

TABLE OF CONTENTS

Table of Authorities ii

NATURE OF THE CASE 1

COUNTER-STATEMENT OF THE CASE 1

COUNTER-STATEMENT OF THE ISSUES 3

ARGUMENT

1. General Standards of Review.. 3

2. Applying standards for vacating judgments on the merits, the trial court properly denied Ms. Stanley’s motion to vacate the judgment.. 6

3. Even applying standards for vacating default judgments, the trial court properly denied Ms. Stanley’s Motion to vacate the judgment. 10

a. Ms. Stanley presented no evidence that her participation in the arbitration would have produced a different result.. 11

b. Ms. Stanley did not establish that her failure to appear for the arbitration or failure to request trial de novo after the arbitration was the result of excusable neglect. 13

c. Mr. Cole would be prejudiced if judgment is vacated. 18

CONCLUSION 19

REQUEST FOR ATTORNEY FEES 21

TABLE OF AUTHORITIES

Table of Cases

<i>Crutcher v. Aetna Life Ins. Co.</i> , 746 F.2d 1076 (5th Cir. 1984) . . .	4, 8-9
<i>Fay v. N.W. Airlines</i> , 115 Wn.2d 194, 796 P.2d 412 (1990)	21
<i>Haller v. Wallis</i> , 89 Wn. 2d 539, 573 P.2d 1302 (1978)	4, 7
<i>In re Marriage of Burkey</i> , 36 Wn. App. 487, 675 P.2d 619 (1984)	4
<i>In re Marriage of Daley</i> , 77 Wn. App. 29, 888 P.2d 1196 (1995)	6
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)	4
<i>Johnson v. Cash Store</i> , 116 Wn. App. 833, 68 P.3d 1099 (2003)	18
<i>Lane v. Brown & Haley</i> , 81 Wn. App. 102, 912 P.2d 1040 (1996)	4, 6-7, 13
<i>Link v. Wabash R.R.</i> , 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)	7-8
<i>Little v. King</i> , 160 Wn.2d 696, 161 P.3d 345 (2007)	11-12, 18
<i>L.P. Steuart, Inc. v. Matthews</i> , 329 F.2d 234 (D.C. Cir. 1964)	15
<i>Luckett v. Boeing Co.</i> , 98 Wn. App. 307, 989 P.2d 1144 (1999)	4
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (2003)	21
<i>M.A. Mortenson Co. v. Timberline Software Corp.</i> , 93 Wn. App. 819, 971 P.2d 82, <i>aff'd</i> 140 Wn.2d 568, 998 P.2d 305 (1999)	7
<i>Myers v. Landrum</i> , 4 Wash. 762, 31 P. 33 (1892)	7, 13

<i>Pybas v. Paolino</i> , 73 Wn. App. 393, 869 P.2d 427 (1994) . . .	3, 5, 7, 9, 21
<i>Reichelt v. Raymark Indus., Inc.</i> , 52 Wn. App. 763, 764 P.2d 653 (1988)	7, 18-19
<i>Rosander v. Nightrunners Transport, Ltd.</i> , __ Wn. App. __, 196 P.3d 711 (2008)	19
<i>Scanlon v. Witrak</i> , 110 Wn. App. 682, 42 P.3d 447 (2002)	4
<i>Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson</i> , 95 Wn. App. 231, 974 P.2d 1275 (1999)	12, 13-14
<i>Swasey v. Mickleson</i> , 65 Wash. 411, 118 P. 308 (1911)	15
<i>Tacoma Recycling, Inc. v. Cole</i> , 34 Wn. App. 392, 661 P.2d 609 (1983)	6
<i>Tran v. Yu</i> , 118 Wn. App. 607, 75 P.3d 970 (2003)	5
<i>White v. Holm</i> , 73 Wn. 2d 348, 438 P.2d 521 (1968)	11

Statutes, Rules and Other Authorities

RCW 7.06.050(1)	5
RAP 18.1(a)	21
RAP 18.9.	21
CR 60(b)	3, <i>passim</i>
MAR 5.4	5
MAR 7.2.	5
MAR 7.3	21

NATURE OF THE CASE

This is an action for personal injuries. After she filed suit, plaintiff Jamie Stanley, transferred her case to mandatory arbitration. Defendant, Harold Cole, admitted liability. Arbitration was set and discovery occurred. Though they do not dispute they knew the arbitration date, neither Ms. Stanley or her attorney appeared for the hearing. Nevertheless, the arbitrator made an award in Ms. Stanley's favor, then served and filed it. Ms. Stanley did not appeal the award by seeking trial de novo. Instead she sought to vacate the judgment after the period for requesting trial de novo had passed. When the trial court refused, she appealed.

COUNTER-STATEMENT OF THE CASE

On December 16, 2004, Ms. Stanley was traveling southbound on Warren Avenue in Bremerton when Mr. Cole pulled out from a stop sign and collided with Ms. Stanley's vehicle. CP 42.¹ Ms. Stanley filed a complaint in Kitsap County Superior Court on November 14, 2007. CP 1-8.

Ms. Stanley filed a statement of arbitrability on July 28, 2008. CP 9-12. The case was transferred to Mandatory Arbitration on August 22, 2008. CP 13. Defendants conducted discovery, including deposing Ms.

1. In this brief, the record is cited by the designation "CP" for "clerks papers" and the page number assigned by the clerk. Ms. Stanley's references to the record do not follow any decipherable format.

Stanley. CP 40. A hearing was set for December 5, 2008, with the parties' pre-hearing statements of proof due November 21, 2008. CP 13. Defendants timely delivered their pre-hearing statement to both Ms. Stanley's attorney, Vonda Sargent, and the arbitrator. CP 37-43. Ms. Stanley did not serve a pre-hearing statement. CP 21.

Arbitration occurred as scheduled on December 5, 2008. Defendant admitted liability. CP 39. Only defense counsel and the arbitrator attended. CP 20-21, 45. Following the hearing, the arbitrator issued an award in Ms. Stanley's favor, then filed and served the award on both parties. CP 45-46. The arbitrator noted on the award that pursuant to MAR 5.4, the award was based in part on Ms. Stanley's failure to appear at the hearing. CP 45.

Ms. Stanley did not request trial de novo. Instead, on February 6, 2009, nearly two months after the award was filed and served, Ms. Stanley moved to vacate the arbitration award. She based her motion on CR 60(b) and excusable neglect. CP 15-19. In the motion, Ms. Stanley's attorney, Ms. Sargent, claimed she neither attended the arbitration nor informed defense counsel or the arbitrator she would not be attending because she had been caring for her ill parents. CP 15-19. She testified she walked away from her practice in late August, 2008 and did not return until January 5, 2009. CP 18, ln. 14.

The court denied the motion to vacate, deciding that counsel's actions did not constitute excusable neglect. CP 23. The court entered judgment on the arbitration award on February 27, 2009. CP 27-28. Ms. Stanley filed her Notice of Appeal on March 27, 2009.

COUNTER-STATEMENT OF THE ISSUES

1. Did the trial court properly deny Ms. Stanley's motion to vacate the arbitration award, concluding that excusable neglect had not occurred under CR 60(b) where Ms. Stanley and her counsel failed to attend the arbitration hearing and failed to inform opposing counsel or the court of that they would be attending?
2. Is respondent entitled to an award of costs and reasonable attorney fees on appeal under MAR 7.3 and RAP 18.9?

ARGUMENT

1. General Standards of Review

Ms. Stanley sought to vacate the judgment under CR 60(b). A court may relieve a party from a final judgment, order, or other proceeding under CR 60(b) where the court finds fraud, misrepresentation, or excusable neglect. CR 60(b). CR 60 cannot be used to circumvent time constraints of other rules, such as the time limit for requesting trial de novo following mandatory arbitration. *Pybas v. Paolino*, 73 Wn. App. 393, 398, 869 P.2d 427 (1994).

A trial court's decision to vacate a judgment under CR 60(b) is reviewed for abuse of discretion. *Haller v. Wallis*, 89 Wn. 2d 539, 543, 573 P.2d 1302 (1978). Discretion is abused when the court bases its decision on unreasonable or untenable grounds. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999). A decision is unreasonable if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). An abuse of discretion requires a finding that no reasonable person would have reached the same decision of the court. *In re Marriage of Burkey*, 36 Wn. App. 487, 489, 675 P.2d 619 (1984). An appellate court will not overturn a trial court's decision on a motion to vacate a judgment for excusable neglect unless it plainly appears that the trial court abused its discretion. *Scanlon v. Witrak*, 110 Wn. App. 682, 686, 42 P.3d 447 (2002)(emphasis added). Thus, it is not enough that vacating the judgment might have been permissible, or even warranted – denial must have been so unwarranted as to constitute an abuse of discretion. *Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1082 (5th Cir. 1984), cited in *Lane v. Brown & Haley*, 81 Wn. App. 102, 106, 912 P.2d 1040 (1996).

In this case, Ms. Stanley asked to vacate a judgment based on a mandatory arbitration award because she did not appear for the hearing.

When considering such motions it is proper to consider the purposes of mandatory arbitration. *Pybas v. Paolino*, *supra*, 73 Wn. App. at 396. The Legislature’s purpose in adopting mandatory arbitration was to reduce congestion on the courts and delays in hearings in civil cases. *Tran v. Yu*, 118 Wn. App. 607, 611, 75 P.3d 970 (2003). There is a strong public policy in this state which favors arbitration because it provides an expeditious method of resolving disputes and is generally less expensive than litigation. *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995). Consistent with that goal, MAR 5.4 specifically provides: “The arbitration hearing may proceed, and an award may be made, in the absence of any party who after due notice fails to participate or to obtain a continuance.” Not appearing at arbitration falls directly within MAR 5.4. Entering an award in Ms. Stanley’s absence was precisely what the rules called for. *Id.*

Nor is such a result unfair. A party aggrieved by an arbitrator’s decision has a remedy: trial de novo. RCW 7.06.050(1); MAR 7.2. If Ms. Stanley believed the award was unfair, she had the opportunity to return to a position as though no award had been made.

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2. Applying standards for vacating judgments on the merits, the trial court properly denied Ms. Stanley's motion to vacate the judgment.

Ms. Stanley argues the court should apply the standard for reviewing default judgments to the judgment entered in her case. Mr. Cole disagrees. Having appeared in an action and filed pleadings, failure to appear for trial does not render a party subject to default judgment. *Tacoma Recycling, Inc. v. Cole*, 34 Wn. App. 392, 394-95, 661 P.2d 609 (1983). Ms. Stanley retained counsel, filed her complaint, set the matter for arbitration, and participated in discovery. An arbitration occurred. Importantly, evidence was presented. After considering evidence, including her own deposition testimony, the arbitrator decided her case on its merit, granting an award in her favor. Her failure to participate does not make the arbitration any less a proceeding on the merits. See *In re Marriage of Daley*, 77 Wn. App. 29, 32, 888 P.2d 1196 (1995)(where, on day of trial, court considers evidence despite absence of a party, subsequent judgment is not a default judgment); *Lane v. Brown & Haley*, *supra* (attorney's failure to argue case on correct legal theory does not make summary judgment like default judgment).

The distinction is important because review of judgments by default and judgments on the merits differ in two important ways. *Lane v. Brown & Haley*, 81 Wn. App. at 105. First, courts apply a different set of equitable

factors when considering a motion to vacate a default judgment as opposed to a motion to vacate a judgment on the merits. Second, the law favors resolution of cases on their merits and, accordingly, favors their finality. *Id.* at 105-06. “Therefore, an appellate court will review the vacation of a default judgment more leniently than the vacation of a judgment on the merits.” *Id.* at 106.; accord *Haller v. Wallis*, 89 Wn. 2d 539, 573 P.2d 1302 (1978)(distinguishing between vacating default judgments and consent judgments).

Generally, want of attention, incompetence or neglect by counsel is not excusable neglect justifying vacating judgments on the merits. *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wn. App. 819, 838, 971 P.2d 82, *aff'd* 140 Wn.2d 568, 998 P.2d 305 (1999); *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996); *Myers v. Landrum*, 4 Wash. 762, 763, 31 P. 33 (1892); see *Pybas v. Paolino*, 73 Wn. App. 393, 869 P.2d 427 (1994); accord *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 764 P.2d 653 (1988)(attorneys’ failure to file notice of appeal because one left firm and other was under unusually heavy workload was not extraordinary circumstance justify extending time). It has long been held that the neglect of the attorney in prosecuting a case after appearance is to be treated as the neglect of the party. *Link v. Wabash R.R.*, 370 U.S. 626, 82

S.Ct. 1386, 8 L.Ed.2d 734 (1962). In *Link*, a personal injury action with a history of delays was dismissed for failure to prosecute after plaintiff's attorney failed to appear at a scheduled pretrial conference. Justice Harlan, writing for the majority, observed:

There is certainly no merit in the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot avoid the consequences of the acts and omissions of this freely selected agent.

Id., 370 U.S. at 633. Such a rule is necessary to assure fair application of Rule 60(b). As the court noted succinctly in *Crutcher v. Aetna Life Ins. Co.*, *supra*:

In most cases litigation is handled by lawyers. While in other spheres of life a person may not excuse his breaches of duty on the ground that the negligence was that of his agent – whatever his remedies against the agent – it is true that courts have shown sympathy for the plight of the diligent litigant with an incompetent or sloppy lawyer. When the question arises in the context of the original decision to impose a sanction, the court may, and frequently does, take into consideration the harshness of a dismissal or a default judgment as a penalty imposed upon a client for the acts and omissions of the lawyer; in many instances courts have chosen to impose penalties directly upon the lawyer rather than upon the client. After judgment, however, when the question arises in the context of a motion for a vacation of the judgment, the wording of Rule 60(b) puts the court in a dilemma. The question presented on a Rule 60(b) motion is whether the conduct is excusable neglect. Obviously the greater the negligence involved, or the more willful the

conduct, the less "excusable" it is; on the other hand, the more inexcusable it is, the greater the natural sympathy the court has with the client.

746 F.2d at 1083.

In this case, Ms. Stanley clearly failed to overcome the preference for finality. The only evidence she presented to warrant vacating the judgment was the neglect of her attorney. Ms. Stanley presented literally no evidence the arbitration award either was unfair or she would have obtained a different result if she had participated. She did not present medical records or lay, medical or expert testimony describing the nature or extent of her injuries, she did not present evidence of other arbitration awards in comparable cases, and she did not even present evidence that she would have presented different or additional evidence to the arbitrator. This alone justified the trial court's refusal to vacate the judgment. See *Pybas v. Paolino*, 73 Wn. App. 393, 404, 869 P.2d 427 (1994)(refusal to vacate judgment not an abuse of discretion where plaintiff failed to show that denial of trial de novo "would result in a gross miscarriage of justice".)

Moreover, she presented very little evidence to justify her "neglect of counsel" argument. Ms. Sargent was Ms. Stanley's selected representative. Indeed, Ms. Sargent remains Ms. Stanley's selected representative even now, ratifying Ms. Sargent's prior acts as Ms. Stanley's

agent. What is more, Ms. Stanley herself gave no testimony regarding her role in the management of her case. Thus, the trial court had no evidence that Ms. Stanley was not aware of the arbitration date, that she was not aware her attorney was neglecting her case, or even that she made an effort to remain current in the progress of her case. In other words, the trial court had no evidence that Ms. Stanley was a victim of her attorney's misconduct.

In light of the nature of Ms. Sargent's defalcations and the absence of evidence regarding the merits of Ms. Stanley's claim and her role in the management of her case, it cannot be said that the trial court was not within the bounds of permissible discretion to conclude that Ms. Stanley's excuse was inadequate to justify vacating the judgment. The trial court acted well within its discretion to deny Ms. Stanley's motion to vacate.

3. Even applying standards for vacating default judgments, the trial court properly denied Ms. Stanley's Motion to vacate the judgment.

Even if the court applies standards for reviewing default judgments, the trial court properly denied Ms. Stanley's motion to vacate. She did not submit evidence sufficient for this court to conclude that the trial court had no reasonable basis for its decision.

When deciding a motion to vacate a default judgment, the Court considers two primary and two secondary factors which must be shown by

the moving party. *White v. Holm*, 73 Wn. 2d 348, 352, 438 P.2d 521 (1968). The primary factors are: (1) that there is substantial evidence to support at least a prima facie defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action and answer the opponent's claim was occasioned by mistake, inadvertence, surprise or excusable neglect. The secondary factors are (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *Id.* Even applying those standards, the trial court did not abuse its discretion in denying her motion to vacate.

a. Ms. Stanley presented no evidence that her participation in the arbitration would have produced a different result.

The first *White* factor examines the merits of the defaulting party's case. If that standard applies to plaintiffs who fail to appear for trial or arbitration, this element requires them to present evidence that would support a conclusion on at least a prima facie basis, that the outcome would have been different had they participated in the proceedings. *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007). In this case, the arbitrator made an award in Ms. Stanley's favor. Ms. Stanley had the burden, therefore, of presenting evidence that she would have received a better award if she had

participated in the arbitration.

She failed to meet her burden. The sum of her evidence on the merit of her claim is an inference: because Mr. Cole admitted liability, and because she was not able to present her case to the fact-finder, the arbitrator's decision obviously was less than it would have been if she had participated. Her argument is wholly insufficient. The amount of damages in a default judgment must be supported by substantial evidence. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 240-42, 974 P.2d 1275 (1999). Therefore, "it is not a prima facie defense to damages that . . . the damages might have been less [or more] in a contested hearing." *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007)(brackets material not in original). Even considered in the light most favorable to Ms. Stanley, argument based on the contention the result might have or could have been different is considered mere speculation and not substantial evidence. *Id.* at 705.

In fact, Ms. Stanley submitted no evidence to the trial court, prima facie or otherwise, to support her damages. As discussed previously, she did not present medical records, medical testimony, or even lay testimony that her injuries justified a greater award than she received. Indeed, she presented no evidence at all on the merits of her case. Thus, she failed to show that the

likely outcome of her case would have been different had she participated in the arbitration.

- b. Ms. Stanley did not establish that her failure to appear for the arbitration or failure to request trial de novo after the arbitration was the result of excusable neglect.**

The only reason Ms. Stanley offers for her failure to appear for the arbitration and failure to request trial de novo after the arbitration is that her attorney did not attend to the responsibilities of her law practice. Ms. Sargent testified that to care for her parents she simply walked away from her law practice for four months. Ms. Stanley claims this constitutes excusable neglect.

She has cited no Washington authority that neglect of counsel constitutes excusable neglect warranting vacation of a default judgment. As stated previously, in the context of judgments on the merits, generally want of attention or neglect by counsel is not excusable neglect. *Lane v. Brown & Haley*, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996); *Myers v. Landrum*, 4 Wash. 762, 763, 31 P. 33 (1892).

Ms. Stanley's reliance on *Shepard v. Helsell Fetterman*, 95 Wn. App. 231, 974 P.2d 1275 (1999), not only is misplaced, but the decision demonstrates the failure of her argument. In that case, the court ruled that a default judgment would have been set aside for excusable neglect where the

defendant company showed that the employee who received the complaint and was responsible for its handling misplaced it because of complications from diabetes and thereafter left on medical leave during which time she suffered a heart attack. 95 Wn. App. 234-35. In other words, the very person responsible for handling the complaint suffered illness which prevented her, and therefore the defendant, from handling it properly. Moreover, the court's conclusion that the employee's illness would have supported vacating the default judgment did not actually bring about that result. Instead, it merely supported the defendant's claim of malpractice against the attorney who failed to bring the motion. Stated another way, the plaintiff was not penalized for the defendant's employee's failure, the defendant's attorney was.

None of those circumstances are present here. Ms. Stanley and Ms. Sargent were responsible for prosecuting the claim in this case. Neither of them were sick or incapacitated. While they showed that Ms. Sargent's parents were ill, neither Ms. Stanley nor Ms. Sargent showed that they ever were incapable of properly prosecuting Ms. Stanley's claim. They simply showed that Ms. Sargent directed her efforts elsewhere. Moreover, here, Ms. Stanley is not arguing that Ms. Sargent should be penalized for failing to prosecute her claim, she is arguing that Mr. Cole should bear that burden.

Shepard is not analogous.

More analogous is *Swasey v. Mickleson*, 65 Wash. 411, 118 P. 308 (1911). There the court held that sickness of the defendant's wife did not justify his failure to respond to process. 65 Wash. at 415. The court declined to find that the trial court abused its discretion in refusing to vacate default judgment.

Nor do decisions from federal courts support Ms. Stanley's contentions. She cites *L.P. Stuart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir. 1964), for the proposition that federal courts recognize illness of an attorney's parent as excusable neglect under the federal equivalent of CR 60(b). Although the court in that case did allow vacation of the judgment, the illness of the attorney's parents was not the primary impetus, the attorney's false statements to the client regarding the status of the case were. *L.P. Stuart*, 329 F.2d at 235. The court reasoned that the client should not be penalized by the deceptive actions of his counsel, such as repeatedly telling the client the case was proceeding well and that settlement would be made soon.

In *L.P. Stuart*, the client attempted to remain aware of the status of the case and was defeated by the attorney. There is no evidence of that here. Ms. Stanley did not provide any evidence that she tried to remain aware of

the events occurring in her case, or that Ms. Sargent defeated her efforts.

Finally, even if want of attention or neglect by counsel could support a finding of excusable neglect, it should not in this case, nor do the facts of this case lead to the unmistakable conclusion that the trial court abused its discretion. While Ms. Stanley contends that Ms. Sargent's family circumstances so debilitated her that her neglect of the case was excusable, her evidence falls far short of supporting that contention. Ms. Stanley presented no evidence that the events with Ms. Sargent's family incapacitated Ms. Sargent emotionally or physically at all, let alone so fully incapacitated her as to prevent her from attending to such minimal details of her practice as withdrawing as counsel, finding substitute counsel, enlisting the aid of the Washington Bar Association, or just sending notice of unavailability to the court or counsel. Indeed, the evidence shows the contrary. Ms. Sargent's testimony indicates that during the four months she left her practice to care for her parents, she engaged in intelligent, rational, thoughtful, detailed, reasoned actions and decisions in fulfillment of promises to her family. CP 16-19. In other words, she remained capable at all times. She simply directed her capabilities towards caring for her family to the exclusion of her responsibilities for her legal practice and to her clients. Nor did Ms. Stanley explain what happened with Ms. Sargent's office or staff during her absence,

whether others could have assisted Ms. Sargent, and whether Ms. Sargent remained able to meet other demands on her time such as paying bills (personal or business) and the like. Moreover, Ms. Stanley herself does not explain her role in the management of her case: Did she know of the arbitration date? Did she make efforts to communicate with Ms. Sargent? If she could not communicate with Ms. Sargent, did she try to enlist other counsel?

In the absence of such evidence, Ms. Stanley's "excusable neglect" argument amounts only to "my attorney had to care for her family which justifies her ignoring my case." That cannot be sufficient. Many, many attorneys shoulder enormous responsibilities to care for family members and others while representing clients. When burdens outside their practice interfere with their ability to attend to their clients, their remedy is not simply to ignore the clients, but rather to find other counsel who can attend to the client's needs. Indeed, the judicial system would grind to a halt if attorneys could justify ignoring client responsibilities based simply on the press of other matters, regardless of their importance. Excusing attorney's misconduct by making opposing parties like Mr. Cole bear the burden of it encourages the misconduct.

Where a party fails to provide evidence of a prima facie defense and

fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. *Little v. King*, 161 P.3d at 350; see also *Johnson v. Cash Store*, 116 Wn. App. 833, 847-49, 68 P.3d 1099 (2003)(where party did not meet primary *White* factors, trial court did not abuse its discretion in denying their motion to vacate). While defendants sympathize with Ms. Sargent's difficult circumstances, neither illness nor personal tragedy is sufficient to excuse what occurred here. Because Ms. Stanley has failed to meet the two primary factors required under *White* to vacate a judgment, the trial court did not abuse its discretion in refusing to grant their motion to vacate. Ms. Stanley has not shown that a reasonable person would not have reached the same decision regarding vacation of the award.

c. Mr. Cole would be prejudiced if judgment is vacated.

Ms. Stanley claims Mr. Cole will not be prejudiced by vacating the judgment because he has admitted liability. Brief of Appellant at 23. Her argument misses the mark.

In *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 764 P.2d 653 (1988), the court refused to extend the time for filing a notice of appeal and dismissed the appeal, which was filed 10 days beyond the due date. The court rejected the appellant's argument that because one of the two trial attorneys

on the case left the firm during the 30 days following entry of judgment, and the firm's appellate attorney had an unusually heavy workload at the time, extraordinary circumstances existed justifying an extension of time to avoid a gross miscarriage of justice. The court considered a lack of prejudice to the respondent as irrelevant, and noted that the prejudice of granting an extension of time would be “to the appellate system and to litigants generally, who are entitled to an end to their day in court.” *Reichelt*, at 766 n.2.

The prejudice here is much easier to define. Mr. Cole appeared for arbitration, presented evidence, obtained a decision, reduced the award to judgment and paid the judgment, all at considerable expense. Ms. Stanley would undo all of that.

CONCLUSION

Washington Courts have held repeatedly that they value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules. *Rosander v. Nightrunners Transport, Ltd.*, __ Wn. App. __, 196 P.3d 711, 717 (2008). Litigation is inherently formal, and all parties are burdened by formal time limits and procedures. *Id.*

It is very disturbing that in attempting to persuade this court to set aside the judgment, Ms. Stanley has pointed blame at defense counsel (Brief

of Appellant at 24), contending he should have contacted Ms. Sargent when she failed to file a pre-hearing statement in November, 2007,² and he “should have taken the short walk down the hallway to his own co-workers” who Ms. Sargent claims to have found time to inform of her situation.³ Ultimately, this simply illustrates what Ms. Stanley is asking in this appeal. She wants others to bear responsibility for her and her attorney’s failures.

While defendants are sympathetic to counsel’s family situation, Mr. Cole should not be penalized for it. If Ms. Stanley had simply enlightened defense counsel or the court about her circumstances, the situation could have been resolved, either by agreement or motion. Instead of taking responsibility for what has occurred, Ms. Stanley is attempting to shift the burden of her failure to appear and prepare for arbitration onto the defense. Ms. Stanley should not be rewarded for her inattention to court rules and procedures. Nor should Mr. Cole be forced to continue to litigate this matter despite following the rules. The trial court did not abuse its discretion by agreeing with the defense. For the reasons set out above, the defendant asks that the Court affirm the trial court’s judgment.

2. If she was out of her office since August and not reading her mail, how could defense counsel have contacted her?

3. How would defense counsel have known to ask a co-worker about Ms. Sargent’s whereabouts and why would he have reason to think they would know?

REQUEST FOR ATTORNEY FEES

Attorney fees are recoverable on appeal if allowed by statute, rule, or contract. RAP 18.1(a). Two sources warrant an award in this case.

The first is MAR 7.3. It provides that the court shall assess costs and attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. It also provides that a court may assess costs and attorney fees against a party who voluntarily withdraws a request for a trial de novo. Here, Ms. Stanley's request to vacate the judgment is equivalent to a request for trial de novo. *Pybas v. Paolino*, 73 Wn. App. at 400 (noting that vacating judgment following mandatory arbitration award granted plaintiff a new trial.) She seeks the opportunity to re-try her case. Unless she betters her position in this appeal, she should be obligated to pay Mr. Cole's costs and fees.

The second basis is RAP 18.9. This court has the power to require a party to "pay terms or compensatory damages" caused by a "frivolous appeal." RAP 18.9(a). "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003), quoting *Fay v. N.W. Airlines*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990).

The arbitration award in this case was \$7,000. Respondent respectfully suggests that Ms. Stanley has no legitimate basis for her appeal, that the evidence she submitted in support of motion was obviously deficient, that she has clearly wrongfully based her entire argument on standards applicable to default judgments (and even those cannot be met), and in presenting these arguments and pursuing this appeal she has needlessly but substantially increased the cost of this litigation to the defense. An award of reasonable attorney fees is appropriate.

Submitted this 13th day of September, 2009.



Timothy Gosselin, WSBA No. 13730
Attorney for Respondent

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

09 SEP 14 AM 11:22
STATE OF WASHINGTON
BY _____
DEPUTY

JAMIE STANLEY,

Appellant,

vs.

HAROLD COLE and "JANE DOE"
COLE, and their marital community,

Respondents

NO. 39100-7 -II

DECLARATION OF
SERVICE OF BRIEF OF
RESPONDENTS

I, TIMOTHY R. GOSSELIN, declare and state:

I am a citizen of the United States of America and the State of Washington, over the age of twenty-one (21), not a party to the above-entitled proceeding, and competent to be a witness therein.

On the 13th day of September, 2009, I did place in the United States Mail, first class postage affixed, the BRIEF OF RESPONDENTS and this declaration directed to and to be delivered to:

Vonda M. Sargent
LAW OFFICES OF VONDA M. SARGENT
119 1st Avenue South, Suite 320
Seattle, WA 98104

Jeffrey R. Lanthorn
HOLLENBECK, LANCASTER, MILLER & ANDREWS
15500 SE 30th Place, Suite 201
Bellevue, WA 98007

I declare and state under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 13th day of September, 2009 at Tacoma, Washington.

By : 
TIMOTHY R. GOSSELIN, WSBA #13730
Attorney for Respondents/Cross-Appellants