

COURT OF APPEALS  
DIVISION II  
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No. 41457-1-II

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

ROBERT ROBINSON, an individual, Appellant,

v.

MIDWEST AIR TECHNOLOGIES, INC., a Washington Corporation;  
Respondent.

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APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS APPEAL

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## A. FACTS IN REPLY

The defendant makes a patent misrepresentation in its appellate brief when it claims that it “did not seek. . .relief from the default judgment pursuant to CR 60(b)(1).” Defendant’s brief, p. 28.<sup>1</sup> Based upon that misrepresentation, the defendant goes to great lengths to argue that, because it never sought relief pursuant to CR 60(b)(1), it is not barred from asserting claims pursuant to CR 60(b)(11) despite case law forbidding the assertion of both the “catchall” provision of CR 60(b) and any other enumerated section of CR 60(b). See, e.g., Friebe v. Supancheck, 98 Wn. App. 260, 266, 992 P.2d 1014(1999)(CR 60(b)(11) is “confined to situations involving extraordinary circumstances not covered by any other section of [CR 60(b)].”) The defendant also argues that Mr. Robinson spent unnecessary briefing on the clear rule that the one year time limit for CR 60(b)(1) motions cannot be extended under any circumstances. Defendant’s brief, p. 28.

In its motion to vacate filed with the trial court, the defendant’s very **first sentence** belies the representation it has now made to this court. That first sentence states “[p]ursuant to CR 60(b)(1) **and** (b)(11), Defendant Midwest Air Technologies, Inc., (“MAT”) hereby moves this Court for an order vacating the default judgment entered July 22, 2009.” CP 41(emphasis added). That same motion went on to ask the trial court

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<sup>1</sup> The defendant makes the same misrepresentation at page 29 of its brief when it said it “did *not* ask the trial court to actually grant relief pursuant to CR 60(b)(1) because that would have been futile given controlling Washington authority.” (Emphasis in original).

to “equitably toll the one year limit placed on motions under CR 60(b)(1).” CP 42. The defendant ended its motion to the trial court by asking the trial court “to find that equity supports allowing MAT to rely upon Rule 60(b)(1) in this case.” CP 54.

The defendant’s brief also fails to recount the timing of its failure to respond to the lawsuit that was properly served on it on February 10, 2009. CP 8. In reality, during the 20 days after the defendant was served and was required to appear and answer the complaint, the defendant instead merely e-mailed a copy of the complaint to its insurer on February 11, 2009. The defendant did absolutely nothing further, despite the Summons warning it that it must respond within 20 days of being served. CP 6-7. The defendant’s insurer, which the defendant now blames for causing the default, did not prepare its letter denying a defense to the lawsuit until March 18, 2009. That was 36 days after service of process. Even if the defendant had received its insurer’s denial of coverage letter, the letter would not have been received by the defendant until well after the 20 day time limit to appear in the lawsuit. By then, a default order had already been entered.

In short, the defendant did absolutely nothing after it e-mailed the properly served complaint to its insurer. It did not contact its primary legal counsel, who were obviously available given that the defendant contacted said counsel right after getting notice of Mr. Robinson’s default judgment. CP 63. The defendant did not contact Mr. Robinson’s counsel after

getting served. It did not contact the court or take the simple step of sending some form of appearance. The defendant did not contact its insurer for follow up within the 20 day deadline for appearing, despite having heard nothing from the insurer in response to the e-mailed complaint. And even after all of the deadlines on the Case Schedule issued by the trial court had expired, including the date that the defendant was ordered to appear for trial, the defendant still contacted no one regarding the lawsuit until it got the default judgment months after the ordered trial date. The defendant's neglect in this case was inexcusable.

#### **B. LEGAL ARGUMENT IN REPLY**

1. A default judgment cannot be set aside under CR 60(b) for a lack of substantial evidence supporting the judgment. Instead, an appeal of the judgment is required, which was impossible in the case at bar.

At the trial court level, Mr. Robinson specifically argued that the court cannot vacate a default judgment through CR 60(b) based upon any errors of law. CP 129. A direct appeal is the appropriate remedy. CP 129. The same argument was made in Mr. Robinson's opening brief to this court. Appellant's brief, p. 17. Of course, if a trial court makes a factual determination but did not have substantial evidence to do so, then the trial court committed an error of law. State v. Sweany, \_\_ P.3d \_\_, 2011 WL 2315170, n. 3 (June 14, 2011). In that instance, the party asserting a lack of substantial evidence to support the trial court's decision must timely appeal the decision. Burlingame v. Consolidated Mines & Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986). CR 60(b)(11) is

of no use when the basis for setting the judgment aside is an alleged lack of substantial evidence. Id.

The defendant failed to even address the trial court's lack of authority under CR 60(b) to set aside a judgment based upon allegedly insufficient evidence. The defendant's failure to address this fatal issue is glaring.

In Burlingame, supra, a judgment for contempt was entered against a litigant. The judgment included an award of \$50,000 for compensatory damages. Id. at 330. The trial court later set aside the judgment under CR 60(b) based upon a lack of substantial evidence to support the award of compensatory damages. Id. at 332. An appeal of the order vacating the judgment pursuant to CR 60(b) was filed, at which time Division Two transferred the question directly to the Supreme Court. Id. at 332.

In reversing the trial court and reinstating the judgment, our Supreme court stated as follows:

As an alternative reason for setting aside the contempt judgment of April 28, 1980 the court below concluded that insufficient evidence supported the judgment. Report of Proceedings, at 41–42. This conclusion exceeded the trial court's proper scope of inquiry. Relief from judgments and orders in both civil and criminal cases is governed by CR 60(b). State v. Scott, 92 Wn.2d 209, 595 P.2d 549 (1979); State v. Sampson, 82 Wn.2d 663, 513 P.2d 60 (1973). Civil Rule 60(b) does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings. Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc., 68 Wn.2d 756, 415 P.2d 501 (1966). **Errors of law are not correctable through CR 60(b); rather, direct appeal is the proper means of remedying legal errors.** State v. Keller, 32 Wn. App. 135, 647 P.2d 35 (1982); see also

Pamelin Indus., Inc. v. Sheen-U.S.A., Inc., 95 Wn.2d 398, 622 P.2d 1270 (1981). Here, **insufficiency of the evidence is not an error that is extraneous to the action or affects the regularity of the proceedings.** Burlingame, 106 Wn.2d at 335-36 (emphasis added).

According to Karl Tegland’s analysis of Burlingame, *supra*, “[i]nsufficiency of evidence to support a judgment holding former president of corporation in contempt of court for failing to comply with an order in a liquidation proceeding was not an error that was extraneous to action or affected regularity of proceedings, and, hence, **was not an error which was correctable under rule governing relief from judgments [CR 60(b)].**” 4 Karl B. Tegland, *Washington Practice: Rules Practice CR 60* (5<sup>th</sup> ed., 2010)(emphasis added).<sup>2</sup>

Cases construing CR 60(b)(11), which was the only rule used to set aside Mr. Robinson’s judgment, limit use of CR 60(b)(11) to precisely the same limited situations approved by the Supreme Court in Burlingame, *supra*. Indeed, Division 2 of the Court of Appeals specifically limits use of CR 60(b)(11) to situations involving “irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings.” In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (Div. 2, 1985).<sup>3</sup> Only one year after Yearout was decided, the Supreme Court specifically ruled that a claim that there was insufficient

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<sup>2</sup> “[A] judgment by default is just as good as any other judgment, and whether or not appellant knew that he had been sued is immaterial.” Puett v. Bernhard, 191 Wash. 557, 562, 71 P.2d 406 (1937). Thus, the rule in Burlingame that judgments cannot be set aside pursuant to CR 60(b) for an alleged lack of substantial evidence applies to all judgments equally, including defaults.

<sup>3</sup> Of course, Division 2 authority on this point is consistent with the Supreme Court and the other divisions of the Court of Appeals. *See, e.g., Friebe v. Supancheck*, 98 Wn. App. 260, 266, 992 P.2d 1014 (Div. 1, 1999).

evidence to support a damages award was not subject to relief pursuant to CR 60(b). Using language nearly identical to the language used in Yearout, the Supreme Court refused to set aside a damages award pursuant CR 60(b) because arguing that the damages award was based on insufficient evidence does not implicate matters “extraneous to the action or affect[ing] the regularity of the proceedings.” Burlingame, 106 Wn.2d at 336. Thus, it is impossible under binding Washington precedent to set aside a default judgment pursuant to CR 60(b)(11) when the damages reflected in the judgment are being attacked based upon a lack of substantial evidence to support them.<sup>4</sup>

The defendant’s position in the case at bar is that there was not substantial evidence to support Mr. Robinson’s damages award. That claim is not cognizable under the authority set forth above and could only have been corrected via a direct appeal. Indeed, the defendant itself concedes that the basis of a CR 60(b)(11) motion “cannot be encompassed by any of the other subsections of the rule and must relate to ‘irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings.’” Defendant’s brief, p. 12. Given that concession, and given t he Supreme Court and other binding precedent set forth above that a lack of substantial evidence to support a damages award

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<sup>4</sup> Of course, a party who obtains a default judgment is presumed to have had substantial evidence to support the judgment. Pfaff v. State Farm, 103 Wn. App. 829, 834, 14 P.3d 837 (Div. 2, 2000). To overcome that presumption, it is incumbent on the defaulted party to come forth with competent evidence to prove a defense to the damages awarded by default. Little v. King, 160 Wn.2d 696, 704-05, 161 P.3d 345 (2007). A claim that the damages are too high is not a legally cognizable argument to overcome a default judgment. Rosander v. Nightrunners Transport, Ltd., 147 Wn. App. 392, 408, 196 P.3d 711 (Div. 2, 2008).

is not extraneous to the action of the court, the trial court was without authority to vacate Mr. Robinson's damages award based upon CR 60(b)(11).

The defendant cites 3 primary cases for its ill conceived argument that CR 60(b)(11) authorizes the vacating of Mr. Robinson's compensatory damages when those damages are allegedly not supported by substantial evidence. The first case is Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993). In that personal injury case arising from a car crash, the defendants were never personally served and were instead served by publication. The newspaper publishing the lawsuit initially published only the order allowing publication, and failed to publish the actual summons. By the time the summons was published, the statute of limitations had expired on the plaintiff's claims. Id. at 71.

Despite the problems with service by publication and the expiration of the statute of limitations, the trial court entered a default judgment against the defendants. About five weeks after the default was entered, the defendants moved to dismiss the lawsuit for lack of personal jurisdiction, or to otherwise set the default aside. Id. at 71-72.

The trial court dismissed the lawsuit with prejudice because the statute of limitations had expired before the defendants were served by publication. Although the dismissal of the lawsuit nullified the default judgment anyway, the trial court also ruled that "independent grounds" would have existed to set the default aside even if the lawsuit had not been

dismissed. Id. at 72-73.

On appeal, the Court of Appeals ruled that the defendants had been concealing themselves from personal service and, therefore, the statute of limitations was tolled during the time they concealed themselves. Id. at 75. The case was remanded to determine how long the concealment lasted to see if the statute of limitations had been tolled long enough to reinstate the lawsuit. In remanding the case, the Court of Appeals issued an advisory opinion that, if the trial court determined that the statute of limitations had been tolled and had not expired before service by publication, then the default judgment could be set aside because there was absolutely no evidence in the record that some of the defendants had any liability for the crash. Id. at 76-79.<sup>5</sup>

Caouette's pronouncement of the rule regarding CR 60(b)(11) is both incorrect and not binding. The law is clear that CR 60(b)(11) can only be used to set aside a default based upon "irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings." In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (Div. 2, 1985). The Supreme Court has specifically ruled that a party's claim that damages awarded against her are not supported by

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<sup>5</sup> Whether the Court of Appeals engaged in dicta by pronouncing a ruling that was not necessary to its determination that the trial court erred in dismissing the entire lawsuit with prejudice, or whether the opinion was an advisory opinion to alert the trial court to what it should do if it decides to reinstate the case on remand, the opinion regarding default judgments is not binding. In re Elliott, 74 Wn.2d 600, 616, 446 P.2d 347 (1968) (Advisory opinions are not binding on other courts.)

substantial evidence “is not an error that is extraneous to the action or affects the regularity of the proceedings.” Burlingame v. Consolidated Mines & Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986).

Because an alleged lack of substantial evidence is not extraneous to the action of the court and does not affect the regularity of the proceedings, a defaulted party’s argument that CR 60(b)(11) is a valid line of attack is incorrect. CR 60(b)(11) is of no use here.

The second case upon which the defendant relies is Calhoun v. Merritt, 46 Wn. App. 616, 731 P.2d 1094(1986). In that case, the defaulted party moved to set the default judgment aside less than 2 months after the default was entered. Accordingly, CR 60(b)(1) was available.

The defendant in the case at bar attempts to bootstrap Calhoun into a CR 60(b)(11) analysis by claiming that the case allows a trial court to vacate a default judgment in a personal injury case because it is too difficult to support a damages defense without conducting discovery. But the most Calhoun can do for the defendant here is help bolster its claim that it has a defense to Mr. Robinson’s damages because no discovery was conducted. But a defense to damages is merely a required element under White v. Holm to set aside a default judgment pursuant to CR 60(b)(1). Calhoun in no way implicates CR 60(b)(11), which court rule negates any claim that a judgment may be set aside based upon an alleged lack of substantial evidence. Burlingame, supra. And the Supreme Court has recently confirmed that it is incumbent on the defaulted party to present

competent evidence of a defense to damages to overcome a default judgment. Little v. King, 160 Wn.2d 696, 704, 161 P.3d 345 (2007). The Supreme Court's decision in that case stands in stark contrast to the earlier Division 3 decision in Calhoun, which earlier case apparently would allow a defaulted party to present no evidence of a defense to damages and instead simply claim that it cannot present a defense without conducting discovery. Calhoun has been overruled *sub silentio* by the ruling in Little v. King requiring competent evidence of a defense to damages..

The third case the defendant cites is Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 974 P.2d 1275 (1999). But that case is also a CR 60(b)(1) case. More importantly, that case guts the defendant's argument in the case at bar that its damages defense is sufficient to avoid the default judgment. The court in Shepard Ambulance, Inc., held that, because the defendant failed to file a motion to set aside the default within 1 year, it was barred from avoiding the default pursuant to CR 60(b) despite having a strong damages defense. That is precisely the situation in the case at bar; namely, even if the defendant had a valid damages defense, its failure to move to vacate the judgment within one year obviates its ability to avoid the default judgment even if it did have a defense to damages.

In sum, it is clear that whether insufficient evidence supported Mr. Robinson's judgment is irrelevant on a CR 60(b)(11) motion brought more

than one year after the default judgment was entered.<sup>6</sup> The trial court erred in setting aside the default judgment on the basis of insufficient evidence to support the judgment. The defendant's brief is replete with argument about why the judgment should be vacated based upon insufficient evidence, but the defendant failed to even address the rule that such a claim is not cognizable except through a direct appeal. Binding Supreme Court authority negates any attempt to vacate Mr. Robinson's judgment based upon an alleged lack of substantial evidence to support his damages.

2. The defendant cannot assert both CR 60(b)(1) and CR 60(b)(11) defenses. Even if it could, the trial court erred when it considered only the *White v. Holm* factors, which are required to prove "mistake" or "excusable neglect" pursuant to CR 60(b)(1), and then set the judgment aside pursuant to CR 60(b)(11).

As mentioned above, the defendant argued to the trial court that it sought relief from the default judgment under both CR 60(b)(1) and (b)(11). The defendant's about-face in now trying to argue that it never sought relief pursuant to CR 60(b)(1) is understandable in light of the law that clearly obviates any attempt to set a default aside pursuant to both the "catchall" language of CR 60(b)(11) and any other subsection of CR 60(b). Shoen v. Shoen, 933 F. Supp. 871, 877 (D. Ariz., 1996)(ruling that the catchall codified at FRCP 60(b)(6) cannot be used to set aside a judgment

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<sup>6</sup>

Even if this court were to review the evidence, substantial evidence exists to support the judgment. See Section 3, infra.

if any other section of FRCP 60(b) is asserted.)<sup>7</sup>

The trial court, recognizing that CR 60(b)(1) was unavailable to the defendant, did precisely what is forbidden by prior decisions of this court. The trial court's written decision merely analyzed each of the four White v. Holm factors required to set a default judgment aside under CR 60(b)(1), found that those factors were met, mentioned that more than one year had elapsed before the defendant filed its motion to vacate the judgment, and then promptly set the judgment aside under the unavailable CR 60(b)(11). CP 170-71. This court's prior decisions on this precise point make it clear that the trial court erred:

The use of CR 60(b)(11) 'should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.' State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982). Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings. Keller, 32 Wn. App. at 141, 647 P.2d 35. The courts have stressed the need for the presence of 'unusual circumstances' before CR 60(b)(11) will be applied. In Re the Adoption of Henderson, 97 Wn.2d 356, 360, 644 P.2d 1178 (1982).

In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (Div. 2, 1985).<sup>8</sup>

In the case at bar, there are no such "unusual circumstances"

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<sup>7</sup> FRCP 60(b)(6) states that a judgment can be vacated for "any other reason that justifies relief." Washington law is clear that FRCP 60(b)(6) is the parallel rule of Washington's CR 60(b)(11). Stanley v. Cole, 157 Wn. App. 873, fn. 19, 239 P.3d 611 (2010). Federal authority regarding court rules is persuasive when the federal court rule parallels a state court rule. Craig v. Ludy, 95 Wn. App. 715, 719, 976 P.2d 1248 (1999).

<sup>8</sup> The defendant's brief to this court correctly fails to even attempt to distinguish Yearout or to otherwise question its applicability to the case at bar.

warranting the application of the rarely used CR 60(b)(11). What happened in the case at bar is precisely what happened in nearly every case the defendant cites for the proposition that it was a “mistake” that led to the default judgment; namely, the defendant and its insurer allegedly miscommunicated about who was to defend Mr. Robinson’s lawsuit. For example, in Norton v. Brown, 99 Wn. App. 118, 992 P.2d 1019 (1999)(review denied, 142 Wn.2d 1004, 11 P.3d 826 (2000)), the court found that a “mistake” sufficient to meet one of the White v. Holm factors occurred when the defaulted party and his insurer misunderstood who was to defend the lawsuit. But again, the defendant in the case at bar is bootstrapping a CR 60(b)(1) case to this case even though it waited well over one year to file its motion to set aside the default judgment.

Whether the defendant exhibited a valid “mistake” or “excusable neglect” does not save it from this judgment. The defendant must come forward with far more than meeting all White v. Holm factors because a “mistake” cannot be remedied under CR 60(b)(11). Friebe v. Supancheck, 98 Wn. App. 260, 266-67, 992 P.2d 1014 (1999). And the one year time limit of CR 60(b)(1) cannot be extended under the guise of CR 60(b)(11). Id. While the defendant is correct that it must also meet all four White v. Holm factors, it must do far more given that it waited well over one year to file its motion to vacate this default judgment. Additionally, the defendant’s attempt to bootstrap the CR 60(b)(1) cases and the more lenient standard applicable thereto to a motion under CR 60(b)(11) ignores

the rule that the four White v. Holm factors, with nothing more, apply only to motions to set aside a default under CR 60(b)(1). Luckett v. Boeing Co., 98 Wn. App. 307, 314-15, 989 P.2d 1144 (1999).

In the case at bar, the trial court concluded that the White v. Holm factors were met. But the trial court found nothing more. It did not even mention any “extraordinary circumstances.” CP 170-71. The trial court did not make any findings about whether the entry of default was occasioned by circumstances extraneous to the trial court or by an irregularity in the trial court. Id. Without those additional findings as required by the wealth of case law set forth herein, the trial court erred in setting the default judgment aside.

On a related note, the case that the defendant cites as support for its concession that CR 60(b)(11) applies only in situations extraneous to the action of the court is Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 122 P.3d 922 (2005). In that case, the plaintiff sued an insurance company and served the lawsuit on the insurance commissioner as required by RCW 48.05.200. Id. at 304. The insurance commissioner, after getting served, failed to notify the insurance company of the lawsuit, which violated the commissioner’s statutory duty to so notify the insurer being sued. Id. The insurer, unaware it had been sued, failed to respond to the lawsuit and was subjected to a default.

In affirming the trial court’s decision to vacate the default judgment pursuant to CR 60(b)(11), the Court of Appeals reaffirmed that

CR 60(b)(11) is only to be used in

extraordinary circumstances not covered by any other section of CR 60(b). In re Marriage of Yearout v. Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985). Moreover, those circumstances must relate to ‘irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings.’ Id. Topliff, 130 Wn. App. at 305.

Because the insurance commissioner’s statutory violation was not under the control of the parties or the trial court, and because the insurance company was robbed of due process by never getting the lawsuit timely, CR 60(b)(11) was available to set the judgment aside. Of course, the insurer also had to show that it met all four White v. Holm factors, in addition to meeting the strict test necessary for the application of CR 60(b)(11). Id. at 308.

In the case at bar, there were no extraordinary circumstances that led to Mr. Robinson’s judgment, nor are there any irregularities extraneous to the lawsuit or regularity of the trial court. The trial court did not even mention any in her written ruling setting aside the default judgment. CP 170-71. Without those factors, CR 60(b)(11) is of no use to the defendant, even if it did meet all four White v. Holm factors. The trial court merely found that all four factors were met, but it did not find any extraordinary circumstances or extraneous irregularities. The trial court erred, and this court should reverse it and reinstate Mr. Robinson’s judgment in full.

3. The court entering the judgment had substantial evidence to support Mr. Robinson’s compensatory damages. Even if it did not, that would be an error of law correctable only by direct appeal.

The defendant argues that the court that awarded compensatory damages to Mr. Robinson had no substantial evidence to support the award, including emotional damages. But Mr. Robinson presented sworn testimony that he suffers “intense pain on a regular basis.” CP 18. He has a permanent physical impairment of up to 8% in his leg. CP 21. He is disfigured with a “large mass of protruding scar tissue.” CP 19. He missed a lengthy time from work and was confined to a wheelchair. CP 18. All of those facts provide substantial evidence of general damages, to include emotional distress. At a minimum, emotional injury can be inferred from the massive amounts of pain, suffering and scarring to which Mr. Robinson testified, as well as the stigma of being confined to a wheelchair.

“The trial court's award for emotional distress damages is akin to a general award for pain and suffering. The court is not required to explain its weighing process or segregate the particular factors it considers so long as the award is reasonably within the range of evidence.” Womack v. Von Rardon, 133 Wn. App. 254, 264, 135 P.3d 542 (2006). Even if the trial court lacked substantial evidence to support its measure of damages, that claimed error is an error of law. Id. at 262-263. “Whether substantial evidence exists is also a question of law for the court.” State v. Sweany, \_\_\_ P.3d \_\_\_, 2011 WL 2315170, n. 3 (June 14, 2011). Errors of law are correctable only by direct appeal, not via a CR 60(b) motion. State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 35 (1982).

On a related note, “a challenge to the sufficiency of the evidence admits the truth of the evidence of the party against whom the challenge is made and all inferences that can reasonably be drawn from that evidence, and requires that the evidence be interpreted most strongly against the challenger and in the light most favorable to the opposing party.” State v. Hutton, 7 Wn. App. 726, 727-28, 502 P.2d 1037 (Div. 2, 1972). In Hutton, Division 2 also confirmed that whether substantial evidence exists is a question of law for the court. Id. at 728.

In the case at bar, Mr. Robinson submitted a wealth of evidence of physical suffering and pain, scarring and an inability to work. All of those facts, including all inferences therefrom, are to be interpreted in Mr. Robinson’s favor and strongly against the defendant. With the pain, suffering and scarring Mr. Robinson swore to in his declaration, the trial court reasonably inferred the presence of emotional damage. The court entering this judgment specifically found that \$2 million was an appropriate award under all of the circumstances present. The defendant’s argument that Mr. Robinson was awarded too much because his award is nearly 30 times the special damages cannot be well taken. Indeed, the Supreme Court unanimously approved a default judgment in a personal injury case of 31.54 times the medical specials in Conner v. Universal Utilities, 105 Wn.2d 168, 170, 712 P.2d 849 (1986)(reversing trial court and reinstating default judgment even though the defendant claimed the damages awarded were too high and were beyond the amount pled against

it in the complaint). Conner was specifically argued to the trial court. CP 12.<sup>9</sup>

Additionally, there is no evidence in this record in any way challenging that Mr. Robinson's damages should be less than \$2 million. The defendant apparently hopes this court will use some multiplier of special damages to conclude that an award of less than 30 times those specials was too high, even though the Supreme Court affirmed a default award of 31.54 times the special damages in Conner. More importantly, and as set forth above, claiming that substantial evidence does not support Mr. Robinson's award is a legal error correctable only on appeal. That rule of law cannot be challenged given the wealth of case law holding that the existence of substantial evidence is not correctable with a CR 60 motion and is instead appropriate only for appeal. This court should reverse the trial court and reinstate the default judgment.

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<sup>9</sup> Although not argued by the defendant, it at least implies that the court entering Mr. Robinson's judgment should have conducted an evidentiary hearing and considered live testimony before entering judgment. But no such hearing or live testimony is required. CR 55 provides for the entry of default judgments. The following provision of CR 55(b)(2) allows the court discretion to conduct a hearing as the court deems necessary:

If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury.

Findings of fact and conclusions of law are required by this subsection.

Court of Appeals authority is also clear that no live testimony is required on a motion to enter default judgment. Thomas v. Green, 32 Wn. App. 29, 32, 645 P.2d 732 (1982).

### C. RESPONSE TO DEFENDANT'S CROSS APPEAL

1. Mr. Robinson never consented to an employment relationship with the defendant, and the defendant has no evidence to the contrary. The trial court properly upheld the default as to liability.

The trial court set aside Mr. Robinson's default damages award but upheld the default as to liability. The defendant now argues in its cross appeal that the trial court abused its discretion in failing to set aside the default as to liability because "workers' compensation law may provide immunity to Robinson's personal injury claim." Defendant's brief, p. 39(emphasis added). The defendant's argument that it "may" be immune under worker's compensation law is predicated on the misguided notion that a question of fact exists as to whether both Mr. Robinson and the defendant consented to an employment relationship between the two. The defendant's concession to the weakness of its supposed liability defense by arguing that it "may" be immune from liability aside, case law and the facts of this case are fatal to the defendant's cross appeal.

First, the defendant itself wrote to Mr. Robinson's counsel on September 13, 2007, which was just a few months after this terrible injury incident, that "Mr. Robinson is not a Midwest Air Technologies employee." CP 68. Immediately after Mr. Robinson's leg was crushed, the defendant's Treasurer and Senior Vice President directed her staff to contact Mr. Robinson's employer, Corestaff, to confirm that Corestaff fulfilled its statutory obligation to report any on the job injury of its

employees to Labor & Industries. CP 60-61.<sup>10</sup> The defendant in the case at bar confirmed that the temporary agency reported the claim to L&I on behalf of its employee, Mr. Robinson. If Mr. Robinson had been the defendant's employee, then the defendant would not have contacted Corestaff to confirm that Corestaff reported the claim to L&I. Instead, the defendant itself would have had a statutory duty to report the injury to L&I.

Not only did the defendant disavow any employment relationship with Mr. Robinson, but Mr. Robinson also disavowed any such employment relationship. In fact, in his complaint filed February 3, 2009, and served on the defendant on February 10, 2009, Mr. Robinson confirmed that “[a]t the time of the forklift incident referred to herein, plaintiff Robert Robinson was not an employee of Midwest Air Technologies, Inc.” CP 3. In his motion for default judgment, he reiterated that same allegation. CP 17. Nowhere did either Mr. Robinson or the defendant ever allege facts supporting an employment relationship between the two until 18 months after this lawsuit was served when the defendant finally filed a motion to vacate the default judgment. Even then, the most the defendant argued was that there “may” be some employment relationship that provided some form of immunity. But the defendant failed to provide any facts to support that supposition.

Not only do the facts belie the defendant's current argument that

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<sup>10</sup> That statutory obligation of Mr. Robinson's employer is codified at RCW 51.28.025.

there “may” be some immunity under worker’s compensation law, but the law itself belies that argument as well. It is well settled that “[u]nder workers' compensation law, an employment relationship exists if: (1) the employee and the employer mutually consent to the relationship; and (2) the employer has the right to control the servant's physical conduct in the performance of his duties. Novenson, 91 Wn.2d at 553, 588 P.2d 1174.” Jones v. Halvorson-Berg, 69 Wn. App. 117, fn. 2, 847 P.2d 945 (1993). “Thus, while an employer may ‘loan’ an employee to another, the borrowing employer will not become an ‘employer’ for purposes of RCW Title 51 unless a mutual agreement exists between the loaned servant or ‘borrowed employee’ and the borrowing employer. The burden of avoiding liability on the basis of the loaned servant doctrine is on the person claiming it, the party attempting to gain the benefits of statutory immunity from common law suit.” Rideau v. Cort Furniture Rental, 110 Wn. App. 301, 304, 39 P.3d 1006 (2002)(internal citations omitted).

In the case at bar, the record is undisputed that both the defendant and Mr. Robinson explicitly denied any employment relationship between them. There certainly are no facts to show either party consented to such an employment relationship. And there are no facts to meet the defendant’s burden to prove an employment relationship with Mr. Robinson. The court, in entering the default judgment, had no contrary evidence. And in refusing to set aside the default as to liability, the trial court had no facts to dispute the lack of any employment relationship

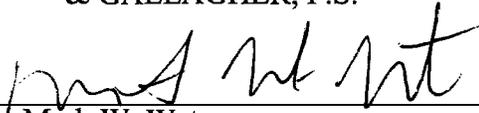
between the parties or the lack of any consent to such a relationship. The defendant's bald attempt to now argue that there "may" be some employment relationship certainly does not rise to the level of an abuse of discretion to uphold the default as to liability. In fact, there is not one shred of evidence that either party to this lawsuit ever consented to an employment relationship between them. This court should affirm the trial court's ruling upholding the default as to liability.

### CONCLUSION

For the foregoing reasons, the court should reverse the trial court's ruling setting aside Mr. Robinson's default judgment and reinstate that judgment in total. The court should affirm the trial court's ruling that the default as to liability is proper.

DATED this 18 day of August, 2011.

THE LAW OFFICES OF WATSON  
& GALLAGHER, P.S.

  
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Attorney for Appellant

COURT OF APPEALS  
DIVISION II  
NOV 10 10 51 AM '11  
STATE OF WASHINGTON  
BY  DEPUTY

**COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON**

ROBERT ROBINSON, an individual,  
Appellant,  
v.  
MIDWEST AIR TECHNOLOGIES, INC.,  
a Washington Corporation,  
Respondent.

NO. 41457-1-II  
**DECLARATION OF MAILING**

Marie Ekstrand hereby declares and states as follows:

On August 18<sup>th</sup>, 2011, I deposited into the U.S. Mail, postage prepaid, true and correct copies of the following documents in the above-captioned matter:

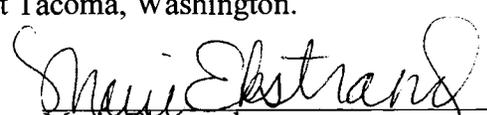
- 1. Appellant's Reply Brief and Response to Cross Appeal; and
- 2. Declaration of Mailing;

addressed to the attorneys of record for respondent and cross-appellant Midwest Air Technologies, Inc., as follows:

Todd W. Rosencrans, Esq.  
Daniel Ruttenger, Esq.  
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I hereby declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18<sup>th</sup> day of August, 2011, at Tacoma, Washington.

  
Marie Ekstrand

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