

FILED

MAR 23 2012

Div. III COA No. 313280

COURT OF APPEALS  
DIVISION III  
CLERK OF COURT  
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SPokane, Washington

COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON

---

CRAIG FROST, REBECCA FROST and AIR CHARTER  
PROFESSIONALS, INC. Respondent,

v.

MARK H. BROOKS, JANE DOE BROOKS, and JOHN AND JANE  
DOE 1-10, APPELLANTS

---

BRIEF OF RESPONDENT

---

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## **I. Introduction**

Craig Frost, Rebecca Frost, and Air Charter Professionals, Inc., Respondent, [herein after ACPI] placed a valuable and rare custom built motorcycle for sale in an online forum in January of 2012. Air Charter Professionals, Inc. is a corporation principally owned by Craig and Rebecca Frost. On February 1, 2012, Mark Brooks, Appellant, [hereinafter Brooks] called Craig Frost in response to the advertisement to inquire about the purchase of the motorcycle. Both Craig Frost and the motorcycle were in the State of Washington at the time of the telephone call with Brooks. Brooks agreed to purchase the motorcycle from Frost for the sum of \$160,000. Frost agreed to transport the motorcycle to Arizona to facilitate the sale. Frost registered the motorcycle in Washington on February 7, 2012 prior to its transportation to Arizona for sale.

Frost transported the motorcycle to Arizona and invited Brooks to come and exchange the payment for the motorcycle. On February 10, 2012, Brooks took the motorcycle for a "test drive" and failed to return. An associate of Brooks remained behind with Frost and, after Brooks failed to return, the associate informed Frost that Brooks would not be returning from the test drive as

Brooks was claiming that he was the proper owner of the motorcycle.

After ACPI initiated this action and Judgment was obtained in its' favor, ACPI attempted to recover the motorcycle by filing a Notice of Filing of Foreign Judgment and a Writ of Special Execution for Replevin of the motorcycle in Maricopa County Arizona in December 2012. Maricopa County Police Officers accompanied Craig Frost to Brooks' home to recover the motorcycle. Brooks claimed that the motorcycle had been sold to someone outside the United States. Additional procedural background is set forth in the Statement of Case, *infra*.

## **II. Issues Pertaining to Assignments of Error**

- A. Did the court below abuse its discretion in failing to vacate the Order of Default when there was no evidence presented of substantial compliance with the appearance requirement and no good cause to vacate the order under CR 60(b)?
  - 1. The Court's entry of the Order of Default was a proper exercise of discretion pursuant to RCW 4.28.180 and CR 55. The Order of Default was

not entered until sixty days had passed from the date of personal service on the Appellant pursuant to RCW 4.28.180. Brooks failed to Answer or substantially comply with the appearance requirement before default was entered, thus default was proper under CR 55.

2. The Court's denial of Appellant's Motion to Vacate the Order was a proper exercise of discretion. The Court found that, while default judgments are not favored, Brooks had failed to establish the necessary criteria for the Court to vacate the Order of Default. [CP 39].

B. Did the court below err in finding personal jurisdiction over Brooks where Brooks failed to timely assert the defense of lack of personal jurisdiction under CR 12(b)?

1. Brooks did not object to personal jurisdiction prior to the entry of the order of default.

2. The Court properly concluded it has personal jurisdiction over Brooks pursuant to RCW 4.28.185

as the transaction between ACPI and Brooks took place in Spokane, Washington.

C. Did the court below err in denying Appellant's motion for a new trial when there was no trial in the first instance?

1. Appellant fails to clearly assign error on this third cause of action.
2. The Court's denial of Appellant's Motion for a New Trial was properly denied under CR 59. The Court properly concluded that there were no proper grounds for reconsideration after consideration of the grounds under CR 59(a)(1)-(9).

D. Is Respondent ACPI is entitled to attorney's fees under RAP 18?

### **III. Statement of the Case**

ACPI filed a Complaint on April 11, 2012 in Spokane County Superior Court claiming breach of contract, tort of conversion, and fraud. [CP 1-9]. ACPI requested damages in the amount of \$160,000 plus statutory interest, punitive damages for the fraud, reasonable attorney's fees and costs, and any other relief the Court

deems just and equitable. The Complaint was served on Brooks on May 5, 2012 by personal service to Dianna Zivuloviz, a person of suitable age and discretion, who resided with Mark Brooks in Arizona. [CP 10-11]. Brooks failed to file a Notice of Appearance or Answer. After service of process, Thomas Baker, an attorney licensed in Arizona, contacted attorney Frank Malone representing ACPI demanding the suit be dropped as a non-suit. [CP 115-16]. On June 14, 2012, counsel for Brooks was informed by counsel for ACPI that ACPI would not be dropping the suit and reiterating the intention to go forward with the suit. [CP 123-124]. After waiting the required sixty days for an out of state party, ACPI moved for an Order of Default on July 5, 2012. [CP 12-14]. Spokane County Superior Court Commissioner Moe signed an Order of Default on July 5, 2012. [CP 15-16]. That same day a Judgment was entered for ACPI for the sum of \$160,000 plus interest, attorney's fees, costs. [CP 17-19]. The Judgment reserved on the issue of punitive damages, and found title to the motorcycle shall be in the name of Air Charter Professionals, Inc. [CP 17-19]. Finally, the Court deemed it just and equitable to grant the right to obtain the vehicle and engine by the remedy of Replevin in the State of Washington or where ever they may be found. [CP 19].

On July 10, 2012, Brooks filed a pro se Motion to Dismiss. [CP 20-54]. Brooks further filed a Motion to Set Aside Entry of Default on July 18, 2012. [CP 55-128]. Brooks' Motion to Dismiss and Motion to Set Aside Entry of Default raised several issues including a challenge to personal jurisdiction and Brooks' defense to the Complaint: Brooks provided attachments that purported to demonstrate that the motorcycle belonged to Brooks and he had merely "pretended to be an interested buyer" of the motorcycle in order to induce Craig Frost to bring the motorcycle to Arizona. [CP 34-35; 52]. The title produced by Brooks was dated February 8, 2012, after the date Brooks and Frost had agreed to the sale, and was notarized by Diana Zivulovic, the same individual that accepted service of the Complaint on May 5, 2012. [CP 35].

On September 26, 2012, Spokane Superior Court Judge Leveque signed an Order denying Mr. Brook's' Motion to Set Aside the Verdict and struck Brooks' hearing on the Motion for Summary Judgment. [CP 191-194]. In the Court's Findings of Fact, the Court found that the Court had personal jurisdiction over Brooks pursuant to RCW 4.28; that Brooks had never filed an answer; that admissible evidence established a dispute regarding ownership of the motorcycle but not a prima facie defense to the Complaint; that

Brooks had failed to provide any evidence that his failure to appear or answer was due to mistake, inadvertence, surprise, or excusable neglect; and that while default judgments are not favored, Brooks failed to establish the necessary criteria for the Court to vacate the Order of Default or the Default Judgment. [CP 191-194].

Brooks thereafter filed Objections to the Court's Finding of Facts and Conclusions of Law [CP 195-213], and filed a Motion for a New Trial on October 5, 2012. [CP 214-274]. ACPI filed a Response [CP 285-293]; and Brooks filed a Reply [[295-301].

The Court entered an Order on Reconsideration denying Defendant Brooks' Motion for Reconsideration. [CP 302-303]. In the Court's Order, Judge Leveque found that after considering the briefing of the parties, there was not sufficient cause to alter the Court's decision in the case and denied the Defendant's Motion for Reconsideration. [CP 302-303].

Brooks then filed a Notice of Appeal to the Court of Appeals Division III on December 10, 2012 appealing the following four orders: (1) Order on Motion for Default; Order and Judgment; Finding of Fact, Conclusion of Law and Order; and Order on Reconsideration. [CP 304-316].

ACPI filed a Motion for Supplemental Proceedings seeking satisfaction of the Judgment. [Motion and Affidavit Examination of Judgment Debtor CPS \_\_\_\_].<sup>1</sup> ACPI further filed a Motion/Declaration for an Order to Show Cause noting that Defendant Brooks had failed to comply with the Court's Order of July 5, 2012. [Motion/Declaration for an Order to Show Cause re Contempt, CPS \_\_\_\_]. The Spokane County Superior Court Commissioner signed an Order in Supplemental Proceedings finding that Defendant Brooks had a Judgment wholly or partially unsatisfied by the Court, and commanding Brooks to appear in person before the Court on January 31, 2013 at 2:00 p.m. and answer concerning property and assets of the Defendant/Judgment Debtor. [ Order in Supplemental Proceedings, CPS \_\_\_\_]. The Court signed an Order to Show Cause re Contempt ordering Brooks to appear. [Order to Show Cause re Contempt, CPS \_\_\_\_]. The Court then entered an Order for Civil Bench Warrant on February 7, 2013 noting that Brooks had appeared by phone on January 31, 2013 and asked for a continuance. [Order for Civil Bench Warrant, CPS \_\_\_\_]. The Court went on to find that Brooks had been required to note a motion for a

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<sup>1</sup> A Supplemental Designation of Clerk's Papers was filed in Spokane Superior Court on May 14, 2013.

stay or note a motion to vacate or to appear at the supplemental proceedings, which he had failed to do, thus the Court entered an Order for Civil Bench Warrant. [Order for Civil Bench Warrant, p. 1, CPS \_\_\_\_]. At the time set for the Motion hearing, a Second Order for Bench Warrant was issued on February 8, 2013 after Brooks again failed to appear as directed or respond. [Order for Bench Warrant, p. 2, CPS \_\_\_\_]. The Court further entered an Order on Show Cause re Contempt/Judgment finding Brooks in contempt and ordering confinement in jail until the contempt is purged. [Order on Show Cause re Contempt/Judgment, p. 3, CPS \_\_\_\_]. Brooks responded five days later on February 13, 2013 with a Notice of Appearance by an Attorney who subsequently filed several motions. ACPI filed several responsive motions. On February 22, 2013, the Spokane County Superior Court signed an Order recalling the warrants [Order Recalling Warrants, CPS \_\_\_\_]. The Court's Order found that the Judgment exceeded the relief requested and vacated the Judgment. [Order Recalling Warrants, CPS \_\_\_\_]. The Court further held that the order of default is not set aside. [Order Recalling Warrants, CPS \_\_\_\_]. ACPI filed a Motion to Reconsider which was denied by the Court. [Motion and Order for Reconsideration, CPS \_\_\_\_]. The current status of the matter in

Spokane County Superior Court is pending a hearing on the Judgment on May 17, 2013.

#### **IV. Summary of Argument**

1. The trial court did not abuse its' discretion in failing to vacate the Order of Default. [CP 15-16]. The trial court properly concluded that Brooks was served outside the State of Washington with a Summons and Complaint, and that no defendants filed or served an appearance or answer on or before July 5, 2012, the date the Order of Default was entered. [CP 15-16]. The court below did not err in determining that Brooks' actions did not substantially comply with the appearance requirements to inform ACPI of the intention of Brooks to defend the suit. *Morin v. Burris*, 160 Wn.2d 745, 755, 161 P.3d 956, 961 (*en banc*) (2007). The court below further properly concluded that Brooks' failure to appear was not occasioned on mistake, inadvertence, or excusable neglect pursuant to CR 60 (b). Likewise, the trial court did not abuse its' discretion in determining that Brooks' cannot meet the standards set forth in *White v. Holm*. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) (*re'hrg denied*). The trial court

considered, and rejected, that Brooks could state a prima facie defense to the Complaint and further rejected that Brooks' failure to appear was occasioned by mistake inadvertence, surprise, or excusable neglect. [CP 39], *and see, Id.*, at 352.

2. The court below did not err in finding that it had personal jurisdiction over Brooks. Brooks waived presentation of an affirmative defense of personal jurisdiction under CR 12(b) by failing to assert the defense in an answer prior to the Order of Default. *See, Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 178 P.3d 981 (2008)(en banc). Furthermore, the trial court did not err in concluding that it had personal jurisdiction over Brooks based upon the conclusion that sufficient contacts regarding the sale of the motorcycle had taken place in Washington.
3. Appellant has failed to state an assignment of error in its third assignment of error. Appellant's Brief identifies assignment of error C to be "the court erred in denying appellant's motion for a new trial" in its' Table of Contents; however there was no trial in this matter as an

Order of Default was entered on July 5, 2012.

Appellant's Brief then identifies in its' Assignments of Error section issue C as being "the court erred in entry of the disputed findings of fact and conclusions of law".

[Brief of Appellant 8]. Finally, in the Argument section of the Brief, it reiterates, "the court erred in denying appellant's motion for a new trial" with a one sentence argument that the "evidence presented created substantial evidence to establish irregularity, misconduct of a party, excessive damages, and substantial justice has not been done." Appellant's third cause of error fails to state proper grounds for appeal under RAP 2.2.

Brooks disputed the trial court's Findings of Fact and Conclusions of Law; however, Brooks fails to assign error to any specific finding. Brooks' other assignment of error listed as "C", his third cause of error, is likewise unclear as there was no trial held in the court below. Brooks filed a "Motion for a New Trial" [CP 214-274] after the trial court entered its' Findings of Fact, Conclusions of Law, and Order denying relief from the default judgment. [CP 191-194]. The trial court treated Brooks' motion as a

motion to reconsider and denied the motion to reconsider. [CP 49]. Appellant's Brief fails to state a cause of error such that Respondent can meaningfully respond.

## **V. Argument**

- A. The Court's denial of Appellant's Motion to Vacate the Order of Default was proper because Brooks never appeared or substantially complied with appearance.

### *STANDARD OF REVIEW*

An appellate court reviews a trial court's decision on a motion to set aside a default judgment for abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702, 161 P.3d 346 (*en banc*)(2007), *citing*, *Yeck v. Dep't of Labor & Indus.*, 27 Wn.2d 92, 95, 176 P.2d 359 (1947). Discretion is abused when it is based on untenable grounds. *Id.*, *citing*, *Braam v. State*, 150 Wn.2d 689, 706, 81 P.3d 851 (2003). "A motion to vacate or set aside a default judgment...is in the first instance, addressed to the sound judicial discretion of the trial court, and that this court, sitting in appellate review, will not disturb the trial court's disposition of the motion unless it be made to plainly appear that sound discretion has been abused. *White v.*

*Holm*, 73 Wn.2d 348 351, 438 P.2d 581 (1968), *citing*, *Yeck v.*

*Dep't of Labor & Indus.*, 27 Wn.2d 92, 176 P.2d 359 (1947).

#### ANALYSIS

1. The Court's entry of the Order of Default was a proper exercise of discretion pursuant to RCW 4.28.180 and CR 55 as Brooks failed to appear or answer the Complaint within the sixty days.

The following facts related to the entry of the Order of Default are not contested: ACPI filed a Complaint in Spokane County Superior Court alleging a cause of action in breach of contract, tort of conversion, and fraud. [CP 1-9]. ACPI then caused the Complaint to be served by personal service to Dianna Zivuloviz, a woman over the age of eighteen, who resides with Brooks. [CP 10-11]. Brooks failed to file a Notice of Appearance or Answer to the Complaint. [Brief of Appellant, pgs. 6-7]. Sixty-one days later, ACPI moved for an Order of Default pursuant to CR 55. The Spokane County Superior Court granted the Order of Default [CP 15-16] and entered a Default Judgment [CP 17-19].

ACPI properly commenced this action pursuant to CR 3 by the filing of a Summons and Complaint. The Summons complied

with the requirements of CR 4 including warnings regarding failure to respond:

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing and serve a copy upon the person signing this Summons within twenty (20) days after service of this Summons, if served with in the State of Washington, or within sixty (60) days after service if served outside the State of Washington excluding the date of service or a Default Judgment may be entered against you without notice....If you serve a Notice of Appearance on the person signing for this Summons, you are entitled to notice before a Default Judgment may be entered.

[CP 1]. Brooks acknowledged receipt of the Summons and Complaint through personal service of an adult resident of his home in Arizona. [Brief of Appellant, p. 6]. The Summons informed Brooks of his responsibilities to state defenses in writing, the consequences of failing to respond including a default judgment, and the entitlement of notice prior to entry of default if Brooks served a Notice of Appearance.

As Brooks was located in Arizona, CR 4(e)(2) and (3) and RCW 4.28.180, requires the following:

The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state.

Brooks was served on May 5, 2012. [CP 10-11]. Brooks neither filed a statement of defenses in writing pursuant to CR 12(3) nor did he file a Notice of Appearance pursuant to CR 4. It is clear that Brooks had actual notice of the lawsuit because his attorney Thomas Baker requested a dismissal and was denied the same. [CP 123-124]. Sixty-one days after Brooks was served, ACPI moved for a Default Judgment pursuant to CR 55. CR 55 provides in pertinent part;

[W]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.

As Brooks had failed to appear, no additional notice was required. CR 55(a)(3). The Court properly entered the Order of Default. [CP 15-16].

After the entry of the July 5, 2012 Order of Default [CP 15-16], the trial court reconsidered and memorialized the rulings on reconsideration of the Order of Default on three occasions: the Findings of Fact, Conclusions of Law and Order [CP 191-194]; the Order on Reconsideration [CP 302-303]; and Order Recalling Warrants that declined to set aside the Order of Default. [CPS \_\_].

2. The Court's denial of Appellant's Motion to Vacate the Order was a proper exercise of discretion as Brooks failed to meet the requirements of CR 60(b).

Default and judgment is set forth in CR 55. CR 55(c)(1) states that for good cause shown and upon such terms as the court deems just, a court may set aside an entry of default, and if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b). CR 60 sets forth the process and grounds that must be followed to seek relief from a Judgment or Order. Brooks failed to comply with Rule 60(e)(1), (2) and (3). Furthermore, Brooks did not state grounds under CR 60 to qualify for relief from the Order of Default. The Court properly determined that Brooks had not appeared within the meaning of the rule and additionally his failure to respond was not entitled to relief due to mistake, inadvertence, surprise, or excusable neglect and properly denied the motion. [CP 17-19].

As a general matter, default judgments are not favored because "it is the policy of the law that controversies be determined on the merits rather than by default." *Little v. King*, 160 Wn.2d at 703, quoting, *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581 599 P.2d 1289 (1979) (further citation omitted). "But we also value

an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.” *Id.*, citing, *Griggs* at 581, 599 P.2d 1289. The fundamental principle when balancing these competing policies is “whether or not justice is being done”. *Id.*, citing *Griggs* at 582, 599 P.2d 1289 (further citation omitted).

CR 60(e)(1)(2) and (3) sets forth the procedure on vacation of judgment. CR 60(e)(1) provides:

Application shall be made by motion filed in the case stating the grounds upon which relief is asked and supported by the affidavit of the applicant or his attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceedings.

CR 60(e)(2) requires that upon the filing of the motion and affidavit, the court shall enter an order on a hearing and show cause why the relief asked for should not be granted. Finally, CR 60(e)(3) requires the motion, affidavit, and order to show cause shall be served upon all parties in the same manner as in the case of summons in a civil action.

Upon the entry of the Order of Default and the Judgment, Brooks filed a “Motion to Dismiss” on July 10, 2012. [CP 20-54]. Brooks’ identified CR 12 and CR 19 as the basis for his Motion to

Dismiss. [CP 20]. The Motion to Dismiss identified three issues: (1) the court lacks jurisdiction over the Defendant; (2) doctrine of forum non conveniens; and (3) Plaintiffs failed to join a necessary party under Rule 19. On July 18, 2012, Brooks filed a "Motion for Order re: Set Aside Entry of Default". [CP 55-128]. This Motion stated as a basis CR 55 and 60 and RCW 4.72.010 as well as the reasons contained in the Motion to Dismiss. [CP 55-128].

Defendants seeking to set aside a default judgment must be prepared to establish that they actually appeared or substantially complied with the appearance requirements and thus were entitled to notice. CR 60(b); and *Morin v. Burris*, 160 Wn.2d 745, 755, 161 P.3d 956, 961 (2007) (*en banc*).

#### *APPEARANCE*

Brooks did not appear nor did he substantially comply with appearance requirements. CR 4 requires that "[a] notice of appearance, if made, shall be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons." It is clear that prior to February 13, 2013, no attorney appeared on Brooks' behalf. Brooks signed all pleadings prior to February 13, 2013 with a *pro se* designation.

Brooks' argument is that he "substantially complied" with the appearance requirement and thus was entitled to notice before default was entered. To support this position, Brooks argues that he retained a Phoenix based attorney who wrote letters on his behalf including a letter asking whether the respondents planned to go forward with the claim, stating, "I am simply trying to get a yes or no prior to incurring expenses." [Brief of Appellant, p. 19; CP 122]. Attorney for ACPI responded to Phoenix based attorney Baker reiterating the position of the intent to go forward on June 14, 2012. [Brief of Appellant, p. 19; CP 123-124]. These actions by Brooks demonstrate actual notice of the lawsuit by ACPI and ACPI made clear its intention to go forward with the lawsuit.

In looking at notice requirements, the Washington Supreme Court examined the issue of notice in a default in *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 276, 996 P.2d 603 (2000). There, an insurer argued they should not be bound by a default judgment that had been entered against an uninsured tortfeasor; arguing that they had merely received a mailed copy of the summons and complaint for the suit and was not actually served with the pleadings to receive proper notice. *Id.*, at 275, 996 P.2d 603. The Court stated, receipt of the summons and complaint "alerts a potential party there

is a lawsuit afoot.” *Id.*, at 275, 996 P.2d 603. The Court reasoned that the insurer knew about the litigation, had an interest in the outcome, was obligated to protect its position and could have done so by intervening; receipt of the pleadings was sufficient to comport with due process notions of “fair play and substantial justice.” *Id.*

Likewise, in the case supported by Brooks for its position, *Morin v. Burris*, the Court stated, “[p]arties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment.” *Morin v. Burris*, 160 Wn.2d at 757, 161 P.3d at 962. The Court noted that litigation is inherently formal and all parties are burdened by time limits and procedures. *Id.*, “Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal.” *Id.* The Court noted that each has its purpose and the purpose is served with a certain formality monitored by judicial oversight to ensure fairness. *Id.* The Court went on to hold:

[a]ccordingly, we hold that parties cannot substantially comply with the appearance rules through prelitigation contacts. Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing, though they may still be entitled to have the default judgment set aside upon other well established grounds.

*Morin v. Burris*, 160 Wn.2d at 757, 161 P.3d at 962. “When served with a summons and complaint, a party must appear. There must be some potential cost to encourage parties to acknowledge the court’s jurisdiction. Substantial compliance will satisfy the notice of appearance requirement.” *Id.*, at 759, 161 P.3d at 964. The *Morin* Court, however, declined to recognize the informal appearance doctrine. *Id.*, at 760, 161 P.3d at 964. The *Morin* Court cited to a prior holding in *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960), where the Court recognized substantial compliance as being an actual appearance in court at a hearing to resist a motion. *Morin v. Burris*, 160 Wn.2d at 756, 161 P.3d at 962.

Here, Brooks was properly served with a summons and complaint informing him of a default judgment if he failed to appear or file an answer within sixty days. Brooks was clearly aware of the dispute being in court and had been informed that there was every intention to go forward by ACPI. Brooks never filed an answer or a notice of appearance. The Court properly concluded that there had not been an appearance or substantial compliance of appearance.

*WHITE v. HOLM FACTORS*

If a party cannot show they actually appeared or substantially complied with the appearance requirements to entitle the party to notice, a party moving to vacate a default judgment must meet the four-part test set forth in *White v. Holm* as follows:

(1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

*Little v. King*, 160 Wn.2d at 703-704, *citing*, *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (further citation omitted). The first two factors are the major elements to be demonstrated by the moving party while factors (3) and (4) are secondary. *White v. Holm*, 73 Wn.2d at 352, 438 P.2d 581, 584. As the proceedings to set aside a default judgment are equitable in nature, the relief sought or afforded is to be administered in accordance with equitable principles and terms. *Id.*, at 351, 438 P.2d at 584. Establishment of the first factor avoids a useless subsequent trial. *Johnson v. The Cash Store*, 116 Wn.App. 833, 841, 68 P.3d 1099, 1104 (Div III, 2003), *citing*, *Griggs v. Averbek Realty, Inc.* 92 Wn.2d 576, 581-2, 599 P.2d 1289 (1979).

The trial court examines the evidence and reasonable inferences from the evidence in the light most favorable to the moving party to determine whether there is substantial evidence of a prima facie defense. *Id.*, (further citation omitted). Thus, where the moving party has a strong or conclusive defense, the reason for the default is less significant than where the moving party is unable to conclusively show a defense. *See White v. Holm*, 73 Wn.2d at 352-53, 438 P.2d at 584. To establish a prima facie defense, the affidavits submitted to support vacation of a default judgment must “precisely set out the facts or errors constituting a defense and cannot rely merely on allegations and conclusions”. *Johnson v. The Cash Store*, 116 Wn. App. at 847, 68 P.3d at 1107 (further citation omitted); *see also* CR 60(e)(1).

The court’s application of the *White* factors should thus occur in order: determining whether a prima facie defense is established, and if so, then determining the reasons for failing to appear and answer to determine whether there was mistake, inadvertence, surprise or excusable neglect. *See, Johnson v. The Cash Store*, 116 Wn.App. at 847, 68 P.3d at 1107. In *Johnson*, Angela Johnson applied for several payday loans from Cash Store and sued Cash Store for unconscionability and Consumer

Protection Act violations. *Id.* The Court of Appeals for Division III found that Cash Store could demonstrate the third and fourth *White* factors. *Id.*, at 842, 68 P.3d at 1104. The *Johnson* Court further found that the Cash Store could only demonstrate a prima facie defense and could not satisfy its burden on demonstrating that its failure to appear and answer was occasioned by mistake, inadvertence, surprise, or excusable neglect where an employee was properly served and misunderstood the Complaint, responding with a note that the loan was no longer active. *Id.*, at 848, 68 P.3d at 1107.

Here, the trial court considered the four-part factors of *White* on at least two occasions. The trial court held a hearing and reviewed all pleadings including Brooks' Motion to Dismiss, Brooks' Motion to Set Aside the Judgment, and several Affidavits and other documents from both parties. [CP 191-194]. The *White Court* noted that a tenuous albeit prima facie showing of a defense would not warrant serious consideration of a motion to vacate a default judgment. *White v. Holm*, 73 Wn.2d 353, 438 P.2d 585. Likewise, here, the trial court noted that "Defendant Brooks has submitted voluminous arguments and largely, if not entirely, inadmissible exhibits/declarations in support of his motion to vacate the Order of

Default and Default Judgment.” [CP 192]. The trial court, in the position to judge the credibility and weight of the evidence, concluded as follows as to the first *White* factor, “[t]he admissible, reliable and credible evidence has established a dispute with conflicting allegations, but not a prima facie defense.” [CP 193].

The Court reviewed additional pleadings in consideration of Brooks’ Motion for Reconsideration, and denied the Motion for Reconsideration as well. [CP 302-303]. Appellant’s argument in its Brief is essentially a rehash of the arguments presented to the trial court regarding the “true ownership” of the motorcycle including a title document and declarations. Brooks acknowledged an intent to deceive Craig Frost by “pretending to be an interested buyer” of the motorcycle and falsely inducing Craig Frost to bring the motorcycle to Arizona. [CP 52] Brooks alleged that after he contacted Craig Frost under this deception, he paid another individual, Randall Hartman, to buy the motorcycle and received a title on February 8, 2012, just a few days after agreeing to purchase the motorcycle from Craig Frost and ACPI. [CP 53]. Brooks provided a title document, which was signed on February 8, 2012 and was notarized by Diana Zivulovic, the same individual that accepted service of ACPI’s Complaint. [CP 35]. The trial court considered

this argument and set of documents, finding that many of the documents were not admissible evidence and considering them as a whole did not amount to a prima facie defense. [CP 193]. The trial court did not abuse its discretion in determining that a prima facie defense was not presented.

Likewise, as to the second significant *White* factor, the trial court considered the arguments and found that the failure to timely appear and answer was not due to mistake, inadvertence, surprise, or excusable neglect. [CP 193]. The trial court considered arguments made by Brooks that his attorney's correspondence with Baker would amount to neglect and surprise. [CP 192]. However, the trial court found: (1) that Brooks had been served by personal service on May 5, 2012 with a Summons and Complaint; (2) that no defendant filed or served an appearance or answer on or before July 5, 2012; (3) there had never been an answer served or filed to the complaint; (4) and neither Brooks nor his attorney, Mr. Thomas Baker, appeared or answered the Summons and Complaint, although there was correspondence with plaintiff's attorney Mr. Malone. [CP 191-193]. The trial court concluded after reviewing essentially the same arguments presented to this Court that Brooks failed to "provide any evidence that his failure to appear or answer

The court below did not abuse its discretion in failing to vacate its Order of Default by concluding that Brooks had failed to appear or substantially comply with appearance requirements. Likewise, the court below properly concluded that Brooks had failed to present a prima facie defense and failed to provide any evidence that his failure to appear or answer was due to mistake, inadvertence, surprise, or excusable neglect. [CP 191-194].

B. The trial court did not err in finding it had personal jurisdiction over Appellant because Brooks failed to timely raise the defense of personal jurisdiction and there was sufficient contacts with the forum state of Washington.

1. Brooks failed to timely raise the defense of personal jurisdiction.

At the outset, it is significant that Brooks failed to raise a defense of personal jurisdiction. Affirmative defenses “shall be asserted in the responsive pleading” or alternatively, a defendant may assert lack of subject matter or personal jurisdiction, improper venue, insufficient process, insufficient service, failure to state a claim, or failure to join a party in a motion filed under CR 12(b). CR 12(b); *see also, Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981, 986 (2008)(en banc). “Generally, a

lack of personal jurisdiction must be pleaded in the answer or in a pretrial motion to dismiss or it is waived.” *Sutton v. Hirvonen*, 113 Wn.2d 1, 5, 775 P.2d 448, 450 (1989)(en banc); *citing*, CR 12(h)(1). CR 12(h)(1) clearly states,

[a] defense of lack of jurisdiction over the person...is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

An objection based on personal jurisdiction must be timely raised or it is waived. *In re Schneider*, 173 Wn.2d 353, 362, 268 P.3d 215, 219 (2011)(en banc); *citing*, CR 12(h)(1). Brooks failed to file an answer or any responsive pleading as required by CR 12(b) prior to July 5, 2012. Brooks waived the defense of lack of personal jurisdiction. *See*, CR 12(h)(1).

2. Even though Brooks failed to timely raise the defense of personal jurisdiction, the trial court nonetheless considered Brooks’ objections to personal jurisdiction and properly concluded that personal jurisdiction exists over Brooks.

#### *STANDARD OF REVIEW*

Whether a court has jurisdiction is a question of law subject to de novo review. *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999). "Proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party, and a judgment entered without such jurisdiction is void." *Woodruff v. Spence*, 76 Wn.App. 207, 209, 883 P.2d 936 (1994).

### ANALYSIS

Personal jurisdiction is bounded by due process under the Fourteenth Amendment; an out-of-state defendant must have some minimum contact with the state so that personal jurisdiction will not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington, Etc.*, 326 U.S. 310, 316 (1945), quoting, *Milliken v. Meyer*, 311 U.S. 457, 463, (1940). The plaintiff has the burden of establishing jurisdiction. *SeaHAVN, Ltd. V. Glitnir Bank*, 154 Wn.App. 550, 563, 226 P.3d 141 (2010). If the trial court's ruling is based upon affidavits and discovery, only a prima facie showing is required and the allegations of the complaint are treated as true for this purpose. *MBM Fisheries Inc. v. Bollinger Mach. Shop and Shipyard, Inc.*, 60 Wn.App. 414, 418, 804 P.2d 627 (1991). General personal jurisdiction can exist when the defendant transacts substantial business to give rise to a legal

obligation. *Id.*, at 418, 804 P.2d 627. By contrast, specific personal jurisdiction over out of state defendants is measured by RCW

4.28.185. *Precision Lab Plastics, Inc. v. Micro Test Inc.*, 96 Wn.App. 721, 456, 981 P.2d 454 (1999).

Washington has a “long-arm” statute for jurisdiction, and it provides as follows:

Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts: (a) the transaction of any business within this state; (b) The commission of a tortious act within this state; (c) The ownership, use, or possession of any property whether real or personal situated in this state; (d) Contracting to insure any person, property, or risk located within this state at the time of contracting; (e) The act of sexual intercourse within this state with respect to which a child may have been conceived; (f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

RCW 4.28.185(1)(a). It is well established in Washington that under the long-arm statute of RCW 4.28.185, Washington courts “may assert jurisdiction over nonresident individuals and foreign corporations to the extent permitted by the due process clause of

the United States Constitution, except as limited by the terms of the statute.” *Certification from the United States Court of Appeals for the Ninth Circuit in Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 767, 783 P.2d 78, 79 (1989)(en banc), *quoting*, *Deutsch v. West Coast Mach. Co.*, 80 Wn.2d 707, 711, 497 P.2d 1311, cert. denied, 409 U.S. 1009 (1972). The *Shute* Court discussed the history of the long-arm statute, noting that Washington’s statute is based upon the Illinois statute which reflects on the part of the legislature a ‘conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause’. *Id.*, at 767, 785 P.2d 80 (further citation omitted).

In order to subject nonresident defendants... to the in personam jurisdiction of this state under RCW 4.28.185(1)(a), the following factors must coincide: (1) the non resident defendant... must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with such transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protections of the law of the forum state afforded the respective parties and the basic equities of the situation.

*Certification from the United States Court of Appeals for the Ninth Circuit in Shute v. Carnival Cruise Lines*, 113 Wn.2d at 767, 783

P.2d at 80. RCW 4.28.185 extends personal jurisdiction over out-of-state defendants to the full limit of federal due process. *Precision Lab. Plastics, Inc., v. Micro Test, Inc.*, 96 Wn. App. 721, 726, 981 P.2d 454 (1999).

In *Shute*, the Court concluded that Carnival Cruise Line's solicitation of business was sufficient for a purposeful act to satisfy the first prong of the statutory test. *Id.*, at 768, 783 P.2d at 80. Factors such as prior negotiations and contemplated future consequences, along with terms of the contract and the parties' actual course of dealing, determine whether the defendant purposefully established minimum contacts within the forum state. *See, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985).

Based upon the circumstances presented in the instant matter, specific personal jurisdiction exists over Brooks based upon his contacts with Craig Frost over the motorcycle. As to the first statutory prong, personal jurisdiction was established by Brooks purposeful action. It is uncontested by Brooks that Brooks saw an advertisement in a trade publication and he contacted Craig Frost. Craig Frost was located in the State of Washington at the time of the contact as was the motorcycle. [CP 3-4]. Mr. Brooks and Mr. Frost contracted for the sale of the motorcycle while Mr. Frost was

in Washington. [CP 4]. The motorcycle was registered in Washington prior to being transported to Arizona where Craig Frost had agreed to transport the motorcycle for delivery to Brooks. [CP 4]. As both Craig Frost and ACPI's motorcycle were in Washington, the only thing outside of Washington was Mark Brooks.

Appellant emphasizes in his brief that the only allegation to support personal jurisdiction is that the parties spoke on the telephone prior to Craig Frost traveling to Arizona. [Brief of Appellant, p. 30]. Appellant neglects to note that all allegations in the Complaint are viewed as true for this purpose and only a prima facie showing needs to be presented. *See, MBM Fisheries Inc. v. Bollinger Mach. Shop and Shipyard, Inc.*, 60 Wn.App. at 418, 804 P.2d 627. While Appellant fails to address this, Brooks initiated the contact with Craig Frost, and a contemplated future action of that contact was Craig Frost's agreement to transport the motorcycle to Arizona for Brooks. Appellant fails to address the fact that Brooks had no intention of providing payment and he had "pretended to be an interested buyer" specifically for the purpose of inducing Craig Frost to deliver the motorcycle to Arizona for the sale. [CP 52]. Brooks then took the motorcycle for a drive indicating he would

return shortly; however he did not return and refused to return the motorcycle to Craig Frost. [CP 4-5]. It was Brooks in the first instance that contacted Craig Frost and that purposeful act of soliciting the purchase of the motorcycle caused Craig Frost to journey to Arizona with the motorcycle to complete the sale.

Appellant argues that there was no contract for purchase of the motorcycle; however, the argument is disingenuous given that Brooks admits he was purposefully acting to deceive Craig Frost by pretending to be a buyer when his every intention was to take the motorcycle by conversion once he had convinced Craig Frost that he would be purchasing the motorcycle. Following Appellant's argument to its natural conclusion, there could never have been a contract in Washington because Brooks was deceiving Craig Frost the entire time and planned to take the motorcycle without payment when it arrived in Arizona. Brooks intentional act of calling Craig Frost and arranging the sale is a purposeful act that meets the first prong for specific jurisdiction under *Shute*.

As to the second prong, it is clear that the instant cause is directly connected to the transaction that was consummated between Craig Frost and Mark Brooks. The Complaint directly

flowed from the agreement to sell the motorcycle while Craig Frost and ACPI's motorcycle were located in Washington.

Washington's statutory test, first announced in *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, was adopted from a law review case note. *Certification from the United States Court of Appeals for the Ninth Circuit in Shute v. Carnival Cruise Lines*, 113 Wn.2d at 769, 783 P.2d at 81, quoting, *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963). The *Shute* Court discussed the critical inquiry in considering whether a party's actions "arises from" a party's contacts with a forum state is a "but for" inquiry. *Id.* "In considering whether a cause of action 'arises from' a party's contacts with a forum state, the article anticipated that a 'cause of action might come to fruition in another state, but because of activities of defendant in the forum state there would still be a 'substantial minimum contact.'" *Id.*, quoting, *Note, Jurisdiction over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 *Geo.L.J.* 342, 351 (1958). The article went on to note, "[f]rom the standpoint of fairness it should make no difference where the cause of action matured, so long as it could not have arisen but for the activities of the nonresident firm in the forum where it is ultimately sued." *Id.*

*quoting Note, Jurisdiction over Nonresident Corporations Based on a Single Act: A New Sole for International Shoe*, 47 Geo.L.J. 342, 355. The *Shute* Court went on to state that the Ninth Circuit also adopted this same “but for” analysis for the “arising from” prong of its test to determine whether the exercise of specific jurisdiction comports with due process. *Id.* The *Shute* Court adopted the “but for” test and held that “but for” Carnival’s transaction of any business in Washington, Mrs. Shute would not have been injured on the cruise ship and her claims arise from Carnival’s Washington contacts within the meaning of Washington’s long-arm statute. *Id.*, at 772, 783 P.2d at 82.

Likewise, here, but for Mark Brooks calling Craig Frost on a pretense to purchase the motorcycle from Craig Frost, Craig Frost would not have transported the motorcycle to Arizona for Brooks to purchase it. ACPI’s claims therefore arise from Brooks contacts within the meaning of Washington’s long-arm statute. The cause of action did not mature until after Brooks took the motorcycle from Craig Frost which took place in Arizona; however, the cause of action could not have arisen but for the activities of Brooks in contacting Craig Frost and arranging the purchase while the motorcycle and Mr. Frost were in Washington.

As to traditional notions of fair play and substantial justice, Brooks premised the sale on a deceit, which he now argues, is insufficient to demonstrate that a contract existed between he and Craig Frost. Brooks contacted Craig Frost and pretended he wanted to purchase the motorcycle. Craig Frost then sought a registration in Washington for the motorcycle and agreed to transport it to Arizona for delivery to Brooks. Appellant argues as to this prong that the phone call and purported agreement are insufficient; however, given that Brooks never intended to actually purchase the motorcycle and was pretending to be a legitimate buyer, it does not offend traditional notions of fair play and substantial justice that Brooks would now be held accountable in a Washington court for his actions in contacting Frost and arranging this sale.

C. The court below did not err in denying Appellant's motion for a new trial when there was no trial in the first instance and did not err in entering Findings of Fact and Conclusions of Law.

At the outset, Appellant has failed to state an assignment of error as to this third issue. In the Table of Contents, Appellant

assigns error as follows: “C. The court erred in denying appellant’s motion for a new trial.” [Brief of Appellant, p. 2]. In its’ Assignments of Error section, Appellant assigns error as follows: “C. The Court erred in entry of the disputed findings of fact conclusions of law.” [Brief of Appellant, p. 8]. In the Argument section, Appellant returns to the assignment of error that the court erred in denying appellant’s motion for a new trial. [Brief of Appellant, p. 32]. The argument that follows the heading is two sentences indicating that Appellant reiterates his arguments previously set forth and contends that the “evidence presented created substantial evidence to establish irregularity, misconduct of a party, excessive damages, and substantial justice has not been done.” [Brief of Appellant, p. 32-22].

RAP 10.3 requires that the Brief of Appellant should contain “a separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignment of error.” RAP 10.3(a)(4). Additionally, RAP 10.3(g) states “[a] separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error

or clearly disclosed in the associated issue pertaining thereto.”

RAP 10.3(g). RAP 10.3(a)(5) requires argument in support of the issues presented for review together with citations to legal authority. *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629, 632 (1995)(en banc).

When an appellant “fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merit of that issue.” *State v. Olson*, 126 Wn.2d at 321, 893 P.2d 629, 893 P.2d at 632. As the *Olson* Court noted, the Rules of Appellate procedure are liberally interpreted to promote justice and facilitate the decision of cases on the merits. *Id.*, at 318, 893 P.2d at 630. The *Olson* Court narrowed this rule from prior holdings, stating that:

the narrow rule makes perfect sense because in the situation where the issue is not raised at all, the Court is unable to properly consider the issue prior to the hearing and is given no information on which to decide the issue following the hearing. More importantly the other party is unable to present argument on the issue or otherwise respond and thereby potentially suffers great prejudice.

*Id.*, at 321, 893 P.2d at 631.

Here, Appellant stated two different assignments of error under subsection C. It is not clear from Appellant's brief whether the assignment of error is in denying Appellant's Motion for a New Trial or whether Appellant is claiming error with the Findings of Fact and Conclusions of Law entered by the Court. Clarity is not found in the argument section, as the argument is two sentences with no legal citation that reiterates the previous arguments. There is no reference to either the Findings of Fact or to a Motion for a New Trial. There was never a trial in this matter as an Order of Default was entered on July 5, 2012.

Appellant did file with the court below Objections to Findings of Fact and Conclusions of Law [CP 195-213] and a Motion for a New Trial [CP 214-274]. Both of these documents contained very similar arguments that had been presented to the court below in previous pleadings including the Motion to Dismiss [CP 20-54] and Motion to Vacate the Default Judgment [CP 55-128]. The court treated Brooks' Objections and Motion for a New Trial as a Motion to Reconsider and denied the same noting that the "Court determines that there is not sufficient cause shown to alter the court's decision in this case." [[CP 302-303].

The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, the appellate court determines if the findings of fact were supported by substantial evidence in the record. If so, it determines whether those findings of fact support the conclusions of law. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Appellant has failed to identify which findings of fact and conclusions of law it assigns error to in violation of RAP 10.3(g). The Findings of Fact and Conclusions of Law entered by Spokane Superior Court Judge Jerome Leveque were detailed findings supported by the record and included the arguments Brooks had made in his Motion to Dismiss and Motion to Set Aside the Judgment. [CP 192]. Brooks' Objections to the Findings of Fact and Conclusions of Law were largely a restatement of earlier arguments already considered by the court including objections to personal jurisdiction and references to declarations previously considered by the court. [CP 195-213]. The court below entered Findings of Fact and Conclusions of Law consistent with the record presented.

Abuse of discretion is the standard of review for an order denying a motion for a new trial: "An order denying a new trial will not be reversed except for abuse of discretion. The criterion for

testing abuse of discretion is: '[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?' " *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978) (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Here, there was no trial. Brooks' Motion for a New Trial argues the default judgment constituted an excessive judgment; however that issue is still pending before the court below as the judgment was vacated. [Order Recalling Warrants, CPS \_\_\_\_]. The bulk of the argument in the Motion for the New Trial was very similar to the pleadings previously presented, and the trial court treated the arguments as a motion to reconsider, which it denied. [CP 302-303]. It was not an abuse of discretion for the court to deny the Motion for a New Trial. As Appellant failed to assign further error, Respondent cannot meaningfully respond further.

D. Respondent is entitled to attorney's fees under RAP 18.1.

ACPI requests attorney's fees under RAP 18.1. Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs. *Austin v. U.S. Bank of Wash.*, 73 Wash.App. 293, 313, 869 P.2d 404, review denied, 124 Wash.2d 1015, 880 P.2d 1005

(1994). ACPI requests reasonable attorneys fees and costs pursuant to RCW 4.84.185 which states:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the non-prevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

Additionally, RCW 4.84.010 provides for costs to the prevailing party including statutory attorney fees.

Here, ACPI obtained an Order of Default and a Default Judgment. Brooks responded late with a Motion to Dismiss, arguably a frivolous motion as that procedure was improper, followed by a Motion to Vacate the Judgment. The court below ruled on Brooks' Motion to Vacate the Judgment, denying the same. [CP 191-194]. Brooks then filed a Motion for a New Trial, another arguably frivolous motion given that a trial had not taken place and containing the same grounds and legal authority already

presented to the court below. The court below also ruled against Brooks on that motion. [CP 302-303]. ACPI meanwhile went through the expense of Motions to Enforce the Judgment in Arizona, which was resisted by Brooks. ACPI was successful in that action and Arizona recognized the Washington Judgment as having full faith and credit. [Superior Court Maricopa Co., CPS\_\_]. ACPI made an attempt to collect the motorcycle in Arizona with Arizona police only to discover that Brooks claimed the motorcycle had been sold to an undisclosed party for an undisclosed sum in Australia.

ACPI further filed a Motion for Supplemental Proceedings in Spokane County seeking satisfaction of the Judgment. [Affidavit Support Order, CPS \_\_]. ACPI further filed a Motion/Declaration for an Order to Show Cause noting that Defendant Brooks had failed to comply with the Court's Order of July 5, 2012. [CPS \_\_]. The Spokane County Superior Court Commissioner signed an Order in Supplemental Proceedings finding that Defendant Brooks had a Judgment wholly or partially unsatisfied by the court, and commanding Brooks to appear in person before the court and answer concerning property and assets of the Defendant/Judgment Debtor. [CPS \_\_]. The court signed an Order to Show Cause re

Contempt ordering Brooks to appear. [CPS \_\_\_\_]. The court then entered an Order for Civil Bench Warrant on February 7, 2013 noting that Brooks had appeared by phone on January 31, 2013 and asked for a continuance. [CPS \_\_\_\_]. The court entered an Order for Civil Bench Warrant. [CPS \_\_\_\_]. At the time set for the Motion hearing, a Second Order for Bench Warrant was issued on February 8, 2013 after Brooks again failed to appear as directed or respond. [CPS \_\_\_\_]. The court further entered an Order on Show Cause re Contempt/Judgment finding Brooks in contempt and ordering confinement in jail until the contempt is purged. [CPS \_\_\_\_]. Brooks responded five days later with a Notice of Appearance by an Attorney who subsequently filed several motions. ACPI filed several responsive motions. On February 22, 2013, the Spokane County Superior Court signed an Order recalling the warrants [CPS \_\_\_\_]. The court's Order found that the Judgment exceeded the relief requested and vacated the Judgment. [CPS \_\_\_\_]. The court further held that the order of default is not set aside. [CPS \_\_\_\_]. ACPI filed a Motion to Reconsider which was denied by the Court. [CPS \_\_\_\_]. The issue of the Judgment remains pending before the Spokane County Superior Court while meanwhile this appeal is being pursued by the Appellant. Appellant furthermore filed its' brief late

under the RAP. By ignoring the procedural rules of the Civil Rules as well as the Rules of Appellate Procedure, ACPI has incurred significant expense. ACPI is now in the position of defending the Order of Default in this Court as well as pursuing its claims for a Judgment in the Spokane Superior Court. For these reasons, reasonable attorney's fees are appropriate.

E. Conclusion

The trial court did not err in finding Brooks in default, and did not err in denying the Motion to Vacate the Default Judgment. Brooks failed to appear or comply with substantial appearance requirements. Likewise, the court below did not err in determining that it has personal jurisdiction over Brooks in this action as Brooks failed to timely assert that defense as required in CR 12(b). Further, but for Brooks' actions in "pretending" to be a legitimate buyer of the motorcycle, this lawsuit would not have been initiated. Brooks' actions are sufficient for Washington's long-arm jurisdiction. Brooks' third cause of action fails to state a claim and should be dismissed outright. Finally, reasonable attorneys fees should be granted in this matter. For the following reasons, Respondent respectfully requests that this Court uphold the determinations of the court below and deny Appellant's appeal.

Dated this 20<sup>th</sup> day of May, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark J. Conlin", written over a horizontal line.

Mark J. Conlin  
WSBA 9020  
Attorney for Respondent