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COURT OF APPEALS
DIVISION II

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COURT OF APPEALS NO. 40788-4-II
KITSAP COUNTY CASE NO. 09-2-003021-1

STATE OF WASHINGTON

BY  _____
DEPUTY

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

MATTHEW CLEVERLEY,

Appellant,

v.

CAROL CAMPBELL,

Respondent.

APPELLANT'S AMENDED BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	1
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
A. Should the Trial Court have vacated the Default Judgment when Defendant did not offer clear and convincing evidence to rebut two declarations from the process server?.....	2
B. Should the Trial Court have vacated the Default Judgment when Defendant offered no evidence of any meritorious defense to any of the claims?	2
C. Should the Trial Court have vacated the Default Judgment when Defendant offered no evidence of mistake, inadvertence, surprise or excusable neglect as required by CR 60(b)?	2
D. Should the Trial Court have vacated the Default Judgment when the Defendant offered no evidence to support relief based on excessive damages?	2
IV. STATEMENT OF THE CASE	2
A. OVERVIEW	2
B. PROCEDURAL HISTORY.....	3
V. ARGUMENT.....	5
A. STANDARDS OF REVIEW	5

**B. THE TRIAL COURT ABUSED ITS DISCRETION IN
VACATING THE DEFAULT JUDGMENT. 6**

1. Vacating A Default Judgment Requires Defendant to Meet a Four-
Part Test. 7

2. Defendant Did Not Present Clear And Convincing Evidence as to
Lack of Service. It was thus an Abuse of Discretion for the Trial
Court to Vacate the Judgment. 8

3. Defendant Offered No Substantial Evidence of a Meritorious
Defense to the Complaint. It was thus an Abuse of Discretion for the
Trial Court to Vacate the Judgment. 13

4. Defendant Offered No Other Valid Arguments under CR 60(b)(1).
It was thus an Abuse of Discretion for the Trial Court to Vacate the
Judgment under CR 60(b)(1). 17

5. Defendant Presented No Evidence to Establish Defenses as to
Damages..... 19

VI. NO ATTORNEY FEES MAY BE AWARDED20

VII. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

<i>Allen v. Starr</i> , 104 Wash. 246, 247, 176 P. 2 (1918).....	9
<i>Beckett v. Cosby</i> , 73 Wn.2d 825, 827 (Wash. 1968)	14
<i>Caouette v. Martinez</i> , 71 Wn. App. 69 (Wash. Ct. App. 1993).....	5
<i>Dubois v. Western States Inv. Corp.</i> , 180 Wash. 259, 263, 39 P.2d 372 (1934)	6, 9
<i>Fisher Props., Inc., v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).....	20
<i>Griggs v. Averbek Realty, Inc.</i> , 92 Wn.2d 576, 581, 599 P.2d 1289 (1979)	7
<i>Herzog Aluminum, Inc. v. General Am. Window Corp.</i> , 39 Wn. App. 188, 191, 692 P.2d 867 (1984).....	21
<i>Little v. King</i> , 160 Wn.2d 696, 706 (Wash. 2007).....	8
<i>Little v. King</i> , 160 Wn.2d 696; 161 P.3d 345 (2007).....	20
<i>Miebach v. Colasurdo</i> , 102 Wn.2d 170, 179 (Wash. 1984)	12
<i>Miebach v. Colasurdo</i> , 35 Wn. App. 803, 808 (Wash. Ct. App. 1983).....	11
<i>Miebach v. Colasurdo</i> , 35 Wn. App. 803, 808; 670 P.2d 276 (1983)	6, 9
<i>Mosbrucker v. Greenfield Implement</i> , 54 Wn. App. 647, 652 (Wash. Ct. App. 1989).....	17
<i>Rosander v. Nightrunners Transp., Ltd.</i> , 147 Wn. App. 392, 403 (Wash. Ct. App. 2008).....	7
<i>State ex rel. Macri v. Bremerton</i> , 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941)	21

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)..... 8

Statutes

R.C.W. 4.28.080(15) 10

Rules

CR 60(b)..... 7

CR 60(b)(4) 14

RAP 18.1(a)..... 21

I. INTRODUCTION

Carol Campbell (“Defendant”) was served with a Summons and Complaint on October 31, 2009. Service was performed by a licensed process server who served Defendant by leaving a copy of the Summons and Complaint with a resident of Defendant’s home. Defendant did not respond to the Summons and Complaint, and a Default Judgment was entered against Defendant on December 4, 2009. In February 2010, Defendant filed a Motion to Vacate the Default Judgment. Defendant offered no evidence that service was not performed, and offered no evidence of a meritorious defense. The trial court vacated the Default Judgment on April 30, 2010. Matthew Cleverley (“Plaintiff”) appeals from the Order Vacating the default judgment.

II. ASSIGNMENTS OF ERROR

The trial court erred when it vacated the Default Judgment against Defendant on April 30, 2010.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Should the Trial Court have vacated the Default Judgment when Defendant did not offer clear and convincing evidence to rebut two declarations from the process server?
- B. Should the Trial Court have vacated the Default Judgment when Defendant offered no evidence of any meritorious defense to any of the claims?
- C. Should the Trial Court have vacated the Default Judgment when Defendant offered no evidence of mistake, inadvertence, surprise or excusable neglect as required by CR 60(b)?
- D. Should the Trial Court have vacated the Default Judgment when the Defendant offered no evidence to support relief based on excessive damages?

IV. STATEMENT OF THE CASE

A. OVERVIEW

Plaintiff is an attorney who was co-representing Defendant's former daughter-in-law in a divorce proceeding. The divorce was taking

place in Indiana, but various witnesses, including Defendant, were being deposed in Washington. During her deposition, Plaintiff discovered that Defendant had been making false statements to others regarding Plaintiff and his relationship with Defendant's former daughter-in-law.

Plaintiff brought the underlying lawsuit based on the false statements made by Defendant that were disclosed during the deposition. Defendant did not respond to the lawsuit, and Plaintiff obtained a default judgment against her. Plaintiff then began garnishing Defendant's wages. Defendant eventually moved to vacate the default judgment, and the Trial Court vacated the default judgment.

This appeal is based on errors the Trial Court made in vacating the default judgment.

B. PROCEDURAL HISTORY

Plaintiff commenced the underlying state court action by serving Defendant with a Summons and Complaint on Saturday October 31, 2009. CP at 1-6. The Summons and Complaint were served by a licensed Process Server, Tom Beals, Registration #1032. The Process Server Provided a Declaration of Service dated November 2, 2009. CP at 7. The Declaration identified the date and time that the documents were served.

The Declaration also indicated that the male recipient of those documents refused to give his name, but that the male indicated he was a co-resident of the Defendant and lived in the home. The Declaration includes a physical description of the person who was served. CP at 7. The process server also provided a supplemental declaration that further supports the position that the Summons and Complaint were properly served. CP at 66.

Plaintiff's Complaint made four claims against Defendant: 1) Defamation; 2) Outrage; 3) Intentional Interference with Business Relationships; and 4) Injunctive Relief. CP at 4-5. Defendant did not answer or otherwise appear in the action. On November 30, 2009, Plaintiff submitted a Motion for Default and Default Judgment to the Court. CP at 8-11. That Motion included the Declaration of Service and a Declaration of the Plaintiff regarding the factual basis for the Complaint and the amount of damages sought. CP at 12-40. On December 4, 2009, the Trial Court signed the Order of Default and entered a Default Judgment. CP at 41-42. The Default Judgment awarded Plaintiff damages in the amount of \$75,000 on each of the three economic claims. The Default Judgment also enjoined Defendant from making future false statements about Plaintiff. CP at 41-42.

On January 5, 2010, Plaintiff obtained Writs of Garnishment and served them on the respective garnishees. On January 12, 2010, Defendant signed a certified mail receipt for the garnishments. Six weeks later, on February 28, 2010, Defendant made her first response in the case by filing her Motion to Vacate the default judgment. CP at 43-47.

On March 26, 2010, the Trial Court held a hearing on Defendant's Motion to Vacate the Default Judgment.¹ At the hearing, the Trial Court issued an oral ruling that the default judgment would be vacated. The Trial Court entered its Order on April 30, 2010. CP at 67-69.

V. ARGUMENT

A. STANDARDS OF REVIEW

A Trial Court's order vacating a judgment under CR 60(b) is reviewed for an abuse of discretion. *Caouette v. Martinez*, 71 Wn. App. 69 (Wash. Ct. App. 1993). "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

¹ Defendant also appeared to be challenging venue of the action. However, after the Default Judgment was vacated, Defendant filed an Answer in Kitsap County Superior Court that waived venue arguments.

is no equitable basis for vacating judgment. It is thus an abuse of discretion.” *Little v. King*, 160 Wn.2d 696, 706 (Wash. 2007).

When challenging service after a Default Judgment has been entered, the Defendant must submit clear and convincing evidence that there was no service. “A facially correct return of service, present in this case, is presumed valid and, after judgment is entered, the burden is on the person attacking the service, [Defendant], to show by *clear and convincing evidence* that the service was irregular.” *Miebach v. Colasurdo*, 35 Wn. App. 803, 808; 670 P.2d 276 (1983), citing *Dubois v. Western States Inv. Corp.*, 180 Wash. 259, 263, 39 P.2d 372 (1934); *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918) (emphasis added).

If the trial court vacated the default judgment without substantial evidence presented by the Defendant that service was irregular, it was an abuse of discretion.

**B. THE TRIAL COURT ABUSED ITS
DISCRETION IN VACATING THE DEFAULT
JUDGMENT.**

As a general rule, the law favors determination of controversies on their merits and, consequently, default judgments are disfavored. *Griggs v.*

Averbeck Realty, Inc., 92 Wn.2d 576, 581, 599 P.2d 1289 (1979).

However, simply because they are disfavored, default judgments are not to be automatically set aside. The Defendant must follow the correct process and meet the evidentiary standards. If Defendant fails to do so, the default judgment should not be vacated.

In determining whether to grant a motion to vacate a default judgment, “[t]he trial court must balance the requirement that each party follow procedural rules with a party’s interest in a trial on the merits.” *Showalter*, 124 Wn. App. at 510. Although “[d]efault judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits,” *Showalter*, 124 Wn. App. at 510, “we also 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.” *Little v. King*, 160 Wn. 2d 696, 703, 161 P.3d 345 (2007). As our Supreme Court recently noted, “[L]itigation is inherently formal. All parties are burdened by formal time limits and procedures.” *Morin*, 160 Wn.2d at 757.

Rosander v. Nightrunners Transp., Ltd., 147 Wn. App. 392, 403 (Wash. Ct. App. 2008).

1. Vacating A Default Judgment Requires Defendant to Meet a Four-Part Test.

The court considers four factors when determining whether to set aside a default judgment under CR 60(b). These factors are: (1) That there is *substantial evidence* to support a least prima facie defense to the claim; (2) that the moving party’s failure to timely appear in the action, and

answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). Factors (1) and (2) are primary; factors (3) and (4) are secondary. *Id.* at 352-53.

The Defendant has the burden of proving all four factors. If the Defendant failed to meet all four factors, then it was an abuse of discretion for the default judgment to be vacated. “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. It is thus an abuse of discretion.” *Little v. King*, 160 Wn.2d 696, 706 (Wash. 2007).

Here, the Defendant did not provide any substantial evidence to establish any defense to the claims. Vacating the default was an abuse of discretion.

2. Defendant Did Not Present Clear And Convincing Evidence as to Lack of Service. It was thus an Abuse of Discretion for the Trial Court to Vacate the Judgment.

Plaintiff's primary argument is that she was not served with the Summons and Complaint, and that she did not know about the suit. Defendant did not present any evidence to controvert the Process Server's Declarations of Service. On the contrary, the evidence before the trial court clearly showed that the service occurred, and the Trial Court acknowledged that service occurred: "[I]t was pretty apparent that that's who got served was the son of Hawaiian – of a family who was living in her basement." RP at 16, line 20-23. Defendant failed to present clear and convincing evidence as to lack of service, it was an abuse of discretion for the Judgment to be vacated based on lack of service.

The Process Server submitted two clear, uncontroverted declarations that the Defendant was properly served at her residence. CP at 7, 66. Service is presumed valid unless defendant can present *clear and convincing evidence* that service was not performed. "A facially correct return of service, present in this case, is presumed valid and, after judgment is entered, the burden is on the person attacking the service, [Defendant], to show by *clear and convincing evidence* that the service was irregular." *Miebach v. Colasurdo*, 35 Wn. App. 803, 808; 670 P.2d 276 (1983), citing *Dubois v. Western States Inv. Corp.*, 180 Wash. 259, 263, 39 P.2d 372 (1934); *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918) (emphasis added).

Washington law provides that service may be made personally or by substitute service. “(15) In all other cases, to the defendant personally, *or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.*” *R.C.W.* 4.28.080(15) (emphasis added).

The first Declaration of Service from the licensed Process Server lists out the specific date, time location and physical description of the person served at the residence. CP at 7. It is prima facie evidence of proper service. When advised that Defendant was challenging the personal service, the Process Server went back to the home to refresh his memory about the service. He then provided a supplemental declaration regarding the service on the son/co-resident. CP at 66.

Defendant’s own declaration also confirms that at the time of service, she had a Hawaiian family *living with her in the basement*. “I had the Manors’ family living in my basement – a husband, wife, son and daughter.” CP at 49. The family consisted of a husband and wife with a son and daughter. Defendant declared that the son was approximately *15 years old and living in the household at the time*. CP at 49. Defendant presented no evidence that the 15 year old was not served, or that he was not of suitable age and discretion for service. The evidence before the trial

court confirmed that the service requirement of *R.C.W.* 4.28.080(15) was met.

Service on the 15 year old resident was proper. In a similar case where a 15-year old foster child had been the one served, the Court of Appeals found that she was a person of suitable age and discretion.

Based on the facts before it, the trial court did not err in concluding that the foster daughter was a person of suitable age and discretion for purposes of receiving service of process. The trial court found that at the time of service the foster daughter was 15 years and some months old, familiar with the court system, a leader of her peer group and concerned with her future. Further, there was testimony at trial indicating that the foster daughter could read and was of at least average intelligence. Courts in other jurisdictions have decided that persons of the same age as the foster daughter are of suitable age and discretion for the purpose of receiving service of process. See *Day v. United Sec. Corp.*, 272 A.2d 448, 449-50 (D.C. 1970); *Holmen v. Miller*, 296 Minn. 99, 206 N.W.2d 916, 919-20 (1973); *Annot.*, 91 A.L.R.3d 827 (1979). The trial court properly concluded that the foster daughter was of suitable age and discretion.

Miebach v. Colasurdo, 35 Wn. App. 803, 808 (Wash. Ct. App. 1983).

The service issue in that case was appealed, and the Washington Supreme Court affirmed that service on the 15 year old foster daughter was appropriate:

JCR 4(e)(13) provides in part, "[s]ervice shall be made . . . to the defendant personally, or by leaving complaint and notice at the house of his usual abode with some person of suitable age

and discretion then resident therein." Although there was conflicting testimony about the suitability of Phillips to receive service of process, the trial court held the Colasurdos were properly served by substitute service upon Phillips who was a person of suitable age and discretion. Furthermore, the court found that Phillips, although a "troubled and rebellious child, whose academic achievements were below the level of [her] school grade . . .", was talented, familiar with the court system, and had an appreciation for the consequences of violating the law. The Court of Appeals, upon review of the record and an analysis of other states' case law, found no error. *Miebach*, 35 Wn. App. at 808, 35 Wn. App. at 808. We concur with the Court of Appeals that the trial court did not abuse its discretion and made no error in finding Samatra Phillips to be of "suitable age and discretion" to receive service of process.

Miebach v. Colasurdo, 102 Wn.2d 170, 179 (Wash. 1984).

Here, the trial court acknowledged that Defendant did not provide clear and convincing evidence of lack of service: "I'm not sure a boarder in your house is the same thing as a resident. I'm not sure, I'm not sure now the family, the Hawaiian family was living in the house, but it was pretty apparent that that's who got served was the son of Hawaiian – of a family who was living in the basement. I didn't know if they were renting or if it was some kind of charitable thing or why these folk were in their basement...." RP at 16. If there was any question, Defendant failed to meet her burden of proof.

The first thing to note is that the Trial Court acknowledged that the son residing in Defendant's house was served. This is consistent with the Process Server's declarations. Defendant was thus obligated to present clear and convincing evidence that the person was not suitable age and discretion residing in the home. Defendant did not present clear and convincing evidence that the family did not reside in her home, or lack of service. On the contrary, Defendant *confirmed that the family lived in her basement*. CP at 49. Defendant presented no evidence to contradict the Process Servers' declarations.

Defendant did not present clear and convincing evidence that service was not made according to the statutes. In fact, Defendant did not present any evidence at all that the person served was not "some person of suitable age and discretion then resident therein." Accordingly, Defendant did not meet her burden to prove a lack of service by clear and convincing evidence. The Trial Court's vacation of the Judgment on this ground was an abuse of discretion.

3. Defendant Offered No Substantial Evidence of a Meritorious Defense to the Complaint. It was thus an Abuse of Discretion for the Trial Court to Vacate the Judgment.

Defendant's second argument is based on *CR 60(b)(4)*, which allows a judgment to be vacated for "fraud, misrepresentation, or other misconduct of an adverse party." *CR 60(b)(4)*. Again, Defendant must offer not only a general denial of the claims, but must offer a *meritorious defense* to each of the claims. "We agree with defendants that the court's first concern in ruling on such a motion for vacation of a default judgment, which is based on excusable neglect, is whether a showing has been made as to the existence of a meritorious defense." *Beckett v. Cosby*, 73 Wn.2d 825, 827 (Wash. 1968).

Defendant offered no evidence whatsoever to support an assertion that Plaintiff committed fraud, misrepresentation or misconduct as required under *CR 60(B)(4)*. Defendant simply states: "The only reason this subject matter left the family circle was Mr. Cleverley's deposition. Carol Campbell answered questions in a deposition and spoke to close family members regarding what was happening to one of their family members. This does not support the legal definition of defamation and is fraud misrepresentation and willful misconduct of Matthew Cleverley." CP at 47. Defendant's conclusion that the deposition where Defendant admitted to making defamatory statements is fraud, misrepresentation or willful misconduct on the part of Plaintiff is unintelligible.

It is undisputed that Defendant made false and defamatory statements about Plaintiff to other people. Defendant apparently tries to assert some sort of “family circle immunity” to a defamation claim. There is no such defense to a claim of defamation, and Defendant offers no authority that would support it as a meritorious defense.

Defendant does make one valid argument about statements that were made in the scope of her deposition. There is a defense of privilege to statements made in a legal proceeding. However, this was not the basis of the Complaint. The deposition is not the *source* of the statements. The deposition is where the Defendant *admits* to having made the statements to other parties. The deposition established that Defendant was told defamatory information from her son, and then she rebroadcast the defamatory statements to others. For example:

Q. So did you discuss this with the rest of your family members as well? What I’m referring to is – is Michael’s suggestion that Colleen and I were having an affair.

A. I would say yes. I’d say it’s pretty commonly accepted, yes, that Colleen and you are traveling together, and yes, you are.

Q. Okay. And who else have you discussed this with?

A. I don’t know. I don’t know which one of my children, which – my children. I’ve discussed it with my children because we’re heartbroken over it all.

CP at 27-27.

It is not her statements in the *deposition* that are defamatory, because they are privileged. It is the statements she *admitted to making outside the deposition* that were defamatory. There is no defense of privilege to those statements, and Defendant provided no authority for one.

An important consideration for the Court here is that *Defendant does not deny making the defamatory statements*. Her apparent defense is that she only made them to her family. That is neither a denial nor a recognized defense to defamation. The statements were not made in any privileged context, and it is clear from the context of her deposition that her widespread dissemination of false statements was intended to hurt the reputation of the persons being discussed.

The claim of defamation was only one of three economic claims in the Complaint. Even if, *arguendo*, Defendant presented a meritorious defense to the defamation claim, Defendant presented no substantial competent evidence of any defense to the other claims in the Complaint. She presented no defense whatsoever to the Outrage claim, nor any defense whatsoever to the Intentional Interference with Business Relationships claim. Since Defendant did not establish any meritorious

defenses to the other claims in the complaint, vacating the default judgment was an abuse of discretion.

4. Defendant Offered No Other Valid Arguments under CR 60(b)(1). It was thus an Abuse of Discretion for the Trial Court to Vacate the Judgment under CR 60(b)(1).

a. There was No Evidence Supporting Inadvertence

“Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unseasonable time or in an improper manner.” *Mosbrucker v. Greenfield Implement*, 54 Wn. App. 647, 652 (Wash. Ct. App. 1989).

Defendant offered no evidence that there were any improper procedures, or that they were done in an improper manner. And there is none in the record. Thus, there was no evidentiary basis for the Trial Court to vacate the default judgment under CR 60(b)(1).

b. Defendant Submitted No Evidence Supporting Mistake, Surprise or Excusable Neglect. The Trial Court Abused Its Discretion in Vacating the Default Judgment without Substantial Evidence.

Defendant’s arguments also fail under CR 60(b)(1). At the hearing, Defendant’s counsel conceded that there was no excusable

neglect: “Was it excusable neglect, number 2? No, it wasn’t excusable neglect.” RP at 9, line 19-20.

Defendants’ entire remaining argument appears to be that she was somehow confused by the Plaintiff’s address. Defendant’s Motion to Vacate states:

Carol Campbell resides in Spokane County. The only contact that Carol Campbell has had with the plaintiff is through a deposition conducted October 5, 2009 in Spokane County, Washington. Mr. Cleverley lists his office as Poulsbo Washington in Pierce County. He states he is employed by McCarthy & Holthus, LLP. He filed his action pro se on footer identifying McKinstry & Division Law firm in Suquamish, Washington. There was no logical reason for the Plaintiff to file in Kitsap County and the choice of venue was chosen to make litigation difficult for the defendant.

CP at 44-45.

The argument does not offer any evidence for *Defendant’s* mistake, inadvertence, surprise, excusable neglect or irregularity. Even assuming, *arguendo*, that all of the statements made are true, none of them individually, nor even all of them collectively, create a basis for setting aside the default judgment in this case. Defendant offers no evidence as to why any of those issues *caused her* to have any mistake, inadvertence, surprise, excusable neglect or irregularity.

Further, none of those factors, even accepted as true, would create a basis for setting aside the default judgment, especially since Defendant failed to appear at all. For example, there is no evidence that Defendant was somehow confused and provided an Answer or response to an incorrect address, or that there was something that excused her from answering because she was confused, or she was misled and sent it to an incorrect address. In short, Defendant did not offer *any* evidence, and did not offer a single substantive argument that supports her contention of mistake, inadvertence, surprise, excusable neglect or irregularity. Her arguments simply do not meet the standards required of CR 60(b)(1).

Defendant does not deny making the defamatory statements. She admits making defamatory statements to family members and others. She offered no prima facie defense to the claims, offered no substantial evidence, and offered no supporting legal authority for a defense. She thus failed to meet her burden for the Trial Court to set aside the default Judgment.

5. Defendant Presented No Evidence to Establish Defenses as to Damages

Defendant failed to offer any evidence or establish any defense as to the amount of the damages awarded in the default judgment.

Except in unusual circumstances, a party who moves to set aside a judgment based upon damages must present evidence of a prima facie defense to those damages. *See CR 60(e)(1); White, 73 Wn.2d at 352.* The amount of damages in a default judgment must be supported by substantial evidence. *See, e.g., Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 240-42, 974 P.2d 1275 (1999).* It is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing. *Shepard, 95 Wn. App. at 242.*

Little v. King, 160 Wn.2d 696; 161 P.3d 345 (2007).

Defendant has not presented a prima facie defense to the amount of damages. It is thus irrelevant if the damages would have been less in a contested hearing. To the extent that the Court's comments may be construed as a finding that the damages were excessive (See RP at 15), the Trial Court abused its discretion because there was no substantial evidence submitted that the damages were excessive.

VI. NO ATTORNEY FEES MAY BE AWARDED

There is no basis for an award of attorney fees to either party in this case. In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity. *Fisher Props., Inc., v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).*

RAP 18.1(a) provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party should request the fees or expenses as provided in this rule." Absent a contractual provision, statutory provision or well recognized principle of equity to the contrary, a court has no authority to award attorney fees to the prevailing party. *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941); *Herzog Aluminum, Inc. v. General Am. Window Corp.*, 39 Wn. App. 188, 191, 692 P.2d 867 (1984).

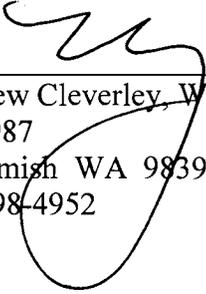
No attorney fees may be awarded to either party in this case, as the underlying claims are not based on contract, and the claims do not provide for attorney fee awards.

VII. CONCLUSION

While default judgments may be disfavored, a Defendant seeking to have one vacated must still present substantial evidence and a legal basis to support vacating the default judgment. Self-serving arguments without evidence and supporting legal authority do not meet the standards that the Courts have set for vacating a default judgment. Without requiring defendants to meet minimum standards to set aside default judgments, the finality of judgments becomes mercurial, and opens the door to abuses by defendants who don't respond, and then later seek to set aside defaults. In

this case, Defendant offered no evidence in support of her motion to vacate the default judgment. The Trial Court erred when it vacated it. Plaintiff respectfully requests that this Court reverse the Trial Court, and reinstate the default judgment.

Dated: September 27, 2010



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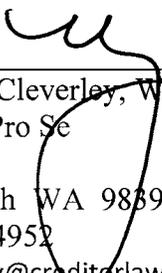
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CERTIFICATE OF SERVICE

I certify that on September 27, 2010, I served a copy of Appellant's Amended Brief on the following persons by first class mail:

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