

Court of Appeals No. 36847-1-II
Skamania County Superior Court No. 07-2-00043-9

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NIGHTRUNNERS TRANSPORT, LTD.,

Appellant,

v.

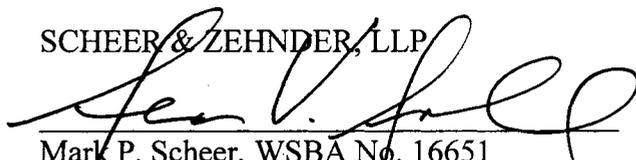
JUANITA ROSANDER and DAVID ROSANDER

Respondents.

FILED
COURT OF APPEALS
DIVISION II
08 FEB 12 1 21 PM '04
STATE OF WASHINGTON
DEPUTY

BRIEF OF APPELLANT

SCHEER & ZEHNDER, LLP



Mark P. Scheer, WSBA No. 16651
Sean V. Small, WSBA No. 37018
Attorneys for Defendant Nightrunners
Transport, Ltd.
SCHEER & ZEHNDER, LLP
701 Pike Street, Suite 2200
Seattle, WA 98101

Scheer & Zehnder LLP
701 Pike Street, Suite 2200
Seattle, Washington 98101
Telephone: (206) 262-1200
Facsimile: (206) 223-4065

ORIGINAL

TABLE OF CONTENTS

DESCRIPTION	PAGE
I. IDENTITY OF MOVING PARTY.....	1
II. INTRODUCTION.....	1
III. STATEMENT OF ISSUES.....	3
A. Whether the trial court failed to set aside the Order of Default and Default Judgment as a matter of right when Respondent provided improper notice to Appellant pursuant to CR 55?	
ANSWER: YES	
B. Whether the trial court abused its discretion when it failed to review the evidence in the light most favorable to Appellant?	
ANSWER: YES	
C. Whether the trial court abused its discretion when it failed to set aside the Order of Default and Default Judgment when Appellant submitted sufficient evidence justifying the same?	
ANSWER: YES	
IV. STATEMENT OF THE CASE.....	3
A. ING Appeared on Behalf of Appellant.....	3
B. ING Did Not Receive Proper Notice of the Motions Related to Default.....	4
C. Appellant Requested the Trial Court Vacate the Order of Default and Default Judgment.....	7
V. ARGUMENT.....	11

A. Failure to Give Notice of Default Proceedings as Required by CR 55 Itself is an Irregularity Justifying Vacation of the Default Judgment....	11
1. <i>Appellant’s Insurance Company Appeared</i>	11
2. <i>Appellant did Not Receive Sufficient Notice</i>	11
B. Default Judgment Standard of Review.....	17
C. Appellant Submitted Sufficient Evidence to Set Aside the Order of Default and Default Judgment.....	19
1. <i>The Trial Court Abused Its Discretion when it Failed to Properly Review the Evidence Presented by Appellant</i>	20
A. <u>The Trial Court Improperly Made a Determination as to Credibility</u>	25
B. <u>The Trial Court Improperly Reviewed Appellant’s Prima Facie Defenses</u>	26
C. <u>The Trial Court did Not Apply the Proper Standard for Reviewing the Evidence Presented</u>	26
2. <i>Appellant Asserted a Prima facie Defense to Respondent’s Claims</i>	27
A. <u>The General Damages Awarded by the Trial Court were Not Justified</u>	28
3. <i>The Little v. King Matter should Not Alter this Court’s Determination that Appellant asserted a Prima Facie Defense</i>	31

4. <i>Miscommunication and Misunderstanding Caused Appellant to Fail to Retain Counsel.....</i>	36
5. <i>Appellant Acted with Due Diligence Upon Learning of the Order of Default and Default Judgment.</i>	41
6. <i>Vacating the Order of Default and Default Judgment will have a Negligible Effect Upon Respondent.....</i>	42
VI. CONCLUSION.....	43

TABLE OF AUTHORITIES

CASE LAW/RULE/STATUTE	PAGE
CR 60(e)(1).....	2, 10, 21, 22, 27, 33
CR 4(d)(4).....	4
RCW 4.28.210.....	11
<u>Shreve v. Chamberlin</u> , 66 Wn. App. 728, 832 P.2d 1355 (1992).....	11, 12
4 WAPRAC CR 55.....	11
<u>Showalter v. Wild Oats</u> , 124 Wn. App. 506, 101 P.3d 867 (2004).....	17, 18, 37
<u>Griggs v. Averbeck Realty, Inc.</u> , 92 Wn.2d 576, 599 P.2d 1289 (1979).....	17, 20
<u>Morin v. Burris</u> , 160 Wn.2d 745, 753, 161 P.3d 956 (2007).....	17, 34, 39
<u>Braam v. State</u> , 150 Wn.2d 689, 81 P.3d 851 (2003).....	18
<u>White v. Holm</u> , 73 Wn.2d 348, 438 P.2d 581 (1968).....	18, 20, 21, 22, 23, 24, 30, 33, 42
<u>Agricultural & Livestock Credit Corp. v. McKenzie</u> , 157 Wn. 597, 289 P. 527 (1930).....	18
<u>Graham v. Yakima Stock Brokers, Inc.</u> , 192 Wn. 121, 72 P.2d 1041 (1937).....	18
<u>Yeck v. Dep't of Labor & Indus.</u> , 27 Wn.2d 92, 176 P.2d 359 (1947).....	18
<u>Hull v. Vining</u> , 17 Wn. 352, 49 P. 537 (1897).....	18, 19

<u>Anderson v. State Farm Mut. Ins. Co.</u> , 101 Wn. App. 323, 329, 2 P.3d 1029 (2000).....	18
Robert Y. Hayne, New Trial and Appeal § 347.....	19
CR 55(a)(3).....	11, 12, 14, 15, 17
<u>Gutz v. Johnson</u> , 128 Wn. App. 901, 117 P.3d 390 (2005)..	11, 12, 19, 20 29, 30, 34, 40, 41
<u>Housing Authority v. Newbigging</u> , 105 Wn. App. 178, 19 P.3d 1081 (2001).....	12, 17
<u>Batterman v. Red Lion Hotels, Inc.</u> , 106 Wn. App. 54, 21 P.3d 1174 (2001).....	12
<u>In re Marriage of Daley</u> , 77 Wn. App. 29, 888 P.2d 1194 (1994).....	12
CR 5(b)(2)(A).....	13, 14, 15, 16, 17
CR 6(a).....	15, 16
<u>Pfaff v. State Farm Mut. Auto. Ins. Co.</u> , 103 Wn. App. 829, 14 P.3d 837 (2000).....	20, 21, 22, 23, 27, 36, 37, 39
<u>TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.</u> , 140 Wn. App. 191, 165 P.3d 1271 (2007).....	21, 22, 23, 24, 27, 28, 30
<u>Johnson v. Cash Store</u> , 116 Wn. App. 833, 68 P.3d 1099 (2003).....	24, 42
<u>Johnson v. Asotin County</u> , 3 Wn. App. 659, 477 P.2d 207 (1970).....	27
<u>Little v. King</u> , 160 Wn.2d 696, 161 P.3d 345 (2007).....	31, 32, 33, 34, 35, 36

<u>Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson</u> , 95 Wn. App. 231, 974 P.2d 1275 (1999).....	28, 29, 33, 34
<u>Calhoun v. Merritt</u> , 46 Wn. App. 616, 622, 731 P.2d 1094 (1986)	28, 29, 34, 36, 41
CR 60(b).....	17, 20, 28, 29, 34, 35, 41, 42
<u>Boss Logger, Inc. v. Aetna Casualty & Surety Co.</u> , 93 Wn. App. 682, 970 P.2d 755 (1998).....	37
<u>Spoar v. Spokane Turn-Verein</u> , 64 Wn. 208, 212, 116 P. 627 (1911).....	37, 38
<u>Friebe v. Supancheck</u> , 98 Wn. App. 260, 992 P.2d 1014 (1999).....	41

I. IDENTITY OF MOVING PARTY

Appellant Nightrunners Transport, Ltd. (“Nightrunners” or “Appellant”).

II. INTRODUCTION

Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits. Appellant comes before this Court requesting that it overturn the trial court’s decision denying Appellant’s Motion to Set Aside the Order of Default and Default Judgment in light of the significant evidence supporting a finding that:

- (1) Appellant did not receive proper notice pursuant to CR 55;
- (2) The trial court failed to review the evidence in the light most favorable to Appellant; and
- (3) Appellant submitted sufficient evidence to set aside the Order of Default and Default Judgment.

The trial court in this matter properly determined that based on the extensive pre- and post-lawsuit communications and activity between Appellant’s insurance company, ING of Canada (“ING”), and Respondent’s counsel -- ING had “appeared”. RP 41:15-17. As such, ING was entitled to and should have received notice of Respondent’s Motion for an Order of Default¹; however, proper notice was not provided. The purpose of providing notice is

¹ RP 41:18-19.

to give the defendant an opportunity to appear and defend before the hearing on the motion, in which case the motion will be stricken. Appellant did not receive sufficient notice of Respondent's motion, and the trial court's determination to the contrary is reversible error.

Pursuant to CR 60(e)(1), when a trial court is considering whether a movant seeking relief from a default judgment has presented facts constituting a defense within the meaning of the rule governing such relief, the trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant. The trial court need only determine whether the defendant is able to demonstrate any set of circumstances that would, if believed, entitle the defendant to relief. The most reasonable method by which to conduct this inquiry is to view the facts proffered in the light most favorable to the defendant, assuming the truth of that evidence favorable to the defendant, and disregarding inconsistent or unfavorable evidence. Simply stated, the trial court here misapplied the standard in which Appellant's evidence was reviewed. In error, the trial court challenged the credibility and sufficiency of Appellant's proffered evidence, as such, the trial court's decision should be reversed.

Finally, a motion to vacate a default judgment is essentially an equitable proceeding in which the trial court balances the interests in favor of finality against the interests in favor of allowing the defendant his or her day in court. Here, Appellant established and submitted sufficient evidence to

support setting aside Respondent's Order of Default and Default Judgment. The trial court misapplied the standard of law applicable to a CR 60 motion, and as such, its decision should be reversed.

For the above stated reasons, Appellant respectfully requests that this Court reverse the trial court's decision denying Appellant's Motion to Set Aside the Order of Default and Default Judgment and allow the parties to resolve this matter on the merits.

III. STATEMENT OF ISSUES

A. Whether the trial court failed to set aside the Order of Default and Default Judgment as a matter of right when Respondent provided improper notice to Appellant pursuant to CR 55?

ANSWER: YES

B. Whether the trial court abused its discretion when it failed to review the evidence in the light most favorable to Appellant?

ANSWER: YES

C. Whether the trial court abused its discretion when it failed to set aside the Order of Default and Default Judgment when Appellant submitted sufficient evidence justifying the same?

ANSWER: YES

IV. STATEMENT OF THE CASE

A. ING Appeared on Behalf of Appellant

On January 14, 2005, Nightrunners truck driver Nicholas McKay was involved in an automobile accident with Respondent Juanita Rosander. CP 70. On February 2, 2005, less than one month after the accident, counsel for Respondent contacted CMB Insurance Brokers, and informed the same that

he was representing Respondent related to the incident described above. CP 71. ING, the insurance carrier for Nightrunners, was informed of the claim. Id. There is no dispute that ING always intended to provide a defense to the claims asserted by Respondent. Id.

In fact, the trial court ruled that based on the extensive communications taking place over two years between ING and Respondent's counsel, ING "appeared" on behalf of Appellant, and as a result, the trial court ruled that ING was entitled to notice pursuant to CR 55. RP 41:15-19.

B. ING Did Not Receive Proper Notice of the Motions Related to Default

After two years of communicating, exchanging information, and working towards settlement, on March 12, 2007, Respondent's counsel sent a letter to ING indicating that as a result of current settlement communications, he did not believe that the matter would be resolved short of litigation. CP 74. In this regard, Respondent's counsel provided Appellant's insurer with a copy of the Summons and Complaint that was filed with the Skamania County Superior Court on March 8, 2007. Id. Respondent asserted that proper service of the Summons and Complaint was made upon Appellant on April 4, 2007, pursuant to CR 4(d)(4). Id.

Records indicate that Respondent prepared a letter and documents regarding the filing of a Motion for Default on June 21, 2007; however, the letter from Respondent's counsel did not arrive to ING until June 27, 2007.

CP 75. In the meantime, on June 22, 2007, Respondent filed a Motion for Default with the Skamania County Superior Court, and the motion was initially noted for July 12, 2007. CP 133.

It is worth noting that right around the time Respondent was preparing to file a Motion for Default, the prior ING claim handler (Ms. Gilbert) working on the case took medical disability leave and has still not returned to work. CP 75. As such, Fern Glazier stepped in to take over the file, and contacted Respondent's counsel on July 5, 2007, and left him a voice mail. Id.

On July 12, 2007 (the day Respondent's Motion for Default was noted for hearing), Ms. Glazier had a telephone conversation with Respondent's counsel, and it was agreed that Respondent would set aside the Order of Default and it was further agreed that Respondent would provide ING a two week extension to review the file and make a settlement offer. CP 75. In addition, ING confirmed that if it was not able to adequately review the file within that time, ING would have defense counsel appointed. Id. In short, Ms. Glazier was under the impression that "so long as she was committed to reviewing the file and then discussing settlement," Respondent's counsel would set aside the Default Order. Id. Unbeknownst to Ms. Glazier and completely contrary to her understanding of the July 12, 2007 phone conference, Respondent's counsel merely re-noted the Motion for Default to July 26, 2007. Id. However, ING did not receive the Amended Citation until

July 30, 2007. Id. The Order granting the Default was entered by the Court on July 26, 2007. CP 134.

Also on July 26, 2007, Respondent filed a Motion for Default Judgment. CP 134. ING received no notice of Respondent's intention to file or the actual filing of the Default Judgment. Id. at 75. In their Motion for Default Judgment, Respondent asserted that they had suffered damages as a result of the motor vehicle accident, however, the monetary damages sought lacked supporting documentation and legal precedent. Id. at 134.

That being said, on the same day that the Motion for Default Judgment was filed, the trial court entered Findings of Fact and Conclusions of Law and Default Judgment. CP 134. The Findings of Fact and Conclusions of Law and Default Judgment, while bearing little resemblance to the figures asserted in the actual Motion for an Order of Default, identified the following amounts to be entered:

- Past Medical: \$25,951.38
- Future Medical: \$181,165.60
- Past Travel: \$2,412.00
- Future Travel: \$5,000.00
- Mrs. Rosander Lost Income: \$33,630.00
- Mr. Rosander Lost Income: \$177,000.00
- Mrs. Rosander General Damages: (blank)
- Mr. Rosander General Damages: (blank)
- Taxable Costs: \$432.56
- Attorney Fees: \$200.00

Id. The Judgment Summary stated that the total amount of the Judgment was \$925,794.54. Id. While not clearly identified, simple math would indicate that Respondent received a judgment for general damages in excess of \$500,000.00, on a personal injury claim where no surgical procedures were recommended and the medical costs incurred totaled only \$25,951.38. Id.

C. Appellant Requested the Trial Court Vacate the Order of Default and Default Judgment

On September 17, 2007, Appellant filed a Motion to Set Aside the Order of Default and Default Judgment. CP 47-69. Appellant asserted that Respondent's Motion for Default and Default Judgment should be set aside for the following reasons:

- Respondent failed to provide proper notice of the Motion for an Order of Default in light of the appearance of Appellant's insurance company;
- Appellant has valid defenses on the merits;
- The Order of Default and the Default Judgment were entered as a result of mistake, inadvertence, excusable neglect, or irregularity;
- Appellant acted with due diligence and took the appropriate steps upon learning of the entry of the Order of Default and Default Judgment; and
- Vacating the Order of Default and Default Judgment would have a negligible effect upon Respondent.

Id. Appellant respectfully requested that the trial court set aside the Order of Default and Default Judgment, and provide it with an opportunity to defend the matter on the merits. Id.

Oral argument concerning Appellant's motion was heard before the Honorable Judge Reynolds on September 27, 2007. RP 13-46. Both parties presented their positions, and Judge Reynolds issued a prepared ruling from the bench. Id. The trial court's ruling, on its face, illustrates three clear and distinct departures from accepted law and precedent: (1) the trial court misinterpreted prevailing case law and the appropriate manner in which to review Appellant's evidence; (2) the trial court negated the evidence establishing that proper notice pursuant to CR 55 was not afforded Appellant; and (3) the trial court applied the wrong standard of review concerning the evidence of Appellant's prima facie defenses.

To begin, the trial court recited what it believed to be the "agreed upon" facts of the case; however, the trial court did not view the facts in the light most favorable to Appellant and did not provide deference to the sworn testimony presented by Appellant. RP 37:23-41:6. Specifically, in regards to whether Appellant received proper notice of the Motion for Default and the apparently evident miscommunication / misunderstanding between the parties, the trial court ruled:

There were some telephone conversations between Mr. Robison, the Plaintiff's attorney, and the adjuster who was handling this matter for I.N.G. at that point was Ms. Glasier. And Mr. Robison agreed that he would not take a Default on the 12th of July 2007...And he said he would give them another -- give I.N.G. two more weeks **before he took his Default.**

RP 40:7-16. Further, the trial court went on to hold:

I do find that there was notice given on two separate occasions of the Default. The first time on July...the 12th. And then that hearing was stricken. And then it was renoted for the 26th, and notice was mailed on the 16th of July. Certainly there should have been -- ten days should have been plenty of time for that notice to have been received by I.N.G. **I know there's an Affidavit that says they didn't get it until the 30th. I don't know if it got lost in their office or what happened to it, but I do not find that that is really credible in this case.** So I do find that the notice was given.

RP 42:4-17. The trial court's above interpretation and analysis of the facts was in direct contravention to the sworn declaration proffered by ING representative, Ms. Glasier. CP 75. Appellant's counsel raised this issue with the trial court and respectfully requested clarification of the trial court's conclusions. RP 44:5-11. In response, the trial court stated the following:

[W]hat I gathered was that...Mr. Robison gave her two more weeks to file an answer, reach a settlement, whatever. She did not do it. She just sat there...And then July 30th, after she finally finds out that, my God, they got a Default. Then she does something. Well she got this -- **she says she got a notice on July 30th, which again, I have found that to be incredible** because of the fact that it was apparently mailed, and I do find it was credible, it was mailed on the 16th of July, so --

MR. SCHEER: No. Your Honor, I --

THE COURT: -- with that change I make the --

MR. SCHEER: Well, I understand that and I don't want to push it too far, because I trust Mr. Robison, too. But I trust my client. And my client's comments are directly contrary to Mr. Robison. She understood that July 12th conversation to mean that he was striking the Motion for Default or the Order for Default and she had time...I think we have an honest, genuine, miscommunication between a Canadian insurance adjuster and an American attorney, speaking two different -- what'd Winston Churchill say, you know, separated by a common language. Isn't that the quote?

THE COURT: Well, that's the reason why -- that's the reason why we have lawyers that can explain to the Canadian insurance companies what American law is all about. And it's unfortunate, Counsel, that they didn't hire you earlier.

RP 45:11-46:17.

When a trial court is considering whether a CR 60 movant has presented “facts constituting a defense” within the meaning of CR 60(e)(1), the trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant. The easiest manner in which to determine whether sufficient facts constituting a defense have been offered is to ask whether the evidence submitted by Appellant, if later believed by a trier of fact, would constitute a defense to Respondent’s claims. The trial court’s ruling on this issue evidences a misunderstanding of law. The trial court simply held, “I just don't find that defense to be substantial.” RP 43:5-6.

The trial court's misinterpretation of the facts and misapplication of the law concerning the same amount to a reversible error. Appellant's respectfully request this Court to set aside the Order of Default and Default Judgment, and allow the parties to resolve this matter on the merits.

V. ARGUMENT

A. Failure to Give Notice of Default Proceedings as Required by CR 55 Itself is an Irregularity Justifying Vacation of the Default Judgment

1. *Appellant's Insurance Company Appeared*

The formal methods of appearance, authorized by RCW 4.28.210 are not exhaustive. Shreve v. Chamberlin, 66 Wn. App. 728, 832 P.2d 1355 (1992). The courts have recognized that an appearance may occur through less formal means, such as an exchange of correspondence, telephone calls, engaging in discovery, settlement negotiations, and the like. Id.; 4 WAPRAC CR 55.

Here, the trial court ruled that ING had "appeared" on behalf of Appellant, and as a result, ING was entitled to notice pursuant to CR 55(a)(3). RP 41:15-17.

2. *Appellant did Not Receive Sufficient Notice*

If a defendant has appeared but "not given proper notice prior to entry of the order of default, the defendant is **entitled to vacation of the default judgment as a matter of right.**" Gutz v. Johnson, 128 Wn. App. 901, 117

P.3d 390 (2005); *citing* Profl Marine Co. v. Those Certain Underwriters at Lloyd's, 118 Wn. App. 694, 708, 77 P.3d 658 (2003); *citing* Shreve, 66 Wn. App. 728, 832 P.2d 1355 (1992) (emphasis added); *see also* Housing Authority v. Newbigging, 105 Wn. App. 178, 190, 19 P.3d 1081 (2001).

If a party has appeared, an order of default entered without proper notice is void and will be vacated. Gutz, 128 Wn. App. 901, 117 P.3d 390 (default judgment should have been vacated; defendant appeared). Any judgment entered on the basis of the void order of default will be vacated. Housing Authority, 105 Wn. App. at 190, 19 P.3d 1081 (Without notice, trial court lacks authority to enter default; party who has not received proper notice is entitled as a matter of right to have any resulting default judgment vacated); Batterman v. Red Lion Hotels, Inc., 106 Wn. App. 54, 21 P.3d 1174 (2001); In re Marriage of Daley, 77 Wn. App. 29, 888 P.2d 1194 (1994)².

Notice of a motion for default must be served on any person who has appeared, at least five days before the hearing on the motion. CR 55(a)(3). The purpose of the notice is to give the defendant an opportunity to appear and defend before the hearing on the motion, in which case the motion will be stricken. In light of the above, ING was entitled to notice of the Motion for Default, however, sufficient notice was not provided.

² As an aside and to be taken into consideration regarding the remainder of Appellant's appeal, when proper notice has not been provided, the defendant need not demonstrate a meritorious defense in order to have the order and judgment vacated. Batchelor v. Palmer, 129 Wn. 150, 224 P. 685 (1924).

Appellant did not receive proper notice for the following reasons:

- (1) ING representative, Fern Glazier, affirmatively declared that she did not receive the Citation relating to the Motion for Default until after the hearing had occurred.
- (2) Respondent's Certificate of Service did not sufficiently establish that ING was properly served;
- (3) Respondent did not provide ING with the required five days notice prior to the Motion for Default hearing; and
- (4) CR 5(b)(2)(A) contemplates service by mail to U.S. residents, not those outside this country.

The trial court improperly considered the facts and law when it failed to set aside the Order of Default and Default Judgment as a result of the above. In short, Appellant is entitled to vacation of the default judgment as a matter of right. The trial court lacked authority to enter the original Default Judgment, and as such, this Court should reversed and remanded this case for a trial on the merits.

First, ING representative Fern Glazier affirmatively declared that she did not receive the Citation related to Respondent's Motion for Default until July 30, 2007 – three days **after** the hearing was conducted (keep in mind that ING is in Alberta, Canada -- not just next door for purposes of mail and service). CP 75. The purpose of the notice is to give the defendant an opportunity to appear and defend before the hearing on the motion, in which case the motion will be stricken. However, Appellant never had an

opportunity to appear. While it is true that ING was certainly on notice of the claim and mistakenly failed to appoint counsel when it should have, it is also undisputed that ING itself had already “appeared” in the case, and thus was entitled to **formal** notice -- proper and timely service -- of the actual Motion for Default. ING did not receive formal and proper notice of the Motion for Default as it was entitled to, and for this reason alone the Order of Default should have been set aside, and this Court should correct that error. As such, the trial court’s decision to deny Appellant’s Motion to Set Aside the Motion for Default and Default Judgment should be reversed. As a side note, the confusion and misunderstandings that ultimately defined the relationship between ING and Respondent’s counsel, as well as the trial court’s review of Appellant’s evidence will be discussed in more detail below, however, the same only compounds Respondent’s failure to comply with CR 55(a)(3)’s notice requirement.

Second, Respondent asserted in their Response to Appellant’s Motion to Set Aside the Order of Default and Default Judgment and during oral argument that they relied on CR 5(b)(2)(A) to establish that proper service of the motion was effectuated. CP 182; RP 27:2-4. CR 5(b)(2)(A) states:

If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with the postage prepaid. The service shall be deemed complete upon the third day following the day upon which they are placed in the mail.

In light of the above rule, Respondent failed to properly serve Appellant pursuant to CR 5(b)(2)(A), when close review of the Certificate of Service demonstrates that it does not provide the indicia of proof that ING was served with the documents sufficient to establish proper service. Respondent's Certificate of Service states that "[O]n the 16 day of July, 2007, I caused to be served MOTION TO AMEND COMPLAINT AND CASE CAPTION and CITATION." CP 12. The Certificate of Service fails to sufficiently establish that Appellant received the required documents related to the Motion for Default necessary to be put on notice. This defect alone constitutes improper notice and grounds for reversal of the trial court's decision denying Appellant's Motion to Set Aside the Motion for Default and Default Judgment.

Third, Respondent's Citation indicated that it was deposited in the mail on Monday, July 16, 2007. CP 12. CR 5(b)(2)(A) states that service shall be deemed complete upon the **third** day following the day upon which they are placed in the mail – therefore service would have been deemed complete on **Thursday, July 19, 2007**. Pursuant to CR 55(a)(3), notice of a motion for default must be served on any person who has appeared, at least **five days before** the hearing on the motion (emphasis added). The hearing was noted for **Thursday, July 26, 2007**.

CR 6(a) clearly states:

In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court...the day of the act, event, or default from which the designated period of time begins to run **shall not be included**...When the period of time prescribed or allowed is **less than 7 days**, intermediate Saturdays, Sundays and legal holidays **shall be excluded** in the computation.

(emphasis added).

Despite the fact that there is a sworn affidavit declaring that ING did not receive notice and in light of the fact that the hearing was noted for Thursday, July 26, 2007 -- ING would only have received four days notice of the hearing. Again, Respondent's failure to provide five days notice of the hearing constitutes improper notice and grounds for reversal of the trial court's decision denying Appellant's Motion to Set Aside the Motion for Default and Default Judgment.

Finally, as stated above, Respondent relied on CR 5(b)(2)(A) to establish that proper service of the motion was effectuated. However, CR 5(b)(2)(A) is intended and designed to provide proper service by mail for residents of the United States, not those residing in a foreign country. An unjust result would surely occur if, for example, something mailed to Togo, West Africa was considered served on that party on the third day following deposit into a U.S. mail bin. No different result applies to Canada -- it is also a foreign country. ING representative Fern Glazier affirmatively declared that she did not receive the Citation related to Respondent's Motion for Default until three days **after** the hearing was conducted. This Court should

find that CR 5(b)(2)(A) does not apply to foreign residents, and as such, Appellant did not receive proper and timely notice of the Respondent's Motion for Default.

A judgment entered on the basis of the void order of default will be vacated. Housing Authority, 105 Wn. App. at 190, 19 P.3d 1081. As identified above, Appellant did not receive proper notice pursuant to CR 55(a)(3). As such, the trial court's denial of Appellant's Motion to Set Aside the Order of Default and Default Judgment should be reversed.

B. Default Judgment Standard of Review

"Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits." Showalter v. Wild Oats, 124 Wn. App. 506, 510, 101 P.3d 867 (2004); *citing* Griggs v. Averbek Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)); *see also* Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007) (This court has long favored resolution of cases on their merits over default judgments. Thus, we will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice).

An Appellate Court will review a trial court's ruling under CR 60(b) for an abuse of discretion³. Morin, 160 Wn.2d at 748, 161 P.3d 956. Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law. Braam v. State, 150 Wn.2d 689, 706, 81 P.3d 851 (2003).

The Court's primary concern is whether the default judgment is just and equitable; thus, the Court will "evaluate the trial court's decision by considering the unique facts and circumstances of the case before" it. Wild Oats, 124 Wn. App. at 511, 101 P.3d 867. Further, pursuant to Wild Oats, an Appellate Court is more likely to reverse a trial court decision refusing to set aside a default judgment. *Id.*; *see also* White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968) (Where the determination of the trial court results in the denial of a trial on the merits an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues); Agricultural & Livestock Credit Corp. v. McKenzie, 157 Wn. 597, 289 P. 527 (1930); Graham v. Yakima Stock Brokers, Inc., 192 Wn. 121, 72 P.2d 1041 (1937); Yeck v. Dep't of Labor & Indus., 27 Wn.2d 92, 95, 176 P.2d 359 (1947). Thus, for more than a century,

³ In light of the abundant case law indicating that the trial court does not make factual determinations and must review the evidence in the light most favorable to the moving party it is difficult to understand why the abuse of discretion standard applies here. The trial court's role under these circumstances is similar to its review of a motion for summary judgment where the standard of review on appeal is de novo. Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323, 329, 2 P.3d 1029 (2000). Appellant would assert that the correct standard of review in this matter should be de novo.

it has been the policy of Washington courts to set aside default judgments liberally. Hull v. Vining, 17 Wn. 352, 360, 49 P. 537 (1897) (Where there is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice); *quoting* Robert Y. Hayne, New Trial and Appeal § 347.

Here, the trial court abused its discretion when it refused to set aside the Order of Default and Default Judgment after Appellant demonstrated and submitted evidence sufficient to set the orders aside.

C. **Appellant Submitted Sufficient Evidence to Set Aside the Order of Default and Default Judgment**

For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default, and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b). CR 55(c)(1).

The party seeking to vacate a default judgment must demonstrate four factors: (1) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; and (2) the reason for the party's failure to timely appear, i.e., whether it was the result of mistake, inadvertence, surprise or excusable neglect; and the secondary factors are: (3) the party's diligence in asking for relief following notice of the entry of the default; and (4) the effect of vacating the judgment on the opposing party. Gutz, 128 Wn. App. at 916, 117 P.3d 390.

A motion to vacate a default judgment is essentially an equitable proceeding, in which the trial court balances the interests in favor of finality against the interests in favor of allowing the defendant his or her day in court. Griggs, 92 Wn.2d 581-82, 599 P.2d 1289.

Significant to this appeal, when determining a motion to vacate, the trial court **does not** make factual determinations; rather, the court evaluates whether the movant, under CR 60(b), has established substantial evidence of a prima facie defense. Gutz, 128 Wn. App. at 917, 117 P.3d 390; *citing Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000). The court must review the evidence in the light most favorable to the **moving party**. *Id.*

1. *The Trial Court Abused Its Discretion when It Failed to Properly Review the Evidence Presented by Appellant*

As it relates to the review of the evidence in this matter, the decision by the trial court to deny Appellant's Motion to Set Aside the Order of Default and Default Judgment was an abuse of discretion and should be reversed for two primary reasons:

- (1) The trial court failed to review the evidence in the light most favorable to Appellant; and
- (2) The trial court applied the wrong standard of review concerning the evidence proffered by Appellant.

When a trial court is considering whether a movant seeking relief from judgment has presented facts constituting a defense within the meaning of the rule governing such relief, the trial court must take the evidence, and

reasonable inferences therefrom, in the light most favorable to the movant. CR 60(e)(1); Pfaff, 103 Wn. App. at 835, 14 P.3d 837.

In Pfaff, this Court looked at the Washington Supreme Court's decision in White, 73 Wn.2d at 352, 438 P.2d 581, and confirmed that a trial court does not act as trier of fact when considering a CR 60 motion. 103 Wn. App. at 834, 14 P.3d 837. In White, the plaintiff's affidavit set forth facts sufficient to support findings that her injuries were due to the defendant Holm's negligence. Id. Holm's affidavit set forth facts sufficient to support findings that the plaintiff White's injuries were due to her own negligence. Id. If the trial court had been sitting as trier of fact, it would have had the discretion to find that either version preponderated. Id. Yet the Supreme Court held, in effect, that the trial court lacked discretion to disregard Holm's version. Id.

This above point was illustrated by way of the following hypothetical set forth in TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 204, 165 P.3d 1271 (2007). Pursuant to a motion to vacate a default judgment on a breach of contract claim, assume that the evidence before the trial court consists of nine declarations proffered by the plaintiff, all asserting that the defendant failed to perform a duty imposed by the contract at issue, and one declaration proffered by the defendant, asserting that the defendant had complied with that duty.

In determining whether the defendant can demonstrate the existence of a prima facie defense, the trial court properly views all the evidence before it in the light most favorable to the defendant and, therefore, relies upon evidence favorable to the defendant while disregarding evidence that is unfavorable or inconsistent with that evidence. Thus, in our example, the trial court would properly assume the truth of the evidence contained in the single declaration favorable to the defendant, and disregard the nine declarations containing inconsistent evidence. That single favorable declaration is sufficient to demonstrate the existence of a prima facie defense because the facts set forth therein, if later believed by the trier of fact, would entitle the defendant to relief.

This Court in Pfaff held that the White decision demonstrated that when a trial court is considering whether a CR 60 movant has presented “facts constituting a defense” within the meaning of CR 60(e)(1), the trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant. 103 Wn. App. at 834, 14 P.3d 837. The movant in Pfaff was the defendant State Farm, and it presented evidence which, if later believed by a trier of fact, would be a defense to the plaintiff’s claims. Id.; *see also* TMT Bear Creek, 140 Wn. App. at 203, 165 P.3d 1271 (2007) (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 would, if believed, entitle the defendant to relief. The

most reasonable method by which to conduct this inquiry is to view the facts proffered in the light most favorable to the defendant, assuming the truth of that evidence favorable to the defendant, and disregarding inconsistent or unfavorable evidence).

Accordingly, this Court in Pfaff ruled that the trial court was both permitted and required to find that State Farm had come forward with “facts constituting a defense” or, in White's terms, “substantial evidence” of a “prima facie” defense. 103 Wn. App. at 835-36, 14 P.3d 837. That being said, a trial court lacks discretion to reject a movant’s version of the facts, even if (according to the Supreme Court) the defense presented is not “strong” or “conclusive,” but only “minimal,” “prima facie,” and “sufficient.” Id. at 833-34, 14 P.3d 837; *citing* White, 73 Wn.2d at 353, 438 P.2d 581.

Important to the review in this matter, the court in TMT Bear Creek, clarified the standard in which the trial court should review evidence concerning a prima facie defense. Where the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reason as which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. TMT Bear Creek, 140 Wn. App. 191, 165 P.3d 1271, *citing* White, 73 Wn.2d at 352-53, 438 P.2d 581.

On the other hand and applicable here, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party. TMT Bear Creek, 140 Wn. App. 191, 165 P.3d 1271, *citing* White, 73 Wn.2d at 352-53, 438 P.2d 581.

Accordingly, in determining whether a party is entitled to vacation of a default judgment, a trial court's initial inquiry is whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff's claims. TMT Bear Creek, 140 Wn. App. 191, 165 P.3d 1271, *see, e.g., Johnson v. Cash Store*, 116 Wn. App. 833, 68 P.3d 1099 (2003).

Here, there are two specific instances where the trial court failed to take the evidence and reasonable inferences therefrom, in the light most favorable to Appellant: (1) when the trial court raised an issue as to the credibility of ING representative Fern Glazier and (2) when the trial court simply negated Appellant's prima facie defense to Respondent's claims. To further compound matters, the trial court failed to apply the proper standard of review concerning Appellant's evidence of a prima facie defense.

A. The Trial Court Improperly Made a Determination as to Credibility

While the current case law and Respondent's own admission (RB 27) clearly indicate that a trial court should review the evidence in the light most favorable to Appellant, the trial court, in no uncertain terms, stated that it did not find the affidavit submitted by Appellant credible, and as a result, ruled that Appellant received sufficient notice of Respondent's Motion for Default. Ms. Glazier swore under oath that she had a telephone conversation with Respondent's counsel, and it was **agreed** that Respondent would **set aside** the Order of Default, and it was further **agreed** that Respondent would provide ING a two week extension to review the file and make a settlement offer. CP 75. When these facts were put before the trial court, Judge Reynolds made a determination directly in conflict with Ms. Glazier, "Mr. Robison agreed that he would...give I.N.G. two more weeks before he took his Default...That's the reason why we have lawyers that can explain to the Canadian insurance companies what American law is all about." RP 40:14-16; 46:1316.

In addition, Ms. Glazier affirmatively testified that ING **did not receive** the Amended Citation until July 30, 2007. CP 75. Yet, the trial court ruled "I know there's an Affidavit that says they didn't get it until the 30th. I don't know if it got lost in their office or what happened to it, but I do not find that that is really credible in this case." RP 42:13-16.

The trial court abused its discretion and misapplied the law. The trial court is not permitted to act as trier of fact when considering a CR 60 motion, and its determination related to credibility concerning an important and definitive question before it requires this Court to set aside the Order of Default and Default Judgment.

B. The Trial Court Improperly Reviewed Appellant's Prima Facie Defenses

The trial court stated “I do find that there’s not a substantial evidence of defense in this case from the agreed facts.” RP 42:20-24. The trial court’s ruling evidences its improper steps to act as the trier of fact. The trial court arbitrarily determined what the “agreed upon” facts in the case were and completely disregarded Appellant’s contributory negligence defense. In determining whether the movant demonstrated a prima facie defense, the trial court need only determine whether the defendant is able to demonstrate **any** set of circumstances that would, if believed, entitle the defendant to relief. The trial court here improperly acted as the trier of fact, and as such, this matter should be reversed and remanded to allow the parties to resolve this dispute on the merits.

C. The Trial Court did Not Apply the Proper Standard for Reviewing the Evidence Presented

Finally, the trial court did not apply the appropriate standard when reviewing Appellant’s prima facie defense. The trial court improperly determined that Appellant’s defense was not substantial, and therefore did not

give rise to a defense. In determining whether a party is entitled to vacation of a default judgment, a trial court's initial inquiry is whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the plaintiff's claims. The trial court negated this analysis, and in doing so abused its discretion.

2. *Appellant Asserted a Prima Facie Defense to Respondent's Claims*

Before a default judgment can be vacated, the defendant must be able to demonstrate that he or she has a valid defense on the merits. Johnson v. Asotin County, 3 Wn. App. 659, 477 P.2d 207 (1970).

The defense need not be proved by a preponderance of the evidence, but the defendant must at least demonstrate a prima facie defense (i.e. a defense that would be valid if the defendant's factual assertions are taken as true). Pfaff, 103 Wn. App. 829, 14 P.3d 837. In Pfaff, this Court held that when a trial court is considering whether a CR 60 movant has presented "facts constituting a defense" within the meaning of CR 60(e)(1), the trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant. Id. at 835, 14 P.3d 837. If the presented evidence which, if later believed by a trier of fact, would be a defense to the claims asserted, the trial court would be both permitted and required to rule that the party had come forward with facts constituting a prima facie defense. Id. at 835-36, 14 P.3d 837; *see also* TMT Bear Creek, 140 Wn. App. 191,

165 P.3d 1271 (The defendant satisfies its burden of demonstrating the existence of a prima facie defense if it is able to produce evidence which, if later believed by the trier of fact, would constitute a defense to the claims presented. The court does not act as a trier of fact in making such a determination and may not conclusively determine which party's facts control).

A. The General Damages Awarded by the Trial Court were Not Justified

As an initial premise, proceedings to vacate default judgments are equitable in character, and relief should be granted or denied in accordance with equitable principles. Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 238, 974 P.2d 1275; *citing* CR 60(b)(1).

In Shepard, the court held that a trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense is established. 95 Wn. App. at 241, 974 P.2d 1275; *citing* Calhoun v. Merritt, 46 Wn. App. 616, 622, 731 P.2d 1094 (1986) (Defendant contended \$50,000 pain and suffering default award was excessive where medical costs totaled \$2,183.27). In Calhoun, no defense was presented and denial of a motion to vacate the liability portion of a default judgment was affirmed, but denial of the motion to vacate the damages portion of a default judgment was reversed as an abuse of discretion. *Id.* The Calhoun court held that it would be

inequitable and unjust to deny a motion to vacate the damages portion of the default judgment on the ground that the defendant failed to present a valid defense where the pain and suffering award warranted further discovery. Id.

In light of Calhoun, the court in Shepard determined that a default award could be vacated if there was not substantial evidence to support the award of damages. 95 Wn. App. at 242, 974 P.2d 1275. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. Id.

In Gutz, this Court evaluated whether the movant, under CR 60(b), had established substantial evidence of a prima facie defense. 128 Wn. App. at 917, 117 P.3d 390. This Court found that the defendant presented a reasonable/prima facie defense to the court's general damages award. Id. This Court reviewed the medical records and determined that \$60,000 and \$80,000 in general damages awarded to the plaintiffs was **not** justified. Id. at 917-918, 117 P.3d 390. In short, this Court found that the trial court abused its discretion when it failed to equitably review the facts of the matter in light of the general damages claimed -- similar circumstances occurred here.

Here, Respondent has asserted that Mrs. Rosander incurred approximately \$25,951.38 in medical costs. CP 134. Records indicate that Mrs. Rosander's medical treatment is related to a soft tissue injury and minor disk bulge. Id. at 73-74. In light of the medical costs incurred and the injuries complained, it does not appear equitable or just for Respondent to

receive a judgment for general damages in excess of \$500,000.00! Appellant requests that this Court consider, as it did in Gutz, the necessity of allowing the parties to settle this matter on the merits when there has been an unreasonable amount of general damages claimed and awarded. The general damages claimed by Respondent are an indication that the Default Judgment was neither equitable nor reflective of the actual facts in this case.

Even with no prima facie defense to liability, there is a “strong” issue regarding the default damages awarded by the trial court. It is inherently unjust and inequitable to allow a default of \$500,000 in general damages on a very limited special damages presentation of approximately \$25,000 -- a fair-minded, rational person would conclude the same. Equities dictate that Appellant should be able to go to the merits on damages, even if there is a finding on liability. In TMT Bear Creek, the court held that a moving party satisfies its burden even if it is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits. 140 Wn. App. 191, 165 P.3d 1271, *citing* White, 73 Wn.2d at 352-53, 438 P.2d 581.

Here, Appellant should have an opportunity to carry the decisive issue of damages to the jury in a trial on the merits. As such, Appellant respectfully requests that this Court reverse and remand this matter to permit the same.

3. *The Little v. King Matter should Not Alter this Court's Determination that Appellant asserted a Prima Facie Defense*

Appellant anticipates Respondent relying heavily on Little v. King, 160 Wn.2d 696, 161 P.3d 345 (2007), in its response; however, the facts and legal analysis relevant to this matter make Little distinguishable and not applicable. Below is a review of the Little matter.

On March 16, 1999, Annie King (“King”) severely collided with Lisa Little's (“Little”) automobile from behind. Little, 160 Wn.2d at 699, 161 P.3d 345. The next day, Little consulted a chiropractor for back and neck spasms and was eventually referred to a neurosurgeon. Id. Three months after the accidents, Little had a MRI done of the neck region of her cervical spine, which indicated that surgery was needed. Id. at 700, 161 P.3d 345. Id. Five months after the accidents, Little had the first of two neck surgeries. Id. In November 2001, Little had microdecompressive back surgery at three lumbar levels. Id. According to her doctors, the neck region of Little's cervical spine continued to deteriorate, as did her lumbar spine. Id. Little's treating doctors declared that it was more probable than not that the two accidents in March 1999 caused “spinal problems [that] are serious, and will permanently reduce her physical capacities, both work-related and in her recreational and family life.” Id.

The parties learned that the coverage on King's car had lapsed and thus she was an uninsured motorist at the time of the accident. 160 Wn.2d at

700, 161 P.3d 345. Little was driving in the scope of her employment at the time, and her employer had uninsured motorist (UIM) coverage from The St. Paul Insurance Company (“St. Paul”). Id. Little's counsel was in communication with St. Paul both before and after formally bringing suit against King. Id. Little's counsel mailed St. Paul a copy of the summons and complaint, the order setting the case schedule, and the notice of deposition of Ms. King. Id. It was determined by the trial court that St. Paul would have been permitted to intervene in the case if it had moved to do so because it was at risk of liability by virtue of its UIM obligations; however, St. Paul took no action to intervene. Id. at 701, 161 P.3d 345.

Thirteen months after filing the complaint and eleven months after serving King and sending copies of the pleadings to St. Paul, Little moved for an order of default and default judgment (or, alternatively, for summary judgment) against King. 160 Wn.2d at 701, 161 P.3d 345. On May 23, 2003, a hearing was held on Little's motions. Id. Little appeared at the hearing through her attorney of record and King was present, without an attorney. Id. At the hearing, Judge Laura Gene Middaugh gave King an opportunity to file an answer and explained that if she did, default judgment would be denied. Id. at 702, 161 P.3d 345. Judge Middaugh then adjourned the proceedings to give King the opportunity to draft and file an answer. Id. When the court reconvened, **King declined the judge's invitation, explaining she had no real dispute with the factual allegations in the complaint, though she**

disputed the amount of damages as unreasonable. Id. (emphasis added)

After reviewing Little's damage calculations, the judge entered a default judgment in favor of Little for \$2,155,835.58, consisting of \$249,234.48 for past economic damages, \$1,256,601.10 for future economic damages, and \$650,000 for general damages. Id.

A few weeks later, Little's attorney sent St. Paul a certified copy of the default judgment and a request for \$2 million in uninsured motorist coverage payments. 160 Wn.2d at 702, 161 P.3d 345. Approximately two weeks after that, St. Paul and King moved to intervene and vacate the default judgment. Id. A different judge granted St. Paul and King's motions, and Little appealed. Id.

Respondent will likely assert that the court in Little determined that it is not a prima facie defense to damages that a defendant is surprised by the damage amount or that the damages might have been less in a contested hearing. 160 Wn.2d at 704, 161 P.3d 345; *citing* Shepard, 95 Wn. App. 240-42, 974 P.2d 1275.

However, even in light of the above, the court in Little stated that under certain circumstances a default judgment will be set aside based upon a challenge to damages. 160 Wn.2d at 704, 161 P.3d 345; *see* CR 60(e)(1); White, 73 Wn.2d at 352, 438 P.2d 581. The amount of damages in a default judgment must be supported by substantial evidence. Id.; *see, e.g.,* Shepard, 95 Wn. App. at 240-42, 974 P.2d 1275.

Consistent with Shepard and Calhoun, a trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense is established. It would be inequitable and unjust to deny a motion to vacate the damages portion of the default judgment on the ground that the defendant failed to present a valid defense where the pain and suffering award warranted further discovery. A default award should be vacated if there was not substantial evidence to support the award of damages. In light of the medical costs incurred and the injuries complained, it does not appear equitable or just for Respondent to receive a judgment for general damages in excess of \$500,000.00. The general damages claimed by Respondent are an indication that the Default Judgment was neither equitable nor reflective of the actual facts in this case. Here, the trial court abused its discretion when it failed to consider the equitable principles of CR 60, as such, Appellant should have an opportunity to carry the decisive issue of damages to the jury in a trial on the merits.

Additionally and consistent with Shepard and Calhoun, nothing in the Little decision questions the applicability of the holding in Gutz permitting a party to challenge the damages awarded in support of a prima facie defense. 128 Wn. App. at 917, 117 P.3d 390; *see also* Morin, 160 Wn.2d at 753, 161 P.3d 956 (Default judgments should be liberally set aside pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice).

It is undisputed that Respondent submitted medical records detailing the treatment of Mrs. Rosander and the total billings for the same amounted to \$25,951.38. CP 134. Appellant has alleged that the medical records and billings do not justify a general damage award in excess of \$500,000. The submitted medical documentation appears significantly inconsistent with the general damages award. Appellant's argument that the general damages claimed by Respondent are an indication that the Default Judgment was neither equitable nor reflective of the actual facts in this case is made in light of the inherent protections of CR 60(b) – i.e., a party's right to move to vacate a default judgment on equitable grounds. The trial court abused its discretion when it failed to consider the inequitable result that would occur by not setting aside the default judgment. Below are two additional examples of how the holding in Little exemplifies the same.

The facts in Little actually highlight how different the circumstances in that matter are compared to the instant matter. In Little, the plaintiff underwent multiple surgeries, and had a treating doctor declare that the accident caused “spinal problems [that] are serious, and will permanently reduce her physical capacities, both work-related and in her recreational and family life.” There is no such declaration in this matter and no surgeries were performed or determined to be required.

Further, a review of Little's damage calculations, is telling. The judgment totaled \$2,155,835.58, and consisted of \$249,234.48 for past

damages, \$1,256,601.10 for future damages, and \$650,000 for general damages. Here, Respondent's judgment totaled \$925,794.54, and consisted, in part, of \$25,951.38 for past medical treatment, \$33,630.00 for past and future economic damages, and an unsupported claim for future medical treatment totaling \$181,165.60 – yet the general damages awarded were in excess of \$500,000.00. CP 134; 129. In short, the trial court permitted general damages to be awarded that were approximately 20 times greater than the cost of Respondent's medial treatment. If the same ratio would have been applied in Little, the plaintiff would have been awarded \$5,000,000 in general damages, rather than \$650,000!

The holding in Little should not be relied upon by Respondent to support an inequitable result that is not reflective of the actual facts in this case.

4. *Miscommunication and Misunderstanding Caused Appellant to Fail to Retain Counsel*

The court should consider the reason for the defendant's failure to respond in a timely manner to the summons and complaint. Referring back to the language of CR 60, the defendant should demonstrate that the failure to appear was the result of “mistake, inadvertence, surprise, excusable neglect, or irregularity.” Calhoun, 46 Wn. App. 616, 731 P.2d 1094.

Typical circumstances justifying the vacation of a default judgment include misunderstandings or miscommunications among attorneys, clients,

and insurance companies. *See, e.g., Pfaff*, 103 Wn. App. 829, 14 P.3d 837 (Default judgment properly vacated after defendant demonstrated that the failure to respond was due to an excusable office mix-up, and demonstrated a valid defense; court brushed aside plaintiff's argument that a trial would work a "substantial hardship" on plaintiff).

In *Boss Logger, Inc. v. Aetna Casualty & Surety Co.*, 93 Wn. App. 682, 970 P.2d 755 (1998), the court was willing to vacate a default judgment simply on the basis that an employee of the defendant (an insurance company) had lost the summons and complaint before the defendant could respond to them. *See also Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (Defendant's failure to appear was due to a misunderstanding within defendant's company about where the summons and complaint should have been sent). In *White*, 73 Wn.2d at 349-50, 438 P.2d 581, the defendant did not answer because he and his insurer misunderstood who was to provide legal counsel during the time it took the insurer to review the case and determine if coverage was provided for the claim. The court held these facts constituted a bona fide mistake. *White*, 73 Wn.2d at 355, 438 P.2d 581.

Similar to the instant matter, in *Spoar v. Spokane Turn-Verein*, 64 Wn. 208, 212, 116 P. 627 (1911), the court upheld an order vacating a default in circumstances where the corporate officer served with the summons and complaint was a native of Germany, unfamiliar with our legal process, and

believed that no further action would be taken until he had been notified of the date of trial.

Here, the interactions between Respondent's counsel and Appellant's insurer demonstrate how miscommunication and misunderstanding led to the mistake, inadvertence, and/or excusable neglect in not responding to the Complaint, as well as the Order of Default and Default Judgment. As noted above, the communications between ING and Respondent's counsel established that attempts were being made to resolve this case. However, it cannot be ignored that the parties were having difficulty understanding each other. To make matters worse, the ING adjuster working on the case at the outset was forced to take medical leave and has still not returned to work. CP 75. While Respondent's counsel provided updates and information, ING requested more documentation to support Respondent's settlement proposal. This type of exchange is not unusual, so it came as a surprise to ING when it received Respondent's June 21, 2007 letter and documents regarding the filing of a Motion for Default. Id. Upon comprehending the gravity of the situation, ING representative Ms. Glazier immediately contacted Respondent's counsel to discuss the motion. Id.

The July 12, 2007 telephone conversation between Ms. Glazier and Respondent's counsel was wrought by confusion and misunderstanding. First and foremost, ING believed it had received a two week extension to review the file and make an offer, and that the plaintiffs would "set aside" the Order

of Default. CP 75. In her own words, Ms. Glazier believed that "so long as she was committed to reviewing the file and then discussing settlement", Respondent's counsel would set aside the Default Order. Id. As discussed at the trial court hearing, Appellant's counsel, who has a great deal of respect for Respondent's counsel, suggested one possible scenario under which both parties may have genuinely thought they knew what the other was thinking. Respondent's counsel may have suggested he was going to "set over" the hearing, where as Ms. Glazier clearly understood that the default hearing was being set aside or cancelled.

Unbeknownst to Ms. Glazier and completely contrary to her understanding of the July 12, 2007 phone conference, Respondent merely re-noted the Motion for Default to July 26, 2007. CP 75. However, ING did not receive the Amended Citation until July 30, 2007. Id. The Order granting the Default was entered by the Court on July 26, 2007. CP 134. Also on July 26, 2007, Respondent's Motion for Default Judgment was entered with the Court. Id. Ms. Glazier's misunderstanding of her agreement with Respondent's counsel constituted a bona fide mistake.

Pursuant to Pfaff, a typical circumstance justifying the vacation of a default judgment includes the misunderstandings or miscommunications among attorneys and insurance companies. That is exactly what happened here. Further, Appellant's actions in this matter should also be viewed in light of its interactions with Respondent's counsel. The Supreme Court in

Morin agreed with this Court's decision in Gutz, where it was held that Respondent may have acted diligently and the failure to appear may have been reasonably excused by the conduct of opposing counsel. 128 Wn. App. 901, 117 P.3d 390.

The above factual circumstances illustrate the parties' failure to understand one another. Ms. Glazier believed after her telephone conversation with Respondent's counsel that the Order of Default would be set aside. The action of Respondent's counsel, in light of a completely different understanding, effectively evidences a reasonable justification for Appellant's failure to have an attorney appear. Ms. Glazier was committed to reviewing Respondent's file and discussing settlement, as such, she was led to believe that Respondent's counsel was vacating the Order of Default.

The trial court failed to consider the misunderstandings and miscommunications that plagued this matter. More importantly, the trial court neglected to consider the actions of Respondent's counsel in contributing to why AIG did not contact an attorney. The trial court inappropriately questioned Ms. Glazier's credibility, and inserted its opinion as to what constituted prudent behavior on the part of Appellant's insurer. RP 42:14-16; 43:13-17; 45:18-22; 46:13-21. While it may be understandable to question whether ING should have appointed counsel earlier (they clearly should have), it is **not** appropriate for the trial court to question the integrity of the ING claim representative when she swore under oath that as of the

conversation she had with Respondent's counsel on July 12, 2007 (which conversation taking place is not debated) she believed the default motion was being set aside. As such, the trial court's justification for finding Appellant's actions inexcusable was based on untenable grounds and a misunderstanding of law; therefore, the trial court abused its discretion.

5. *Appellant Acted with Due Diligence Upon Learning of the Order of Default and Default Judgment*

The third factor reviewed by the court is the party's diligence in asking for relief following notice of the entry of the default. Gutz, 128 Wn. App. at 916, 117 P.3d 390; Calhoun, 46 Wn. App. 616, 731 P.2d 1094.

CR 60(b) specifies that a motion to vacate on the basis of mistake, inadvertence, surprise, excusable neglect, or irregularity must be made within a reasonable time, and in any event, not later than one year after the judgment was entered. Friebe v. Supancheck, 98 Wn. App. 260, 992 P.2d 1014 (1999).

In the instant matter, Respondent's Order of Default and Default Judgment were both entered on July 26, 2007. CP 18-25. Defense counsel for Appellant was retained on August 16, 2007. CP 134. Upon discovering the entry of the Order of Default and Default Judgment, defense counsel immediately contacted Respondent's counsel to request that Respondent's counsel set aside the orders of default, and then timely filed its Motion to Set Aside the Order of Default and Default Judgment. Id. As a result, Appellant

diligently requested relief following notice of the entry of the default within a reasonable timeframe and consistent with CR 60(b).

6. *Vacating the Order of Default and Default Judgment will have a Negligible Effect upon Respondent*

When deciding whether to vacate a default judgment, the court will consider the effect of vacating the default judgment upon plaintiff; *i.e.*, the relative hardship imposed upon the plaintiff whose judgment would be vacated, and who would be required to proceed on the merits. White, 73 Wn.2d 348, 438 P.2d 581.

In Johnson v. Cash Store, the court held that the fact that vacation of a default judgment would prolong plaintiff's dependence on her family and would be "painful, humiliating, and distressing" was not a sufficient reason to deny defendant's motion to vacate. 116 Wn. App. 833, 68 P.3d 1099 (2003). The court stated, "Vacation of a default judgment inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution in the merits." Id. at 842, 68 P.3d 1099.

Here, there has been very little delay suffered by Respondent. While the accident occurred some time ago, Respondent did not serve Nightrunners with the Complaint until April 2007. CP 74. Additionally, Respondent's brief in opposition to Appellant's Motion to Set Aside to the Order of Default and Default Judgment identified no prejudice to Respondent as a result of the default order or Appellant's motion to set the same aside.

Counsel for Appellant has entered a notice of appearance, and will make every attempt to work with Respondent's counsel to efficiently get this matter back on track and work towards the resolution of the same. The trial court did not appear to address this issue during the hearing and/or in its decision to deny Appellant's Motion to Set Aside the Order of Default and Default Judgment, as such, Appellant asserts that no undue hardship has been or will be imposed upon Respondent as a result of setting aside the default judgment. To the extent there was or is any hardship based on delay, the trial court could obviously remedy any such problem by other remedies, such as an expedited trial or discovery schedule, etc.

VI. CONCLUSION

For the foregoing reasons, Appellant requests that this Court overturn the trial court's denial of Appellant's Motion to Set Aside the Order of Default and Default Judgment, and allow the parties to resolve this matter on the merits.

RESPECTFULLY SUBMITTED this 30 day of, February 2008.

SCHEER & ZEHNDER LLP

By: 

Mark P. Scheer, WSBA No. 16651

Sean V. Small, WSBA No. 37018

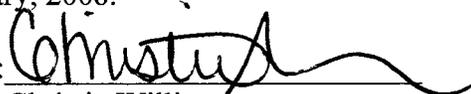
Attorneys for Appellant Nightrunners
Transport, Ltd.

CERTIFICATE OF SERVICE

I, Christie Williams, certify that on the day of, 2008, I caused a true and correct copy of this to be served on the following in the manner indicated below:

Gideon Caron William Robison Caron Colven Robison & Shafton LLP 900 Washington St Ste 1000 Vancouver, WA 98660-3455	<input checked="" type="checkbox"/> Federal Express (Tracking No. 613088810000630) <input type="checkbox"/> Legal Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
---	--

DATED 20 this day of February, 2008.

By: 
Christie Williams

FILED
COURT OF APPEALS
DIVISION II
08 FEB 21 PM 1:04
STATE OF WASHINGTON
BY W DEPUTY