

No. 41821-5

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

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STATE OF WASHINGTON
BY *u*

MASAYOSHI ICHIKAWA and JANE DOE ICHIKAWA,

Defendants/Appellants,

v.

ELIZABETH YVONNE KIMBALL,

Plaintiff/Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff/Respondent Elizabeth Yvonne Kimball (hereinafter referred to as “Plaintiff” or “Ms. Kimball”) submits this Respondent’s Brief.

To prevail in this appeal, Appellants/Defendants Masayoshi Ichikawa and Jane Doe Ichikawa (hereinafter referred to as “Defendant” or “Mr. Ichikawa”) must show that the Superior Court abused its discretion in denying his motion to vacate the default judgment. A trial court abuses its discretion only where it adopts an unreasonable view, applies the wrong legal standard, or relies on unsupported facts. The Superior Court denied Defendant’s motion to vacate, not because of any debatable legal issue, but because Defendant failed to introduce any evidence that would have justified setting aside the default judgment.

Defendant only focuses on the contacts between his insurance company and Plaintiff’s counsel during the period leading up to the end of settlement negotiations. But those settlement negotiations terminated with an August 18, 2010 letter from Plaintiff’s counsel to Defendant’s insurer rejecting its settlement offer, and then specifically advising that he would continue his efforts to obtain service on Mr. Ichikawa and then proceed to

trial. There were then absolutely no contacts between Plaintiff or her representatives and Defendant or his representatives during the several months that elapsed between this letter and the entry of the default judgment on November 30, 2010.

The amounts of both Plaintiff's future economic damages and general damages were independently calculated by the Superior Court based on evidence presented at the default hearing, including Ms. Kimball's medical records, bills, and sworn testimony that her injuries from the collision were substantial and had a significant impact on her ability to engage in the activities she enjoyed before the accident. Including future medical expenses, Ms. Kimball's special damages were \$48,650. (CP 11.) The total amount of the default judgment, including \$150,000 in general damages awarded based on substantial evidence and testimony establishing Ms. Kimball suffered significant and permanent injuries as a result of the collision, was \$198,650. (CP 8-11.) The amount of the judgment clearly was not excessive.

Defendant did not produce any evidence from which the Superior Court could have concluded that Defendant substantially complied with the notice of appearance requirement, that Defendant has any meritorious

defense to the Plaintiff's claim, that the default judgment was entered as a result of any excusable neglect on the part of Defendant or his insurer, or that Plaintiff's counsel did anything to mislead Defendant or his insurance company into believing he would not do what he specifically promised he would do in his letter breaking off settlement negotiations. Defendant's appeal is frivolous, and Plaintiff should be awarded her attorney's fees and costs incurred in opposing it.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. Did Defendant substantially comply with the appearance rule, where there were no contacts between the parties or their representatives, during the period that elapsed between Plaintiff's counsel advising Defendant's insurance company at the breakdown of settlement negotiations that he would proceed to serve Defendant and then to trial, and entry of the default judgment several months later?

2. Did the Superior Court abuse its discretion in ruling that Defendant did not establish a prima facie defense that the default judgment was excessive, where the amount of the default judgment was based on medical records and bills submitted into evidence, as well as the testimony of Plaintiff in court concerning the substantial and ongoing effect her

injuries had and are having on her life, and where, despite Plaintiff providing Defendant's insurance company her medical records and bills in settlement negotiations before trial, Defendant did not dispute that Ms. Kimball suffered significant and permanent injuries as a result of the collision and did not offer any evidence in moving to vacate the default judgment that any of Plaintiff's medical expenses were unreasonable, unnecessary, or not provided for injuries caused in the motor vehicle collision?

3. Did the Superior Court abuse its discretion in ruling that Defendant did not show that entry of the default judgment was the result of his or his representative's excusable neglect, mistake, surprise or inadvertence, where Defendant did not produce any evidence explaining why neither he nor his representatives took any action or made any communication with Plaintiff or her representatives, during the period that elapsed between Plaintiff's counsel advising Defendant's insurance company at the breakdown of settlement negotiations that he would proceed to serve Defendant and then to trial, and entry of the default judgment several months later?

4. Did the Superior Court abuse its discretion in ruling that Defendant did not show any inequitable conduct by Plaintiff or her counsel justifying setting aside the default judgment, where Defendant did not introduce any evidence of any contacts between the parties or their representatives, during the period that elapsed between Plaintiff's counsel advising Defendant's insurance company at the breakdown of settlement negotiations that he would proceed to serve Defendant and then to trial, and entry of the default judgment several months later?

5. Were Defendant's constitutional due process rights violated, where Plaintiff effected substitute service on him through the Secretary of State after numerous attempts to locate him failed, and where Defendant did not introduce any evidence of his whereabouts during the period Plaintiff was attempting to personally serve him or that would otherwise support a finding that in the exercise of due diligence Plaintiff should have been able to locate and personally serve him?

III. RESPONSE TO STATEMENT OF FACTS

In the declaration she submitted in support of Defendant's motion to vacate, Defendant's insurance representative, Melissa Roberts of American Commerce Insurance Company ("ACIC"), states that she

communicated with Plaintiff's attorney concerning the status of Ms. Kimball's claim and her medical records on five occasions between June 2009 and July 2010. (CP 17-18.) She then lists her last three contacts with Plaintiff's counsel before the default judgment was entered on November 30, 2010, which were Plaintiff's counsel's August 4, 2010, settlement demand package, her letter with an offer in response, and Plaintiff's counsel's August 18, 2010, letter to her stating he was rejecting the offer. (CP 18-19.)

Ms. Roberts attached a copy of Plaintiff's counsel's August 18, 2010 letter to her declaration. (CP 19 & 31.) In this letter, Plaintiff's counsel specifically advises:

"I will not convey your ridiculous offer to my client. I will not assist you in adding insult to the injury inflicted by your insured. I will rather continue to secure service on the elusive Mr. Ichikawa and continue to trial - until and unless there is a response to our demand that indicates a sincere desire to negotiate based on a competent evaluation of the claim." (CP 31.)

(Plaintiff's counsel's office did, however, convey the offer to Ms. Kimball, who agreed with her counsel that it should be rejected without a counter offer. (CP 120.))

Ms. Roberts does not claim that after receiving Plaintiff's counsel's August 18 letter she ever inquired concerning whether suit had

been filed or process had been served. (CP 17-19.) In his declaration in opposition to Defendant's motion to vacate, Plaintiff's counsel specifically denies ever receiving any such inquiry or communication from ACIC. (CP 118-19.)

Plaintiff's efforts to personally serve Defendant are detailed in a declaration his attorney filed demonstrating the due diligence exercised by Plaintiff in this regard. Although he had a Washington driver's license, Defendant provided a California address to the investigating officer at the scene of the collision. Personal service was attempted at this address, but he no longer lived there and the person living there did not know where he was. (CP 80-81.)

Plaintiff's counsel's office then sent a change of address for this address to the United States Postal Service (hereinafter "USPS"), receiving a response that the address had been changed to an address in Redmond, Washington. But when personal service was attempted at that address, the process server learned that this was the address for a private mailbox at a United Postal Service (hereinafter "UPS") store. (CP 81.)

Plaintiff's counsel's office then performed numerous internet searches, of databases both free and subscribed to and paid for by

Plaintiff's counsel's office. (CP 81-82.) One of these searches revealed another address for Defendant in Redmond. Personal service was attempted at this address, but the process server was told by the current tenant that Defendant moved about several months earlier and he had no forwarding address for him. (CP 81-82.)

The process server employed by Plaintiff's counsel's office then performed their own searches of databases they subscribed to, which revealed the same Redmond address as the searches performed by Plaintiff's counsel's office. Personal service was again attempted at this address, but again was futile. (CP 82.)

A change of address request was sent to the USPS for this address, and the USPS provided another address in Redmond in response. Personal service was attempted at that address, but the process server discovered it was a USPS post office. (CP 82.)

Having no other address for Defendant, Plaintiff then effected substitute service pursuant to RCW 46.64.040, by hand-delivering two copies of the Summons and Complaint to the Washington Secretary of State and mailing copies to Defendant at two of the last addresses known for him. (CP 82-83.)

Defendant determined not to provide this Court a verbatim report of the default hearing, so Plaintiff did so. In granting the default judgment, the Superior Court specifically found that Plaintiff's counsel's office had gone through extreme efforts to obtain personal service on Defendant and that their efforts were extensive, reasonable, and diligent. (RP at 14:4-9.)

At the hearing on entry of default judgment Ms. Kimball testified that the collision was a substantial one. (RP at 2:15-22.) She also testified that her injuries from the collision were significant and had a permanent impact on her ability to engage in the activities she enjoyed before the accident. She testified that she immediately had headache, neck ache, back ache, her feet would go numb, she had problems with her knees, and was in constant pain. (RP at 5:6-10.) Her neck was so painful the pain radiated into her arms and they would go numb. (RP at 5:22-24.) She testified that, with the exception of her knee injury, she was still experiencing all of these problems at the time of the entry of the default judgment, although they had improved. (RP at 5-7.)

The medical records submitted at the default judgment also reflect that Ms. Kimball had post-concussion syndrome, light-headedness, and

problems with balance and short term memory as a result of the collision. (RP at 8:9-11.) Ms. Kimball testified that she was still having problems with her short term memory at the time of the default hearing. (RP at 8:12-13.) She worked in sales and sometimes while on a sales call would pull over and cry, because she could not remember where she was and she thought she was losing her mind. (RP at 8:16-20.) But her doctors had assured her she would get better and she was better at the time of the default hearing, although there were still times when she could not remember a word, where she put something she had just laid down, or a conversation she had the previous day. (RP at 8:21 to 9:6.)

Ms. Kimball is unmarried and has a son who lives with her who at the time of the default hearing was 11 years old. Ms. Kimball was herself a gymnast in highschool and prior to the collision was very active. But she testified that because of the collision she could no longer play football with her son. And the Cymbalta she was still taking for the pain would at times cause her to fall asleep while sitting straight up. (RP at 9:10 to 10:16.)

Ms. Kimball was still taking Cymbalta at the time of the default hearing. She testified her doctors had told her she would likely be taking

this medication for the rest of her life. (RP 10:17 to 11:3.) She testified that a one month supply of this medication cost over \$150. (RP 11:7-15.) The Superior Court calculated that the cost of Ms. Kimball's ongoing medication was approximately \$1,800 a year, and awarded this cost for approximately half of her life expectancy of 35 years. (RP at 20:7-22.)

Evidence was presented at the default hearing concerning the impact Ms. Kimball's ongoing injuries would likely have on her for the rest of her life. (RP at 17:19 to 18:6.) The Superior Court independently calculated the amount of Ms. Kimball's general damages, finding that an award equaling approximately \$500 a month for 25 years was justified. (RP at 19:15 to 20:1.)

Based on the evidence presented at and testimony received in the default hearing, the Superior Court entered the following findings with regard to damages in the default judgment:

“7. ECONOMIC DAMAGES: As a direct and proximate result of defendant Masayoshi Ichikawa's negligence, plaintiff sustained severe personal injuries, causing her to incur medical expenses in the amount of \$16,101.06, which were reasonable and necessary, copies of which were introduced at the hearing as Exhibit 'A'.

“8. GENERAL DAMAGES: Medical records were introduced as Exhibit "B" and testimony was given by plaintiff and Steve Tilton which clearly reflected the injuries sustained by plaintiff and

the pain and disability she suffered.

“Immediately following the collision, plaintiff was transported by ambulance to Legacy Salmon Creek Hospital for emergency treatment. Thereafter, Ms. Kimball had extensive follow up care with multiple Kaiser medical providers, Rebound Rehabilitation, John Hagen, DC, Nicole Frye, LMT, and Robert S. Djergaian, MD. Diagnoses, included but were not limited to, cervical strain and facet mediated pain, lumbar strain, right knee strain, post concussion syndrome, headache, shoulder strain, tarsal tunnel syndrome, and radiculopathic pain from the forminal stenosis which was previously asymptomatic prior to the June 10, 2009, collision.

“Plaintiff has experienced considerable pain and discomfort since the collision and it appears that her neck pain and radiculopathic pain is permanent in nature. Her life expectancy is 34.81 years. She continues to rely on Cymbalta, Ibuprofen, home exercises and traction.” (CP 10-11.)

Other than the pleadings and records already on file with the Superior Court, the declaration of Defendant’s insurance company claim representative, Ms. Roberts, was the only evidence relied on by Defendant in moving to vacate the default judgment. (CP 37-50.) Despite the fact that Ms. Roberts already had Plaintiff’s medical records and bills, as well as a copy of the video transcript of the default hearing, Ms. Roberts did not reference any of these materials in her declaration in support of Defendant’s motion to vacate the default judgment. (CP 17-36.)

IV. ARGUMENT

A. Standard of Review

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. A trial court's ruling on a motion to vacate a default judgment will not be disturbed on appeal "unless it clearly appears that the court abused its discretion or its exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons."

Hwang v. McMahon, 103 Wn.App. 945, 949-50, 15 P.3d 172

(2000)(reversing trial court's grant of motion to vacate and reinstating default judgment). As explained in *Hwang*, while default judgments are disfavored, the courts must balance against this policy the countervailing policy of requiring compliance with judicial summons, to the end that justice is done. *Hwang*, 103 Wn.App. at 950.

In *Morin v. Burris*, 160 Wn.2d 745, 61 P.3d 956 (2007), the Washington State Supreme Court stated three bases under which a defendant may seek vacation of a default judgment in Washington. These are the same bases argued by Defendant in the present case:

- (1) That the defendant actually appeared or substantially complied with the appearance requirements and was therefore entitled to but did not receive notice of the default proceedings. *Morin*, 160 Wn.2d at 755.

- (2) Or, alternatively, that the defendant meets the four-part test of *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) by showing: (1) substantial evidence to support a prima facie defense; (2) the failure to appear was the result of mistake, inadvertence, surprise or excusable neglect; (3) due diligence after notice of entry of the default judgment; and (4) no substantial hardship to the opposing party. *Morin*, 160 Wn.2d at 755.
- (3) Or, alternatively, that the defendant's failure to appear was the result of inequitable conduct by the plaintiff's attorney. *Morin*, 160 Wn.2d at 755.

None of these grounds justify setting aside the default judgment in the present case.

B. Defendant Did Not Introduce Any Evidence From Which the Superior Court Could Have Reasonably Concluded He Substantially Complied With the Appearance Rule.

To set aside a default judgment on the bases of lack of notice, a party must establish they at least substantially complied with the appearance requirement. *Morin*, 160 Wn.2d at 755. While this may be accomplished informally, the defendant must appear and acknowledge the jurisdiction of the court in some fashion:

“However, whether or not a party has substantially complied with the rules must be decided against the fact that litigation is a formal process. Those who are served with a summons must do more than show intent to defend; they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences. We disagree with our learned colleagues below that pre litigation communication alone is sufficient to satisfy a party's duty to appear and defend against a court case.

Although substantial compliance with the appearance requirement can be accomplished informally, we do not adopt the doctrine of informal appearance as it has been formulated below. *See, e.g., Batterman v. Red Lion Hotels, Inc.*, 106 Wn.App. 54, 21 P.3d 1174 (2001).” *Morin*, 160 Wn.2d at 749.

Defendant originally contended in his motion to vacate to the Superior Court that his insurance company had substantially complied with the appearance rules through “communications and negotiations of settlement [that] continued well after suit was filed *and up until the default was entered.*” (CP 41, ln. 27, to CP 42, ln. 4; emphasis supplied.) But this mischaracterizes the facts. Defendant’s insurance company’s claim representative testifies in her declaration that the last contact she had with Plaintiff’s counsel before entry of the default judgment was when she received his August 18, 2010 letter, in which he advised her that, unless he received a response indicating a sincere desire to negotiate, he would “continue to secure service on the elusive Mr. Ichikawa and continue to trial”. (CP 17-19 & 31.) The default judgment was entered on November 30, 2010, over three months after Ms. Roberts received this letter. Defendant has not offered any evidence of any contacts between the parties or their representatives during those three months.

As quoted above, in *Morin* the Supreme Court completely rejected

the informal appearance doctrine articulated by the Court of Appeals in *Batterman v. Red Lion Hotels, Inc.*, 106 Wn.App. 54, 21 P.3d 1174 (2001). *Morin*, 160 Wn.2d at 749. Defendant nevertheless relies on *Colacurcio v. Burger*, 110 Wn.App. 488, 41 P.3d 506 (2002), in arguing his insurance company's contacts with Plaintiff's counsel after suit was filed but before his August 18, 2010 letter were sufficient to substantially comply with the appearance requirement. But the decision in *Colacurcio* was based entirely on the authority of *Batterman* and on the informal appearance doctrine. *Colacurcio*, 110 Wn.App. at 497.

Under *Morin*, a "mere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*." *Morin*, 160 Wn.2d at 756 (emphasis in original). Defendant does not point to any evidence that he or his representatives acknowledged that a dispute existed *in court* after Ms. Roberts was clearly put on notice of this fact by Plaintiff's counsel's August 18, 2010 letter.

Of the three cases addressed in *Morin*, the instant case is virtually identical to the facts in the *Morin* case set forth at 160 Wn.2d 750-51. In that case, the defendants were the driver and owner of a vehicle insured by

Farmers. Farmers's adjuster paid Morin's property damage, and Morin told the adjuster she was seeing a doctor. Morin refused an injury settlement offer by the adjuster and hired a lawyer. The lawyer and adjuster had unsuccessful settlement negotiations in June 2001. There was no further contact between the parties that year and suit was filed in November 2001. One defendant was personally served and the other served by publication. Neither defendant responded in any way, and Morin obtained a default judgment. After notice from the lawyer to the adjuster a year later, the defendants moved to vacate arguing they had informally appeared in the action and were entitled to notice of the intent to get an order of default. The trial court agreed and vacated the judgment, the Court of Appeals affirmed, and the Supreme Court reversed, stating:

“Having rejected the doctrine of informal appearance as formulated below, our inquiry is not done. We must apply the existing rules to these cases. The defendants in both *Matia* and *Morin* have not substantially complied with the appearance rules. We find no action in either case acknowledging that the disputes were in court. Thus, they were not entitled to notice of the default judgment hearing.” *Morin*, 160 Wn.2d at 757-58.

Despite this unequivocal language, Defendant nevertheless argues that a narrower reading of *Morin* has been recognized in subsequent decisions, citing to *Sacotte Construction, Inc. v. National Fire & Marine*

Ins. Co., 143 Wn.App. 410, 415, 177 P.3d 1147 (2008). This case does not support that argument. In *Sacotte*, the Court of Appeals only ruled that a defense attorney's informal appearance in a telephone call to the plaintiff's counsel after lawsuit was filed substantially complied with appearance requirements, where he made a contemporaneous written record in e-mails to the defendant to confirm the call, and he made the call to avoid a default without notice and to show intent to defend. *Sacotte*, 143 Wn.App. at 415-16.

Interestingly, the facts in the instant case would not even meet the pre-*Morin* Division II requirements for an informal appearance, under which: "A party will not be considered to have appeared informally if the plaintiff could reasonably harbor doubts about whether the party intended to defend the matter." *Smith v. Arnold*, 127 Wn.App 98, 104, 110 P.3rd 257 (2005). Given Defendant's insurance company's complete silence after being told that Plaintiff would be proceeding with legal action against Defendant, Plaintiff could reasonably harbor doubts about Defendant's insurance company's intention to defend the matter.

Despite Defendant's insurance company being put on notice after Plaintiff's counsel terminated settlement negotiations that Plaintiff was

proceeding forward to serve Defendant and to trial, Defendant did not provide any evidence that either he or his insurance company representative even inquired concerning whether a dispute existed in court, much less acknowledged that fact. Therefore, the Superior Court did not abuse its discretion in refusing to vacate the default judgment on the grounds that Defendant was entitled to notice of the default proceedings because he had substantially complied with the appearance requirement.

C. Defendant Did Not Produce Any Evidence From Which the Superior Court Could Reasonably Have Concluded Defendant Had a Prima Facie Defense to Plaintiff's Claim.

As Defendant failed to produce any evidence that would support a finding that he substantially complied with the appearance requirement, the Superior Court could have abused its discretion in denying Defendant's motion to vacate only if Defendant either produced evidence satisfying all four of the requirements of *White*, or establishing that his failure to appear was the result of inequitable conduct by Plaintiff or her counsel. But he did not produce any such evidence.

Of the four factors listed in *White*, establishing a prima facie defense to the claim, and that the failure to appear was the result of mistake, inadvertence, surprise or excusable neglect, are the two primary

requirements. *White*, 73 Wn.2d at 352-53. Defendant relies on *Calhoun v. Merritt*, 46 Wn.App. 616, 731 P.2d 1094 (1986), in arguing that he is not required to set out facts supporting a prima facie case. But in *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007), the Washington State Supreme Court more recently confirmed that a defendant must still produce competent evidence to support a prima facie defense that the amount of a default judgment was excessive.

In *Little*, a default judgment in an amount in excess of \$2,000,000 was awarded based on approximately \$250,000 in past economic damages. As in the present case, in *Little* the defendant did not argue a defense to liability. But he argued the damages were unreasonable and that preexisting conditions might have contributed to the plaintiff's injuries.

The *Little* Court first declared that:

“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.” *Little*, 160 Wn.2d at 704 (citing to *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn.App. 231, 240-42, 974 P.2d 1275 (1999)).

The Court then noted that the only evidence submitted by the defendant was a declaration from an insurance adjuster stating the adjuster had reviewed the plaintiff's medical records and found reports concerning

preexisting problems. The Court ruled that, without any evidence of a causal connection between these preexisting conditions and the injuries plaintiff complained of following the collision, this evidence would be inadmissible at trial, because its introduction would only invite the jury to speculate as to a causal relationship. *Little*, 160 Wn.2d at 705. The Court therefore held that, even viewing the evidence most favorably to him, the defendant had not established a prima facie defense to damages, because he had not provided any competent evidence supporting a defense. *Little*, 160 Wn.2d at 704-05.

This Court considered this issue in *Rosander v. Nightrunners Transport, LTD*, 147 Wn.App. 392, 196 P.3d 711 (2008), where the defendant appealed from the trial court's refusal to vacate a default judgment of approximately \$1,000,000, arguing among other things that the amount of the judgment was unfair and presumptively excessive when the amount of the general damages awarded was compared to the amount awarded for special damages. The defendant did not introduce any evidence to support these arguments, and this Court rejected them both. In disposing the defendant's argument the judgment was unfair, the Court cited to the holding in *Little* that a trial court abuses its discretion if it

vacates a default judgment solely because the defendant is surprised by the amount of the judgment or that amount might have been less at a contested hearing. *Rosander*, 147 Wn.App. at 408 (citing to *Little*, 160 Wn.2d at 704.) In rejecting the defendant's argument that the amount of the judgment was presumptively excessive when the general damages were compared to the special damages, the Court noted this argument was apparently based on *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 128 S.Ct. 2605, 1710 L.Ed.2d 570 (2008), which discussed punitive damages, not general damages, and was therefore not helpful, and also that the defendant did not dispute that the plaintiff suffered significant and lifelong injuries. *Id.*

In the present case, Ms. Kimball's medical records and bills were introduced into evidence at the default hearing, and were referred to and relied upon by the Superior Court in entering the default judgment. (CP 10-11.) Plaintiff testified that she suffered significant and lifelong injuries from the collision. (RP 5-11.) Defendant does not dispute this.

Defendant's insurance company's claim representative testifies in her declaration - the only evidence submitted by Defendant in support of his motion to vacate to the Superior Court - that several months before

entry of the default judgment the insurance company “received a settlement demand from Plaintiff including a significant amount of medical records and other documentation in support of her claim.” (CP 18.) She attaches as an exhibit to that declaration a letter from Plaintiff’s counsel to her establishing that Defendant’s insurance company had the transcript of the default hearing for two weeks before she signed the declaration in support of Defendant’s motion to vacate the default judgment. (CP 32 & 19.) But despite having all of this evidence before moving to vacate the default judgment, Defendant did not cite to any medical record or the hearing transcript in his motion to vacate the default judgment. (CP 37-50.)

Defendant now argues for the first time in this appeal that the Superior Court’s award of \$32,400 for future medical expenses without expert testimony was unjustified. Defendant did not raise this issue to the Superior Court and Plaintiff respectfully requests that this Court decline to consider this argument under RAP 2.5(a).

Even if this Court should be inclined to review this claim of error, it is completely without merit. Expert testimony is not always necessary to support an award for personal injury damages. *See Parris v. Johnson*, 3

Wn.App. 853, 861, 479 P.2d 91 (1970)(“We have not found, nor have defendants pointed to any cases holding that substantial damages for personal injuries may not be awarded in absence of medical testimony, whether the elements of damage be termed injury, pain and suffering or disability.”) In the case relied on by Defendant in contending that medical testimony is typically required to establish that medical expenses are reasonably necessary in the future, the Court also ruled that: “Lay testimony on future damages may be sufficient to justify a jury instruction.” *Stevens v. Gordon*, 118 Wn.App. 43, 56, 74 P.3d 653 (2003)(citing to *Bitzan v. Parisi*, 88 Wn.2d 116, 122, 558 P.2d 775 (1977)).

At page 17 of his brief, Defendant disingenuously argues that the award of future medical expenses was not based on evidence of their necessity to a reasonable medical probability, based on a question by the Superior Court to Plaintiff’s counsel asking whether it was correct that Plaintiff could not say with a reasonable medical certainty that future physical therapy would be required. Plaintiff’s counsel agreed that this was correct. (RP 19:8-14.) The default judgment’s award of future medical expenses does not include any amount for future physical therapy.

(CP 8-11.)

Defendant's argument at page 18 of his brief that there "was absolutely no competent evidence to conclude" that Cymbalta was medically necessary for Plaintiff's treatment again completely ignores the fact that Plaintiff's medical records and bills were introduced into evidence at the default hearing. The colloquy between the Superior Court and Plaintiff's counsel Defendant quotes at page 18 of his brief only discusses the issue of how long Ms. Kimball was expected to continue to require Cymbalta, not whether there was any evidence that Cymbalta was medically necessary as a result of the accident.

Defendant had the burden of establishing through substantial evidence a prima facie defense to the amount of damages awarded. Defendant could not satisfy this burden through "mere allegations and conclusions" - he was required to "set out specific facts or errors constituting a prima facie defense." *Johnson v. Cash Store*, 116 Wn.App. 833, 850, 68 P.3d 1099 (2003)(citing to *Shepard Ambulance*, 95 Wn.App. at 239). Defendant did not set out any facts constituting a prima facie defense, only allegations and conclusions that the amount of damages awarded was excessive. The Superior Court did not abuse its discretion in

finding that Defendant did not present a prima facie defense to the award of damages.

D. Defendant Did Not Provide Any Evidence Showing That His Failure to Appear Was the Result of Mistake, Surprise, Excusable Neglect or Inadvertence.

The second primary factor to be considered under *White* is whether a defendant's failure to appear was the result of mistake, surprise, excusable neglect, or inadvertence. In his argument with regard to this factor, Defendant does not introduce any evidence that his failure to appear resulted from incorrect legal advice, *See Moe v. Wolter*, 134 Wash. 340, 235 P. 803 (1925), a misunderstanding concerning the nature of the proceedings, *see Morgan v. Burks*, 17 Wn.App. 193, 563 P.2d 1260 (1977), or some misunderstanding as to which party would be appearing, *see Calhoun, supra*. Instead, Defendant only argues that Plaintiff's counsel's failure to notify Defendant's insurer that he had already filed a complaint before settlement negotiations started, coupled with the fact that Mr. Ichikawa could not be located for personal service, somehow justifies relief under this factor.

Defendant relies on the facts of the Gutz case, one the three consolidated cases addressed in the *Morin* decision, in arguing that he has

satisfied the *White* factor of mistake, inadvertence, surprise, or excusable neglect. However, as the below quotation from the *Morin* decision shows, there was a significant distinction between the facts in Gutz and the facts of the present case:

“Gutzes' counsel had no duty to inform Allstate of the details of the litigation. But counsel's failure to disclose the fact that the case had been filed and that a default judgment was pending when the Johnsons' claim representative was calling and trying to resolve matters, and *at a time when the time for filing an appearance was running*, appears to be an inequitable attempt to conceal the existence of the litigation. If the Johnsons' representative acted with diligence, and the failure to appear was induced by Gutzes' counsel's efforts to conceal the existence of litigation *under the limited circumstances we have described above*, then the Johnsons' failure to appear was excusable under equity and CR 60.” *Morin*, 160 Wn.2d at 759 (emphasis supplied).

The controlling and dispositive difference between the facts of Gutz and the facts of the subject case is that in the present case it is undisputed that all settlement negotiations and communications between the parties' representatives had ended well before the time for filing an appearance started running. It is precisely because of the complete absence of any contact between the parties during the period when the time for filing an appearance was running that Defendant's failure to appear could not possibly have been the result of any “concealment” of the litigation by Plaintiff's representatives.

Defendant also contends that it was “irregular” for Plaintiff’s counsel not to notify Defendant or his insurer of service through the Secretary of State and that “an actual summons and complaint were never received by either Ichikawa or his insurer.” (Appellant’s Brief, pg. 27.) However, at the hearing on the default judgment, the Superior Court Judge and Defendant’s counsel had the following discussion concerning whether there was any evidence that Mr. Ichikawa either did or did not receive service of process:

“Judge: - well if the letter from Mr. Nelson basically says we’re done – I’m going to serve your client.

“* * * * *

“RH: Correct. But there’s no notice that that was ever – that at least Mr. Ichikawa was never provided service –

“* * * * *

“Judge: Did you get something from him that says that?

“RH: - no Your Honor. There’s no evidence that he was though.”

“* * * * *

“Judge: There’s nothing from Mr. Ichikawa claiming I got the service and I didn’t give it to my insurance company because I didn’t think I had to or they told me I didn’t have to or something – anything like that, right?

“RH: Nothing Your Honor. The only evidence before the court is that nobody knew about the default until the demand was given in December after the Default Judgment was already entered. That’s the first indication on the record that anybody ever got.

“* * * * *

“Judge: Okay. And since this insurance company – you don’t have to serve the insurance company, you serve the Defendant – I don’t have anything from the Defendant saying I was never served, correct?

“RH: You have nothing from Defendant. That’s part of the problem Your Honor.” (RP at 43-44.)

Defendant, therefore, has admitted that it has no evidence concerning whether or not Mr. Ichikawa ever received a copy of the summons and complaint.

Defendant argues that it was somehow irregular for Plaintiff to file suit before settlement negotiations began and then serve Mr. Ichikawa through the Secretary of State after settlement negotiations broke down without asking his insurance company where he was or notifying it of this service. As it was not a party, Plaintiff was not required to serve Defendant’s insurance company with process or, in the absence of any request from the insurance company that it do so, provide it with notice that it had served Defendant. So there was no “irregularity” in Plaintiff not notifying Defendant’s insurer that Mr. Ichikawa had been served.

Defendant also argues that his insurance company was surprised by the substitute service on Defendant through the Secretary of State, contending that Plaintiff's counsel never asked Defendant's insurance company where Mr. Ichikawa was. Defendant does not cite to anything in the record to support his assertion that Plaintiff's counsel never asked Defendant's insurer concerning his whereabouts. But even assuming for the sake of argument that Plaintiff's counsel never asked Defendant's insurance company where Mr. Ichikawa was, this would be relevant only if his insurer *did* know where he was during the period that Plaintiff was attempting to personally serve him. If Defendant's insurer knew where Mr. Ichikawa was during this period, it was incumbent upon it to introduce evidence of this fact. But the only evidence is Defendant's counsel's admission that they have no evidence from Defendant to offer in support of his motion to vacate. In the absence of any evidence in this regard, the only possible conclusion is that an inquiry of Defendant's insurance company concerning Mr. Ichikawa's whereabouts would have been futile. Defendant should not be heard to argue that he or his insurance company were surprised by Plaintiff's use of substitute service on the Secretary of State, where Defendant did not produce any evidence suggesting that in

exercise of reasonable diligence Plaintiff could have located and personally served Mr. Ichikawa.

The only evidence is that Defendant's insurance company did nothing after Plaintiff's counsel advised in the August 18, 2010, letter that he would pursue service and go to trial. There is no evidence that ACIC inquired as to whether the complaint had been filed, requested that it be notified when service was effected, hired counsel, or advised Mr. Ichikawa of pending service and the need to communicate with ACIC when he was served. The Superior Court did not abuse its discretion in finding that Defendant did not show that his failure to appear was the result of mistake, inadvertence, surprise or excusable neglect, because Defendant did not produce any evidence that would have justified the Superior Court in so finding.

E. The Superior Court Did Not Abuse Its Discretion in Ruling That There Was No Inequitable Conduct Justifying Vacating the Default Judgment.

It is immaterial whether suit was already filed before settlement negotiations began. Filing the summons and complaint was the least time consuming part of the process of starting litigation against Defendant. Even if suit had not already been filed before settlement negotiations broke

down, there was more than ample time after they did so before entry of the default judgment several months later for Plaintiff to file suit, serve Defendant, and then obtain the default judgment. Given the complete lack of any contact during the period between Plaintiff's counsel's August 18 letter advising he would serve Mr. Ichikawa and proceed to trial and entry of the default judgment several months later, if Plaintiff's counsel had waited until after his sending his letter to both file the complaint and serve Defendant the result would have been the same. In the absence of any contact between the parties, Plaintiff's counsel was under no duty to advise Defendant's insurance company's representative of the details of the litigation during this period. *Morin*, 160 Wn.2d at 759.

If anything, the fact that the complaint was filed before settlement negotiations began potentially gave Defendant's insurer more notice that suit had been filed than the insurer would have received had Plaintiff waited until after settlement negotiations broke down to both file and serve. Plaintiff's counsel's August 18 letter very clearly put Ms. Robert's on notice that suit had been filed by advising it he "would continue to secure service" and "continue to trial". (CP 31.) In her declaration, Ms. Roberts states that, after receiving Plaintiff's counsel's December 8, 2010

letter notifying her of the entry of the default judgment, she “discovered via the Washington Court’s website that a complaint had been filed in this matter on or about December 8, 2009.” (CP 19.) In denying Defendant’s motion to vacate, the Superior Court specifically noted that this statement by Ms. Roberts established that ACIC “can readily check court records for the existence of a filed lawsuit.” (CP 66.) But Ms. Roberts offers no explanation as to why she did not check the website after she received Plaintiff’s counsel’s August 18, 2010 letter, although as the Superior Court also noted, this letter “directs the insurer to be on its guard.” (CP 66.) Had she done so, she would have discovered the complaint had already been filed.

Defendant’s argument that Plaintiff’s counsel somehow acted inequitably in filing suit before settlement negotiations began without advising Defendant’s insurer of that fact, and then serving Mr. Ichikawa after settlement negotiations had broken down and he had advised Defendant’s insurer that he intended to do so, is completely without merit.

F. Having Correctly Determined That Defendant Failed to Meet Its Burden of Establishing Either of the Primary *White* Factors, the Superior Court Did Not Abuse its Discretion in Failing to Rule on the Secondary Factors of Diligence and Prejudice.

Having found the two primary *White* factors dispositive, the Superior Court was not required to address the secondary factors of diligence and prejudice. *See Johnson*, 116 Wn.App. at 848-49 (trial court did not abuse its discretion in denying defendant's motion to vacate, even though secondary factors of diligence and lack of prejudice met and trial court's finding that the defendant had not presented a prima facie defense was based on untenable grounds, where the defendant did not satisfy its burden of demonstrating that its failure to appear and answer was occasioned by mistake, inadvertence, surprise, or excusable neglect). As explained in *Morin*:

“We find no action in either case acknowledging that the disputes were in court. Thus, they were not entitled to notice of the default judgment hearing. Nor has either established mistake, surprise, or excusable neglect as required by *White*, 73 Wn.2d at 352, or inequitable conduct as required by *Trickel [v. Superior Court]*, 52 Wash. 13 [100 P. 155 (1909)]. We need go no further.”

Similarly, in the present case, Defendant has not shown any action acknowledging that the dispute was in court, so he has not substantially complied with the appearance rules. He has not established either that he

has a prima facie defense or that his failure to appear resulted from mistake, surprise, excusable neglect, or inadvertence. Nor has he established any inequitable conduct. The Superior Court therefore did not abuse its discretion in failing to address the issues of whether Defendant acted with diligence in moving to set aside the default judgment or whether Ms. Kimball would be prejudiced if the default judgment is set aside.

G. There Was No Manifest Error Involving a Constitutional Right.

RAP 2.5(a) provides:

“(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. * * *.”

The constitutional error exception only applies if the alleged error is truly constitutional and it had a practical and identifiable consequences in the trial of the case. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). In the present case, Defendant makes two “constitutional” arguments, neither of which is truly constitutional.

Defendant first argues that his due process rights were violated

because Plaintiff allegedly did not exercise due diligence in attempting to locate him before serving him through the Washington Secretary of State pursuant to RCW 46.64.040. Defendant then argues that the notices of service on the Secretary of State Plaintiff sent to Defendant's last known addresses were somehow invalid, because one of the notices was signed for by a UPS employee who under the contract with Defendant would sign for mail regardless of whether the mail was actually accepted by Defendant. These are both jurisdictional arguments, not constitutional ones. If the substitute service on Defendant through the Secretary of State was invalid, then the Court did not have jurisdiction over Defendant to enter a default judgment against him.

Even if the Court should determine that these issues are truly constitutional, the Court should nevertheless decline to hear them because neither had a practical and identifiable consequence in connection with entry of the default judgment. Defendant does not know whether Mr. Ichikawa actually received a copy of the summons and complaint or not, and Defendant's motion to vacate was not based on any testimony or evidence from Mr. Ichikawa in this regard. (RP at pgs. 43-44.) Defendant therefore cannot show that had Plaintiff's counsel exercised more

diligence than the extraordinary diligence he did exercise Mr. Ichikawa would have been located. Nor can Defendant show that Mr. Ichikawa did not accept the notice of service sent to his UPS post office box signed for by his agent at UPS.

RAP 2.5(a) does provide that this Court may consider jurisdictional issues for the first time on appeal. But regardless of whether framed in terms of due process or jurisdiction, Defendant's arguments are completely without merit.

First, Plaintiff's counsel's office did exercise honest and reasonable efforts to personally serve Mr. Ichikawa before using substitute service on the Secretary of State to serve him. Plaintiff sent process servers to attempt service at four different addresses for Mr. Ichikawa, one an address in California provided by Mr. Ichikawa to the police at the scene of the collision, even though he had a Washington driver's license, the next an address in Redmond, Washington, provided by the USPS in response to a change of address request from Plaintiff for the California address when Mr. Ichikawa could not be found there, a third address, also in Redmond, found through a public records search when Mr. Ichikawa could not be found at the Redmond address provided by the USPS with

regard to the California address, and a fourth address, also in Redmond, provided by the USPS in response to a change of address request from Plaintiff for the third Redmond address. (CP 80-82.) Defendant has not introduced any evidence that had Plaintiff done anything more she would have located Mr. Ichikawa, or even suggested what other steps Plaintiff might have taken in attempting to do so.

Defendant's argument that the notice of service on the Secretary of State was somehow defective is equally specious. With regard to mailing the notice of service, RCW 46.64.040 only provides:

“That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show that the defendant received personal delivery by mail * * *.”

Establishing that a defendant actually endorsed a receipt of the notice of service only effects the requirements for the declaration of the plaintiff's counsel in support of the service. A defendant's endorsement of

the receipt for the registered mailing of the notice of service is not required for substitute service on the Secretary of State to be effective.

Plaintiff was only required by RCW 46.64.040 to mail the notice of service to the last address for Defendant known to Plaintiff. Because the last known address for Mr. Ichikawa, provided by the USPS in response to a change of address request, was actually a USPS post office, Plaintiff actually mailed the notice and a copy of the summons to two of the last known addresses for Mr. Ichikawa, one of which was a private UPS mailbox. Plaintiff's counsel's office had already determined through the four attempts at personal service that Defendant was not at any of the other addresses known to Plaintiff, so this was the only address where Defendant might possibly actually receive the notice and summons. But while Plaintiff's counsel pointed to evidence of the return receipt signed by an employee of UPS and the UPS service agreement as establishing Defendant did actually receive the notice of service mailed to this private UPS mailbox, Plaintiff was not required to show this to perfect substitute service through the Secretary of State.

The analysis of *Goettemoeller v. Twist*, 161 Wn.App. 103, --- P.3d --- (2011), does not apply in the present context. *Goettemoeller* involved

the effectiveness of substitute service under RCW 4.28.080(16). Sections (15) and (16) of this statute provide:

“The summons shall be served by delivering a copy thereof, as follows:

“* * * * *

“(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.

“(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, ‘usual mailing address’ shall not include a United States postal service post office box or the person's place of employment.”

In *Goettemoeller*, there was evidence of where the defendant lived at the time service of process was attempted. In 2001, he had taken out a private mailbox. In 2005, he was involved in the automobile accident giving rise to the action. Later that year, he began using a new home mailing address. The first part of 2006, he moved to England. The plaintiff attempted to serve him in 2008. The plaintiff's process server was able to contact the defendant by email, and was told by him in a reply

email that he had moved from Washington more than two years earlier. The plaintiff then attempted to serve the defendant at the private mailbox he had opened in 2001. In cross motions for summary judgment on the issue of service, the defendant stated that he had cancelled the private mailbox in 2005, that he received no mail at that address and had made no arrangement to have mail forwarded to him from that address, and that he then began receiving mail at a different address. In support of these statements, he produced mail and other documentation showing his receipt of mail at his different address. *Goettemoeller*, 161 Wn.App. at 105-06.

The Court began its analysis by noting:

“An affidavit of service is presumptively correct, and the party challenging the service of process bears the burden of showing by clear and convincing evidence that the service was improper. A person who challenges the personal jurisdiction based on insufficient service of process has the burden of proof to establish a prima facie case of improper service.” *Goettemoeller*, 161 Wn.App. at 106 (citations omitted).

After then quoting RCW 4.28.080(15) and (16), the Court framed the issue before it as whether service was made at the defendant’s “usual mailing address” pursuant to RCW 4.28.080(16). *Goettemoeller*, 161 Wn.App. at 108. The evidence submitted on this issue included two declarations from the custodian of records for the private mailbox service,

one to the effect that some unknown person had made annual payments for the mailbox through the end 2009, and the second to the effect that the defendant had not received any mail at the mailbox since the beginning of 2007. *Id.*

The Court acknowledged that under *Wright v. B & L Properties, Inc.*, 113 Wn.App. 450, 461-62, 53 P.3d 1041 (2002), a private mailbox may serve as a defendant's "usual mailing address." *Goettemoeller*, 161 Wn.App. at 109. The Court also acknowledged the fact that a person may have more than one "usual mailing address." *Id.* But after noting that there was no evidence that the defendant used the mailbox or had mail forwarded from it, the Court held that the private mailbox was not the defendant's "usual mailing address" under RCW 4.28.080(16), explaining that as the plaintiff knew the defendant did not live in this country when the summons was mailed to the private mailbox, in the exercise of due diligence he should have effected substitute service through the Secretary of State:

"Goettemoeller argues that he expended due diligence to obtain an address to which he could serve the complaint. But the crux of the issue is the 'usual mailing address,' not due diligence. Moreover, the process server was aware via e-mail that Twist resided out of the country, it would seem that due diligence would have included service on the secretary of state." *Goettemoeller*, 161 Wn.App. at

110.

In the present case, the issue is not whether the private mailbox was Defendant's "usual mailing address" under RCW 4.28.080(16). The issue is whether it was a "last known address" under RCW 46.64.040. Unlike in *Goettemoeller*, in the present case Plaintiff had no information as to Mr. Ichikawa's whereabouts. Indeed, unlike in *Goettemoeller*, Defendant has no information concerning Mr. Ichikawa's whereabouts.

Under RCW 46.64.040, a nonresident who uses the public highways of Washington, or a resident who does so and who after a due and diligent search cannot be found in Washington, appoints the Secretary of State as his attorney upon whom process may be served on a complaint arising out of an accident on public highways in the state, with the same legal force and effect as if he were served personally. Plaintiff could not locate Mr. Ichikawa to personally serve him through a due and diligent search. As suggested in *Goettemoeller*, Plaintiff exercised due diligence by using substitute service on the Secretary of State, the agent Mr. Ichikawa had appointed to receive service for him if he did not reside in or could not be located in Washington, and perfected that service by mailing by registered mail a notice and process to two of Mr. Ichikawa's last

known addresses, one a private mailbox where another agent appointed by Mr. Ichikawa, a UPS employee, signed the receipt for the registered mailing.

Plaintiff was not required to establish that Mr. Ichikawa still currently received mail at this last known address to perfect service under RCW 46.64.040. Nor was Plaintiff required to mail the notice and process to every address ever discovered for Mr. Ichikawa, when such mailing would have obviously been futile. Defendant's due process rights were not violated by service on him through the Secretary of State.

H. Request for Attorney Fees

Under RAP 18.9(a), attorney fees may be awarded as a sanction for a frivolous appeal. A court's decision as to whether to grant attorney fees as a sanction for a frivolous appeal is guided by the following considerations:

“(1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) 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.” *Streater v. White*, 26 Wn.App. 430, 435, 613 P.2d 187 (1980).

Defendant's appeal is totally devoid of merit and has no possibility of reversal. Defendant provided no evidence to the Superior Court upon which it could have in the exercise of its discretion vacated the default judgment. Plaintiff therefore requests her attorney fees and expenses incurred in this appeal pursuant to RAP 18.1 and 18.9(a).

V. CONCLUSION

The operative period for determining whether any bases exist for vacating the default judgment is the approximately three and one-half months between Plaintiff's counsel's August 18, 2010 letter putting Defendant's insurer on notice that settlement negotiations were over and that Plaintiff would be proceeding to serve Defendant and to trial, and the default hearing the end of November 2010. Unless Defendant's insurer did something to acknowledge the dispute existed in Court during that period, Defendant could not possibly have substantially complied with the appearance requirement. Unless Plaintiff's counsel said or did something during that period to mislead Defendant's insurance company into believing otherwise, he could not possibly have engaged in any inequitable conduct in doing what he specifically said he was going to do in his August 18 letter. But Defendant did not introduce any evidence of any

communications or conduct during this period that would have justified the Superior Court in concluding either that Defendant substantially complied with the appearance requirement or that his failure to appear was the result of any inequitable conduct by Plaintiff's counsel.

Defendant similar completely failed to offer any evidence that would have justified relief under either of the primary *White* factors. His only defense on the merits is that the amount of the judgment was excessive. But despite having Plaintiff's medical records and bills, as well as the video transcript of the default hearing, before bring the motion to vacate, Defendant did not produce any specific facts to support his argument that the amount of the judgment was excessive. Defendant's argument under the other primary *White* factor, which requires him to show that his failure to appear was the result of mistake, inadvertence, surprise or excusable neglect, is simply a reiteration of his argument that Plaintiff's counsel somehow acted inequitably filing suit before settlement negotiations began and then, on the breakdown of settlement negotiations, doing precisely what he promised to do: serve Defendant and proceed to trial.

Both Defendant's motion to vacate to the Superior Court and his present appeal of the Superior Court's denial of that motion were and are totally devoid of merit, because Defendant completely failed to introduce any evidence that would have justified the Superior Court in vacating the default judgment. Therefore, Defendant's appeal should be dismissed and Plaintiff should be awarded her attorney fees and expenses in responding to Defendant's frivolous appeal.

Respectfully submitted this 8th day of July, 2011.

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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to Rory W. Leid, III and Ryan J. Hesselgesser, Appellant's attorneys, at 1000 Second Avenue Building, Suite 1300, Seattle, WA 98104, postage prepaid, on July 8, 2011.


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