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NO. 68206-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

VIET N. NGUYEN,

Appellant,

vs.

HAI TANG and JANE DOE TANG, husband and wife and their marital
community,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Theresa B. Doyle, Judge

BRIEF OF RESPONDENTS

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I. NATURE OF THE CASE

Plaintiff Nguyen served a complaint arising out of a traffic accident on defendant Tang. Unsophisticated and speaking only poor English as a second language, defendant Tang did not advise his auto liability insurer, which had earlier denied plaintiff's claim on the ground its investigation had shown defendant was not liable.

Plaintiff obtained a default judgment. Two days later, the liability insurer learned about it. The next day, counsel appointed by the liability insurer appeared for defendant Tang and, five days later, moved to vacate the default judgment. The trial court vacated the default judgment.

II. ISSUES PRESENTED

A. Did the trial court abuse its considerable discretion in vacating a default judgment where—

1. Defendant Hai Tang was a relatively unsophisticated person who did not speak English well;

2. There was a *prima facie* defense to liability—namely, that it was plaintiff who turned into defendant's car, not the other way around;

3. Defense counsel moved to vacate the default judgment a mere six days after learning of it; and

4. Plaintiff never claimed he would be prejudiced by vacating the default judgment.

B. In the event this court finds that the default judgment should be reinstated, was the motion to vacate the default judgment in violation of CR 11?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

On August 28, 2009, plaintiff/appellant Viet Nguyen and defendant/respondent Hai Tang were both traveling southbound on Rainier Avenue South. Plaintiff was in the left lane; defendant Tang was in the right lane. (CP 2, 73-74) At some point, one of the parties pulled into the other's lane, causing a collision and damaging both vehicles. (CP 74)

Plaintiff promptly obtained an attorney, who formally notified defendant's auto liability insurer about his representation. (CP 94) Subsequently, the insurer denied plaintiff's claim, explaining (CP 105):

Per an in-depth personal interview with our driver, the facts indicate your client is responsible for this loss, thus causing his own damage and injuries. The GEICO driver [defendant Tang] was stopped in the right lane when your client struck my insured's stopped vehicle. . . .

B. STATEMENT OF PROCEDURE.

Claiming that Tang had negligently pulled into the left lane where plaintiff was driving, plaintiff sued. (CP 1-3) Pursuant to an *ex parte* order, plaintiff mailed service.¹ (CP 21-26)

Defendant Tang, who is relatively unsophisticated and speaks English only poorly as his second language, did not notify his insurance company that he had been sued. (CP 74) On August 5, 2011, plaintiff moved for default. (CP 37-46) An order of default was entered on August 8, 2011. (CP 47-48)

Plaintiff moved for a default judgment on November 23, 2011. (CP 49-61) Default judgment in the amount of \$48,088.11 was entered on November 28, 2011. (CP 62-63)

In the meantime, plaintiff's own insurer, State Farm, had filed a suit for property damage subrogation against defendant Tang, serving him on April 19, 2011. (CP 75, 91) GEICO received separate notice of this suit and appointed defense counsel for defendant Tang. (CP 75)

Defendant Tang's defense counsel noted the deposition of plaintiff Nguyen in the State Farm subrogation suit. On November 30, 2011,

¹ Defendant objects to plaintiff's repeated claims that defendant "avoided" service. (Opening Brief 4, 7-8) There is no evidence in the record to show that defendant Tang was even at home when the process server attempted service or that even if he was, that he knew that the person at the door was trying to serve him. (CP 6-13, 107-09)

counsel for plaintiff Nguyen in the instant case appeared at the deposition, and provided defendant Tang's counsel with a copy of the default judgment. This was the first time defense counsel learned that plaintiff Nguyen had filed a personal injury lawsuit against defendant Tang. (CP 75)

The default judgment in the personal injury action had been entered just two days before defense counsel learned of it at the deposition. (CP 75) Defense counsel signed a notice of appearance in the personal injury action the next day, December 1, 2011, and filed it a day later, on December 2, 2011. (CP 165) He filed a motion for reconsideration and/or to vacate five days after that, on December 6, 2011. (CP 66-72)

The trial court granted the defense motion and vacated the default judgment. (CP 157-58)

IV. ARGUMENT

This is an appeal from an order vacating a default judgment. This court will review for abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). Abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 199, 165 P.3d 1271 (2007). A

manifestly unreasonable decision is one that is “outside the range of acceptable choices, given the facts and the applicable legal standard”. *Fowler v. Johnson*, ___ Wn. App. ___, 273 P.3d 1042, 1047 (2012). A decision is based on untenable grounds if it is based on facts unsupported by the record. *See id.* A decision is for untenable reasons if it is based on “an incorrect standard or the facts do not meet the requirements of the correct standard.” *Id.*

That this court might have reached a different decision does not mean the trial court abused its discretion. *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn.2d 544, 548, 647 P.2d 30, *cert. denied*, 459 U.S. 1037 (1982). Significantly, “[a]buse of discretion is less likely to be found if the default judgment is set aside.” *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979). Indeed, “for more than a century, it has been the policy of [the Washington Supreme Court] to set aside default judgments liberally.” *Morin*, 160 Wn.2d at 754. Hence, a court deciding a motion to vacate a default judgment must act in accordance with equitable principles so that justice is done. *Griggs*, 92 Wn.2d at 582.

In short, default judgments—“one of the most drastic actions a court may take”—are not favored. *Griggs*, 92 Wn.2d at 581. Courts prefer to allow the parties to have their day in court, with controversies being decided on the merits. *Morin*, 160 Wn.2d at 754.

As will be discussed, the trial court here did not abuse its discretion in vacating the default judgment. In fact, the trial court acted so justice could be done.

A. THIS COURT WILL NOT CONSIDER ISSUES RAISED FOR THE FIRST TIME ON APPEAL OR FOR WHICH THERE IS NO SUPPORT IN THE RECORD.

Preliminarily, this court should be aware that plaintiff/appellant's opening brief contains several arguments made for the first time on appeal. For example, plaintiff makes numerous procedural arguments about CR 59 and King County Local Rule 7 and 7(b)(8). *See, e.g.*, Opening Brief 1-3, 13-14, 20-21, 23-25. Plaintiff also argues that because the default order was not challenged, it still stands, and that the trial court erred by not entering findings of fact and conclusions of law. *See, e.g.*, Opening Brief 2-3, 14-15, 24.

However, plaintiff never raised any of these arguments in the trial court. It is too late to make them now. RAP 2.5(a); *Thorsteinson v. Waters*, 65 Wn.2d 739, 748, 399 P.2d 510 (1965), *overruled on other grounds*, *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). This court should not now consider these arguments.

In any event, the arguments are meritless. For example, citing CR 59 (presumably meaning CR 59(f)), plaintiff repeatedly argues that the trial court should have entered findings of fact and conclusions of law to

support its decision to vacate the default judgment. (*E.g.*, Opening Brief 2, 3, 14, 41) But CR 59(f)² deals with new trials, not vacating default judgments. Here, there has been no trial at all, so there cannot be a new trial. CR 59(f) simply does not apply. Plaintiff has cited no authority that supports his claim that findings and conclusions were necessary.³

Plaintiff further argues, evidently under CR 59, that there should have been a hearing. (*E.g.*, Opening Brief 14, 21, 41) The record shows that both parties requested a hearing. (CP 64, 164) Where, as here, the motion was made by a party, CR 59(e)(3) permits the trial court judge to determine whether there should be oral argument or whether the motion can be determined on the briefs. There is no requirement that a hearing must be held simply because a party requested one.

Plaintiff also complains that the motion to vacate did not specifically identify any of the grounds for reconsideration set forth in CR

² CR 59(f) provides:

In all cases where the trial court grants a motion for a new trial, it shall, in the order granting the motion, state whether the order is based upon the record or upon facts and circumstances outside the record that cannot be made a part thereof. If the order is based upon the record, the court shall give definite reasons of law and facts for its order. If the order is based upon matters outside the record, the court shall state the facts and circumstances upon which it relied.

³ In contrast to vacation of a default judgment, when default judgment is *entered* where damages are uncertain, findings of fact and conclusions of law are required. CR 55(b)(2).

59(a). The motion, which was also made under CR 55 and 60, clearly identified “the specific reasons in fact and law” upon which it was based. CR 59(b).

That the motion did not mention a specific ground listed in CR 59(a) is immaterial. Under the facts of this case, the CR 60 requirement of excusable neglect is similar to the CR 59(a)(3) ground of “[a]ccident or surprise which ordinary prudence could not have guarded against”. Further, where, as here, default judgment is entered against an unsophisticated defendant who does not understand English well, but who has a *prima facie* defense, “substantial justice” within the meaning of CR 59(a)(9) has not been done.

In any event, the motion was also made pursuant to CR 55 and CR 60. (CP 66) Even if the requirements of CR 59 were not met, vacating the default judgment was proper under CR 55 and CR 60, as will be discussed *infra*.

Plaintiff’s argument that defendant Tang failed to comply with KCLR 7(b)(8), is also misplaced. First, the rule applies only to “[a] motion for revision of a commissioner’s order.” KCLR 7(b)(8)(A). The commissioner here signed a judgment, not an order. (CP 62-63) “Furthermore, the superior court has inherent power to waive its own rules, and this court will presume the superior court had sufficient cause to

waive LR 7, absent evidence of an injustice.” *Foster v. Carter*, 49 Wn. App. 340, 343, 742 P.2d 1257 (1987). There is no evidence of an injustice.

Plaintiff’s argument about forum shopping based on *Howland v. Day*, 125 Wash. 480, 216 P. 864 (1923), is baseless. *Howland* involved a motion for new trial. The Supreme Court simply stated that motions for new trial are ordinarily to be heard by the judge who tried the case. Here, there was no trial, let alone a motion for new trial.

There is no merit to the argument that the default order still stands either. The parties agree that to vacate a default judgment under CR 55 and CR 60, a defendant must show at least a *prima facie* defense. (Opening Brief 18) The purpose of this requirement is to avoid a useless trial. *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099, *rev. denied*, 150 Wn.2d 1020 (2003). But with a default order, the defaulting party is deemed to have admitted the allegations of plaintiff’s complaint as to liability. See 4 K. Tegland, *WASHINGTON PRACTICE Rules*, at 334 (5th ed. 2006). The *prima facie* defense requirement to vacate a default judgment would be meaningless if the order of default remained in effect when the default judgment was vacated.

Indeed, that plaintiff is now, for the first time on appeal, claiming that the default order remains in effect is inconsistent with what he argued

below. In the trial court, plaintiff treated the motion to vacate as a motion to vacate *both* the default judgment *and* the default order. Plaintiff's response to the motion stated:

COMES NOW Plaintiff Viet N. Nguyen by and through his attorney of record and asks this Court to deny Defendants Hai H. Tang's and Jane Doe Tang's ("Defendants") ***motion to vacate the order of default entered on August 9, 2011*** and the default judgment entered against them on November 28, 2011.

(CP 77) (emphasis added).

In any event, the requirements for vacating a default judgment are much more stringent than the requirements for vacating a default order. To vacate a default order, a defendant need only show good cause. CR 55(c)(1); *In re Estate of Stevens*, 94 Wn. App. 20, 30, 971 P.2d 58 (1999). Good cause can be shown by demonstrating excusable neglect and due diligence. *Id.*

In contrast, as will be discussed *infra*, not only must a defendant seeking to vacate a default judgment show excusable neglect and due diligence (*i.e.*, good cause within the meaning of CR 55(c)(1)), but also at least a *prima facie* defense and no substantial prejudice to the plaintiff. *Stevens*, 94 Wn. App. at 30. Hence, if a defendant can show that the requirements for vacating a default judgment exist, he has automatically shown the requirements for vacating the default order.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY VACATING THE DEFAULT JUDGMENT.

To obtain vacation of a default judgment, a defendant must show⁴:

“(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that 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) that 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.”

Morin, 160 Wn.2d at 755 (quoting *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)). The first two factors are primary factors; the last two are secondary factors. *TMT Bear Creek*, 140 Wn. App. at 201.

1. Defendant Tang Has a *Prima Facie* Defense.

A *prima facie* defense is one that would send the case to a jury. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 239, 974 P.2d 1275 (1999), *rev. denied*, 140 Wn.2d 1007 (2000). “[A] defendant satisfies its burden of demonstrating a prima facie defense if it produces evidence that, if later believed by the trier of fact, would constitute a defense to the claims presented.”

⁴ Plaintiff’s repeated arguments that there was service here completely miss the point. For purposes of the motion to vacate the default judgment and this appeal, defendant Tang does not deny he was properly served. Indeed, had he not been properly served, the default judgment would have been void for lack of personal jurisdiction. *Ahten v. Barnes*, 158 Wn. App. 343, 349, 242 P.3d 35 (2010).

Rosander v. Nightrunners Transport, Ltd., 147 Wn. App. 392, 404, 196 P.3d 711 (2008). The trial court must determine whether, viewing the evidence and reasonable inferences therefrom in the light most favorable to the moving party—here, defendant Tang, there is substantial evidence of a *prima facie* defense. *Showalter v. Wild Oats*, 124 Wn. App. 506, 512, 101 P.3d 867 (2004). The court does not act as a fact finder in determining a motion to vacate. *Id.* Thus, the court may not conclusively determine which facts are the truth. *Id.*

In the instant case, plaintiff claimed defendant Tang moved out of his lane and into plaintiff's lane and hit plaintiff. (CP 2) On the other hand, defendant Tang claimed it was plaintiff who moved over into his lane and hit him. (CP 74, 76) If believed by the trier of fact, defendant Tang would not be liable. Thus, defendant Tang made out a *prima facie* defense.

Plaintiff essentially admits that defendant Tang has established a *prima facie* defense (Opening Brief 31), assuming *arguendo* there was admissible evidence. However, plaintiff claims there was no admissible evidence to establish the *prima facie* defense.

It is true that defense counsel explained the *prima facie* defense in his declaration and its attachment and that no declaration by defendant Tang was submitted. (CP 73-76) Plaintiff claims that this was fatal to the

motion to vacate because there was no admissible evidence by defendant Tang himself.

Plaintiff's argument is in error, and none of his cited cases actually hold that the evidence sufficient to support vacating a default judgment must be on personal knowledge and admissible. Indeed, in *Rosander v. Night Runners Transport, Ltd.*, 147 Wn. App. 392, 196 P.3d 711 (2008), cited by plaintiff at page 18 of his Opening Brief, the court considered an accident report and an attorney's claim evaluation in determining whether the default judgment should have been vacated. Accident reports are hearsay, and an attorney's claim evaluation would not be on personal knowledge as well as being hearsay. See, e.g., 5C K. Tegland, WASHINGTON PRACTICE *Evidence* § 803.38, at 98 (5th ed. 2007); cf. *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982) (declining to consider attorney's affidavit on summary judgment). But the court did not decline to consider the documents as inadmissible.

In any case, motions to vacate judgments, default or otherwise, are made pursuant to CR 60(e). See *Pfaff v. State Farm Mutual Automobile Insurance Co.*, 103 Wn. App. 829, 14 P.3d 837 (2000), *rev. denied*, 143 Wn.2d 1021 (2001). Unlike CR 56(e), which expressly requires affidavits in summary judgment proceedings to be made on personal knowledge and

set forth admissible evidence,⁵ CR 60(e) simply provides that a motion to vacate must be supported by “the affidavit of the applicant *or his attorney* setting forth a concise statement of the facts . . .” (emphasis added). *Cf. Thor v. McDearmid*, 63 Wn. App. 193, 817 P.2d 1380 (1991) (counsel’s statements as to how witnesses would testify constitute adequate offer of proof).

Here, the declaration of defendant Tang’s attorney (CP 73-75) sets forth a concise statement of facts describing his client’s defense. *See Griggs*, 92 Wn.2d at 583 (suggesting that affidavit of defendant’s attorney in support of vacating default judgment should have included statement of facts constituting defendant’s defense).

Second, for purposes of vacating a default judgment, a *prima facie* defense can be established by the record instead of, or in addition to, the affidavit of counsel or the applicant. *Griggs*, 92 Wn.2d at 583-84. For example, in *C. Rhyne & Associates v. Swanson*, 41 Wn. App. 323, 704 P.2d 164 (1985), the defendant failed to file an affidavit to support his motion to vacate the default judgment. This court nevertheless ruled that

⁵ Thus, plaintiff’s reliance on *Hash v. Children’s Orthopedic Hosp. & Med. Center*, 49 Wn. App. 130, 741 P.2d 584 (1987), *aff’d*, 110 Wn.2d 912, 757 P.2d 507 (1988), and *Parkin v. Colocousis*, 53 Wn. App. 649, 769 P.2d 326 (1989), is misplaced since both involved CR 56 summary judgment motions. *In re Marriage of Martin*, 22 Wn. App. 295, 588 P.2d 1235 (1979), involved a contested divorce decree, not a vacation of a default judgment.

the judgment should have been vacated because defendant's answer, filed after entry of default, set forth his "prima facie, albeit tenuous, defense." *Id.* at 327-28. See also *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986) (vacating default judgment as to damages on basis of insurance adjuster's affidavit and argument that *prima facie* defense as to damages award cannot be made absent discovery). Clearly the answer would not have been admissible at trial to prove the defense.

Here, not only did the declaration of defense counsel explain his client's defense, so did the record. The record contained defendant Tang's liability insurer's denial of plaintiff's claim. That denial explained (CP 76):

Per an in-depth personal interview with our driver [defendant Tang], the facts indicate your client [plaintiff] is responsible for this loss, thus causing his own damage and injuries. The GEICO driver [defendant Tang] was stopped in the right lane when your client [plaintiff] struck my insured's stopped vehicle. Additionally, at the scene both drivers agreed to handle their own damages.

This was sufficient to set forth defendant Tang's *prima facie* defense.

2. Defendant Tang's Failure To Timely Appear Was Due to Excusable Neglect.

Defendant Tang's failure to timely appear was a result of excusable neglect. Defendant Tang speaks poor English and is relatively unsophisticated. (CP 74) Thus, he did not notify his insurance company that plaintiff had sued him. (CP 74)

The trial court did not abuse its discretion in concluding that lack of sophistication coupled with lack of mastery in the English language was excusable neglect. Many courts have so held.⁶

Contrary to plaintiff's assertions, *Hwang v. McMahill*, 103 Wn. App. 945, 15 P.3d 172 (2000), *rev. denied*, 144 Wn.2d 1011 (2001), does not apply. In that case, defendant Maureen McMahill, a high school graduate, claimed she was too upset and impatient to read what had been served on her. *Id.* at 951-52. There was no claim of lack of mastery of the English language by an unsophisticated defendant. Plaintiff's other cited cases also do not involve unsophisticated defendants who do not speak English adequately.⁷

⁶See, e.g., *Brown v. Martin*, 23 Cal. App. 736, 139 P. 823 (1914) (excusable neglect where defendant was unsophisticated Portuguese who did not speak English); *Thompson v. Goubert*, 137 Cal. App. 2d 153, 289 P.2d 887 (1955) (defendants were unsophisticated and spoke limited English); *Northern Commercial Co. v. Goldman*, 37 N.D. 542, 164 N.W. 133 (1917) (excusable neglect where defendant was Russian who did not speak English); *Consortium Consulting Group, Inc. v. Tsai*, 2 A.D.3d 177, 768 N.Y.S.2d 213 (2003) (excusable neglect where defendant lacked English proficiency); cf. *Berri v. Rogero*, 168 Cal. 736, 145 P. 95 (1914) (affirming vacating default judgment where Italian-Swiss defendants unable to speak English failed to appreciate need to verify answer).

⁷ See *Larson v. Zabronski*, 21 Wash. 572, 152 P.2d 154, 155 P.2d 284 (1944) (defendant claimed he never received summons and complaint); *Brooks v. University City, Inc.*, 154 Wn. App. 474, 225 P.3d 489 (2010) (registered agent for corporate defendant forwarded summons and complaint to wrong employee), *rev. denied*, 169 Wn.2d 1004 (2010); *Johnson v. Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003) (defendant's store manager failed to forward summons and complaint to corporate counsel), *rev. denied*, 150 Wn.2d 1020 (2003); *Luckett v. Boeing Co.*, 98 Wn. App.307, 989 P.2d 1144 (1999) (attorney agonizing over dismissal of his client's case due to failure to file confirmation of joinder delayed four months in moving to vacate dismissal), *rev. denied*, 140 Wn.2d 1026 (2000); *Prest v. American Bankers Life Assurance*, 79 Wn. App. 93, 900 P.2d 595

That defense counsel appointed by defendant Tang's insurance company was defending him against the State Farm subrogation action proves nothing. There is *no* evidence in the record as to how defendant Tang's insurance company, GEICO, received notice that plaintiff's insurer, State Farm, had brought the subrogation action. It is just as likely, if not more so, that State Farm, as a courtesy to GEICO, informed GEICO of the suit, as it is that defendant Tang advised GEICO of the lawsuit.

Plaintiff also appears to argue that because defendant Tang was being defended in the State Farm subrogation suit, he somehow should have known that he had been sued in a completely separate lawsuit and needed to notify his insurance company. (Opening Brief 34) Plaintiff also argues that defendant Tang should have notified his defense counsel in the State Farm subrogation suit when he received the Order Changing Case Assignment. (*E.g.*, Opening Brief 5, 35) But an unsophisticated person lacking in adequate English skills might reasonably fail to understand that

(1995) (defendant insurance company failed to notify insurance commissioner of change of person designated to accept service of process), *rev. denied*, 129 Wn.2d 1007 (1996). In *Puget Sound Medical Supply v. Wash. State Dept. of Social & Health Services*, 156 Wn. App. 364, 234 P.3d 246 (2010), the delinquent business claimed that the delay was due to:

“(1) [R]esponse date not calendared because office staff was out of the office for the holidays; (2) short deadline (10 working days) to decide whether to appeal after receipt of the Initial Decision; (3) lead attorney left the firm; (4) difficulty contacting an expert witness; (5) possibility that the Department would seek to supplement hearing record; (6) Initial Decision arrived earlier than expected.”

156 Wn. App. at 373.

the paperwork served on him was not in reference to the subrogation suit. In fact, an unsophisticated person lacking in adequate English skills might not even understand that that paperwork involved a lawsuit. The trial court did not abuse its discretion in vacating the default judgment.

3. Defendant Tang Acted with Due Diligence Once He Learned of the Default Judgment.

Defendant Tang's defense counsel in the State Farm subrogation action learned of the default judgment on November 30, 2011. (CP 75) Counsel signed a notice of appearance in the instant action the very next day, December 1, 2011, and filed it a day later, on December 2, 2011. (CP 165) The defense filed its motion to vacate less than a week later, on December 6, 2011. (CP 64-72) In other words, the motion to vacate was filed less than a week after the defense learned of the default judgment.

Much longer delays have been held to support vacating default judgments. For example, in both *Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (2004), and *Pfaff v. State Farm Mutual Automobile Insurance Co.*, 103 Wn. App. 829, 14 P.3d 837 (2000), the Court of Appeals affirmed an order vacating a default judgment, where the motion to vacate was made 10 days after defendant discovered the default judgment.

Plaintiff claims that the defense had notice of his personal injury lawsuit well before his deposition in the State Farm subrogation action. Plaintiff claims that defendant Tang's counsel in the State Farm subrogation action (who later became his defense counsel in the instant action) should have realized plaintiff had filed a personal injury action against defendant Tang based on an objection State Farm made to an interrogatory. Whether this argument is relevant to due diligence or excusable neglect, the trial court was within its discretion to reject it.

The interrogatory objection, which did not identify the title or cause number of the suit, was received by defendant Tang's defense counsel *after* the order of default against defendant Tang had been entered, so even if it had provided adequate notice of plaintiff's action, it would not have prevented the default order. (CP 47, 130, 136)

In any event, defense counsel for Mr. Tang submitted a declaration in which he testified that he understood the objection to mean that plaintiff's personal injury claim was being negotiated and was not yet in suit because either GEICO or his office would have been notified had suit been commenced. (CP 155-56) He further testified that often when there is disputed liability in a personal injury action, the property damage claim is also made in that case, and that since he had not been informed of any personal injury action, he believed there was none. (CP 156) These were

reasonable conclusions on defense counsel's part, given that he had already been retained by GEICO to represent Mr. Tang in the State Farm subrogation suit. The trial court was within its considerable discretion to deem this explanation reasonable.

4. Plaintiff Will Not Suffer Substantial Hardship.

Finally, plaintiff will not suffer any substantial hardship by vacating the default judgment. The mere fact that plaintiff will now have to try the case is insufficient. *Pfaff*, 103 Wn. App. at 836 (“prospect of trial cannot constitute, without more, ‘substantial hardship’”). Indeed, plaintiff has not claimed any substantial hardship.

C. PLAINTIFF'S OTHER ARGUMENTS THAT THE DEFAULT JUDGMENT SHOULD STAND ARE WITHOUT MERIT.

Plaintiff also argues that the motion to vacate should have been denied because it failed to follow the procedure set forth in CR 60. Under CR 60(e)(2)-(3), a motion to vacate and supporting affidavits and an order to show cause must be served on all parties “in the same manner as in the case of summons in a civil action”, and the trial court must set a place and time for a show cause hearing. It is true that service was not effected as it would be with a summons in a civil action, and there was no show cause hearing. Rather, the motion was set as a regular motion, with the parties having an opportunity to fully brief the matter. (CP 64-65)

The procedure followed here was sufficient. *Lindgren v. Lindgren*, 58 Wn. App. 588, 794 P.2d 526 (1990), *rev. denied*, 116 Wn.2d 1009 (1991), is illustrative. In that case, a default judgment was entered against a third-party defendant. Nearly four years later, the third-party defendant moved to vacate the default judgment, serving the motion on the judgment creditor's attorney instead of the judgment creditor. The judgment creditor argued that the third-party defendant had failed to follow the requirements of CR 60(e) because service of the motion to vacate had been on the judgment creditor's attorney rather than on the judgment creditor himself.

The Court of Appeals rejected this argument. First, the court held that the trial court had obtained jurisdiction over the judgment creditor in several different ways, including—

- when he had been originally served with the initial complaint, some 5 years earlier;

- when he filed his third-party complaint, four-and-a-half years prior, thereby submitting himself to the jurisdiction of the court;

- when he served a writ of garnishment on the third-party defendant, 2 months before.

Second, the failure to serve the judgment creditor personally was not fatal to the motion to vacate. The court noted that the personal service

requirement would have been important had the party who obtained the default judgment believed the case was concluded and no longer was retaining the lawyer who had originally pursued the matter. However, the court explained:

[W]hen a copy of the motion is received by the attorney for the adversary party, who has recently filed papers relating to the same action, and the party appears and defends the motion, . . . it is clear that the party had adequate notice of the motion to vacate.

Id. at 593.

Here, plaintiff's attorney does not deny receiving a copy of defendant Tang's motion to vacate, which was filed just eight days after plaintiff's attorney had obtained default judgment against defendant Tang. (CP 62-63, 66-72, 165) Plaintiff's attorney does not deny he received the 10 days' notice required by CR 59(c). Plaintiff, through his attorney, appeared and defended against the motion, filing opposition papers of more than 70 pages in length. (CP 77-149) Just as in *Lindgren*, plaintiff had adequate notice of the motion to vacate the default judgment. It was not an abuse of discretion to decide the motion.

Carpenter v. Elway, 97 Wn. App. 977, 988 P.2d 1009 (1999), *rev. denied*, 141 Wn.2d 1005 (2000), also provides a helpful comparison. In that case, judgment on a mandatory arbitration award was entered against the defendant. The defendant then moved for reconsideration under CR

59, rather than moving to vacate the judgment under CR 60, and simply noted the motion for hearing.

Accordingly, there was no request for a show cause hearing or service of an order to show cause, as required under CR 60. MAR 6.3, however, prohibits setting aside a judgment on an MAR award except by a CR 60 motion to vacate.

The Court of Appeals rejected the argument that because the procedural requirements of CR 60 had not been followed, the judgment could not be vacated. The court explained:

Although the rules require a CR 60(b)(1) motion, in this instance we find Elway's deviation from the technical requirements to be inconsequential. As even Carpenter notes, only the technical requirements of CR 60(e) distinguished Elway's motion from a properly filed CR 60(b)(1) motion.

97 Wn. App. at 985.

The cases cited by plaintiff, *State ex rel. Gaupseth v. Superior Court*, 24 Wn.2d 371, 164 P.2d 890 (1946), and *State ex rel. Hibler v. Superior Court*, 164 Wash. 618, 3 P.2d 1098 (1931), are inapposite. Both cases dealt with whether the failure to serve the motion to vacate on the plaintiff, as opposed to on the plaintiff's attorney, deprived the trial court of jurisdiction. Plaintiff here does not and could not claim the trial court lacked jurisdiction. As the *Lindgren* court explained:

. . . the courts' language [in *Gaupseth* and *Hibler*] upon which Demopolis relies—that the failure to serve deprives the court of jurisdiction to hear a motion to vacate—is arguably unnecessary to the courts' decisions and clearly inconsistent with a statute giving a trial court continuing jurisdiction to adjudicate matters in an ongoing litigation. The statute, Rem. Rev. Stat. § 238, the former codification of RCW 4.28.020, was in effect at the time [*Gaupseth* and *Hibler* [failed to] cite Rem. Rev. Stat. § 238; we must presume the court did not consider its application when rendering the decisions.

58 Wn. App. at 592-93. RCW 4.28.020 provides:

From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings.

Thus, so long as the court has jurisdiction of the original action, jurisdiction continues for purposes of the CR 60(b) motion. *See In re Marriage of Parks*, 48 Wn. App. 166, 737 P.2d 1316, *rev. denied*, 109 Wn.2d 1006 (1987).

Allen v. Allen, 12 Wn. App. 795, 532 P.2d 623 (1975), another case cited by plaintiff, also does not support his position. In that case, the moving party unexpectedly made an oral motion to vacate an entire divorce decree during a hearing that had been set solely to determine whether custody should be modified. The opposing party had no prior notice that the entire divorce decree might be vacated and had no opportunity to file a response. In this case, in contrast, plaintiff had 10

days' notice of the motion to vacate and in fact filed a lengthy response in opposition. (CP 64-65, 77-149)

In sum, plaintiff's procedural complaints are not supported by Washington law. The trial court did not abuse its discretion in vacating the default judgment.

D. THERE WAS NO CR 11 VIOLATION IN THE TRIAL COURT.

Plaintiff claimed the motion to vacate violated CR 11. By granting the motion to vacate, the trial court impliedly found no violation of CR 11. If this court affirms the grant of the motion to vacate, the CR 11 issue becomes moot. *See Do v. Farmer*, 127 Wn. App. 180, 110 P.3d 840 (2005).

In the event this court reverses the vacation of the default judgment, there was still no CR 11 violation. CR 11(a) provides:

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record The signature . . . of an attorney constitutes a certificate by the . . . attorney that the . . . attorney has read the pleading, motion, or legal memorandum, and that to the best of the . . . attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified,

are reasonably based on a lack of information or belief. . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

Whether a CR 11 violation has occurred vests in the sound discretion of the trial court. *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 110, 780 P.2d 853 (1989). The rule is not, however, intended to chill a lawyer’s enthusiasm or creativity in pursuing factual or legal theories. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Accordingly, this court has recognized—

“Because CR 11 sanctions have a potential chilling effect, the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success. The fact that a [motion] does not prevail on its merits is not enough.”

Dutch Village Mall v. Pelletti, 162 Wn. App. 531, 539, 256 P.3d 1251 (2011), *rev. denied*, 173 Wn.2d 1016 (2012) (quoting *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn. App. 195, 208, 211 P.3d 430 (2009)).

“CR 11 deals with two types of filings: (1) baseless filings and (2) filings made for an improper purpose.” *West v. State, Washington*

Association of County Officials, 162 Wn. App. 120, 135, 252 P.3d 406

(2011). Plaintiff claims that the motion to vacate was a baseless filing.

A filing is “baseless” when it is “(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.” To impose sanctions for a baseless filing, the trial court must find not only that the claim was without a factual or legal basis, **but also** that the attorney who signed the filing did not conduct a reasonable inquiry into the factual and legal basis of the claim.

Id. (quoting *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883-84, 912 P.2d 1052 (1996)) (emphasis added).

Plaintiff argues that CR 11 sanctions are permitted “[w]hen an attorney (or party) fails to make a reasonable inquiry into the facts and law supporting a pleading, **or** proceeds without factual support”, and that the trial court need find only that “counsel ignored facts and/or law, **or** they failed to conduct a ‘reasonable, competent inquiry under an objective standard’”. (Opening Brief 37) (emphasis added). Neither case plaintiff cites for these disjunctive propositions⁸ support them. Ironically, given that it is plaintiff who is seeking CR 11 violations, plaintiff has misread well-established law.

⁸ Plaintiff cites *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008), *rev. denied*, 165 Wn.2d 1049 (2009), and *Ambach v. French*, 141 Wn. App. 782, 173 P.3d 941 (2007), *rev'd on other grounds*, 167 Wn.2d 167, 216 P.3d 405 (2009).

Twenty years ago, the Washington Supreme Court set forth the correct standard as follows:

If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim.

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (emphasis in original). Thus, contrary to plaintiff's position, a lack of factual basis *or* the failure of the attorney signator to conduct a reasonable inquiry is insufficient. Both must be found.

In the instant case, defense counsel was faced with "one of the most drastic actions a court may take", a default judgment against his client, an unsophisticated person with poor English skills. *Griggs*, 92 Wn.2d at 581. There was a *prima facie* defense to liability—namely, that the accident had been plaintiff's fault, not the client's. Thus, the motion had a factual and legal basis for the two most important factors required to vacate a default judgment—the *prima facie* defense and excusable neglect.

The secondary factors were also present. Given that the default judgment had been entered a mere two days before counsel learned of it, there would be no prejudice to the plaintiff if the judgment were vacated. And, given that defense counsel himself had learned of the default

judgment only a few days before, there was at least a reasonable argument that the due diligence factor was also satisfied.

Moreover, the argument that defense counsel should have realized that there was a personal injury suit against his client three months earlier was just that—an argument. There was no case law with similar facts to provide any guidance. The decision on the issue was within the trial court’s discretion. Thus, it was not “patently clear” that a motion to vacate would have “absolutely no chance of success”. *Dutch Village Mall*, 162 Wn. App. at 539.

Under these circumstances, defense counsel not only had a factual and legal basis for a motion to vacate the default judgment, he had *an obligation* to his client to try to get the default judgment vacated. There was no CR 11 violation.

Plaintiff argues that if defense counsel had confirmed that service had been made, the motion to vacate was frivolous. It is plaintiff’s argument that borders on the frivolous. Where, as here, the argument for vacating the default judgment is excusable neglect, not that the default judgment was void for want of personal jurisdiction, the argument presumes that valid service has been made. *See, e.g., White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968).

Further, as plaintiff well knows, defendant Tang is arguing more than that he “merely failed to give him [defense counsel] the documents.” (Opening Brief 40) Defendant Tang is arguing that, as an unsophisticated person lacking adequate English skills, his failure to provide the summons and complaint to his insurance company was excusable neglect.

E. PLAINTIFF IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL.

Plaintiff claims attorney fees on appeal pursuant to CR 11. (Opening Brief 36) CR 11 deems an attorney’s signature on a document as certification that the document signed is, among other things, warranted by existing law. Hence, plaintiff’s request is indeed ironic, since CR 11 has not applied to appeals for nearly 20 years—specifically, since 1994, when RAP 18.7 was amended to delete reference to CR 11. *Building Industry Association v. McCarthy*, 152 Wn. App. 720, 750, 218 P.3d 196 (2009); I WASHINGTON APPELLATE DESKBOOK § 5.5(3) (WSBA 3d ed. & 2011 Supp.); *see also* 3 K. Tegland, WASHINGTON PRACTICE *Rules* at 495 (7th ed. 2011).

Thus, where, as here, parties seek attorney fees on appeal only under CR 11, they have failed to identify an applicable basis for awarding fees and such fees must be denied. *Building Industry*, 152 Wn. App. at 750. In any event, even if CR 11 applied on appeal, there was no violation for the reasons discussed in the preceding section.

V. CONCLUSION

The trial court here set aside the default judgment. Because defendant Tang showed a *prima facie* defense, excusable neglect, prompt action upon discovery of the default judgment, and no prejudice to plaintiff, the trial court here did not abuse its discretion. "Abuse of discretion is less likely to be found if the default judgment is set aside," as opposed to if the default judgment is affirmed. *Friebe v. Supancheck*, 98 Wn. App. 260, 266, 992 P.2d 1014 (1999); *Griggs*, 92 Wn.2d at 582.

Therefore, this court should affirm and remand for a trial on liability, causation, and damages.

DATED this 11th day of May, 2012.

REED McCLURE

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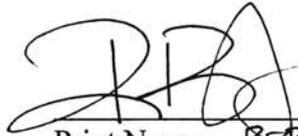


Cathi Key

SIGNED AND SWORN to (or affirmed) before me on May 11,

2012 by Cathi Key.





Print Name: REBECCA BARRETT
Notary Public Residing at LYNNWOOD, WA
My appointment expires 4-9-2014