

NO. 708635

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

INNA MEDNIKOVA and VYACHESLAV AVADAYEV,

Respondents,

v.

MARE MORSE and MARTIN MORSE,

Appellants.

Appeal from the Superior Court for King County
Cause No. 13-2-19004-4 SEA

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Mednikova's response is based on an incorrect understanding of the law and a misunderstanding of Morse's arguments. There is good cause to vacate the default order and therefore the default judgment must also be vacated. Additionally, the default judgment should be vacated in its own right because Morse has shown at least a prima facie defense to damages and a trial on the merits is the only way to avoid prejudice to the parties. Mednikova cannot and does not make a compelling or genuine argument to dispute the need for a trial on the merits and clearly the equities in this matter require it.

II. REPLY ARGUMENT

A. Morse Does Not Argue Informal Appearance.

In their response, Mednikova argues that the negotiations between their counsel and Morse's insurance company, Omni Insurance, did not constitute an informal appearance and therefore Morse was not entitled to notice of the motion for default order. However, while the ongoing communication with Omni should be considered at least an informal appearance there was no argument by Morse on appeal that notice was

required due to an informal appearance. Morse seeks relief from the order of default for good cause, not lack of requisite notice of the motion.

However, in raising this argument in their response, Mednikova shines light on the important fact that despite their knowledge of Omni's intention to defend in his matter, Mednikova chose not to inform Omni of the lawsuit. There is no doubt that Mednikova was well aware that Omni would be the entity to provide a defense. In fact, Mednikova acknowledges in their response that they assume Omni is paying for Morse's defense in this matter. Respondents' Brief, at p. 19. Therefore, it is clear that Mednikova deliberately failed to inform Omni of the lawsuit despite knowing Omni's involvement, because they wanted to avoid litigation on the merits and obtain a fast and surreptitious default. Admittedly, Mednikova is not *legally* obligated to inform the insurance company of such litigation. However, their purposeful evasion of Omni's calls and calculated nondisclosure of the litigation was at best unprofessional, and more likely, an ethical violation.

As stated, Mednikova has responded to an argument not raised by Morse and therefore it will be assumed no further reply on this issue of notice is necessary or warranted.

B. Mednikova Confuses the Different Standards Used to Vacate a Default Order Under CR 55 and a Default Judgment Under CR 60.

In their response, Mednikova confuses the different standards for vacating a default order and for vacating a default judgment. The standard for vacating a default order is less demanding than to vacate a default judgment. Only good cause, defined as excusable neglect and due diligence, need be shown to vacate a default order. Once good cause is established and the default order vacated, any default judgment must also be vacated, as a default order is a prerequisite to a default judgment. Morse has clearly established good cause to vacate the default order and therefore both the default order and default judgment should be vacated and it was an abuse discretion for the trial court to hold otherwise.

i. Morse's Failure to Timely Appear was the Result of Excusable Neglect.

Morse's late appearance in this matter was the result of excusable neglect resulting from a reasonable mistake by Morse, Mendikova's failure to inform Omni of the lawsuit and Mednikova's tactical and strategic concealment of the lawsuit and hurried default. Washington case law is indisputably clear that these circumstances amount to excusable neglect for purposes of vacating defaults.

a. A Reasonable Mistake is Excusable Neglect.

Morse was honestly and reasonably confused about their obligation to respond to the summons and complaint. As Mare Morse testifies in her declaration, she was under the impression that Omni was handling Mednikova's claims. When Morse was served with the Summons and Complaint they had no reason to believe that these documents were not being addressed by their insurance company. Additionally, the representations of the process server reaffirmed Morse's reasonable assumption that Omni was handling the claim entirely. When a little after a month went by without any word from the insurance company, it occurred to Morse that maybe her insurance company was not made aware of these documents, as she previously reasonably assumed they had. Unfortunately, at that time, she was approximately two weeks too late. Morse contacted Omni on June 13, 2013 and defense counsel was assigned and appeared the next week.

The assumption by Morse that their interests were being protected by Omni was unquestionably reasonable under these circumstances. Mednikova made their claim for damages to Omni, not to Morse. Further, it was Omni who Mednikova negotiated and communicated with for three years, not Morse. The Morses are not attorneys or familiar with the legal

process or insurance claims. There was no reason why Morse would assume that Mednikova would completely end communication with their insurance company after three years. Indeed, any reasonable person might assume that an ethical and professional attorney would inform the insurance company of such litigation when they are well aware that it is the insurance company who will defend the claim.

Washington case law is very clear that “a genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint will constitute a mistake for purposes of vacating a default judgment.” *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019, 1022 (1999) *amended*, 3 P.3d 207 (Wn. Ct. App. 2000) *citing* *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 312, 748 P.2d 241 (1987) (“a delay solely attributable to an oversight or mistake on the insurance carrier's part will excuse a default where the insured has no reason to believe his interests are not being protected”). *See also, Calhoun v. Merritt*, 46 Wn. App. 616, 621, 731 P.2d 1094 (1986) (holding that the late appearance was a mistake and excusable for purposes of a motion to vacate a default when the defendant did not answer the summons and complaint because he believed his insurer was already involved in the case).

Mednikova ignores this well settled case law and instead tries to distract the court by comparing this matter to *Johnson v Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003). In *Johnson*, the party served with the summons and complaint completely failed to notify counsel or the company administration of service of the summons and complaint. Additionally, In *Johnson* there was no misunderstanding about who was obligated to respond, instead, the defendant in *Johnson* merely ignored the service of process. This is entirely distinguishable from the case at hand. Unlike in *Johnson*, Morse had good reason to believe that their interests were being protected by their insurance company. Further, Morse did not completely fail to notify her insurance company of the service of process, but rather was about two weeks late in realizing that maybe her insurance company was not informed of the lawsuit as she previously reasonably assumed. This is entirely different from *Johnson*, where counsel was *never* notified and there was no other possible person or entity whom could have been reasonably assumed to be handling the matter.

Mednikova also references *Akhavuz v Moody*, 315 P.3d 572, 578 (Wash. Ct. App. 2013) to argue that being an innocent insured does not necessarily protect a party from default. However, the *Akhavuz* court specifically states that their ruling is only applicable under the

circumstances of that case and the facts in this matter are completely distinguishable. *Akhavuz*, at 578.

In *Akhavuz*, the defendant and its insurer were both well aware of the existence of the lawsuit and the party responsible for the defense. Further, they were aware of the default. However, neither the defendant nor their insurance company took any action until about a year after the default was entered. The *Akhavuz* court found that ***under these circumstances*** the defendants were not simply innocent insureds who made a reasonable mistake and that the neglect by defendant Moody was inexcusable. *Akhavuz*, at 578.

In their opinion, the *Akhavuz* court distinguishes other Washington case law which finds excusable neglect where an insured is reasonably mistaken about who will protect their interests. In distinguishing these cases, the *Akhavuz* court places a great emphasis on the reasonableness of the mistake and the length of the delay in the defense by defendants. Indeed, the *Akhavuz* court affirms the holding in *Norton* that, “a default judgment is normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party.” *Akhavuz*, at 578 (citing *Norton*, 99 Wn. App. 118, 126, 992 P.2d 1019, 3 P.3d 207 (2000)).

One such case distinguished by *Akhavuz*, was *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968). In *White*, the court found excusable neglect where there was a reasonable misunderstanding regarding who was responsible for the defense and the defendant waited only 11 days to move to vacate the default. The *Akhavuz* court declined to apply the holding in *White* because defendant Holm had made a reasonable mistake and was diligent in taking action to correct it. Similarly, the *Akhavuz* court declined to compare *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 748 P.2d 241 (1987), a case in which the defendant insurance company misplaced the file, causing a default. The defendant in *Berger* moved to vacate the default a month after it was entered. In distinguishing these cases, the *Akhavuz* court strongly emphasizes the promptness of the motion to vacate and the reasonableness of the defendant's assumptions that their interests were being protected.

Clearly, the case before this court is more like *White* and *Berger* than *Akhavuz* because Morse reasonably assumed their insurance company was protecting their interests and a notice of appearance was filed the day the default was discovered and less than a month after the default was obtained. The *Akhavuz* ruling was specific to the facts of that case, which are completely distinguishable from the case currently before the court.

Unlike in *Johnson* and *Akhavuz*, Morse made a reasonable mistake in relying on their insurance company to protect their interests. The *relevant* Washington case law of *Norton*, *White* and *Berger* make it clear that Morse's mistake was reasonable, inconsequential, forgivable and amounted to excusable neglect, and it was an abuse of discretion for the trial court to find otherwise.

b. Morse's Late Appearance was the Result of Mednikova's Misconduct.

Like mistake or excusable neglect, misrepresentation or other misconduct also justifies vacation of a judgment under CR 60 (b)(4). *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 825, 225 P.3d 280, 290 (2009). Party misconduct is also grounds to grant reconsideration. CR 59(a)(2). Washington precedent clearly holds that a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable. Specifically, the Court should find "excusable neglect" for purposes of vacating a default when an alleged tortfeasor acted with due diligence but the victims' counsel attempted to conceal the existence of the litigation. *Morin v. Burris*, 160 Wn.2d 745, 755-759, 161 P.3d 956 (2007).

It is disingenuous for Mednikova to accuse Morse of inexcusable neglect in responding to the lawsuit. Mednikova could not have been

surprised by the Morse's late appearance because it appears that Mednikova's counsel orchestrated much of the confusion. Mednikova was well aware of Omni's intentions to defend in this matter. However, they chose not to inform Omni of the lawsuit. While they are not obligated to inform Omni of the lawsuit, despite an opportunity to do so in their response, Mednikova provides no explanation for their silence. Therefore, we must assume it was an attempt to avoid any defense of their claims and obtain a hurried, quiet default.

Mednikova attempts to mislead the court in their Response by stating that they informed Omni that a lawsuit would be filed. Respondent's Brief, at pp. 14 and 20. To be clear, Mednikova threatened a lawsuit approximately one year before the lawsuit was filed. Mednikova never informed Omni of the lawsuit after it was filed, or even in the months prior to filing it.

In fact, Mednikova did not simply fail to inform Omni of the lawsuit, but rather counsel for Mednkikova purposefully evaded Omni's attempts to contact Kesselman Law Firm. Mednikova argues that Omni should have left a voicemail message. However, clearly this would be impossible if the phone was hung up before reaching voicemail. Mednikova also argues that their law firm would have just ignored the calls rather than hanging up because they have caller ID. While it is

interesting to note that Mednoikova has a procedure for avoiding unwanted phone calls, this tactic would have left the possibility of a voicemail by Omni. Medniokva then questions why the law firm would not want Omni to leave a voicemail – and the only explanation is that Mednikova wanted to avoid feeling any type of obligation to inform Omni of the litigation. Lastly, Mednikova argues that a letter from Omni might have avoided all of this confusion. However, Omni did send a letter dated June 4, 2013, which was not responded to. CP 169. Further, as Mednikova well knows, due to the timing of the lawsuit, the statute of limitations and the court deadlines, Omni needed immediate contact with Mednikova’s counsel, which could not have been accomplished by letter.

Mednikova further suggests that Morse should provide more evidence of their misconduct accusations, such as telephone company records. Clearly, obtaining the telephone records of a nationally operated insurance company is not a burden necessary for the Court to recognize that the circumstance under which Mednikova obtained their defaults does not pass the smell test.

Lastly, Mednikova tries to make light of the evidence of Mednikova’s misconduct that Morse provided in the form of a declaration of Lynn Smith, Omni Adjuster. Lynn Smith was chosen as a representative of Omni because she has reviewed the records of all the

Omni employees who tried to contact Mednikova in 2013 and is fully aware of the extent of the efforts that Mednikova went through to avoid Omni's attempts at communication. Indeed, Lynn Smith was the most suitable Omni representative for this purpose. Further, it is curious why Mednikova's counsel believes that affidavits prepared on Morse's behalf are self-serving and not credible when Mednikova relies on the same type of evidence to support their own arguments.

Morse appeared only 24 days after service of process was complete. This minimal delay is not the type of offense that should be punishable by a default judgment of almost \$60,000.00. Morse's late appearance was simply the result of Morse's reasonable misunderstanding about who was responsible for defense of the lawsuit and Mednikova's deceitful attempt to conceal the existence of litigation from Morse's insurance company. When considering the Washington case law on this matter, as well as the equities, this clearly amounts to excusable neglect for purposes of vacating a default order.

i. Morse Acted Diligently Upon Notice of the Default Order.

Morse's diligence cannot be disputed. Morse promptly took action upon learning of the default order. The delay from the time that Morse learned of the Default Order to when they filed their Motion to Vacate the

Default Order was approximately two weeks. Further, that two week delay was agreed upon by Mednikova. Washington case law is clear that a two week delay is considered diligent for purposes of vacating a default. *Akhavuz v. Moody.*, 315 P.3d 572, 578 (Wash. Ct. App. 2013). In fact, the *Akhavuz* court suggests that such a short delay is also evidence of excusable neglect. *Akhavuz*, at 578. Further, the due diligence of Morse and their counsel is not even questioned by Mendikova and therefore this factor has clearly been established. The trial court abused its discretion in entering a default order.

ii. Default Judgment Cannot be Entered When There is No Enforceable Default Order.

Pursuant to KCLR 40(b), a party may move for a default judgment only upon the entry of an order of default. KCLR 40(b). Therefore, a holding by this Court that the trial court erred in entering the default *order* requires reversal of the default *judgment*, as the judgment was entered in reliance on the Order of Default.

Morse has shown good cause to vacate the default order and therefore both the default order and judgment must be vacated. This Court need not even consider the legitimacy and equity of the default *judgment*. However, even if more rigorous requirements for vacating a default judgment were applied, Morse is entitled to have the judgment vacated.

iii. Pursuant to CR 60, Good Reason Exists to Vacate the Default Judgment.

Unlike the simple ‘good cause’ standard which applies when vacating a default order under CR 55, the discretion the trial court is called upon to exercise in deciding whether to set aside a default *judgment* concerns two primary and two secondary factors. The primary factors are: 1) that there is substantial evidence to support, at least *prima facie*, a defense to the claim; and 2) that the moving party’s failure to timely appear was the result of mistake, inadvertence, surprise or excusable neglect. The two secondary factors are whether the moving party acted with due diligence and whether substantial hardship for the opposing party will result. *White*, 73 Wn.2d at 351-352. Each of these factors must be applied in the context that ***default judgments are not favored*** and motions to vacate a default judgments are equitable proceedings and the ***overriding concerns of the court is to do justice***. *Calhoun*, at 620.

Two of these four factors, excusable neglect and due diligence, have already been established in the discussion regarding good cause to vacate the default *order* and those arguments are hereby incorporated by reference. Further, because good cause to vacate the default order was established, the Court’s analysis need go no further. However, if the court is going to consider the cause for vacating the default judgment, the two

remaining factors to be considered are whether at least a prima facie defense can be shown and whether Mednikova will be prejudiced. Morse has clearly established all four requisite factors to vacate the judgment and the trial court abused its discretion by entered this default.

a. Mednikova Does not Provide Substantial Evidence of the Damages Claimed which is a Prima Facie Defense to Damages.

The requirement for a prima facie defense ensures that a subsequent trial is not useless. In determining whether a trial would be useful, the trial court need only determine whether the defendant is able to demonstrate *any set of circumstances* that, if believed by the tier of fact, would constitute a defense to the claims presented. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202-203, 165 P.3d 1271, 1279 (2007). Where the defendant moves promptly to vacate and has a strong case for excusable neglect, the strength of the defense is less important to the reviewing court. *C. Rhyne & Associates v. Swanson*, 41 Wn. App. 323, 328, 704 P.2d 164, 167 (1985). Morse has shown that their late appearance was the result of excusable neglect and was in no way willful. Therefore, only a prima facie defense must be shown in order to vacate the default judgment.

Mednikova cites *Courier Service, Inc. v. Miller*, 13 Wn. App. 98, 533 P.2d 852 (1975) for the position that a prima facie defense is not sufficient to vacate a default. Respondent's Brief, at pp. 15-16. However, this case law is incorrectly interpreted by Mednikova. *Courier Service, Inc.* holds that a prima facie defense is not sufficient only when the failure to timely appear is willful or the result of inexcusable neglect. *Courier Service, Inc.*, at 103 and 106. (Interestingly, this case also confirms the *White v. Holm* holding that reasonable reliance on an insurance company amounts to excusable neglect. *Courier Service, Inc.*, at 107.) As already discussed at length, Morse's late appearance was the result of excusable neglect, and therefore, at most, Morse need show only a prima facie defense to the claims against them.

For purposes of vacating a default judgment, the required prima facie defense can be either a defense to liability or a defense to damages or both. *Calhoun*, 46 Wn. App. at 620-621. Washington law requires the existence of substantial evidence to support an award of damages. Therefore, ***a showing of lack of evidence of damages is a prima facie defense to damages.*** *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 242, 234, 974 P.2d 1275 (1999). Further, when the damages sought are unliquidated, the party moving to have the default judgment vacated is entitled to conduct

discovery because it would be inequitable to expect a full defense of damages without the ability to conduct discovery. *Calhoun*, at 620.

Morse has shown more than a prima facie defense to damages, even without the opportunity to conduct discovery because Mednikova failed to provide the trial court with substantial evidence to support their damages. Viewing the evidence in the light most favorable to the party seeking a reversal of the default, Morse can clearly show a set of circumstances under which a jury would find for Morse.

Mednikova's response brief claims that Morse provides no evidence of a prima facie defense. Respondent's Brief, at pp. 16, 17 and 24. However, that is clearly incorrect. Morse's defense of damages is evident in Mednikova's complete lack of support of their claim for damages. Most of Mednikova's medical bills and records were, and still are, missing. Mednikova argues that Morse had full access to Mednikova's medical file and therefore should have provided more evidence of defense of damages. However, this is simply not true. On November 18, 2013, counsel for Morse called Mednikova's counsel to request the full medical records, explaining that the records provided to date do not account for the full amount of Mednikova's claims and many of the records provided appear to be unrelated to the motor vehicle accident that is the subject matter of Mednikova's lawsuit. Mednikova's counsel flatly refused to

provide the medical records. Therefore, even when the evidence was specifically requested, Mednikova was unable to provide substantial evidence of their claims.

What Mednikova does not seem to understand is that Morse's prima facie defense to the damages is the fact that Mednikova does not provide substantial evidence to support their damages. Notably, in their response, Mednikova does not deny that they failed to provide substantial evidence of their alleged medical damages. Rather, Mednikova apparently provided only the "most important parts". Respondent's Brief, at p. 25. However, providing only the "most important parts" is not equivalent to providing the required substantial evidence of the damages.

Further, while most of Mednikova's claims are not supported by *substantial* evidence, some of Mednikova's claims are not supported by any evidence at all. Mednikova provides no credible evidence to support her wage loss claim and absolutely no evidence to support a loss of consortium claim. In fact, there is no evidence that the couple is even legally married and therefore loss of consortium is not a valid claim for damages. Mednikova argues that Morse should not have brought up this fact on appeal. However, this is not a new argument. Morse has argued throughout this litigation that the loss of consortium claim, as well as all other damages, was not supported by substantial evidence. In fact, the

\$14,000.00 loss of consortium claim is supported by no evidence at all. Mednikova does not even bother with a declaration by the “common law husband”. The reason Mednikova’s marital status was not raised before is because Mednikova was successful in misleading Morse into believing that the Mednikova’s were truly married by referring to them as being in a “common-law marriage” in their complaint and by Mednikova’s references to “wife” and “husband” in her declaration attached to the motion for default judgment. CP 4, 60 and 61. Of note, in their response, Mednikova does not deny that they are not legally married. Should the court disregard the fact that Mednikova is not married and the loss of consortium claim is invalid, because of the late revelation, this fact should at least be considered when weighing the equities in this matter and also assessing the integrity with which Mednikova’s counsel practices. Further, even if the couple were married and the claim for loss of consortium valid, there is absolutely no evidence to support the amount of type of damages allegedly suffered by Vyacheslav Avadayev (the “common law husband”).

Morse has clearly shown that Mednikova has not and cannot provide substantial evidence to support the alleged damages. This is true despite the fact that Morse has been unable to conduct the discovery they are entitled to under these circumstances. Washington courts are clear that it would be *an abuse of discretion*, to deny the motion to vacate the

damages portion of the judgment on the grounds that the defendant did not present a *prima facie* defense when the damages are not liquidated and there had been no opportunity for discovery. *Calhoun*, 46 Wn. App. at 620-622. In this case, discovery would allow Morse to explore the later suffered knee injury, as well as the effect of the previous car accident, and the legitimacy of the property damage and wage loss claims, loss of consortium and all other general damages claims. This outstanding discovery is required for an equitable and just result. *Calhoun*, 46 Wn. App. at 620-621.

Even without the ability to conduct discovery, clearly Morse has shown that Mednikova does not provide a substantial evidence to support the alleged damages, and therefore Morse has shown at least a *prima facie* defense as to damages and it was an abuse of discretion by the trial court to enter the default judgment under these circumstances. *Shepard Ambulance, Inc*, 95 Wn. App. at 242, 234 and 244. The evidence being viewed in favor of the party in default, Morse has shown a set of circumstances under which a reasonable jury may question the alleged damages and the trial on the merits would be far from useless. Morse is entitled to a have the judgment vacated.

b. Mednikova Will Suffer No Hardship When the Default Judgment is Vacated and Their Claims are Tried on the Merits.

Mednikova claims that they will be prejudiced by an order requiring a trial on the merits because of a previous collections action, because of her alleged damages in the motor vehicle accident and because her recent diagnosis of breast cancer. However, none of these alleged prejudices would be *caused* by a trial on the merits and none would be *avoided* by sustaining the defaults. These alleged prejudices would have occurred even if the trial moved forward as scheduled or the defaults were sustained. These “prejudices” are completely unrelated to the defaults and the appeal.

Further, vacation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits. *Johnson*, 116 Wn. App. at 842. If Mednikova wanted a resolution on the merits sooner, they should have filed their lawsuit upon first learning of the value impasse with Omni. As stated in their response, Mednikova was aware of Omni’s unchanging offer of settlement by at least early 2012. Respondent’s Brief, at p. 3. Additionally, from the minimal medical records before the court, it appears that Mednikova was done treating sometime in mid-2011. Mednikova could have filed a lawsuit at that time. However, instead

Mednikova chose to wait several years, and just days before the statute of limitations, to quietly file this lawsuit.

Further, because Mednikova was aware that Omni would be providing the defense and or settlement in this matter, letting Omni know about the lawsuit sooner, or at all, would have been in Mednikova's best interest. Mednikova also had the opportunity to vacate the default and settle or try the case on the merits, which would have avoided any alleged delays caused by the motions and appeal. Had they agreed to try the case on the merits, this matter would have been resolved by the trial date of August 4, 2014 at the latest. However, Mednikova refused – seemingly because the merits of her claims are not strong. Therefore, even if having to try this case on the merits were an accepted prejudice for these purposes, which it is not, Mednikova cannot honestly blame Omni or Morse for the delay in the resolution of this matter.

The equities in this case require a trial on the merits. There is simply no imaginable hardship that will be suffered by Mednikova as a result of the default order and judgment being vacated. Mednikova will in no way be limited in their ability to fully pursue their claims against Morse and, furthermore, the matter could be appropriately adjudicated on its merits.

C. Substantial Justice and Equity is a Primary Consideration.

“Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve their disputes on the merits.” *Akhavuz v. Moody*, 315 P.3d 572, 575 (Wash. Ct. App. 2013)(citing, *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867, (2004)). A default judgment has been described as one of the most drastic actions a court may take to punish disobedience to its commands. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). “A default judgment is normally viewed as proper only when the adversary process has been halted because of an essentially unresponsive party.” *Akhavuz*, at 578 (citing *Norton*, 99 Wn. App. 118, 126, 992 P.2d 1019, 3 P.3d 207 (2000)). The overriding policy is that controversies should be determined on their merits, not by default. *Johnson v. Cash Store*, 116 Wn. App. 833, 840, 68 P.3d 1099, 1103 (2003). As noted by Mednikova, Washington Courts recognize that justice will not be done if hurried defaults are allowed any more than if *continuing* delays are permitted. Respondents’ Brief, at p. 6. In fact, justice might, at times, require a default or a delay. *Shepard Ambulance, Inc.*, 95 Wn. App. at 238.

If justice and equity truly matters, these defaults must be vacated. Morse should not be so harshly punished for a reasonable misunderstanding, which was at least in part orchestrated by Mednikova's counsel's misconduct. This is not a situation where there have been continuous delays – it is however one where a hurried default was inequitably obtained. A trial on the merits in this matter is the only fair and equitable outcome because it is clear that Mednikova has a lot of issues in proving the alleged damages that were included in the default judgment obtained against Morse prior to any opportunity for discovery.

While the conduct of Mednikova's counsel, from what we know, does not appear to be illegal, it is at best, unprofessional. It is obvious that Mednikova wanted a default rather than a trial on the merits and they took questionable actions in order to obtain it. They failed to inform Omni of the lawsuit and hung up the phone when Omni called, despite the fact that they knew Omni intended to defend. They obtained the default as fast as possible under the rules, apparently because Mednikova did not want a trial on the merits, as they knew the merits of their claims were not sound. Indeed, they have snuck in a seemingly unrelated injury to their damages claim, while refusing to provide the medical records to support the claim. Additionally, they seemed to have made a claim for loss of consortium for an unmarried party by purposefully and artfully failing to disclose the true

status of their relationship. Rewarding this type of dishonest conduct is not justice.

III. CONCLUSION

Morse's failure to timely appear was caused by an honest mistake about who was responsible for defending the lawsuit and by Mednikova's purposefully and questionable conduct used to obtain a fast and quiet default. Morse was very diligent upon learning of the default, and this diligence was not even questioned by Mednikova.

Mednikova's damages are far from substantially supported by the evidence. In fact, most of the damages are completely unsupported by any evidence, and at least one claim, for loss of consortium claim, is not even a legitimate claim – which surely Mednikova's counsel was well aware of, having almost 18 years of legal practice in Washington State between them.

Lastly, no prejudice would be caused by a trial on the merits. In fact, when considering the interests of equity and justice, it is clear that this matter deserves a trial of the merits. Upon review of the relevant precedent established by *Norton*, *White*, *Calhoun*, *Morin* and *Shepard*, under these circumstances the trial court abused its discretion and the default order and default judgment must be vacated.

Respectfully submitted,

SCHLEMLEIN GOETZ FICK & SCRUGGS, P.L.L.C.

A handwritten signature in cursive script that reads "Colleen Cody". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Schlemlein Goetz Fick & Scruggs, P.L.L.C.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and am competent to be a witness herein.

3. On February ____, 2014, I served the foregoing REPLY BRIEF OF APPELLANTS on the following parties via the method indicated:

Zara Sarkisova, WSBA #38381
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Via Legal Messenger for hand delivery on December 5, 2013

Via Facsimile

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Court Clerk's Office

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Dated at Seattle, Washington this 5th day of February, 2014.


Lacey J. Georgeson