

71166-1

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No. 71166-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

WANNA CHOI,
an individual,

Appellant,

v.

ASHLEY YOUNG,
an individual,

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT ASHLEY YOUNG

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I. ASSIGNMENTS OF ERROR

The trial court did not err either in entering its October 22, 2013 Order Granting Ashley Young's Motion to Vacate the Default Judgment of July 30, 2013 or in entering its January 3, 2014 Order Granting Plaintiff's Motion for Award of Attorney's Fees and Costs in the amount of \$1,873.97.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Plaintiff did not file her Amended Motion for Default Judgment and the Declaration of Wanna Choi on which it was based until six months after the court commissioner had ruled on it and only after she filed her Notice of Appeal, was the resulting default judgment void?

2. Did the trial court abuse its discretion in following *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007) to vacate the default judgment where (1) Plaintiff improperly obtained it without notice, after defendant had entered a notice of appearance; (2) Defendant has met the 4-part test of *White v.*

Holm, for vacating the default judgment; and (3) it was improperly obtained through inequitable conduct by Plaintiff's counsel?

3. Did the trial court abuse its discretion in vacating the damages portion of the default judgment, where Plaintiff's claim was for an "amount uncertain," Plaintiff failed to present substantial evidence of her damages, and Defendant presented substantial evidence that rebutted Plaintiff's damages?

4. Did the trial court abuse its discretion in determining the reasonable amount of attorney's fees to award Plaintiff?

III. STATEMENT OF THE CASE

A. Facts.

Plaintiff filed her Complaint on March 22, 2013 (CP 1-3).

On March 26, 2013, Plaintiff Wanna Choi's counsel, Eileen McKillop, wrote to USAA Claim Representative Wade Langston and stated:

We are willing to forego service of process on your insured, Ashley Young, for a period of thirty (30) days to try to resolve Ms. Choi's claim through settlement negotiations. We agree to notify you prior to service of process upon Ms. Young.

(CP 45 - 47). On May 2, 2013, over thirty days after Ms. McKillop's letter, Mr. Langston wrote to Ms. McKillop, asked for Ms. Choi's supporting tax and wage loss records, and concluded: "Please contact USAA to present your counter offer so we may continue to move this claim forward to an amicable settlement." (CP 447, 452). On May 17, 2013, Ms. McKillop had still not served Ms. Young, but issued a second letter to USAA stating, "Unless we can resolve this claim quickly, we will serve your insured with the Summons and Complaint and let the court or trier of fact determine Ms. Choi's damages." (CP 45- 47). She told him that the deadline for service of process was June 19, 2013. (CP 45-47). However, on May 30, 2013, 13 days later and 20 days before the deadline for service, without notice to Mr. Langston, Plaintiff had a process server serve someone at Ms. Young's residence with the summons and complaint. (CP 47, CP 146). At no time prior to service on Defendant Ashley Young did Ms. McKillop ever notify Mr. Langston that settlement discussions were over and she was going to serve Ms. Young. (CP

448). Instead, in her letter of July 11, 2013, Ms. McKillop advised Mr. Langston for the first time that Ms. Young had been served. (CP 198). She did not disclose that she had already obtained an order of default two weeks earlier. (CP 7-8).

Choi incorrectly states that on June 27, 2013, she filed a motion for order of default against Young. Appellant's Brief at 5, Declaration of Eileen I. McKillop (CP 49). Instead, even though an order of default was obtained from the court commissioner on that date (CP 7-8), the clerk's papers establish that Plaintiff's Motion for Default was not filed until January 10, 2014, seven months after the Order of Default was entered and six weeks after Plaintiff filed her Notice of Appeal on November 21, 2013. (CP 613-15).

On July 16, 2013 USAA's appointed defense counsel, Alan Peizer, was assigned to defend Ms. Young and called Ms. McKillop (CP 499). He advised her of his appearance and requested that Ms. McKillop stipulate to set aside the order of default, which she refused (CP 499-500). On July 17, 2013, Mr.

Peizer filed and served a Notice of Appearance on behalf of Defendant Ashley Young. (CP 500, CP 504). When Mr. Peizer asked Ms. McKillop if she had entered a default judgment, she said she had not. (CP 500).

Thirteen days later, without any notice to or service upon defense counsel Peizer, Ms. McKillop proceeded to ex parte again and obtained a default judgment for \$134,269.99. (CP 49, CP 11-12). As with her motion for an order of default, Plaintiff did not file Plaintiff's Motion for Entry of Default Judgment until January 10, 2014, almost six months after obtaining the judgment and six weeks after filing her Notice of Appeal. (CP 632-649).

Similarly, while Plaintiff Choi has asserted in this appeal that her motion for default judgment was based on her declaration, medical records, income tax statements and employer letters, Appellant's Brief at 6, nothing to support her motion for a default judgment was part of the court record until almost six months after it was entered. (CP 662-701).

Plaintiff incorrectly claims that after the July 17, 2013

Notice of Appearance, “[f]or the next three months, Peizer never contacted Choi’s counsel and took no action whatsoever to vacate the default order.” Appellant’s Brief at 6. In fact, she admits that it was actually only seven weeks later, on September 12, 2013, that Young filed a motion to vacate the order of default. Appellant’s Brief at 6 (CP 18-26). Further, Defendant’s Answer was filed on September 17, 2013. (CP 488-491).

Plaintiff does not dispute Mr. Peizer was medically disabled in July and August of 2013, recovering from two cancer surgeries. (CP 499, 501). Nor does she dispute that while he was recovering from those surgeries, Mr. Peizer also had to deal with his mother’s stroke of July 22, 2013. (CP 502). Nevertheless, on July 30, 2103, only thirteen days after receiving Mr. Peizer’s Notice of Appearance, she proceeded to ex parte without notice to Mr. Peizer and obtained her default judgment. (CP 11-12).

When Defendant filed her motion to vacate the order of default, she had no knowledge of Plaintiff’s unfiled motion for default judgment, the Declaration of Wanna Choi, or that a

default judgment had been entered. (CP 500). Defendant sought only to vacate the order of default based on evidence from Defendant Ashley Young and Claim Representative Wade Langston that Ms. Young had not been properly served with the Summons and Complaint. (CP 18-26, CP 445-446, CP 447-456).

In opposition to Defendant's motion to vacate the order of default, Plaintiff served and filed the Declaration of Eileen I. McKillop. (CP 45-214). Attached to Ms. McKillop's declaration were copies of her pleadings that had never been filed or served, including Exhibit 2, Plaintiff's Motion for Entry of Default Judgment (CP 57-68) and the Declaration of Wanna Choi. (CP 69-108). In addition, Plaintiff served for the first time Exhibit 14, Order Granting Motion for Default (CP 45-46) and Exhibit 15, the Default Judgment. (CP 207-214). Even though Plaintiff had failed to file or serve her motion for default judgment, Plaintiff's counsel opposed defendant's motion to vacate the order of default on the grounds that Defendant had not also moved to vacate the default judgment. (CP 27, 36-37).

Defense counsel Alan Peizer was taken completely by surprise by Plaintiff's first disclosure that a motion for default judgment had been presented to the court and a default judgment had been entered. (CP 409-501, CP 492-494). Defendant argued that the default judgment was void because of Plaintiff's failure to serve the motion for default judgment before obtaining it ex parte. (CP 494-496).

Defendant's September 12, 2013 motion to vacate the order of default was transferred by the court commissioner to the assigned judge, Judge Rietschel. (CP 511). Two weeks later, on October 8, 2013, Defendant filed and served Defendant Young's Motion to Vacate Order and Judgment by Default and Request for Evidentiary Hearing. (CP 222-223, CP 224-235). Defendant Young's motion argued in pertinent part that (1) Defendant had never been served with a summons and complaint; (2) Defendant had appeared prior to the motion for default judgment and was therefore entitled to notice of that motion; (3) Defendant was also entitled to a hearing on Plaintiff's damages; and (4) the

Court's damage award was unsupported by the evidence which Plaintiff presented. (CP 224-235).

In seeking to vacate the default judgment, Defendant pointed out that Ms. Choi had informed the court commissioner that she suffered from numbness in her left leg. (CP 665). However, that claim was contradicted by Exhibit 2 to her own declaration, the April 7, 2010 progress note of Patricia Lewis, M.D., who stated: "Initially she had some fairly sharp pains in her low back and some numbness in her left leg. That has now resolved. Her low back just feels tight and she feels sore." (CP 674). Plaintiff claimed, "I now suffer from severe depression because of my inability to work and the financial hardship which has affected my self-esteem." (CP 666, par. 13). However, by her own admission, her income loss in her real estate business ended in 2010, three years earlier. (CP 668-669). Further, she offered no evidence of her pre-accident income or of a single lost real estate sale due to her injuries. (CP 668-669). In fact, her income from her real estate business increased by \$10,000 in 2011 and another

\$15,000 in 2012. (CP 668).

Similarly, Ms. Choi claimed a loss of 30 hours from her job as a courier for NHS, but failed to provide a single date of work missed due to any pain or disability complaints or doctors' visits. (CP 668). Plaintiff also claimed lost income from Local Transports, LLC. However, the claimed income loss was, again, only in 2010, and no evidence of income loss from that job was offered for 2011 or 2012. (CP 668-669).

On October 22, 2013, the lower court vacated the July 30, 2013 default judgment. The court made the following key findings of fact:

1. Defendant appeared after entry of the Order of Default and filed a Motion to Vacate Order of Default and demonstrated a prima facie issue of lack of personal jurisdiction, due diligence and excusable neglect.
2. Defendant has shown that the default judgment herein was obtained by Plaintiff without notice and after Defendant had entered a Notice of Appearance.
3. Plaintiff's claim is for an amount uncertain.

(CP 434-435). Based on these findings, the court entered the following orders:

(1) the Order of Default of June 27, 2013 will be considered at the evidentiary hearing;

(2) the Default Judgment dated July 30, 2013 is hereby VACATED; and

(3) an evidentiary hearing on service of process is set for November 15th at 1:30 pm, 2013. Plaintiff may present affidavit for attorneys fees for default orders.

(CP 434-436).

Pursuant to Judge Rietschel's October 22, 2013 order vacating the default judgment (CP 434-435), an evidentiary hearing was conducted on November 15, 2013, regarding defendant's challenge to the validity of service of process upon her. After considering exhibits and taking live testimony, the court entered an order denying Defendant's challenge to service: "Default as to liability stands but not as to damages and that the Defendant is entitled to a hearing or jury trial on the issue of damages and causation of damages only." (CP 437-439).

The lower court set a hearing to assess Plaintiff's claims for

her attorneys fees. (CP 434-35, CP 611-612). Even though the default judgment had been vacated, Plaintiff requested all of her fees and costs related in any way to both the order of default and the default judgment, totaling \$28,094.61. (CP 521-528). The Declaration of Alan Peizer analyzed the number of hours claimed to perform certain tasks and demonstrated that those hours were unjustified for the modest tasks described. (CP 709-711). Defendant pointed out that Plaintiff was also claiming attorney's fees to oppose Defendant's motion to set aside the default judgment, but it was Defendant who was the prevailing party. (CP 713-715). The lower court noted the motions on which Plaintiff prevailed, in whole or in part, and based on CR 60(b), awarded Plaintiff her attorney's fees for the default motion of \$1,650 and costs of \$223.97, for a total of \$1,873.97. (CP 611-612).

IV. SUMMARY OF ARGUMENT

As Plaintiff's Motion for Default Judgment and the supporting Declaration of Wanna Choi were not filed until

approximately six months after she obtained the default judgment and six weeks after she filed her Notice of Appeal, the lower court's decision vacating that default judgment may be affirmed on those grounds.

Default judgments are disfavored and the Supreme Court prefers to give parties their day in court and have controversies determined on their merits. The lower court did not abuse its discretion in concluding that Defendant Young was entitled to have the default judgment vacated under the three alternative tests set forth in *Morin v. Burris*, 160 Wn.2d 745, 755, 161 P.3d 956.

Under the first *Morin* test, a default judgment entered without notice to the defendant when the defendant has appeared must be vacated as a matter of right.

Under the second *Morin* test, a defendant can have a default judgment vacated if she can meet the 4-part test of *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). Defendant here met that 4-part test because (1) there was substantial evidence to

support a prima facie defense; (2) the Defendant's failure to appear was occasioned by inadvertence or excusable neglect; (3) Defendant acted with due diligence after entry of the default judgment; and (4) there is no substantial hardship to plaintiff.

Defendant met the third *Morin* test for vacating a default judgment in showing that Plaintiff's counsel acted inequitably in obtaining the default judgment.

The lower court did not err in determining that an excessive damage award that was not properly obtained and not supported by substantial evidence must be vacated. The lower court also did not err in determining a reasonable amount for Plaintiff's attorney's fees and costs. Plaintiff's request for her attorney's fees under RAP 18.1 should be denied for lack of legal authority.

V. ARGUMENT

A. Standard of Review.

A ruling on a motion to vacate a default judgment is reviewed for abuse of discretion, which occurs only when the trial

court exercises its discretion on untenable grounds or for untenable reasons. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). “Abuse of discretion is less likely to be found if the default judgment is set aside.” *White v. Holm*, 73 Wn. 2d 348, 351-352, 438 P. 2d 581(1968); *Griggs v. Averbek Realty, Inc.* 92 Wn. 2d 576, 582, 599 P.2d 1289(1979). In addition, the Court’s policy for the last century governs this standard of review:

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... Thus, for more than a century, it has been the policy of this court to set aside default judgment liberally.

Morin, 160 Wn.2d at 754 (internal citations omitted). In this case, the court below vacated the default judgment on tenable grounds and for tenable reasons, in accordance with equitable principles and terms, in deference to the Washington Supreme Court’s policy to set aside default judgments liberally.

B. Plaintiff’s Motion for Default Judgment Was Not Filed Until after the Appeal and the Resulting Default Judgment was Void.

Plaintiff's Motion for Default Judgment was not filed until January 10, 2014, approximately six months after she obtained the default judgment and six weeks after she filed her Notice of Appeal. (CP 632-649). Similarly, the Declaration of Wanna Choi in Support of Plaintiff's Motion for Entry of Default Judgment was also not filed until January 10, 2014. (CP 662-701). Plaintiff avoided disclosure of the motion and declaration for a default judgment by neither serving nor filing them. Plaintiff was thereby able to insulate this motion from discovery by Defendant and her insurer, USAA. Defendant did not raise the Plaintiff's failure to file the motion papers in Defendant's motion to vacate the default judgment because she was unaware of this failure until Plaintiff filed them for the first time on January 10, 2014. (CP 632-49, CP 662-701). This practice fundamentally violates the purpose of filing motions with the court. As stated in *Malott v. Randall*, 83 Wn.2d 259, 262, 517 P.2d 605(1974):

The purpose of filing is to deposit the document in a public place so that it may be seen and examined by any person interested therein, and "a document may

be said to be filed with an officer when it is placed in his official custody, and deposited in the place where his official records and papers are usually kept.” *Stanley v. Board of Appeals*, 168 Misc. 797, 800, 5 N.Y.S.2d 956 (Sup. Ct. 1938).

The consequence of failure to file a pleading but then proceed off the record is to render it ineffective or void. *State v. Robinson*, 104, Wn.App. 657, 665, 17 P.3d 653 (Div. 1, 2001). Plaintiff’s calculated decision not to file her motion and declaration for a default judgment disregarded fundamental statutes and rules governing court procedure. RCW 2.08.030 provides that, “[t]he Superior Courts are courts of record....” Under RCW 2.32.050, it is the duty of each county clerk for each of the courts for which he is clerk, “(4) To file all papers delivered to him for that purpose in any action or proceeding in the court as directed by court rule or statute.” Under RCW 36.23.030, the clerk of the superior court shall keep the following records:

* * * *

- (2) A docket in which before every session, he or she shall enter the titles of all causes pending before the court at that session in the order in which they were

commenced,...

* * *

- (4) A record in which he or she shall record the daily proceedings of the court, and enter all verdicts, orders, judgments, and decisions thereof,...

Under the Civil Rules, filing motions is mandatory. CR

5(d)(1) provides:

(d) Filing.

- (1) *Time.* Complaints shall be filed as provided in rule 3(a). Except as provided for discovery materials in section (i) of this rule and for documents accompanying a notice under ER 904(b), all pleadings and other papers after the complaint required to be served upon a party shall be filed with the court either before service or promptly thereafter.

* * *

- (e) **Filing with the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him or her, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk...

Civil Motions and supporting papers must also be filed under King County Superior Local Rule 7:

(A) Filing and Scheduling of Motion. The moving party shall serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered.

Consequently, Plaintiff's motion for default judgment and the evidence to support it from the Declaration of Wanna Choi were not effectively before the court commissioner when the default judgment was entered and should, therefore, be deemed void. Under CR 60(b), the default judgment could have been vacated by the lower court because of the failure to file on the basis of (1) ...“irregularity in obtaining a judgment or order.” The fact that Defendant Young did not raise these omissions in her motion to vacate the default judgment is immaterial, since Defendant's first notice of this omission was when Plaintiff filed her motion papers six weeks after Plaintiff filed her notice of appeal. The lower court's decision to vacate the judgment can be affirmed on grounds other than those relied upon by the court

below.

Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

C. Defendant Young Was Entitled to Have the Default Judgment Vacated under the Three Alternative Tests of *Morin v. Burris*

Plaintiff mistakenly asserts that the only reason the trial court vacated the default judgment was because Young's counsel was not given notice of the motion for default judgment. (Appellant's Brief at 13). Instead, the court below honored the long-standing presumption of vacating default judgments in favor of resolution on the merits under *Morin v. Burris*, 160 Wn.2d 745, 755, 161 P.3d 956 (2007):

Again, we do not favor default judgments. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). We prefer to give parties their day in court and have controversies determined on their merits. *Id.* (quoting *Dlouhy v. Dlouhy*, 55 Wn.2d 718, 721, 349 P.2d 1073 (1960)). 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. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943). Thus, for more than a century, it has been the policy of this court to set aside default judgments liberally. *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897) (“where there

is a showing, not manifestly insufficient, the court should be liberal in the exercise of its discretion in furtherance of justice” (emphasis omitted) (quoting Robert Y. Hayne, *A Treatise on New Trial and Appeal* § 347, at 1046 (1884))).

In vacating the default judgment here, the court below found that defendant met all three of the alternative bases for vacating a default judgment set out in *Morin*. *Id.* at 755. In *Morin*, the Washington Supreme Court addressed three consolidated appeals of default judgments in which each defendant acknowledged they had not timely filed a notice of appearance, but based their requests to vacate the default judgment on their informal appearances prior to suit and other mitigating circumstances. In each case, the conduct of both the plaintiff and the defendant guided the *Morin* Court to determine whether the default judgment should be vacated. The Court’s decision in each of the cases turned on whether the plaintiff met at least one of three alternative bases for vacating a default judgment (numbered brackets supplied to designate each of the three bases):

Applying CR 55 and CR 60 liberally, this court has required defendants seeking to set aside a default

judgment to be prepared [1] to establish that they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice. CR 60(b); *Dlouhy*, 55 Wn.2d 718. [2] Or, alternately, defendants may set aside a default judgment if they meet the four part test set forth in *White*[v. Holm, 73 Wn.2d 348, 352, 338 P.2d 581(1969)]:

(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White, 73 Wn.2d at 352 (citing *Hull*, 17 Wash. 352). [3] Finally, a default judgment should be set aside if the plaintiff has done something that would render enforcing the judgment inequitable. See *Trickel*, 52 Wash. 13; cf. CR 60(b)(4) (allowing default to be set aside based on fraud, misrepresentation, or misconduct by adverse party).

Id. at 755. The Morin Court applied each of these three tests to each of the three appeals before it, but found only the last one, *Gutz v. Johnson*, 128 Wn.App. 901, 117 P.3d 390 (Div. 2, 2005), to warrant vacating the default judgment and remanding for

additional findings. *Id.* at 758-759. Because the facts in the instant matter are like *Gutz*, and unlike the other two cases, the court below acted properly in vacating the default judgment here.

In the first case, *Morin v. Burris*, 126 Wn.App 1057, 2005 Wash.App. LEXIS 598 (Div. 1, 2005) (Published decision without published opinion), plaintiff Morin's counsel and Burris' insurer had initially discussed settlement, but had not been in contact for five months when Morin filed suit. Morin first obtained an order of default and then a default judgment before any notice of appearance was entered. Burris then appeared and attempted to vacate both the order of default and the default judgment on the basis that the settlement discussions constituted an informal appearance. The trial court vacated the default judgment on that basis and the Court of Appeals affirmed. *Id.* at 750-751. The Morin Court reversed the Court of Appeals and reinstated the default judgment because an informal appearance by a defendant who has not acknowledged that the matter was before the court has not met the requirements of a valid appearance. *Id.* at 757-

758.

In the second case, *Matia Investment Fund, Inc. v. City of Tacoma*, 129 Wn.App. 541, 119 P.3d 391 (Div. 2, 2005), Matia first filed an administrative claim with the City of Tacoma and, when it was denied, served a summons and complaint on the City clerk's office. These pleadings were not forwarded to the city attorney and no notice of appearance was ever entered before Matia obtained both an order of default and a default judgment against the City. More than a year later, the City moved to vacate both the order and the judgment, which the lower court granted. *Id.* at 752-753. Again, the Morin Court reversed on the basis that defendants' informal appearance in the pre-litigation claims process, without acknowledging that the matter was ever before the court, did not satisfy the requirement of an appearance. *Id.* at 757-758.

The third case, *Gutz v. Johnson*, 128 Wn.App. 901, 117 P.3d 390 (Div. 2, 2005) is the most significant to this appeal because the facts were substantially less favorable to the defendant there

than those here, but the Morin Court remanded the case to the trial court to make findings on whether the defendant met one of the three tests listed above to vacate the default judgment.

The facts in *Gutz* closely parallel the facts in this case. After extensive and ongoing settlement negotiations between plaintiff Gutz and Johnson's insurer, Allstate, plaintiff Gutz filed suit and served Johnson. Johnson notified Allstate that he had been served, but Allstate had no record of such notice and, therefore, did not direct defense counsel to appear. Without knowledge of the suit, Allstate called and asked Gutz's paralegal if the case would be litigated, which the paralegal apparently did not answer. Nevertheless, after that conversation, Gutz moved for and obtained a default order without notice to Johnson or Allstate. When Allstate called again to discuss settlement, Gutz's paralegal disclosed only that suit had been filed, but not that an order of default had been entered. Allstate learned of the default order on December 2, 2003, but did not move to vacate it until February 19, 2004, 2 ½ months later. The lower court denied the

motion to vacate. Again without notice to Johnson or Allstate, Gutz then moved for and obtained a default judgment for \$155,000. Again, Gutz moved to vacate, but the trial court denied the motion. The Court of Appeals reversed the trial court and Gutz appealed. *Id.* at 758-759.

1. **The First Morin Test: A Default Judgment Entered Without Notice After an Appearance Must be Vacated.**

The first basis under *Morin* for vacating a default judgment is where the defendant has actually appeared before the motion for a default judgment has been filed. In language that is dispositive here, the Court stated: “A party who has appeared in an action is entitled to notice of a default judgment hearing and, if no notice is received, is generally entitled to have judgment set aside without further inquiry.” *Id.* at 755. In *Gutz*, no notice of appearance was filed by Johnson before entry of the default judgment and so the default judgment could not be vacated on the basis of an actual appearance. *Id.* at 759, note 3. Here, however, Defendant Young appeared in the action before the

motion for a default judgment was filed and was, therefore, entitled both to notice of the default judgment hearing and to have the default judgment set aside. In the language quoted from *Morin* above, the Court cited *Dlouhy v. Dlouhy*, 55 Wn. 2d 718, 349 P.2d 1073(1960) for this rule. *Dlouhy* was a divorce proceeding. Defendant husband never filed a notice of appearance or an answer to the wife's petition for divorce. However, he personally appeared at a hearing on whether he should be restrained from contact with the plaintiff wife. Without notice, the wife then obtained a default order and then a decree of divorce. The husband petitioned to vacate the divorce decree for lack of notice, which the trial court denied. In reversing, the Dlouhy Court said:

The test is whether the proceeding bears a relation to the case so that both sides recognize that participation therein constitutes submission to the court's jurisdiction for the entire matter. Appellant's [husband's] acts constituted an appearance, and he was therefore, entitled to notice of all subsequent proceedings.

Id. at 723-724. That test is even more easily met here by

Defendant Young filing a notice of appearance prior to Plaintiff filing a motion for default judgment.

Plaintiff nonetheless maintains that once a default order has been entered, no notice of a motion for a default judgment need be provided to the defendant. Plaintiff is incorrect. First, RCW 4.28.210 provides:

A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is special appearance.

Here, of course, Defendant Young appeared and was entitled to notice of all subsequent proceedings, including a motion for default judgment. Similarly, CR 55(a)(3) provides:

(3) *Notice.*

Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before

the hearing on the motion. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to notice of the motion, except as provided in rule 55(f)(2)(A).

Thus, a party who has not appeared before the motion for default is not entitled to notice of the motion for default. However, CR 55(a)(3) does not state or imply that an appearance thereafter is ineffective such that plaintiff is not required to serve any subsequent pleadings upon the defendant. Here, of course, Defendant Young appeared orally on July 16, 2013 and in writing on July 17, 2013. Nevertheless, Plaintiff moved for and obtained a default judgment without notice to Defendant on July 30, 2013.

The due process rights of a defaulting defendant are not violated where the defendant does not appear at any time before a default judgment is entered, *Conner v. Universal Utilities*, 105 Wn.2d 168, 170, 712 P.2d 849 (1986). However, due process is violated where a default judgment is entered after the defendant appears or takes similar steps to notify the plaintiff and the court of his opposition to the relief sought:

We recognize that due process permits a default judgment against a non answering defendant to be entered without additional notice on the theory that a properly served defendant has been given adequate notice to allow an intelligent decision on whether to appear or default... [internal cites omitted] This rationale does not apply here because the defendants took action to contest the complaint and were denied notice of the refusal to file their answer and were not given a meaningful opportunity to be heard.

R. R. *Gable v. Burrows*, 32 Wn. App. 749, 753, 649 P.2d 177, (Div 1, 1982). The trial court was correct in determining that Defendant Young was entitled to have the default judgment vacated for Plaintiff's failure to comply with the notice requirements set out in the foregoing case law, statute and civil rules.

Plaintiff relies upon four cases that were decided before *Morin* to excuse her failure to provide notice of her motion for default judgment. First, in *Conner v. Universal Utilities*, 105 Wn.2d 168, 170, 712 P.2d 849 (1986), the defendant neither appeared nor answered at any time prior to the entry of the default judgment. That decision does not provide any guidance where, as

here, the defendant has appeared after the order of default, but before the motion for a default judgment.

Plaintiff also cites *J-U-B Engineers, Inc. v. Routsen*, 69 Wn. App. 148, 848 P.2d 733 (Div. 3, 1993) for the same proposition. Defendant Routsen neither appeared nor answered the plaintiff's complaint, so the trial court granted the plaintiff's motion for an order of default. *Id.* at 150. The trial court, *sua sponte*, refused to enter a default judgment when the amount of the claim was uncertain and the Court of Appeals affirmed. *Id.* at 151. In *dicta*, the Court of Appeals stated that if defendant moved to vacate the order of default, he would be "re-entitled" to notice. *Id.* at 151-152. However, unlike Defendant Young, Routsen had not entered a notice of appearance before the default judgment. Further, this *dicta* by the Conner Court cannot survive the declaration of a right to notice of a default judgment once a defendant has appeared, as stated in *Morin*, 160 Wn 2d at 755 and *Dlouby*, 55 Wn.2d at 723-24.

Plaintiff's reliance on *Pedersen v. Klinkert*, 56 Wn.2d 313,

320, 352 P.2d 1025 (1960) is also misplaced. There, the action was on a contract for a sum certain, set forth in the complaint. Defendant had filed a notice of appearance but, after receiving both a letter and a notice of the motion for default, failed to file an answer. He was then provided with a copy of the order of default and still filed no answer. A judgment was obtained without further notice nine days later. *Id.* at 314. Defendant's notice of the full amount of the claim against him and disregard of multiple notices of the pending motion for default was undisputed and defendant did not offer any basis to vacate the judgment for excusable neglect. *Id.* at 315. Further, defendant could offer no explanation of what he would do to defend the undisputed damages claim even if the judgment was vacated. Where there was repeated and indisputable neglect by the defendant and no resulting prejudice from the lack of notice, the lower court acted properly in not vacating the default judgment. *Id.* at 320. Those facts have no application here.

Finally, Plaintiff cites to *dicta*, in *C. Rhyne & Associates v.*

Swanson, 41 Wn.App 323, 704 P.2d 164 (Div. 1, 1985). It is distinguishable because the defendant there offered no defense to his failure to file a notice of appearance, unlike Defendant Young. Further, the Rhyne Court relied almost entirely on *Pedersen v. Klinkert*, 56 Wn.2d 313, 320, 352 P.2d 1025 (1960), already distinguished above, to relieve Plaintiff of the requirement to provide notice of the default judgment to defendant. In addition, the Rhyne Court was not faced with the consequence of the defendant filing an appearance before the motion for default judgment. Finally, the holding in *Rhyne* was in favor of the defendant and the default judgment was vacated because the defendant showed excusable neglect. *Id.* at 326-27.

Consequently, the authorities relied upon by Plaintiff do not justify reversal of the court below in this case.

2. **Second Morin Test: If the Defendant can meet the 4-part test of *White v. Holm*, the Default Judgment must be Vacated.**

In remanding *Gutz v. Johnson*, the Morin Court reaffirmed that if the defendant can meet the 4-part test of *White v. Holm*, 73

Wn.2d 348, 352, 438 P.2d 581 (1968), the default judgment should be vacated. *Morin*, 160 Wn. 2d at 758. That test is as follows:

A trial court considering a motion to set aside a default judgment must address two primary and two secondary factors:

These factors are: (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968); *Hardesty v. Stenchever*, 82 Wn. App. 253, 263, 917 P.2d (1996). Judge Rietschel properly found that these factors were met by Defendant Young here:

(1) Judge Rietschel concluded that substantial evidence of two prima facie defenses were presented by Defendant Young: lack of personal jurisdiction/ insufficiency of process and

deficiencies in the proof of Plaintiff's damages. The first required an evidentiary hearing before it could be resolved. The latter is a recognized prima facie defense when the validity of a default judgment is at issue. *Little v. King*, 160 Wn. 2d 696, 704-705, 161 P.2d 345 (2007).

(2) Judge Rietschel found that Defendant had demonstrated inadvertence, surprise and excusable neglect. Defendant's delay in appearing was occasioned by inadvertence and excusable neglect, as Defendant contended in good faith and put on evidence that she was not personally served with process and, as a result, was unaware of the contents of the summons and complaint. Judge Rietschel also found that Defendant had shown the default judgment was obtained by Plaintiff, "without notice and after Defendant had entered a notice of appearance." As a result, it was excusable neglect that Defendant was unaware of the default judgment because Plaintiff had obtained it improperly and without notice to Defendant after she had served and filed a notice of appearance.

(3) Defendant demonstrated and the lower court found that she acted with due diligence after notice of entry of the default judgment. She submitted the Declaration of Alan J. Peizer, which established substantial and bona fide medical reasons for the seven week delay between discovery of the order of default and filing a motion to vacate the order of default. (CP 501-502). Defendant waited only two weeks to file a motion to vacate the default judgment once she learned of it from Plaintiff's opposition to Defendant's motion to vacate the order of default. (CP 435). Plaintiff's argument that Defendant delayed in moving to vacate the default judgment is disingenuous; any delay was due entirely to Plaintiff's wrongful failure to serve the motion for the default judgment on Defendant and the failure to file either the motion for default judgment or the Choi Declaration.

(4) While the court below did not make a specific finding about any hardship that would result to Plaintiff as a result of vacating the default judgment, under *White v. Holm* this factor warrants little further consideration where the first two factors of

(1) prima facie defense and (2) mistake, inadvertence, surprise or excusable neglect are satisfied. As the Court said in *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007): “Factors (1) and (2) are primary; Factors (3) and (4) are secondary. The only hardship to Plaintiff of vacating the default judgment is to require her to litigate this case on the merits.” *White v. Holm*, 73 Wn2d 348, 352-53, 438 P.2d 481 (1968). Nevertheless, the prospect of litigation on the merits, without more, cannot constitute “substantial hardship” under *White v. Holm*. *Pfaff v. State Farm*, 103 Wn.App 829, 836, 14 P.3d 837 (Div 2, 2000).

3. **Third Morin Test: If Plaintiff's Counsel has Acted Inequitably in Obtaining the Default Judgment, it Must be Vacated.**

As noted above, the third ground to vacate a default judgment under *Morin* is inequitable conduct by the plaintiff. In *Gutz*, the one case that was remanded for further findings, the Morin Court focused on plaintiff's counsel not being forthcoming about filing the lawsuit and not providing notice to defendant of the motion for default or the motion for a default judgment. *Id.*

at 758-759. Here, Plaintiff's counsel engaged in sharp and deceptive practices that should not be condoned. Despite assuring USAA that she would provide notice before she filed suit, she filed suit without notice to USAA. Plaintiff's counsel received an oral notice of appearance from defense counsel Alan J. Peizer on July 16, 2013, the day the case was assigned to him, and told him she had not obtained a default judgment. She received Mr. Peizer's notice of appearance the next day, July 17, 2013, requesting that all future pleadings be served upon him. Nevertheless, Plaintiff's counsel appeared in court and presented her motion for entry of default judgment without either filing it or providing any notice to defense counsel. This is inequitable conduct.

As noted above, once Defendant's notice of appearance was served on Plaintiff, Plaintiff was required to provide at least 5 days notice of Plaintiff's motion under CR 55(a)(3). She did not. In Plaintiff's July 30, 2013 motion for a default judgment, Plaintiff's counsel provided no notice to the court that Defendant

Ashley Young was now represented by counsel and had filed a notice of appearance on July 17, 2013, 13 days earlier (CP 632-649). Instead, Plaintiff's counsel selectively informed the court only that no appearance had been filed prior to entry of the order of default. (CP 640).

Plaintiff's counsel's refusal to file her motions for default or to provide any notice whatsoever to USAA or defense counsel, either before the order of default of June 27, 2013 or the default judgment of July 30, 2013, is compelling evidence of inequitable conduct and defiance of court rules and statutes. Judge Rietschel's finding of fact number 2 supports this conclusion. This finding meets the third test for vacating a default judgment under *Morin*.

D. An Excessive Damage Award That was Not Properly Obtained and Not Supported by Substantial Evidence Must Be Vacated.

The standard of review of a trial court's decision to vacate a damages award granted in a default judgment is abuse of discretion. *Johnson v. Cash Store*, 116 Wn.App. 833, 849, 68 P.3d

1099 (Div. 3, 2003). Under CR 55(b)(2), judgment after default on an unliquidated claim may only be entered as follows:

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

In *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokinson*, 95 Wn. App. 231, 242, 974 P.2d 1275 (Div. 1, 1999), the Court of Appeals set out the standard of proof which a plaintiff seeking a default judgment must either meet or have the judgment vacated:

Thus, the default award here could be vacated if there were not substantial evidence to support the award of damages. Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. The evidence here, including Berkins' own declaration opposing Shepard's motion to vacate, does not support the finding of fact from the default hearing that Berkins suffered two or more broken ribs. Because the default award was based upon that finding, we find

that Shepard would have satisfied the test for vacating a default damages award if it had moved within the one-year period applicable to motions under CR 60(b)(1).

The amount of damages in a default judgment must be supported by substantial evidence. *Little v. King*, 160 Wn.2d 696 at 704; *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokinson*, 95 Wash.App. 231, 240-42, 974 P.2d 1275 (Div. I, 1999).

In *Calhoun v. Merritt*, 46 Wn.App. 616, 620-21, 731 P.2d 1094 (Div. 3, 1986), the lower court's denial of a motion to vacate the liability portion of a default judgment was affirmed, but its denial of the motion to vacate the damages portion of a default judgment was reversed as an abuse of discretion:

In this context, we note that development of a defense to the damages would require the examination of Mr. Calhoun by a defense expert. Here, the default was entered before any such discovery could take place. Moreover, presenting a defense to damages for pain and suffering is always complicated by the subjective as opposed to objective nature of such damages. Given these circumstances, it would be inequitable and unjust to deny the motion to vacate the damage portion of the

judgment on the ground that Mr. Merritt did not present a prima facie defense.

Defendant demonstrated and the lower court agreed that the evidence submitted in support of Plaintiff's default judgment was not "sufficient to persuade a fair-minded, rational person of the truth of the declared premise." Plaintiff's total medical bills were only \$1,822. While calculations of wage loss were set forth by Plaintiff, they were materially contradicted by Defendant with substantial evidence: the absence of any evidence of pre-accident earnings and the substantial increase in earnings in 2011 and 2012.

Plaintiff based \$100,000 of the entire judgment amount of \$134,269.99 on claims of pain and suffering. However, her claim of continuing leg numbness was disproven by Defendant and her claim of continuing depression from impaired earnings was contradicted by the admitted increase in wages from 2011 forward.

Under these circumstances, the lower court did not abuse

its discretion in vacating the damages portion of the judgment and requiring plaintiff to prove her damages at a hearing under CR 55(b)(2).

E. The Lower Court Did Not Abuse Its Discretion in Awarding Plaintiff's Attorney's Fees

The standard of review for the lower court's award of Plaintiff's counsel's attorney's fees and costs is abuse of discretion. *Ermine v. Spokane*, 143 Wn.2d 636, 650, 23 P.3d 492 (2001). The lower court did not award Plaintiff her fees and costs in defending Young's two motions to vacate. This was not an abuse of discretion. The American rule is that a prevailing party does not ordinarily recover its attorney's fees unless authorized by a contract, statute, or recognized ground of equity. *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn.App. 466, 477, 694 P.2d 1101 (1985); *Dempere v. Nelson*, 76 Wn.App. 403, 886 P.2d 219 (1994). As the Plaintiff points out, the only basis for recovery of attorney's fees here was CR 60(b), which authorizes such fees only if the court relieves a party from a final

judgment, order or proceeding. With regard to the order of default, it was not vacated and Defendant was not relieved from that order. Consequently, Defendant should not have to pay for Plaintiff's resulting attorney's fees. In the case of the default judgment, while Defendant was relieved from the default judgment, it had been obtained under improper circumstances. As a result, Plaintiff did not prevail and the court was not inclined to exercise its discretion to award the related attorney's fees. There was no abuse of discretion.

F. Choi Should Be Denied Her Fees and Costs Under RAP 18.1(a).

RAP 18.1(a) allows a party their attorney's fees on appeal only if applicable law grants such a right. Plaintiff Choi has failed to identify any authority for such an award. To the contrary, fees may be awarded as part of the costs of litigation only when there is a contract, statute, or recognized ground of equity for awarding such fees. *West Coast Stationary Engineers Welfare Fund v. City of Kennewick*, 39 Wn.App. 466, 477, 694 P.2d 1101 (1985). Here,

Plaintiff's request for attorney's fees is based on CR 60(b), i.e. for relieving a party from a judgment or order on such terms as are just. It was plainly unjust for Plaintiff to seek the subject default judgment, requiring defendant to move to vacate it. Consequently, Plaintiff's request for her attorney's fees on appeal should be denied.

VI. CONCLUSIONS

For the foregoing reasons, the lower court's orders should be affirmed and this court should deny Plaintiff her attorney's fees on appeal.

DATED this 21st day of March, 2014.

PEIZER & ZIONTZ, P.S.


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