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65207-9

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No. 65207-9-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

AMBER FOWLER, M.D., Appellant,

v.

DONALD RUSSELL JOHNSON, M.D., and JANE DOE RUSSELL,
husband and wife and the marital community comprised thereof,
and ISLAND COUNTY DERMATOLOGY, PLLC, a Washington
professional limited liability corporation, D/B/A FIDALGO
DERMATOLOGY, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY
09-2-01188-8

REPLY BRIEF OF APPELLANT

BURI FUNSTON MUMFORD, PLLC

By PHILIP J. BURI
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ORIGINAL

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INTRODUCTION

This case turns on a legal issue: can a trial court vacate part of a default judgment? Rather than answer this question, Respondent Dr. D. Russell Johnson asserts it is irrelevant.

Whether [the trial court] could have vacated only part of the judgment is irrelevant, as it is undisputed that Dr. Johnson has a strong, virtually conclusive defense to one of five *closely related* claims.

(Response Brief at 9) (emphasis added). Respondent devotes only two pages of a 25-page brief to the trial court's concern -- is default an "all or nothing" decision.

Answering the trial court's question is critical for three reasons. First, the trial court stated it would have affirmed default judgment on four of Appellant Dr. Amber Fowler's claims if this was not an all or nothing decision. Second, the five claims are not closely related, but rather separate on the important element of intent. And third, Washington law gives courts authority to vacate default judgments on less than the entire case.

The trial court asked the right question but answered it incorrectly. Appellant Dr. Fowler respectfully requests the Court to reverse the trial court's decision and reinstate default judgment on

her claims for unpaid wages, violation of the UCC, and reasonable attorneys' fees.

I. THE TRIAL COURT RECONSIDERED ITS DEFAULT JUDGMENT ON ONE GROUND ONLY

Dr. Johnson's response presumes that the trial court reversed its entire decision on reconsideration, vacating all of its earlier findings. This is incorrect. The court reconsidered only one claim out of five and did not revise the other findings.

In his original decision, Superior Court Judge David Needy refused to overturn the default judgment against Dr. Johnson. The court found no excusable neglect, rejecting the arguments Dr. Johnson now reasserts on appeal.

An issue before the court was whether the defendants' failure to timely appear and answer was the result of "mistake, inadvertence, surprise or excusable neglect." (CR 60(b)(1)).

None of the explanations/circumstances presented by defendants rise to the accepted level of mistake, inadvertence, surprise or excusable neglect.

(Order Denying Motion to Vacate at 8; CP 438). Furthermore, the court did not rule that Dr. Johnson had strong defenses to the claims. It concluded only,

there is substantial evidence to support a defense to all or part of the sums claimed by the plaintiff and awarded in the default judgment.

(Order Denying Motion to Vacate at 8; CP 438).

The trial court reconsidered its decision on one limited ground: Dr. Johnson has a conclusive defense that he did not willfully withhold Dr. Fowler's wages. "This Court finds that Defendant(s) demonstrated a strong or virtually conclusive defense to the third cause of action." (5/18/10 Letter Ruling; CP 476) Judge Needy made clear that his earlier rulings on the other issues were the same. "The remaining four causes of action remain subject to the four prong analysis resulting in the previous ruling denying the Motion to Vacate Default and Default Judgment." (5/18/10 Letter Ruling; CP 473).

The trial court's limited ruling on reconsideration undermines Dr. Johnson's arguments on appeal. Respondent repeats arguments the trial court rejected – that Dr. Johnson allegedly had strong defenses to Dr. Fowler's claims and acted with excusable neglect. (Response Brief at 11- 20). Because Dr. Johnson did not appeal from, or assign error to, the trial court's rulings, all findings of fact are verities on appeal. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) ("A party must assign error to a finding of

fact for it to be considered on review”). Furthermore, he must prove the trial court abused its discretion in deciding against him.

The only issue properly before this Court is whether vacating a default judgment is an all or nothing decision. As detailed below, the trial court erred by concluding it was.

II. DR. JOHNSON’S STRONG DEFENSE APPLIED TO ONE ELEMENT OF ONE CLAIM

A. Only The Double Damages Claim Required Proof of Willfulness

In her complaint, Dr. Fowler alleged four counts containing five claims:

- Breach of Contract (wages);
- Breach of Contract (spa referral fees);
- Violation of RCW 49.48.010 (wages);
- Violation of RCW 49.52.070 (double damages); and
- Violation of UCC (dishonored checks).

(Complaint; CP 13-20). Although Dr. Fowler filed an amended complaint in Superior Court on July 7, 2009, that was never served on defendants and was not part of the default judgment. (CP 21-29) (Amended Judgment Summary; CP 105-113) (Attached as Appendix A).

Only the claim the claim for double damages required proof that Dr. Johnson acted willfully. RCW 49.52.050(2) (“willfully and with intent to deprive the employee of any part of his or her wages...pay any employee a lower wage than...obligated to pay...by contract”). Neither the contract claims nor the other statutory violations required this higher proof of intent. See e.g. Seabed Harvesting, Inc. v. Department Of Natural Resources, 114 Wn. App. 791, 797, 60 P.3d 658 (2002) (“the party making such a claim must show that the contract imposed a duty, that the duty was breached, and that the breach proximately caused damage”).

The trial court’s default judgment reinforces the separate nature of each claim, awarding damages individually on “plaintiff’s claims for unpaid wages, damages pursuant to RCW 62A.3-501 et seq., and attorneys’ fees.” (Amended Judgment Summary at 2; CP 106). On unpaid wages, the court ruled,

Island County Dermatology PLLC has failed to pay Dr. Fowler in accordance with her employment agreement, as confirmed in writing by Default Defendants on November 24, 2008. Island County Dermatology’s failure to pay is a violation of RCW 49.48.010 and RCW 49.52.050(2). The net unpaid wages owed to Dr. Fowler are \$163,997.80 as of March 10, 2009.

(Amended Judgment Summary at 8; CP 111-112). This claim did not require proof that Dr. Johnson intentionally withheld the wages.

The court ruled separately to award double damages for intentionally withholding wages.

Pursuant to RCW 49.52.070, Island County Dermatology PLLC and Dr. D. Russell Johnson, as the principal owner and sole member of Island County Dermatology PLLC, are jointly and severally liable to pay twice the amount of \$163,997.50, which was wrongfully withheld from Dr. Fowler within the meaning of RCW 49.52.050(2), plus reasonable attorneys' fees and costs of suit.

(Amended Judgment Summary at 8; CP 112). These were not identical claims, but rather discrete conclusions of law.

Next, the court concluded that Dr. Johnson violated the UCC by failing to pay on a dishonored check.

Pursuant to RCW 62A.3-515, Dr. Fowler is further entitled to an award of reasonable attorneys' fees for her attorney's efforts to collect on the dishonored checks for wages from Island County Dermatology PLLC. Dr. Fowler complied with all provisions of RCW 62A.3-501 et seq.

(Amended Judgment Summary at 8; CP 112). This claim had nothing to do with whether Dr. Johnson intentionally withheld wages. It instead compensated Dr. Fowler for collecting on Dr. Johnson's NSF checks.

Finally, the court awarded Dr. Fowler her spa referral fees.

Island County Dermatology PLLC agreed to pay Dr. Fowler for spa referral fees in accordance with her employment agreement, as confirmed in writing by Default Defendants on November 24, 2008. The amount owed Dr. Fowler for spa referral fees between August 2006 and December 12, 2008 was agreed by the parties to be \$26,000, which was to be paid in three equal monthly installments of \$8,666 starting in January 1, 2009. Island County Dermatology PLLC failed to make the final payment of \$8,666 and as a consequence, Island County Dermatology remains liable for this amount, plus pre-judgment interest from March 1, 2009 in the amount of \$432.60.

(Amended Judgment Summary at 8-9; CP 112-113) This claim also did not require proof that Dr. Johnson intentionally withheld the spa referral fees.

The trial court awarded damages on four counts – breach of contract for wages, breach of contract for spa referral fees, unpaid wages, and violation of the UCC on the dishonored checks. The court doubled damages for intentionally withholding wages under RCW 49.52.050(2). Although arising from the same incident, only the claim for double damages required proof of specific intent, that Dr. Johnson intentionally withheld wages. The other claims merely required evidence of general intent, that Dr. Johnson committed the acts alleged.

B. The Five Claims Are Not “Closely Related”

To rebut the separate standing of each claim, Dr. Johnson repeatedly asserts the claims were “closely related”.

The cases cited by Dr. Fowler do not support finding an abuse of discretion where, as here, there is a strong defense to a claim that is closely related to the other claims asserted in the complaint.

(Response Brief at 23, 1, 9, 24). Dr. Johnson cites no rule or caselaw that supports this theory. Instead, he implies that the five claims are so intertwined that the trial court could not vacate default judgment on one without affecting the remaining four.

Dr. Johnson’s argument is unpersuasive for three reasons. First, as described above, only the double damage claim requires proof of intent and is separate from the remaining claims. They are not so closely related that vacating one for lack of willfulness requires the court to vacate all. Put differently, a jury could find Dr. Johnson liable for withholding wages but not for double damages.

Second, Dr. Fowler’s later claim for tortious interference was not part of the default judgment. Dr. Johnson asserts that the tortious interference claim requires proof of intent.

On her claim for intentional interference with a business expectancy, Dr. Fowler was required to show that Dr. Johnson intentionally interfered with Dr. Fowler’s business expectancy for an improper

purpose. Leingang v. Pierce County Medical Bureau,
131 Wn.2d 133, 157, 930 P.2d 288 (1997).

(Response Brief at 13). This argument has multiple flaws.

The first flaw is that it is a new argument on appeal. Dr. Fowler pled the claim for tortious interference in her amended complaint, filed after Dr. Johnson's default. It was not part of the default judgment and Dr. Johnson's trial counsel did not mention or challenge the tort claim in his motion for reconsideration.

It would be unjust to permit the Plaintiff to retain a default judgment for "double damages" related to her wage claim when the record clearly establishes that the Plaintiff provided no evidence that the Defendants willfully failed or refused to pay her wages with intent to deprive Plaintiff of those funds.

(Defendant's Motion for Reconsideration at 2; CP 415). Appellate counsel improperly raises the issue for the first time in the response brief.

Next, the trial court mistakenly included the amended complaint in its second letter ruling on reconsideration. (5/18/10 Letter Ruling at 1; CP 473) ("five causes of action were pled in the Amended Complaint filed by Plaintiff on July 7, 2009"). The court overturned default judgment "specifically, as it related to the willful and intentional requirements of RCW 49.52.050." (5/18/10 Letter Ruling at 1; CP 473). It did not rule on the tort claim.

Although mentioned in the May 18th letter ruling, the court did not consider the amended complaint in the original default judgment, the letter ruling denying the motion to vacate, or the order denying the motion to vacate. The court's reference to it in the second letter ruling was a mistake, but a harmless error.

The last flaw is that tortious interference requires different proof of intent from that required under RCW 49.52.050-.070. The tort involves intentional interference with a business expectancy *other than the contract between Dr. Johnson and Dr. Fowler*. Here, the allegation is that Dr. Johnson interfered with referrals to Dr. Fowlers' new practice. Given that the trial judge never ruled on these allegations, it is not a reason to uphold vacating the entire default judgment.

Third, Dr. Johnson does not have a strong defense to any claim other than double damages. In his response, he argues directly contrary to the trial court's rulings.

Dr. Johnson demonstrated a virtually conclusive defense on Dr. Fowler's breach of contract claims. Dr. Johnson submitted unrebutted declarations that a full review of his billing records showed that Dr. Fowler was paid in full and, in fact, was overpaid.

(Response Brief at 12). The trial court did not reach this conclusion. In the default judgment, the court found ample

evidence of Dr. Fowler's unpaid wages. (Amended Judgment Summary at 3-4; CP 107-108). Furthermore, the trial court's rulings on reconsideration found only that "there is substantial evidence to support a defense as to all or part of the amount included in the default judgment." (11/25/09 Letter Ruling at 2; CP 346) (Attached as Appendix B).

Dr. Fowler's claims are not so closely related as to prevent the Court from entering default judgment on some of them. The double damages claim required proof of intent beyond that necessary for breach of contract or the other statutory violations. Because a trier of fact could logically separate it from the others, the trial court could vacate default judgment solely on the double damages claim.

III. THE TRIAL COURT HAS AUTHORITY TO VACATE ONE PART OF THE DEFAULT JUDGMENT

In her opening brief, Dr. Fowler identified three legal grounds for the trial court to vacate only part of the default judgment: (1) existing caselaw; (2) Civil Rules 55 and 60; and (3) rules of equity. Dr. Johnson's arguments against these grounds do not nullify the trial court's authority.

First, Dr. Johnson tacitly concedes that the trial court has authority to vacate default judgment on damages only, leaving judgment on liability intact.

Neither Calhoun [v. Merritt, 46 Wn. App. 616, 731 P.2d 1094 (1986)] or Shepard [Ambulance v. Helsell, Fetterman, 95 Wn. App. 231, 974 P.2d 1275 (1999)] addresses vacating one of several closely related claims. *Rather they address vacating damages, but affirming liability, on a single claim.*

(Response Brief at 24) (emphasis added). This is an important concession. In answer to the trial court's question, Respondent acknowledges that a court has authority to vacate part of a default judgment - if it involves different elements in the same claim.

This concession undermines Respondent's argument. Why would the element of damages not be "closely related" to that of liability? It is hard to imagine more closely related issues than liability and damages in a single cause of action. The distinction is not that the issues are closely related; instead, it is that proving liability involves different evidence than proving damages. The same is true here: proving willfulness in wage withholding is different from proving breach of contract and violation of the wage statute. Dr. Johnson's strong defense applies to only one element of proof – whether he intentionally withheld Dr. Fowler's wages.

Because courts can enter default judgments on specific elements of a claim, they can also enter default judgments on claims unaffected by a defense to one element of one claim.

Next, Dr. Johnson argues that the defendants in Calhoun and Shepard failed to present convincing evidence of a defense on liability. (Response Brief at 24). But the trial court here reached the same conclusion. Although Dr. Johnson presented evidence of a defense, it was not so strong as to require the court to vacate default judgment on four out of five claims. (5/18/10 Letter Ruling at 1; CP 473).

Neither Calhoun nor Shepard applied a different standard for vacating default judgment. Both concluded that short of a strong, virtually conclusive defense, a defaulting defendant must show excusable neglect. Calhoun v. Merritt, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986) (“if the party can show only a minimal prima facie defense, the court will scrutinize the other considerations more carefully”); Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 243, 974 P.2d 1275 (1999) (“where a party moving to vacate a default shows a strong defense and the cause of the error is understandable, a motion to vacate

can be granted if it is filed within the one year period of CR 60(b)(1)").

Dr. Johnson's dispute is not with the rulings in Calhoun and Merritt; it is with the trial court's ruling that he did not prove excusable neglect. Once the court ruled that none of Dr. Johnson's "explanations/circumstances rise to the accepted level of mistake, inadvertence, surprise or excusable neglect", evidence of a defense to each claim was not enough. (11/25/09 Letter Ruling at 2; CP 346) Dr. Johnson had to provide a strong, virtually conclusive defense to each claim. He did so only for one claim, not all five.

Second, Dr. Johnson offers no analysis to rebut the trial court's authority under CR 55 and 60. (Response Brief at 25) ("rules do not 'expressly authorize' nor compel the drastic result of allowing a default on all but one cause of action"). Given that the trial court had already approved the "drastic result" of default on *all* of Dr. Johnson's claims, this argument has no weight. The trial court's question was whether a strong defense to one element of one claim required him to vacate the entire default judgment. Both CR 55 and 60 allowed the court to vacate judgment on the only claim with a strong defense, leaving the remainder of his earlier ruling unaffected.

Third, the trial court had the equitable power to vacate judgment solely on the double damages claim. Dr. Johnson asserts that “depriving Dr. Johnson of his day in court would be neither just under the rules nor an equitable exercise of the court’s powers.” (Response Brief at 25). This is one side of the story. The other side is the court’s need to enforce important procedural safeguards.

A proceeding to vacate a default judgment is equitable in character and relief is to be afforded in accordance with equitable principles. The trial court should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.

The fundamental guiding principle has been thus stated:

(T)he overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted. But justice might, at times, require a default or a delay. What is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome.

Widucus v. Southwestern Elec. Cooperative, Inc.,
supra 26 Ill.App.2d at 109, 167 N.E.2d at 803.

Griggs v. Averbeck Realty, Inc. 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (citations omitted).

The trial court had authority under existing caselaw, the civil rules, and the rules of equity to vacate default judgment on one claim against Dr. Johnson. Although defendant believes it unfair, the trial court had ample reason and authority to affirm default judgment on the remaining four.

IV. DEFAULT JUDGMENT IS APPROPRIATE ON DR. FOWLER'S CLAIMS FOR UNPAID WAGES, VIOLATION OF THE UCC, AND REASONABLE ATTORNEYS' FEES.

Dr. Johnson challenges the trial court's rulings on the remaining claims, arguing that he has a strong defense to all claims and acted with excusable neglect. But the trial court did not abuse its discretion in rejecting these arguments.

In its November 25, 2009 letter ruling, the trial court carefully reviewed Dr. Johnson's evidence and found it insufficient to overturn default judgment. (11/25/09 Letter Ruling at 2; CP 346) The court correctly weighed the four factors in White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968), concluding that Dr. Johnson failed to prove excusable neglect. (11/25/09 Letter Ruling at 2; CP 346). Central to the court's ruling was Dr. Johnson's failure to do

anything after receiving personal service of the summons and complaint.

Dr. Johnson and ICD never responded to Dr. Fowler's summons and complaint. Dr. Johnson conceded that he may not have opened the envelope containing the summons and complaint until after Dr. Fowler's Writ of Garnishment was served on Whidbey Island Bank in late September, 2009.

(Order Denying Motion to Vacate, Finding ¶ 14; CP 435).

The trial court did not abuse its discretion in finding this neglect inexcusable.

We review a trial court's decision on a motion to vacate an order of default or default judgment for abuse of discretion. Discretion is abused if exercised on untenable grounds or for untenable reasons. A proceeding to vacate or set aside a default judgment is equitable in its character, and the relief sought or afforded is to be administered in accordance with equitable principles and terms.

Aecon Bldgs. Inc. v. Vandermolen Const. Co., Inc., 155 Wn. App. 733, 738-739, 230 P.3d 594 (2009).

Although Dr. Johnson mentions the standard of review – abuse of discretion -- he does not address it in his arguments. All of the trial court's rulings come under the abuse of discretion standard. In her opening brief, Dr. Fowler described how the trial court applied the incorrect legal standard to vacate the entire default judgment, creating an abuse of discretion. (Opening Brief at

14); Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (“untenable reason if...based on an incorrect standard”).

In contrast, Dr. Johnson fails to prove the trial court abused its discretion by finding a lack of excusable neglect. The trial court applied the appropriate standard under White v. Holm. Simply put, Dr. Johnson failed to act reasonably after personally receiving two copies of the summons and complaint.

Dr. Johnson cites a number of cases that found excusable neglect when parties relied on their attorney to answer a complaint. (Response Brief at 15). But in all these cases, the party acted reasonably after receiving service of process. Hardesty v. Stenchever, 82 Wn. App. 253, 264, 917 P.2d 577 (1996) (“Leedom filed a notice of appearance and represented the defendants in *Hardesty I*, which involved the same parties and issues”); Norton v. Brown, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999) (“genuine misunderstanding between an insured and his insurer as to who is responsible for answering the summons and complaint”); Calhoun v. Merritt, 46 Wn. App. 616, 621, 731 P.2d 1094 (1986) (“his misunderstanding constituted a bona fide mistake”); State v. A.N.W. Seed Corporation, 44 Wn. App. 604, 609, 722 P.2d 815 (1986) (before leaving country defendant “had an agreement with

the law firm to enter a notice of appearance on his behalf”); Gutz v. Johnson, 128 Wn. App. 901, 919, 117 P.3d 390 (2005) (“Mr. Johnson promptly left a message with Allstate”).

Here, after a process server personally handed him two envelopes containing the summons and complaint, Dr. Johnson could not be bothered to open one and send it to his attorney. (Declaration of Service; CP 36-37) He instead set the envelopes aside, unopened, until a garnishment order motivated him to look inside. This was neither reasonable nor excusable.

The trial court was well within its discretion not to excuse Dr. Johnson’s neglect. As the cases above illustrate, trial courts have the discretion to excuse actions when the defendant acted reasonably to protect his or her interests. “Excusable neglect is determined on a case by case basis.” Gutz v. Johnson, 128 Wn. App. 901, 919, 117 P.3d 390 (2005). The court in this case correctly found a lack of excusable neglect.

V. BY PREVAILING ON APPEAL, DR. FOWLER IS ENTITLED TO FEES

Under RCW 62A.3-515, Dr. Fowler is entitled to an award of reasonable attorneys’ fees if she prevails on appeal. Dr. Johnson does not dispute the legal grounds for this claim, asserting only that

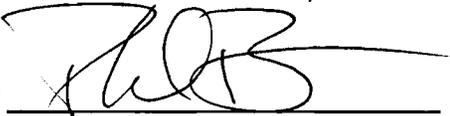
Dr. Fowler should not be the prevailing party. Dr. Fowler respectfully requests a fee award at the end of this appeal.

CONCLUSION

Trial courts in Washington have the authority to vacate part of a default judgment. It is not an all or nothing decision. Appellant Dr. Amber Fowler respectfully requests this Court to reverse the trial court's order vacating the entire default judgment, and remand for entry of judgment on claims for unpaid wages, violation of RCW 62A.3-501, and reasonable attorney' fees. A trial on the merits is appropriate only on Dr. Fowler's claim that Dr. Johnson willfully withheld her wages, justifying double damages under RCW 49.52.070.

DATED this 12th day of May, 2011.

BURI FUNSTON MUMFORD, PLLC

By 

Philip J. Buri, WSBA #17637
1601 F. Street
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360/752-1500

DECLARATION OF SERVICE

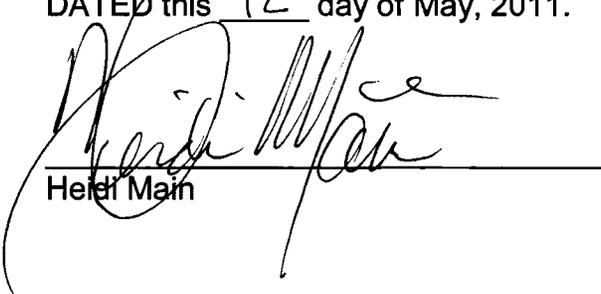
The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the Opening Brief of Appellant to:

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DATED this 12th day of May, 2011.



Heidi Main

APPENDIX A



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAGIT COUNTY

AMBER D. FOWLER, M.D., an individual,)	
)	
Plaintiff,)	Case No. 09 2 01188 8
)	
v.)	AMENDED JUDGMENT SUMMARY
)	AND FINDINGS OF FACT AND
DONALD RUSSELL JOHNSON, M.D. and JANE DOE JOHNSON, husband and wife and the marital community comprised thereof, and ISLAND COUNTY DERMATOLOGY, PLLC, a Washington professional limited liability corporation, D/B/A FIDALGO DERMATOLOGY,)	CONCLUSIONS OF LAW REGARDING PLAINTIFF'S CLAIMS FOR UNPAID WAGES, DAMAGES PURSUANT TO RCW 62A.3-501 ET SEQ. AND ATTORNEYS' FEES
)	
Defendants.)	
)	

9

I. JUDGMENT SUMMARY

- 1. Judgment Creditor: Amber D. Fowler, M.D.
- 2. Judgment Debtors: DONALD RUSSELL JOHNSON, M.D. AND JANE DOE JOHNSON; ISLAND COUNTY DEMARTOLOGY, PLLC, DBA FIDALGO DERMATOLOGY
- 3. Principal: \$337,561.60

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- 4. Interest Owed to
Date of Judgment: \$6,126.97
- 5. Costs: \$315.00
- 6. Plaintiff's Attorney
Fees: \$19,531.50
- 7. Total Judgment: \$363,535.07
- 8. Interest Rate: 12.0%
- 9. Attorneys for Plaintiff: Barron Smith Daugert, PLLC

II. ORDER

This matter, having come before this Court pursuant to CR 55(b)(2) and the Court's prior Order of Default entered on July 24, 2009 against defendants D. Russell Johnson and Island County Dermatology PLLC, and being fully apprised in the premises, including having considered the oral testimony of plaintiff, Dr. Amber Fowler, and the Declarations of Dr. Amber Fowler and Amy Robinson, enters the following Findings of Fact and Conclusions of Law and Default Judgment regarding plaintiff's claims for unpaid wages, damages pursuant to RCW 62.A.3.501 et seq., and attorneys' fees:

FINDINGS OF FACT

- 1. Plaintiff, Dr. Amber Fowler, was an employee of Island County Dermatology PLLC from August, 2006 to December 12, 2008, where she worked as a licensed, board certified dermatologist.
- 2. Defendant D. Russell Johnson is the principal owner and sole member of Island County Dermatology PLLC, which operated locations in Anacortes and Coupeville



1 under the business names Fidalgo Dermatology, Island Skin Care Center, Island
2 Medical Spa, and Whidbey Island Dermatology. Dr. Johnson is a licensed, board
3 certified dermatologist.

- 4
- 5 3. During the period from July, 2007 until Dr. Fowler's departure from Island County
6 Dermatology PLLC on December 12, 2008, her wages were paid on a percentage of
7 accounts receivable from dermatology and surgical services that Dr. Fowler provided
8 to patients, plus she was to be paid a referral fee of twenty percent (20%) of all spa-
9 related fees and services incurred by patients who she referred to Island Medical Spa
10 for spa cosmetic procedures.
- 11 4. A copy of Dr. Fowler's employment agreement was requested from Dr. Johnson and
12 Island County Dermatology (collectively, "Default Defendants") by Dr. Fowler's
13 attorney, Amy Robinson, but Default Defendants failed to provide a copy. Defendant
14 Dr. Johnson separately confirmed Dr. Fowler's wage formula and referral fees as set
15 forth above in writing on November 24, 2008.
- 16
- 17 5. Dr. Fowler's wages during her first full year of employment with Island County
18 Dermatology PLLC in 2007 upon completing her residency were \$533,994. No spa
19 referral fees were paid to Dr. Fowler in 2006 or 2007.
- 20 6. Dr. Fowler's wages during her second year of employment with Island County
21 Dermatology PLLC in 2008 were \$802,159.18 until her departure on December 12,
22 2008. Dr. Fowler was on maternity leave in September, 2008. Upon her return from
23 maternity leave, her patient schedule was busier than normal due to the backlog of
24



1 patients who were unable to use Dr. Fowler's professional services while she was on
2 maternity leave. No spa referral fees were paid to Dr. Fowler in 2008.

3 7. Due to the nature of Dr. Fowler's wage formula, *i.e.*, she was paid 50% of accounts
4 receivable upon receipt, Dr. Fowler did not typically receive wages from a specific
5 service for approximately three to six months after the service was provided. Upon
6 her departure from Island County Dermatology PLLC on December 12, 2008,
7 therefore, Dr. Fowler expected, based on the prior course of dealing between the
8 parties and the business practices of her employer, that she would receive wage
9 payments for 3-6 months following her departure at the same or similar amounts as
10 she has earned in the preceding 6 months before she departed.

11
12 8. The Court finds that Dr. Fowler's expectation set forth above in ¶7 was reasonable
13 and consistent with the parties' employment agreement, the prior course of dealing
14 between the parties and the business practices of Island County Dermatology PLLC.

15
16 9. The payroll, billing and accounts receivable records ("Supporting Wage
17 Documentation") that would allow Dr. Fowler to calculate wages owed her in the 6
18 months preceding her departure on December 12, 2008 are within the exclusive
19 control of Default Defendants. Dr. Fowler, through her attorney, Amy Robinson,
20 repeatedly requested an accounting from Default Defendants and copies of the
21 Supporting Wage Documentation. Default Defendants did not provide an accounting
22 or the requested Supporting Wage Documentation.

23
24 10. In lieu of an accounting or Supporting Wage Documentation from Default
25 Defendants, Dr. Fowler presents an estimate of her gross wages for the 3 months prior



1 to her departure in the amount of \$209,259.00. Her estimate uses a monthly average
2 of \$69,753 based on her W-2 wage earnings from Island County Dermatology PLLC
3 for 2008 divided by the 11.5 months that she was employed by Island County
4 Dermatology PLLC. The Court finds that her gross wage loss estimate and
5 methodology is reasonable under the circumstances. Default Defendants should not
6 be allowed to financial benefit from their refusal to provide an accounting and
7 Supporting Wage Documentation and/or appear and defend against this lawsuit.
8

9 11. Dr. Fowler argues that her actual gross wage loss may be higher and that the figure of
10 \$209,259 is conservative because she was substantially busier than normal in the final
11 3 months of her employment and her estimate only includes the final 3 months (as
12 opposed to 6 months) of earnings. The Court appreciates the reasonableness of Dr.
13 Fowler's arguments, however, in that Dr. Fowler agrees to use \$209,259 as the
14 estimate for her claim for gross wage loss, the Court is limited to finding that
15 \$209,259 is a reasonable estimate that is adequately supported by the evidence
16 submitted. Dr. Fowler's estimate is neither remote nor conjectural nor speculative
17 under the circumstances.
18

19 12. Since her departure from Island County Dermatology PLLC on December 12, 2008,
20 Dr. Fowler has received three (3) checks for wages owed—one for \$28,183.99 on
21 January 2, 2009 (Check No. 13287), one for \$17,077.21 on January 16, 2009 (Check
22 No. 13399) and one for \$12,991.65 on February 27, 2009 (Check No. 13888). All
23 three checks for wages were returned by Whidbey Island Bank due to insufficient
24 funds.
25



1 13. Dr. Fowler's counsel, Amy Robinson, wrote a certified letter to Dr. Johnson on
2 January 21, 2009, notifying same of the checks' dishonor by Whidbey Island Bank
3 and demanding full payment of the \$45,261.20 that was tendered in the first two
4 checks that were outstanding at the time of her letter. Subsequent to Ms. Robinson's
5 letter, Island County Dermatology remitted payment of the \$28,183.99 by Cashier's
6 Check on February 9, 2009, *i.e.*, 19 days after Notice of Dishonor was provided, at
7 which time Dr. Fowler was also instructed to re-deposited the check for \$17,077.21.
8 That latter check for \$17,077.21 ultimately cleared. Despite demands by Ms.
9 Robinson, Island County Dermatology has not paid any further wages to Dr. Fowler
10 or responded to Ms. Robinson's demand for reissuance of the final NSF check for
11 \$12,991.65.
12

13 14. The net amount of unpaid wages is estimated by Dr. Fowler to be \$163,997.80 after
14 deducting the amounts eventually paid by Island County Dermatology PLLC in ¶13
15 above. The Court finds that Dr. Fowler's estimate of net unpaid wages to be
16 reasonable and adequately supported by the evidence submitted. Dr. Fowler's
17 estimate of her net unpaid wages is neither remote nor conjectural nor speculative
18 under the circumstances. Twice the net unpaid wages is \$327,995.60.
19

20 15. Prejudgment interest on \$327,995.60 at 12% from March 10, 2009 to the date of
21 today's hearing is \$5,694.37.
22

23 16. At the time of Dr. Fowler's departure from Island County Dermatology PLLC on
24 December 12, 2008, it had not paid Dr. Fowler's spa referral fees owed her for 2006-
25 2008. Island County Dermatology calculated the total of spa referral fees owed at
26



1 \$26,509.73, which Dr. Fowler agreed to be paid in three equal monthly installments
2 of \$8,666, starting on January 1, 2009. Island County Dermatology paid the first two
3 installments, but has not paid the final \$8,666 installment due on March 1, 2009
4 despite repeated demands. Prejudgment interest on \$8,666 at 12% from March 1,
5 2009 to the date of today's hearing is \$432.60.

6
7 17. Dr. Fowler has incurred \$315 in court costs and filing fees to date.

8 18. Dr. Fowler has incurred attorneys' fees to pursue the dishonored checks for wages
9 from Island County Dermatology PLLC and to investigate and pursue her claims in
10 this lawsuit. The amount of attorneys' fee incurred by Dr. Fowler through today's
11 hearing is \$19,531.50.

12 CONCLUSIONS OF LAW

- 13 1. Dr. Fowler was an employee of Island County Dermatology PLLC between August,
14 2006 and her departure on December 12, 2008.
- 15 2. As an employee, Dr. Fowler is entitled to the protections of RCW 49.48.010 *et seq.*
16 and RCW 49.52.010 *et seq.*
- 17 3. Dr. Fowler was due her unpaid wages upon her departure from Island County
18 Dermatology PLLC in accordance with her employment agreement, as confirmed in
19 writing by Default Defendants on November 24, 2008 and as evidenced by the prior
20 course of dealing between the parties and the business practices of Island County
21 Dermatology PLLC.
- 22 4. Island County Dermatology PLLC has failed to pay Dr. Fowler in accordance with
23 her employment agreement, as confirmed in writing by Default Defendants on
24
25



1 November 24, 2008. Island County Dermatology's failure to pay is a violation of
2 RCW 49.48.010 and RCW 49.52.050(2). The net unpaid wages owed to Dr. Fowler
3 are \$163,997.80 as of March 10, 2009.

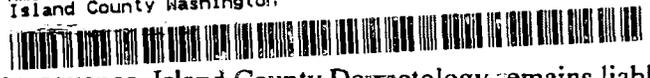
4 5. Pursuant to RCW 49.52.070, Island County Dermatology PLLC and Dr. D. Russell
5 Johnson, as the principal owner and sole member of Island County Dermatology
6 PLLC, are jointly and severally liable to pay twice the amount of \$163,997.50, which
7 was wrongfully withheld from Dr. Fowler within the meaning of RCW 49.52.050(2);
8 plus reasonable attorneys' fees and costs of suit.

9
10 6. Pursuant to RCW 48.48.030 and RCW 49.52.070, Dr. Fowler is entitled to an award
11 of reasonable attorneys' fees incurred to recover her unpaid wages.

12 7. Pursuant to RCW 62A.3-515, Dr. Fowler is further entitled to an award of reasonable
13 attorneys' fees for her attorney's efforts to collect on the dishonored checks for wages
14 from Island County Dermatology PLLC. Dr. Fowler complied with all provisions of
15 RCW 62A.3-501 et seq.

16
17 8. This Court finds that attorneys' fees in the amount of \$19,531.50 are fair and
18 reasonable under the circumstances and properly awarded to Dr. Fowler.

19 9. Island County Dermatology PLLC agreed to pay Dr. Fowler for spa referral fees in
20 accordance with her employment agreement, as confirmed in writing by Default
21 Defendants on November 24, 2008. The amount owed Dr. Fowler for spa referral
22 fees between August, 2006 and December 12, 2008 was agreed by the parties to be
23 \$26,000, which was to be paid in three equal monthly installments of \$8,666 starting
24 on January 1, 2009. Island County Dermatology PLLC failed to make the final
25



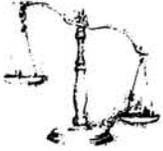
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payment of \$8,666 and as a consequence, Island County Dermatology remains liable
for this amount, plus pre-judgment interest from March 1, 2009 in the amount of
\$432.60

DONE IN OPEN COURT this 14th day of August, 2009.

Judge, Skagit County Superior Court

APPENDIX B



Skagit County Superior Court

Skagit County Courthouse
205 West Kincaid Street, Room 202
Mount Vernon, WA 98273

Phone: (360)336-9320
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JOHN M. MEYER
JUDGE, DEPARTMENT NO. 1

MICHAEL E. RICKERT
JUDGE, DEPARTMENT NO. 2

SUSAN K. COOK
JUDGE, DEPARTMENT NO. 3

DAVE NEEDY
JUDGE, DEPARTMENT NO. 4

G. BRIAN PAXTON
COURT COMMISSIONER

DELILAH M. GEORGE
COURT ADMINISTRATOR

November 25, 2009

Kenneth L. Karlberg
Attorney at Law
P.O. Box 5008
Bellingham, WA 98227

Christon C. Skinner
Attorney at Law
740 SE Pioneer Way
Oak Harbor, WA 98277

Re: Fowler v. Johnson, et ux., et al. #09-2-01188-8

Dear Counsel:

This matter comes before the Court on Defendants' Motion to Vacate Default Order and Judgment.

The parties agree on the analysis the Court must use in deciding whether the motion should be granted or denied.

The first question is whether defendant(s) actually appeared or substantially complied with the appearance requirements and were as such entitled to notice. Although discussions had occurred between defendants' attorney, Mr. Skinner, and Ms. Robinson from plaintiff's law firm, there is no basis for the Court to find that Mr. Skinner actually appeared or substantially complied with appearance requirements once the action was filed.

A side issue regarding notice is the fact that Mr. Karlberg telephoned Mr. Skinner's office and left a message about the case status and deadline for answering prior to seeking the default order. He indicates he did this for the specific purpose of avoiding the very situation in which the parties are now involved. The Court finds this position somewhat confusing under the circumstances. No effort was made to communicate in writing despite the fact that Mr. Karlberg's associate had been in email contact with Mr. Skinner during their discussions. The time and expense of a short letter also seem insignificant in light of litigation costs if the real intent was to give clear notice of the pending action.

Having found no entitlement to notice, the Court will now apply the four part test to determine if the motion should be granted or denied.

Kenneth L. Karlberg
Christon C. Skinner
November 25, 2009
Page Two

- (1) The underlying dispute in this case involves a claim for unpaid wages. Defendants deny the claimed amount. Because plaintiff was not a straight forward hourly wage employee, it would take considerable testimony before any finder of fact could determine the correct amount of unpaid wages. Under RCW 49.52.050(2) plaintiff doubled the \$163,997.80 claimed resulting in a default judgment including principal, interest, costs and fees of \$363,535.07. The application of this statute is vigorously contested. The Court is satisfied that there is substantial evidence to support a defense as to all or part of the amount included in the default judgment.
- (2) Was the moving party's failure to timely appear and answer the result of mistake, inadvertence, surprise or excusable neglect? The reasons offered by defendant Dr. Johnson are that he thought his attorney was getting a copy of everything he was receiving, he thought the wage dispute was resolved, he had been served with other documents not requiring a response, and his wife had a serious medical condition during this time frame which caused him to be preoccupied and less attentive to the contents of the summons and complaint.

This Court's review of the rules and the associated case law lead to the conclusion that none of these explanations/circumstances rise to the accepted level of mistake, inadvertence, surprise or excusable neglect.

Although this finding effectively terminates the need for analysis of the remaining two parts of the test; they will be addressed in the event of further review of the decision.

- (3) This Court strongly believes that the defendant(s) acted with due diligence after notice of entry of the default judgment. Upon receipt of the Writ of Garnishment, motions were filed immediately on the ex-parte calendar and this Motion to Vacate was set within a few weeks.
- (4) The fourth question is whether substantial hardship will result of the Plaintiff if the judgment is vacated. The process always involves effort, expense and time, but this Court does not believe there are any special circumstances in the present case warranting a finding of substantial hardship if the judgment were to be vacated.

In addition to the four part test, there is also the need to examine whether the plaintiff has done something that would render enforcing the judgment inequitable. This deals with the issue of being purposely deceptive or manipulative rising to the level of preventing the other party's full participation. The Court finds no such conduct occurred in this case.

Plaintiff has filed numerous evidentiary objections to defendant's submittals. The information the Court relied on to render this decision is contained in body of this letter. In light of the court's ruling denying the Motion to Vacate the Order of Default and Judgment, there is no need to rule on each objection.

If either side wishes further clarification of the submittals relied on in this opinion, a record can be made at the time of presentment if necessary.

Kenneth L. Karlberg
Christon C. Skinner
November 25, 2009
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Mr. Karlberg, please present the appropriate orders, including a lifting of the previous stay.
The Court will not be awarding any further fees, costs or sanctions as a result of this motion.

Sincerely,

A handwritten signature in black ink that reads "Dave Needy". The signature is written in a cursive style with a large, looped initial "D".

Dave Needy
Judge, Department Four

DN:mb