan, leaving

Moi with nothing but liability to the bank. Despite their protestations to the contrary, Kruger and Wathen have perpetrated an outrageous fraud upon the court and Moi.

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

Kruger's declaration in support of the "amended" default judgment asserted that Kruger's total out-of-pocket damages totaled \$141,379.59, and that these damages were supported by the attached spreadsheet. CP (09) 58. Moi has documented how the spreadsheet adds up to only about \$80,000, resulting in an unsupported excess judgment of at least \$61,000. *App. Br.* at 29-30; CP (09) 572-573. Kruger has completely failed to respond, thereby conceding that Moi is correct.

In addition, Moi has explained that the spreadsheet submitted to the ex parte court was virtually unreadable, that Kruger's GR 17 declaration (CP (09) 60) shows that Kruger knew it was unreadable, and that this may explain why the ex parte court failed to notice the fact that the spreadsheet did not support Kruger's vastly inflated claim for \$141,379.59. *App. Br.* at 30-31. Again, Kruger has completely failed to respond, thereby conceding that Moi is correct.

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

Moi has documented how Kruger also included \$31,000 in

damages that are not supported by any documentation, and which apparently include 100% of the amounts allegedly paid by Kruger rather than the 50% actually owed by Moi. *App. Br.* at 31; CP (09) 575-577. Again, Kruger has failed to respond, conceding that Moi is correct.

In sum, the trial court clearly abused its discretion in failing to vacate the default judgments improperly obtained by Kruger. 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.**

It is well settled that a defendant has the right to assume that the relief granted by default will not exceed or substantially differ from the relief sought in the complaint. *Columbia Val. Credit Ex., Inc.*, 12 Wn. App. at 954-55. A judgment for substantially greater or different relief, entered without notice to the defendant, is void. *Id.*

Because Kruger's 2009 complaint did not claim any specific amount of money, the trial court should have held a hearing and prepared findings and conclusions to determine the amount of damages. *App. Br.* at 33 (citing CR 55(b)(2)). Kruger has failed to respond, conceding, *sub*

*silentio*, that the default judgments erroneously granted.<sup>15</sup>

More importantly, the 2009 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. CP (09) 3-7. In *Sceva Steel Buildings, Inc. v. Weitz*, 66 Wn.2d 260, 261, 401 P.2d 980 (1965), a contractor brought an action to foreclose upon a construction lien for a steel building, and the defendants allowed a decree of foreclosure against the property to be taken by default. The contractor later sold the building to a third party, and, without notice to the defendants, obtained a “corrected” judgment to allow the building to be removed from the land. On the defendants’ motion, the trial court vacated the “corrected” judgment, and the supreme court affirmed, because the remedy obtained (foreclosure of a chattel lien) exceeded and differed from the remedy sought in the complaint (foreclosure of a lien against the land). 66 Wn.2d at 262. Similarly, the “amended” judgment for the \$160,000 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.

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<sup>15</sup> Kruger asserts that no authority requires Kruger to plead a specific amount of money. *Resp. Br.* at 36. That is a straw man argument. Moi has only argued that a hearing was required by CR 55(b)(2) because the complaint was silent about the amount of damages.

Not surprisingly, Kruger’s response avoids any specific discussion of the additional award of \$160,000 in the “amended” default judgment. *Resp. Br.* at 35-36. Instead, Kruger notes that the complaint alleged that Moi had “breached” the parties’ agreement by failing to make certain payments, and that Kruger had incurred “damages.” *Resp. Br.* at 25. It is undisputed that the \$160,000 loan principal was not due, and had not been paid by Kruger. Nothing in the complaint alleges that Moi was required to immediately pay the entire \$160,000 principal, or that Moi’s failure to do so was a “breach” of the agreement. CP (09) 3-7. Nothing in the complaint indicates that Kruger had been damaged by Moi’s failure to pay \$160,000 that was neither due nor owed to Kruger. *Id.*

Kruger argues, without supporting authority, that his complaint “put Moi on notice that Kruger was seeking all possible damages as a result of Moi’s breach.” *Resp. Br.* at 36. Kruger’s argument would render the requirement of notice meaningless. Under Kruger’s reasoning, as long as a complaint is sufficiently vague, the defendant is put on notice that the plaintiff might obtain unlimited relief by default. That is not the law.<sup>16</sup>

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<sup>16</sup> The only case cited by Kruger, *Champagne v. Thurston County*, 163 Wn.2d 69, 178 P.3d 936 (2008), did not involve a default judgment. In that case, the Supreme Court rejected an argument that the appellant employees had not sufficiently pleaded relief under certain wage statutes, but upheld summary judgment for the defendant county on those statutory claims anyway. 163 Wn.2d at 86, 89.

In addition, both default judgments in the 2009 case are void because the complaint did not provide notice that Kruger would seek to recover attorney fees. Kruger notes that the “relief requested” in the complaint included a request for “attorney’s fees and costs as allowed by law.” CP (09) 7. But a generic prayer for relief is not sufficient where the allegations in the complaint do not set forth any basis for granting such relief. *See Columbia Val. Credit Ex., Inc.*, 12 Wn. App. at 955 (where debts alleged in complaint totaled only \$1,596, default judgment for greater amount (\$3,328) set forth in prayer for relief was void).

Kruger argues that Moi knew that the parties’ contract included an attorney fee provision. *Resp. Br.* at 36. But Moi denies that there was any such contract, no court has found that such a contract existed, and Kruger’s claims for contractual attorney fees are barred by res judicata.

In sum, both default judgments in the 2009 case provided greater and significantly different relief than Kruger sought in the complaint. Both of those judgments are void, and the trial court’s failure to vacate those judgments under CR 60(b)(5) was erroneous.

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

Kruger erroneously asserts that Moi took “no action” for sixteen months, and that Moi has offered “no excuse” for such long delay. *Resp.*

*Br.* at 20-24. In fact, Moi responded promptly to the improper default judgments, and Kruger was immediately notified that the validity of the default judgments was disputed. CP (09) 123, 126. When Moi discovered the “amended” default judgment, Moi promptly filed for bankruptcy, and filed a notice of bankruptcy in this case. CP (09) 555; CP (06) 2047.

In concluding that Moi did not act with diligence, the trial court opined that Moi “strategically chose” to file for bankruptcy. CP (09) 1110. But there was no legal basis for the trial court to second guess Moi’s decision to file for bankruptcy. The merits of the bankruptcy case were for the bankruptcy court to adjudicate.

In a similar vein, Kruger suggests that Moi should not have filed for bankruptcy, and that his decision to do so was a lack of diligence for purposes of CR 60(b). Kruger’s argument, if accepted, would require an insolvent defendant to choose between (i) moving to vacate an improper default judgment and (ii) the protections of the federal bankruptcy stay. Such an untenable choice is inconsistent with the purpose of the automatic stay in bankruptcy, which is to give the debtor “breathing room,” to relieve the debtor from further collection efforts, and to insure an orderly liquidation or rehabilitation of the debtor. *Brunetti v. Reed*, 70 Wn. App. 180, 186, 852 P.2d 1099 (1993); *Seattle-First Nat’l Bank v. Westwood Lumber*, 59 Wn. App. 344, 351–352, 796 P.2d 790 (1990).

Kruger cites numerous cases for the proposition that sixteen months of inactivity constitutes a lack of diligence. *Resp. Br.* at 20-22. But these cases are inapplicable because they do not address the issue of whether filing for bankruptcy constitutes a lack of diligence for purposes of a motion to vacate default.<sup>17</sup> The sixteen months was not a period of “no action.” The validity of Kruger’s default judgments was at issue throughout that period. CP (09) 83-117, 710-733, 962-63, 978, 1003.

Kruger mischaracterizes Moi’s position as an argument that bankruptcy “tolled [Moi’s] obligation to act with due diligence.” *Resp. Br.* at 22. Moi has not argued that his obligation to act with diligence was “tolled.” Rather, Moi argues that he acted with diligence by promptly filing for bankruptcy, challenging the default judgments in bankruptcy, and then by promptly moving to vacate the default judgments in state court once the bankruptcy case was over. Kruger’s argument

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<sup>17</sup> See *Shepard Ambulance, Inc.*, 95 Wn. App. 231; *Smith v. Arnold*, 127 Wn. App. 98, 113, 110 P.3d 257 (2005); *Estate of Stevens*, 94 Wn. App. 20, 971 P.2d 58 (1999); *Cammarano v. Longmire*, 99 Wash. 360, 361, 169 P. 806 (1918); *Hardesty v. Stenchever*, 82 Wn. App. 253, 917 P.2d 577 (1996); *Canam Hambro Systems, Inc. v. Horbach*, 33 Wn. App. 452, 453, 655 P.2d 1182 (1982); *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922 (2005); *Kuhn v. Mason*, 24 Wn. 94, 64 P. 182 (1901); *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404 (5th Cir. 1994); *Federal Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, (8th Cir. 1989); *Security Mut. Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062 (10th Cir. 1980); *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245 (4th Cir. 1974); *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204 (5th Cir. 2003).

characterizes filing for bankruptcy as a lack of diligence. Not surprisingly, Kruger cites no authority to support that characterization.

Attempting to characterize the bankruptcy case as a lack of diligence by Moi, Kruger argues that the bankruptcy case was a “nullity” because it was voluntarily dismissed by Moi. *Resp. Br.* at 14, 16, 23. Kruger takes the word “nullity” out of context from a case that has nothing to do with the question of diligence in moving to vacate a default judgment. *Resp. Br.* at 23; *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 158 P.3d 1271 (2007). In *Wachovia*, the trial court granted the plaintiff creditor’s motion for dismissal without prejudice, and declined to award attorney fees to the defendant pursuant to the underlying note. 138 Wn. App. at 857. The Court of Appeals affirmed, holding that a dismissal without prejudice is not a “final judgment” for purposes of RCW 4.84.330. 138 Wn. App. at 863. In the passage cited by Kruger, the court stated “[a]s we have previously stated in the attorney fee context, ‘the effect of a voluntary dismissal is to render the proceedings a nullity and leave the parties as if the action had never been brought.’” 138 Wn. App. at 861 (quoting *Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1999)).

In context, *Wachovia* stands for the proposition that a voluntarily dismissed case is a “nullity” in that such a case does not finally determine the rights of the parties. 138 Wn. App. at 861. It is true that the

bankruptcy case did not determine the merits of this dispute because the bankruptcy case was dismissed without prejudice. But that dismissal did not magically transform a 15-month bankruptcy proceeding (which subjected the state court case to an automatic stay) into a lack of action or diligence by Moi. *Wachovia* does not hold otherwise. Kruger's argument is wholly unsupported by authority.

Moi's inability to file a CR 60(b) motion in state court during the bankruptcy case was *not* a lack of diligence. In *Federal Land Bank of St. Louis v. Cupples Bros.*, 889 F.2d 764, (8th Cir. 1989), cited by Kruger, the trial court granted a judgment and decree of foreclosure for the plaintiff creditor, and the debtor appealed. After the judgment was affirmed on appeal the debtor brought a motion under CR 60(b) to restrain the foreclosure sale. The district court denied the motion, holding that the motion, filed one year and eleven weeks after the judgment, was not brought in a reasonable amount of time. 889 F.2d at 766-767. On appeal, the debtor argued that the district court erred in including the time during which the appeal was pending in calculating how long the motion was delayed. The circuit court disagreed, noting that the pendency of an appeal did not toll the deadline for filing a CR 60(b) motion because such motions can be brought while an appeal is pending. *Id.*

In contrast to *Federal Land Bank*, Moi could *not* bring a CR 60(b) motion in state court while the bankruptcy case was pending. Indeed, Kruger opposed Moi's first motion to vacate on grounds that it violated the automatic stay. CP (09) 152-153. And when Moi moved to dismiss the bankruptcy case in order to re-file his motion, Kruger unsuccessfully opposed dismissal. CP (09) 621. Under *Federal Land Bank* (and common sense), the unavoidable delay caused by the bankruptcy case was not a lack of diligence on Moi's part. In other words, the only applicable case cited by Kruger confirms that Kruger's argument is erroneous.

Kruger argues, for the first time on appeal, that Moi could have filed motion for relief from stay during the bankruptcy case. *Resp. Br.* at 23. Not only does this argument violate RAP 2.5(a), but it requires the Court to speculate that a motion for relief from stay would have been granted over Kruger's objections. This Court does not have jurisdiction over bankruptcy matters, and it does not even have a complete record of Moi's bankruptcy case. The Court cannot uphold the trial court's untenable ruling based on speculation that a motion for relief from stay would have been granted over Kruger's objections.

Finally, Kruger erroneously argues, for the first time on appeal, that RCW 4.72.030 requires any motion to vacate a judgment based on fraud to be brought within one year after the judgment. *Resp. Br.* at 23.

RCW 4.72.030 has been superseded by CR 60. *Commercial Courier Service v. Miller*, 13 Wn. App. 98, 102, 533 P.2d 852 (1975); *Morgan v. Burks*, 17 Wn. App. 193, 197 n.1, 563 P.2d 1260 (1977). The one-year limitation in CR 60(b) does not apply to motions brought under CR 60(b)(4), (5) or (11). Kruger has either failed to adequately research his new argument or he has attempted to mislead this Court.

Vacating the improper default judgments would not cause Kruger any prejudice in the legal sense. The additional cost and delay of vacating an inequitable default judgment cannot be said to “prejudice” the nonmoving party. *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003). Kruger had notice of Moi’s intent to challenge the default judgments, and was not surprised when Moi moved to vacate those judgments. Because the default judgments provided excessive relief and were the product of Kruger’s own misconduct, the delay and cost incurred in setting aside those default judgments is entirely Kruger’s own fault.

Kruger makes two arguments regarding prejudice, neither of which has any merit. First, Kruger argues that vacation of the default judgments will force Kruger to bear the “entire financial burden” of the parties’ joint venture. *Resp. Br.* at 28. Kruger exaggerates the effect of vacating the default judgments. Moi concedes that he has breached the agreement and owes Kruger some amount of money. If this court vacates the default

judgments Kruger will still recover his actual damages. Kruger will not recover the grossly excessive relief to which he was never entitled in the first place, but that is not “prejudice” in the legal sense. *Johnson*, 116 Wn.2d at 842. Kruger does not claim any “prejudice” to his ability to prove his actual damages from Moi’s breach if the improperly obtained default judgments are vacated.

Second, Kruger complains about the attorney fees he incurred in the bankruptcy proceeding. *Resp. Br.* at 28-29. But there is no causal relationship between vacating the default judgments and the cost of the bankruptcy case, despite Kruger’s incoherent attempt to establish such a relationship. Vacating the improper default judgments will not cause Kruger to incur the cost of the bankruptcy case. Kruger has already incurred those attorney fees, and his opportunity to recover those fees from Moi is gone. Kruger requested an award of attorney fees in the bankruptcy court, and his request was denied. CP (09) 992-993, 996, 1003-1004. Those fees are not “prejudice” that would be caused by a decision to vacate the default judgments in state court.

In sum, Moi exercised diligence in moving to vacate the default judgments, and Kruger has not shown any actual prejudice. Furthermore, default judgments are not favored in the law. *Griggs*, 92 Wn.2d at 581. Where a court is asked to vacate a default judgment, the court “should

exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.” *White*, 73 Wn.2d at 351 (citing *Hull v. Vining*, 17 Wn. 352, 49 P. 537 (1897)). Justice has not been done in this case. The default judgments improperly obtained by Kruger vastly exceeded the relief to which Kruger was legitimately entitled. The trial court’s refusal to vacate the default judgments was an abuse of discretion and must be reversed.

**C. The trial court erred in failing to award Moi attorney fees under CR 11.**

Kruger notes that a trial court’s decision under CR 11 is reviewed for abuse of discretion. However, a trial court must exercise such discretion on articulable grounds. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007). The trial court in this case simply ignored the clear evidence that Kruger and his attorney violated CR 11 by misrepresenting the nature and extent of Kruger’s alleged “damages” in order to obtain vastly inflated default judgments against Moi. Kruger’s response is equally conclusory. *Resp. Br.* at 36-37. 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.

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

It is undisputed that Kruger has refused to comply with the

February 2007 order to transfer Parcel B to Moi. CP (06) 220-221. Nor does Kruger deny that the trial court's failure to enforce that order resulted in Parcel B being sold to Kruger for a fraction of its value. Kruger's assertion that the issue is "moot" because Moi has not assigned error to the 2007 judgment is not supported by any authority. *Resp. Br.* 37.

It is also undisputed that the 2007 order (i) was obtained by Kruger, (ii) implemented the parties' agreement to divide the property, and (iii) placed no conditions on Kruger's obligation to transfer Parcel B to Moi. CP (06) 14-15. If Kruger had the legal right to withhold Parcel B from Moi until after Moi paid the money judgment, the 2007 order would have so stated. Neither Kruger nor the trial court has identified any legal theory that would allow the trial court to refuse to enforce the order based on a payment condition that was not set forth in that order.

Kruger asserts that he has "steadfastly agreed to transfer Parcel B as soon as Moi satisfied his debts." *Resp. Br.* at 37. That is not a legal argument. That is just an explanation of Kruger's selfish motivation for failing to comply with an unambiguous order that he obtained. Kruger does not deny that a judgment lien would have adequately protected Kruger's interests as a judgment creditor. *See App. Br.* at 42. Nor does Kruger deny that his refusal to give Moi clear title to Parcel B prevented Moi from using the property to pay or supersede the judgment, or that, as a

result, the Parcel was sold *to Kruger* for a fraction of its value. *Id.*; CP (06) 1633-1657. Consequently, it is undisputed that Kruger's refusal to transfer Parcel B was unlawful, entirely unnecessary to protect Kruger, caused an enormous loss to Moi, and created a windfall for Kruger.

Having no legal excuse for failing to comply with the order to transfer Parcel B to Moi, Kruger argues that a trial court's decision "in regard to a default judgment" is within the trial court's discretion. *Resp. Br.* at 37. A trial court does not have unfettered "discretion" to refuse to enforce the parties' agreement or the court's own prior orders. The fact that the 2007 order to convey Parcel B was obtained by default is irrelevant to the question of whether that order must be enforced. The cases cited by Kruger merely state that a trial court's decision on a motion to vacate a default judgment is reviewed for abuse of discretion. Those cases do *not* hold that a trial court has "discretion" to refuse to enforce a court more than four years after the order was issued.<sup>18</sup>

Finally, Kruger argues that Moi refused to cooperate with Kruger to facilitate the satisfaction of the 2007 judgment. *Resp. Br.* at 38. This argument has no basis in law or fact. Kruger cites no authority for the proposition that Moi had any legal duty to "cooperate" with an adverse

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<sup>18</sup> See *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007); *Graham v. Yakima Stock Brokers, Inc.*, 192 Wn. 121, 126, 72 P.2d 1041 (1937); *Shepard Ambulance, Inc.*, 95 Wn. App. at 238; *Leen*, 62 Wn. App. at 478.

party that had willfully violated a court order. Nor does Kruger provide any factual basis for his self-serving claim that Moi failed to “cooperate.”

Kruger has willfully failed to comply with a court order that he obtained. The trial court’s failure to enforce that order was erroneous.

**E. Other matters raised by Kruger are irrelevant or meritless.**

**1. Moi’s brief complies with RAP 10.3(a)(5).**

Kruger argues that Moi’s Statement of the Case fails to cite the record as required by RAP 10.3(a)(5). *Resp. Br.* at 18. Kruger does not specify what part of Moi’s Statement is allegedly unsupported. *Id.* In fact, all of Moi’s Statement is supported by citations. *App. Br.* at 6-18.

**2. Moi properly assigned error to the trial court orders issued on February 7, 2012 and March 22, 2012.**

Kruger erroneously argues that Moi has failed to brief his appeal of the trial court orders issued on February 7, 2012 and March 22, 2012. *Resp. Br.* at 38-42. Moi assigned error to these orders because both orders purport to award \$34,000 in attorney fees. CP (09) 1195, 1277. Moi complied with RAP 10.3(a)(4) by stating that the issue pertaining to this assignment of error is whether Kruger is entitled to attorney fees. *App. Br.* at 6. That issue is addressed in Moi’s brief. *App. Br.* at 25-27, 43-45.

Kruger argues that the entry of the *Corrected Amended Default Judgment* (February 7, 2012) merely corrected a clerical error in the earlier default judgment. *Resp. Br.* at 38-39; CP (09) 1140-1151. As

explained in Moi's pending *Motion to Deny Entry of Corrected Amended Default Judgment*, the lack of a judgment summary in the original default judgment was not a clerical error for purposes of CR 60(a), and the re-characterization of the existing default judgment to include award of \$34,000 in attorney fees was a substantive change in the judgment then under review by this Court. 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.

Kruger's long discussion of writs of execution irrelevant to the issue of whether Kruger was entitled to attorney fees. *Resp. Br.* at 40-42.

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

The necessity and cost of this appeal are attributable to the same misconduct for which the trial court should have awarded Moi attorney fees under CR 11. *See* section C. This Court award Moi attorney fees on appeal to be awarded to Moi on remand. *See* RAP 18.1(i).

#### **IV. 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.

RESPECTFULLY SUBMITTED this 15th day of October, 2012.

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**Certificate of Service**

I, the undersigned, certify that on the 15th day of October, 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):

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