IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. _____

No. 86117-4-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SHANGRI-LA LLC,

Plaintiff-Respondent,

v.

EAGLE WEST INSURANCE COMPANY,

Defendant-Petitioner.

PETITION FOR DISCRETIONARY REVIEW

Eliot M. Harris, WSBA #36590
Williams, Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
Telephone: (206) 628-6600
Email: eharris@williamskaster.com

Attorneys for Petitioner
Eagle West Insurance Company

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I. IDENTITY OF PETITIONER

Petitioner is Eagle West Insurance Company ("Petitioner"), Respondent in Division I of the Washington Court of Appeals under Case No. 86117-4-I, and Defendant in the Superior Court of Snohomish County, Cause No. 22-2-01501-31.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the Division I unpublished opinion in *SHANGRI-LA LLC, a Washington limited liability company v. EAGLE WEST INSURANCE COMPANY, a foreign insurance company,* No. 86117-4-I, filed August 26, 2024 (attached hereto at Appendix A).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' unpublished opinion is in conflict with the decision of the Supreme Court in *Morin v. Burris,* 160 Wn.2d 749, 161 P.3d 956 (2007) and therefore warrants review under RAP 13.4(b)(1)?

2. Whether the Court of Appeals' unpublished opinion presents a significant question of law under the Constitution of the State of Washington or of the United States, when unconstitutional attorney fees and punitive damages were reinstated by the Court of Appeals, and therefore warrants review under RAP 13.4(b)(3)?

3. Whether the Court of Appeals' unpublished opinion conflicts with Court of Appeals precedent and therefore warrants review under RAP 13.4(b)(2) because it misinterprets the "irregularities and erroneous proceedings" shelters found under CR 55 and CR 60?

4. Whether the Court of Appeals' unpublished opinion involves an issue of substantial public interest that should be determined by the Supreme Court and therefore warrants review under RAP 13.4(b)(4) when the Court of Appeals unpublished opinion will have a precipitous effect of unconstitutional and unsubstantiated attorney fee awards and treble damages awards?

IV. STATEMENT OF THE CASE

Petitioner appeared via letter after Respondent Shangri-La, LLC's Complaint was filed in Superior Court. Respondent was required to provide Petitioner with notice of its Motion for Default Judgment. Respondent did not. A default judgment was entered awarding unconstitutional attorney's fees and unconstitutional damages.

Respondent is the owner of an apartment building, and Petitioner is Respondent's property insurer. CP 218. Respondent filed an insurance claim with Petitioner in May 2021 regarding damage in the roof of the building. CP 219. Petitioner responded to the claim and retained an expert to investigate. *Id*.

Petitioner utilized reports from its own expert and Respondent's expert to determine denial of coverage. CP at 753. Petitioner explained that the roof condensation and rot was caused by faulty building design and faulty

workmanship, which were excluded perils in the insurance policy. CP at 753-4.

Petitioner sent the denial of coverage letter on August 26, 2021, which specifically requested that Respondent provide new information or additional information, with any explanation Respondent wished Petitioner to consider in reevaluation of the denial. CP at 757.

A. The Lawsuit

Respondent filed its lawsuit in Snohomish County Superior Court on March 17, 2022. *See* CP 534-36. The same day, counsel for Respondent sent Petitioner a letter of intent to assert an IFCA claim. *See* CP 547-49. The initial complaint was never sent to Petitioner, and the IFCA notice did not reference the existing lawsuit, nor contain any mention that Respondent had already filed suit against Petitioner. Here is the pertinent part of the one-paragraph text of the IFCA notice:

> The purpose of this letter is to provide notice under RCW 48.30.015(8) that Shangri-La LLC intends to assert a cause of action against Eagle West under the Insurance Fair Conduct Act, RCW 48.30.015. The basis for the cause of action is: the property damage to Shangri-La LLC's building is covered under the above referenced policy.

CP 757. Petitioner's claim representative, Ken Gotchall, acknowledged receipt of the IFCA notice by return letter dated April 21, 2022. CP 551. In his response, Mr. Gotchall wrote as follows:

> This letter will serve as confirmation of our receipt and acknowledgement of your letter of representation, regarding the above-captioned claim, that is dated March 17, 2022. Please send a copy of your letter of designation or authorization of representation with Mr. Hashim's signature.
>
> Upon receipt, we will email you a certified copy of the applicable policy and endorsements along with any documents that you have request.
>
> We would appreciate the opportunity to discuss this above captioned claim with you at your earliest convenience.
>
> Please let me know if you have any questions or concerns regarding this matter.

CP 551. Respondent's counsel never responded to Mr. Gotchall's April 21, 2022 letter. Instead, Respondent filed an amended complaint on July 14, 2022, adding an IFCA cause of action, and served the summons and amended complaint upon the OIC. CP 221. Unfortunately, the OIC sent a copy of the documents to Petitioner's old address. *Id*. Notably, Respondent did not send a copy to Petitioner, as it had with the IFCA notice. CP at 54.

A. The Irregularity of Default Proceedings

Respondent was granted a default judgment on July 26, 2022. CP 54. The Commissioner did not conduct an independent evaluation to substantiate the amount of damages or attorney fees Respondent claimed, and instead simply signed off on Respondent's so-called "findings of fact," many of which were conclusory statements for which there was no evidentiary support. *See* CP 55, 63-7. Moreover, there is no indication in either the signed findings of fact and conclusions of law, or the transcript

from the default judgment hearing, that the Commissioner even considered the criteria for awarding punitive damages, let alone made the determination that the criteria were satisfied. *Id*. Here, in their entirety, are the court proceedings that took place for Respondent to seek, and the court to grant, the default judgment:

> The Court: All right. Shangri-La vs. Eagle West Insurance.
>
> Mr. Hayes: Good morning, Your Honor. Todd Hayes for Plaintiff. As I said, we're here on a motion for entry of a default judgment. It's unopposed so –
>
> The Court: It's unopposed.
>
> Mr. Hayes: -- I can argue if you want or you can ask questions.
>
> The Court: If you want to make a record, that's fine. I have gone through these documents, so I understand what the request it, but it's up to you, Counsel. It's unopposed so…
>
> Mr. Hayes: No, that's fine. I think the motion and the documents adequately support the motion.
>
> The Court: I would agree with that. The Court is prepared to sign –
>
> Mr. Hayes: Okay.

> The Court: -- the proposed order as presented. And I appreciate all the work that went into that.
>
> Mr. Hayes: Thank you.
>
> The Court: And I do appreciate having all that information to help the Court ma– --
>
> Mr. Hayes: It can be kind of a –
>
> The Court: -- endorse this decision.
>
> Mr. Hayes: -- dense legal issue.
>
> The Court: Yes. Quite surprised that they didn't respond, but...
>
> Mr. Hayes: It's happened before.
>
> The Court: Really?
>
> Mr. Hayes: Yeah
>
> The Court: Okay. Well, good luck, Counsel. I have signed the order.
>
> Mr. Hayes: Thank you, Your Honor.
>
> And will you file it?
>
> The Clerk: Mm-hmm.
>
> Mr. Hayes: Okay, thank you.
>
> (Conclusion of hearing)

See CP 163 - 170. Accordingly, the punitive damages award is not supported by evidence in the record, and does not

comport with the requirements of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *See* CP 55, 63-7. Lastly, the Commissioner mistakenly endorsed an exorbitant attorney fee award that was not supported by any testimony, and is not consistent with Washington case law guidelines. *See* CP 163 – 170, *see also* CP 69 - 74 and 255 - 263.

This table shows the monetary awards made by the court in the default judgment:

Element	**Amount**
Cost of Repairs:	$1,928,349
Punitive Damages Enhancement:	$3,856,698
40% Contingent Attorneys' Fee:	$2,314,019
Total:	$8,099,066

CP 224, *see also* CP 69 - 74 and 255 - 263. There was no evidence the cost to repair the property was actually $1,928,349, as opposed to $1,546,379, the amount of the "stipulated sum" contract signed by Respondent and its contactor. CP 63-4. There was no evidence to justify trebling Respondent's repair cost award pursuant to the

IFCA. CP 64-5. There was no evidence that the lodestar method was ever applied to obtain the awarded fee amount, as required by law. CP 66. It appears the attorney fees were calculated based solely on a contingency rate (40%) for the total recovery, plus an incomprehensible 3x multiplier stolen from IFCA. *Id.*

Respondent's counsel's work spanned from filing to a default judgment prior to obtaining the default judgment. CP 246. The "resulting cost of that work" at the rates that Respondent's primary fee expert endorsed is only $43,896.50 for **104** hours of work, because that is the amount and cost of the work that is documented in the record. See CP 246, 267. However, the Commissioner inexplicably awarded $2,314,019 for the time it took to file the case and file unopposed motions for default and judgment. *See* CP 69 - 74 and 255 - 263.

These errors forced Petitioner to file unsuccessful motions to vacate the default and judgment orders with the same Commissioner who imposed them. *See* CP 75-76.

Petitioner filed a motion to revise the Commissioner's Orders. *See* CP 53-68. On December 19, 2023, trial court Judge Weiss properly granted the motion. *See* CP 8-9. Judge Weiss ruled Mr. Gotchall's letter constituted an informal appearance under Washington law, and Petitioner was entitled to notice of the default and judgment proceedings. CP 9. Respondents prevailed on appeal, and Petitioner seeks review of the errors of the lower courts.

V. ARGUMENT - REVIEW SHOULD BE ACCEPTED

A. Mr. Gotchall's Letter Was an Appearance Under *Morin*

Mr. Gotchall's letter does satisfy the substantial requirement notice doctrine under *Morin*. The substantial compliance doctrine looks to the defendant's conduct after litigation was commenced in order to determine whether the plaintiff was apprised of the defendant's intent to litigate the

case. *Morin*, 160 Wn.2d at 755. Washington Courts have found informal notice of appearance from just a single communication from the defendant after litigation had commenced. *Pitera v. Asset Recovery Group Inc.*, 2:22-cv-00255-TL, 2022 WL 3701009 at *3 (W.D. Wash., Aug 29, 2022) (citing *Sims v. Midland Funding LLC*, 2021 WL 1546135, at *3 (W.D. Wash. Apr. 20, 2021)); *Sacotte Const., Inc. v. Nat'l Fire and Marine Ins. Co.*, 143 Wn. App. 410, 416, 117 P.3d 1147 (2008) (concluding an appearance was made when defense counsel made a single post-litigation phone call followed up by an email to plaintiff's counsel). In *Meade*, the Court held that post-litigation contact constituted a sufficient appearance when defendant's attorney responded to a settlement offer and discussed potential evidentiary issues. *Meade v. Nelson*, 174 Wn. App. 740, 300 P.3d 828 (2013).

Here, Mr. Gotchall had knowledge the claim was headed to court – Respondent sent him an IFCA notice of filing. Mr. Gotchall responded to the IFCA notice with evidence of his

intent to defend against Respondent's claims, including the IFCA claims. He did turn a blind eye to the issues presented, as did two of the defendants scrutinized in *Morin*.

The Court of Appeals evaluated the three cases comprising the *Morin* opinion – *Morin*, *Matia Investment Fund, Inc. v. City of Tacoma*, and *Gutz v. Johnson*.[1] The Court of Appeals agreed that neither of the defendants in *Morin* or *Matia* showed any intent to defend or even respond to the respective plaintiffs.[2] There was no intent by either defendant to defend either claim.

In the third case, *Gutz*, this Court remanded it for analysis of whether plaintiff's counsel potentially used inequitable methods to conceal litigation – this Court never addressed the *Gutz* claim adjuster's response regarding her intent to defend the claim.

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[1] Appendix A: *Shangri-La, LLC v. Eagle West Insurance Company*, No. 86117-4-I, slip op. at 9 (Wash. Ct. App. Aug. 26, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/861174.pdf

[2] *Id*.

Here, Petitioner's letter to Respondent's counsel, approximately one month after suit was filed, constituted an informal notice of appearance – it evidenced Petitioner's intent and desire to actively engage in defending the claim via discussion of the claim and exchange of documents. Petitioner was never notified of or served with Respondent's initial Complaint. In this letter, Petitioner specifically asked to speak with Respondent's counsel about this case. It was clear Petitioner was not ignoring Respondent's counsel, but rather wanted to defend the claim and explore "the opportunity" of resolution.

The Court of Appeals focuses on Mr. Gotchall's letter not showing "an intent to defend against a lawsuit in court."[3] This is incorrect, and misapplies the underlying principle (intent of a defendant) of *Morin*, which is the defendant's

[3] Appendix A: *Shangri-La, LLC v. Eagle West Insurance Company*, No. 86117-4-I, slip op. at 12 (Wash. Ct. App. Aug. 26, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/861174.pdf

conduct in order to determine whether a plaintiff was apprised of the defendant's **intent** to litigate the case. *Morin*, 160 Wn.2d at 755. Here, Petitioner invited a conference and an exchange of documents to defend the case, which satisfies *Morin*. Washington courts do "not exalt[ ] form over substance." *Pitera*, 2022 Wl. 3701009 at *3 (*quoting Morin*, 161 P.3d at 964). Mr. Gotchall acknowledged that a dispute over the claim existed, and the evidence shows he intended to defend the claim when he informally appeared on behalf of Petitioner by responding to the IFCA notice (a lawsuit to be filed in court), requesting claim discussion, and offered an exchange of documents to defend against the same.

B. The Default Judgment Violates the Federal Constitution and Federal Case Law

The Court of Appeals erred when it reversed the order vacating the default order and judgment and remanded for the superior court to reinstate the default judgment against

Petitioner,[4] because (1) the Commissioner did not follow the requirements of CR 55(b)(2), and therefore the default judgment on damages was not properly entered, (2) the Commissioner did not apply the factors articulated by the U.S. Supreme Court to ensure that a punitive damages award does not violate the U.S. Constitution, and (3) the Commissioner did not have sufficient evidence or follow Washington law to award the fees requested.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits states from "imposing a grossly excessive punishment on a tortfeasor." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562, 116 S. Ct. 1589, 1592, 134 L. Ed. 2d 809 (1996) (internal citations and quotation marks omitted). When punitive damages awarded under state law are determined to be "excessive" based on the standards articulated by the U.S. Supreme Court, the damages are unconstitutional. *MKB*

[4] Appendix A: *Shangri-La, LLC v. Eagle West Insurance Company*, No. 86117-4-I, slip op. at 17 (Wash. Ct. App. Aug. 26, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/861174.pdf

Constructors v. Am. Zurich Ins. Co., C13-0611JLR, 2015 WL 1188533, at *24 (W.D. Wash. Mar. 16, 2015), *aff'd*, 711 Fed. Appx. 834 (9th Cir. 2017) ("To comport with due process under the Constitution, state-law punitive damages awards are subject to review for excessiveness.") (*citing BMW v. Gore*).

In *State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), the U.S. Supreme Court articulated the criteria that courts should apply in determining whether a punitive damages award violates the Due Process Clause. 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). Those criteria are "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id*. The most important factor is the "reprehensibility of the defendant's conduct." *Id*. at 419.

The standard for imposing punitive damages under the IFCA is the unreasonableness of the insurer's conduct, so courts applying the *Campbell* criteria to a punitive damages award under the IFCA must evaluate whether the evidence shows that the insurer's denial of coverage or payment of benefits was unreasonable. *MKB Constructors*, 2015 WL 1188533, at *24. **Critically, though, that inquiry must be guided by the criteria set forth in *Campbell*:**

> The Supreme Court, however, has counseled that in determining whether a defendant's misconduct is sufficiently reprehensible to support a punitive damages award, courts should consider whether [1] the harm caused was physical as opposed economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. (*quoting Campbell* at 419) (internal quotation marks omitted).

Based on the foregoing, punitive damages can be imposed under the IFCA only if (1) the insurer's denial of coverage or payment of benefits was unreasonable, and (2) the

unreasonableness of the insurer's conduct rises to the level of reprehensibility that the U.S. Supreme Court has held is required by the Due Process Clause of the Fourteenth Amendment.

Critically, none of this required analysis was completed by the Commissioner when she entered the default judgment. And now, the Court of Appeals has simply ignored this error and remanded for the entire reinstatement of the damages and attorney fees – both of which are unconstitutional – which were awarded by the Commissioner.

C. The Default Judgment Was Irregular and Erroneous Procedurally – The Court of Appeals Decision to Reinstate the Unconstitutional Awards Contradicts Prior Court of Appeals Decisions

A court may vacate a default judgment as enumerated in CR 60(b)(1) – (11). If grounds set forth in CR 60(b)(1) – (10) do not apply, CR 60(b)(11) provides for a judgment to be set aside for "[a]ny other reason justifying relief from the operation of the judgment." Washington courts have interpreted CR 60(b)(11) to authorize vacation of a judgment for (1) "reasons extraneous to the action of the court" or

(2) "matters affecting the regularity of the proceedings." *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35, 37 (1982) (*citing Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.*, 68 Wn.2d 756, 415 P.2d 501 (1966)).

A court's failure to comply with the requirements of CR 55 when entering default judgment is deemed to be an "irregularity" in the proceedings sufficient to justify vacation of the judgment under CR 60(b)(11). *See* CR 55. Default and Judgment, 4 Wash. Prac., Rules Practice CR 55 (7th ed.) (discussing the failure to comply with CR 55 as a "procedural error or irregularity in the manner in which the default judgment was obtained"). This is because the failure to comply with the requirements of CR 55 is a "substantial deviation from procedure" that results in a "fundamental wrong" because, in essence, the failure to comply with the procedural requirements for entering default judgment means that the default judgment was not properly entered. *Keller* at 141.

When the amount of damages sought from a defendant in default is "uncertain," the entry of judgment is governed by CR 55(b)(2), which provides as follows:

> 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.***

(emphasis added).

Importantly, the requirement of entering findings of fact and conclusions of law to determine the amount of damages under CR 55(b)(2) is not satisfied if the trial court merely rubber-stamps the amount of damages presented by the claimant; the court must independently evaluate the evidence and determine the amount of damages supported by the evidence. *Evans v. Firl*, 25 Wn. App. 2d 534, 555, 523 P.3d 869, 881 (2023), review denied, 532 P.3d 158 (Wash. 2023). As the Court of Appeals explained in *Evans*, "[i]t is well

settled that judges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court when the amount of a default judgment is uncertain." *Id*. (quoting *Lenzi v. Redland Ins. Co.*, 140 Wn.2d 267, 281, 996 P.2d 603 (2000)) (internal quotation marks omitted). When the court fails to "independently assess the evidence" and simply rubber-stamps a default judgment presented by the claimant, without any inquiry into the accuracy of the factual and legal assertions, the requirements of CR 55(b)(2) are not satisfied. *Id*.

In this case, there is no substantial evidence of the following:

- That the cost to repair the property was actually $1,928,349, as opposed to $1,546,379, the amount of the "stipulated sum" contract signed by Respondent and its contactor;

- The existence of unreasonableness by Petitioner in denying the claim, or in violation of insurance regulations, to justify trebling Respondent's repair cost award under IFCA;
- That a reasonable attorneys' fee to take the case from filing to default judgment hearing is $2,314,019; and
- An analysis of requirements for imposing punitive damages under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

The Commissioner's failure to comply with CR 55 triggers the "any other reason justifying relief" requirement under CR 60(b)(11). Vacation was proper under either rule.

D. Respondent Is Not Entitled to Fees as Awarded in the Trial Court – The Court of Appeals Decision to Reinstate the Unconstitutional Awards Contradicts Prior Court of Appeals Decisions

In Washington, a determination of reasonable attorney fees begins with a calculation of the "lodestar," which is the number of hours reasonably expended on the litigation

multiplied by a reasonable hourly rate. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *see also, Peiffer v. Pro-Cut Concrete Cutting and Breaking, Inc.*, 6 Wn. App. 2d 803, 834, 431 P.3d 1018, 1033 (2018). A lodestar fee must comply with the ethical rules for attorneys, including the general rule that a lawyer shall not charge an unreasonable fee. RPC 1.5; *Fetzer v. Weeks*, 122 Wn.2d 141, 149–50, 859 P.2d 1210 (1993). This consideration applies whether one's fee is being paid by a client or the opposing party. *Id*. at 156. The "lodestar" is the starting point, and the fee calculated therefrom is not necessarily a "reasonable" fee. *Id*. "Adjustments to the lodestar product are reserved for 'rare' occasions." *Miller v. Kenny*, 180 Wn. App. 772, 825, 325 P.3d 278 (2014). The lodestar is "presumed to adequately compensate an attorney." *Id*.

After the lodestar has been calculated, a court may consider adjusting the award to reflect additional factors, including whether Respondent's counsel brought the case

under a contingency fee agreement. *Bowers*, 100 Wn.2d at 598. The party requesting a deviation from the lodestar bears the burden of justifying it. *Id*. "Adjustments to the lodestar are considered under two broad categories: the contingent nature of success, and the quality of work performed." *Id*. The contingency adjustment is based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services, unless they can receive a premium for taking that risk. *Id*. Under the multiplier, however, the Court evaluates the hours actually worked and reasonable hourly rate under the lodestar method, and then multiplies that amount (1.5x is a common multiplier) to reach the final award of reasonable attorney fees.

In this case, Respondent arrived at an attorney fee award of $2,314,019 arguing from two experts' declarations. *See* CP 275-8. The first expert, Mr. Cordell, testified that the attorney hours and rates were reasonable. *Id*. The second expert, Mr. McIsaac, testified that policyholders' counsel

regularly charge on a contingent fee basis. *Id*. But neither of them justified the $2.3 million that was awarded, under standards set forth in the case law. *Id*.

More importantly, there was no evidence that the lodestar method was ever applied. It appears that attorney fees were calculated based solely on the contingency rate (40%) of the total recovery, plus a 3x multiplier borrowed from IFCA. Neither of the default orders, nor the transcript of proceedings, shows the attorney fee award was based on the number of hours actually worked by Respondent's counsel, or the reasonable hourly rate under the lodestar calculation.

"The burden of demonstrating that a fee is reasonable is upon the fee applicant." *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745, 753 (2013). "'Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.'" *Id*., *quoting Mahler v. Szucs*, 135

Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998). When determining a reasonable rate and ultimate fee, courts are guided by factors in Rule of Professional Conduct 1.5(a). These factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent; and
>
> (9) the terms of the fee agreement between the lawyer and the client, including whether the

> fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

Looking at the declaration of Mr. Cordell, one of Respondent's two experts, Mr. Cordell opined that: "*In my opinion, the* ***amount of work performed and the resulting cost*** *of that work are entirely reasonable.*" *See* CP 267-8 (emphasis added). The "resulting cost of that work" at the rates that Mr. Cordell endorsed is only **$43,896.50** for **104** hours of work, because that is the amount and cost of the work that is documented in the record. This is compared to the **$2,314,019** in attorney fees that the Court actually awarded - a **531.70%** jump from the apparent lodestar calculation in Mr. Cordell's declaration. Critically, Respondents total bill for its entire appeal process, including attending oral argument, was **$115,265.50** for **245** hours of work.[5] Both cost bills are substantially departed from the Commissioner's fee award.

[5] Filed by Respondent with the Court of Appeals under Case Number 861174 on September 4, 2024.

Respondent's other expert, Mr. McIsaac, opined in a very short declaration that lawyers doing this kind of work routinely work on a contingent fee basis, and the 40% contingent fee Respondent signed with its counsel was reasonable. *See* CP 275-6.

Multiplier adjustments of the lodestar fee calculation should rarely be done. *Baker v. Fireman's Fund Ins. Co.*, 5 Wn. App. 2d 604, 621, 428 P.3d 155, 164-65 (2018); *Berryman, supra,* at 666 ("our trial courts grant multipliers sparingly"). The work done here did not justify the magnitude of the Commissioner's award.

Dividing the hours incurred by all of Respondent's counsel's timekeepers (104.3 hours for paralegals, associates, and partners) into the contingent fee yields an effective billable rate of ***twenty-two thousand, one hundred eighty-six dollars and eight cents per hour.*** Assuming an 1,800 billable hour year, a lawyer billing at that rate would generate fees of

$39,935,131.34. No witness has testified that $22,186.08 is a reasonable hourly fee, yet that is what was awarded.

Given the lack of evidentiary support, the Commissioner's award was improper and irregular in the entry of default judgment. It is now wholly improper for the Court of Appeals to remand for reinstatement of the award on a wholesale level. This remand is directly contrary to Court of Appeals decisions, *supra*, and should not be permitted.

E. The Court of Appeals Decision to Reinstate the Unconstitutional Awards Contradicts Prior Court of Appeals Decisions

This case presents many issues of broad public importance. An issue is of substantial public importance when the Court of Appeals decision has "sweeping implications." *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005). Division I's decision has significant sweeping implications. For example: there may now be unconstitutional consequences for other defendants who have wholly improper and unlawful rulings

levied against them. This not only applies to insurance companies, but defendants of any kind.

The opinion provides a more narrow requirement for how a defendant may appear in a case, removing the principles of notice and intent, and instead focusing on "magic" words, potentially meaningless to some defendants, who have no intent of actually defending a case. Division I's opinion reinstating the Commissioner's award alters, reinterprets, and significantly affects the meaning of justice.

This case is a public dispute, as Respondent made IFCA claims, which are governed by public entities. *See Eyman v. Ferguson*, 7 Wash.App.2d 312 433 P.3d 863 (2019) (explaining that whether a "continuing and substantial public interest" justifies review of an issue turns in part on ""(1) [W]hether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur.""). If the Commissioner's ruling does stand, it is extremely likely the same

"treble damages equal treble attorney's fees" will become the requested norm. With such a far reach, this case is worthy of this Court's review.

Accordingly, the Court of Appeals' unpublished opinion warrants review under RAP 13.4(b)(1), RAP 13.4(b)(2), RAP 13.4(b)(3), and/or RAP 13.4(b)(4).

VI. CONCLUSION

Defendant-Petitioner requests that this Court grant review of the Court of Appeals' decision as to its holding regarding issue preclusion.

I certify that this document contains 4,965 words in compliance with RAP 18.17 (excluding the Title Sheet/Caption, Tables of Contents/Authorities, Certificate of Compliance/ Service, and Signature Block), as calculated by the word processing software used to prepare this document.

RESPECTFULLY SUBMITTED this 25th day of September, 2024.

/s/ Eliot M. Harris
Eliot M. Harris, WSBA #36590
Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
Telephone: (206) 628-6600
Email: eharris@williamskaster.com

Attorneys for Respondent
Eagle West Insurance Company

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be served on the following parties and counsel of record via the Washington State Appellate Courts' Portal:

Attorneys for Plaintiff Shangri-La LLC:

Todd C. Hayes, WSBA #26361
HARPER HAYES PLLC
1200 Fifth Avenue, Suite 1208
Seattle, WA 98101-3115
Email: todd@harperhayes.com
mvammen@harperhayes.com
njohnsen@harperhayes.com

Attorneys for Defendant
Eagle West Insurance Company:

Joseph D. Hampton, WSBA #15297
Danielle McKenzie, WSBA #49715
Bullivant Houser Bailey PC
925 Fourth Avenue, Suite 3800
Seattle, WA 98104
Email: joseph.hampton@bullivant.com
danielle.mckenzie@bullivant.com
genevieve.schmidt@bullivant.com
sally.gannett@bullivant.com

DATED this 25th day of September, 2024, at Seattle, Washington.

Sandra V. Brown, Legal Assistant

NO. 86117-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

APPENDIX A
TO
DEFENDANT-PETITIONER
EAGLE WEST
INSURANCE COMPANY'S

PETITION FOR REVIEW

Unpublished Opinion filed on August 26, 2024

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHANGRI-LA LLC, a Washington limited liability company, Appellant, v. EAGLE WEST INSURANCE COMPANY, a foreign insurance company, Respondent.	No. 86117-4-I DIVISION ONE UNPUBLISHED OPINION

BIRK, J. — Shangri-La LLC sent a notice of claim to Eagle West Insurance Company requesting coverage under its policy for damage to the roof of its apartment building. Eagle West denied coverage and Shangri-La filed and served a summons and complaint on Eagle West. Eagle West never filed an answer or appeared in the lawsuit. A superior court commissioner entered an order finding Eagle West in default and a default judgment awarding Shangri-La approximately $8 million in damages and attorney fees. Fifteen months after the default judgment's entry, Eagle West filed a motion to vacate the default judgment, which the commissioner denied. Finding an informal appearance, a superior court judge granted Eagle West's motion for revision and vacated the default order and judgment. We reverse and remand for the default judgment to be reinstated. Eagle West failed to appear in the lawsuit, it was not entitled to notice of the default

motions, and its remaining arguments are time barred because it filed its motion to vacate over a year after its entry.

I

Shangri-La is the owner of the Shangri-La apartment building located in Bothell, Washington. Eagle West is Shangri-La's property insurance company. The coverage agreement is a blanket policy covering multiple structures at 13 locations, including Shangri-La's building.

On February 19, 2021, Wetherholt and Associates Inc. completed and dated a roof condition evaluation report. According to the report, Fields Roof Service maintenance personnel noticed a soft spot on the roof "deck" during repair work on October 7, 2020. The maintenance workers had encountered a "significant amount of deterioration in the oriented strand board (OSB) sheathing and concluded the repair work without addressing a second similar location." After summarizing its general observations of the building, Wetherholt stated, "[T]he roof appears to be suffering from lack of balanced air circulation under the OSB sheathing which has led to condensation." "The lack of ventilation intake, obstructed air movement and exhaust, not having a vapor retarder and the installation of a white reflective, and mechanically attached, roof membrane contributed to the deterioration of the OSB sheathing." Wetherholt recommended the sheathing be removed and replaced due to the existing sheathing's deterioration and organic growth. Wetherholt believed that providing an insulated and unvented " 'compact roof assembly' " would be the best option in mitigating the risk of condensation.

On May 21, 2021, Shangri-La sent a notice of claim under its policy to Eagle West seeking coverage for the damaged roof. The letter attached a copy of Wetherholt's report. Eagle West retained the services of Kip Gatto, PE, of Young & Associates Engineering Services LLC to provide an opinion as to the reported cause(s) of adverse conditions. Gatto's findings are summarized as being (1) the pattern of staining and OSB decay, corrosion, and moisture was consistent with a condensation problem in the roof system, and (2) this condition was a result of the original building design and construction and had likely been developing since the building was first occupied. On August 26, 2021, Eagle West claims representative Ken Gotchall sent a letter to Shangri-La, informing it that Eagle West denied coverage for its claim.

On March 17, 2022, Shangri-La filed a complaint against Eagle West. Shangri-La alleged breach of contract arising out of Eagle West's alleged obligations under the insurance policy. The same day, Shangri-La's attorney dated a letter to Eagle West to provide notice under RCW 48.30.015(8)(a) that Shangri-La intended to assert a cause of action against Eagle West under the Insurance Fair Conduct Act (IFCA), RCW 48.30.015. The letter did not reference any existing lawsuit or the March 17, 2022 complaint. On April 14, 2022, Shangri-La filed an amended complaint, adding an IFCA claim against Eagle West. On April 18, 2022, the Washington Office of the Insurance Commissioner (OIC) accepted service upon Eagle West of the amended complaint and a summons.

In a letter dated April 21, 2022, Gotchall confirmed receipt and acknowledged Shangri-La's March 17, 2022 letter, which he described as a "letter

of representation." Gotchall made no acknowledgement of Shangri-La's intention to pursue an IFCA claim or the existence of a coverage dispute. Gotchall requested a copy of counsel's letter of designation or authorization of representation with a signature from a representative of Shangri-La. Gotchall stated that after receiving that requested documentation, Eagle West would e-mail a certified copy of the applicable policy and endorsements along with any requested documents. Gotchall indicated a wish for a telephone conversation.

According to documents Shangri-La later obtained from the OIC, the day after Gotchall's letter, April 22, 2022, the OIC's forward of service to Eagle West was retrieved at a postal facility in Monterey, California. Eagle West later acknowledged that the OIC's certificate of service indicated that the OIC sent the service papers, but with attention to an employee who was by then "no longer employed" by it and to an address it said it had by that time "vacated." Eagle West never claimed that the OIC sent the service papers to an addressee or address other than the ones it provided. While denying it received the service papers, an Eagle West vice president later explained, "The only explanation I can reach based upon the facts revealed by my investigation to date is that if the envelope containing the summons and complaint were indeed delivered to the [Eagle West] offices, then it was likely mistakenly considered to be personal mail to the former employee . . . and set aside and forwarded to her." Eagle West never filed an answer or other responsive pleading to Shangri-La's lawsuit.

On June 6, 2022, Shangri-La filed a motion for default under CR 55(a) for Eagle West's failure to timely answer or appear in the lawsuit. Shangri-La argued

Eagle West's answer was due no later than May 31, 2022—40 days after the date that the summons and first amended complaint were served on the OIC. And because Eagle West failed to "appear, plead, or otherwise defend within forty days of the date it was served," the court "should therefore enter default against Eagle West under CR 55(1)(a) and RCW 48.02.200(4)." On the same day, a superior court commissioner granted Shangri-La's motion for default.

On July 14, 2022, Shangri-La filed a motion for the entry of default judgment under CR 55(b). Shangri-La noted Eagle West still had not answered or appeared. Shangri-La argued it was entitled to a default judgment for the cost to repair the covered damage, treble damages under IFCA, and attorney fees. Shangri-La requested a judgment of $1,928,349 for actual damages, trebled to $5,785,047 under IFCA, and $2,314,018 for attorney fees based on its contingency fee agreement with its counsel. The commissioner granted the motion and entered a default judgment against Eagle West in the amounts requested.

On August 2, 2023, Shangri-La's counsel sent Eagle West a letter alerting it to the default judgment and proposing settlement discussions.

Nearly 15 months after entry of the default judgment, on October 5, 2023, Eagle West filed a motion to vacate the default judgment. Eagle West argued the commissioner effectively "rubber-stamp[ed]" the damages and attorney fees alleged by the plaintiff and Eagle West was entitled to notice of the motion for

default because it made an informal appearance in the lawsuit through Gotchall's April 21, 2022 letter.[1]

On November 16, 2023, the commissioner denied Eagle West's motion to vacate the default judgment. On November 30, 2023, the commissioner entered a supplemental order and entered a default judgment against Eagle West.

Eagle West filed a motion to revise the commissioner's November 30, 2023 order. On December 19, 2023, a superior court judge signed an order granting Eagle West's motion for revision and vacating the default order and judgment. The judge ruled, "The Court concludes that an informal appearance was made on behalf of the defendant so notice of entry of the default judgment was required." The judge did not reach any other issues. Shangri-La appeals.

II

When a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by the civil rules and that fact is made to appear by motion and affidavit, a motion for default may be made. CR 55(a)(1). We review a superior court's decision on a motion for default judgment for abuse of discretion. Old Republic Nat'l Title Ins. Co. v. Law Office of Robert E. Brandt, PLLC, 142 Wn. App. 71, 74, 174 P.3d 133 (2007). "Discretion is abused if it is exercised on untenable grounds or for untenable reasons." Morin v. Burris, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). A decision is based on untenable grounds or made for untenable reasons if it was reached by applying

[1] On October 24, 2023, the commissioner entered an order to show cause why the default order and default judgment should not be vacated, in strict observance of CR 60(e)(2).

the wrong legal standard. Driggs v. Howlett, 193 Wn. App. 875, 897, 371 P.3d 61 (2016). A trial court that misunderstands or misapplies the law bases its decision on untenable grounds. Id.

Our courts will liberally set aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice. Morin, 160 Wn.2d at 749. At the same time, we "value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." Little v. King, 160 Wn.2d 696, 703, 161 P.3d 345 (2007). "[L]itigation is inherently formal. All parties are burdened by formal time limits and procedures." Morin, 160 Wn.2d at 757. This court is less likely to find an abuse of discretion if a trial court has set aside a default judgment rather than if it has refused to do so.[2] Griggs v. Averbeck Realty, Inc., 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).

Commissioners' rulings are "subject to revision by the superior court." RCW 2.24.050. "On revision, the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner." State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). On appeal, this court reviews the superior court's order, not the

[2] The traditional four-factor test Washington follows when considering whether to vacate a default judgment calls for a party to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. Little, 160 Wn.2d at 703-04 (citing White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968)). Eagle West does not rely either on CR 60(b)(1) or on these factors.

commissioner's. Faciszewski v. Brown, 187 Wn.2d 308, 313 n.2, 386 P.3d 711 (2016).

A

Eagle West argues Gotchall's April 21, 2022 letter was an informal appearance entitling Eagle West to notice of Shangri-La's motion for default under CR 55. We disagree.

We review questions of law de novo, including whether on undisputed facts an appearance has been established as a matter of law. Meade v. Nelson, 174 Wn. App. 740, 750, 300 P.3d 828 (2013). 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 five days before the hearing on the motion. CR 55(a)(3). Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion. Id. Under CR 4(a)(3), a "notice of appearance" shall "be in writing, shall be signed by the defendant or the defendant's attorney, and shall be served upon the person whose name is signed on the summons." 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 or her. RCW 4.28.210.

"[T]he doctrine of substantial compliance applies to the notice requirement of CR 4 when enforcing or setting aside judgments under CR 55 and CR 60." Morin, 160 Wn.2d at 749. Substantial compliance with the appearance requirement may be satisfied informally. Id. However, to satisfy the appearance

requirement, those who have been served with a summons "must do more than show intent to defend; they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences." Id.

Morin was a consolidation of three cases: Morin, Matia Investment Fund, Inc. v. City of Tacoma, and Gutz v. Johnson. 160 Wn.2d at 748. In all three cases, the defendants failed to file answers or otherwise formally appear. Id. at 749. In the first case, Morin, the parties engaged in settlement discussions resulting from damages arising out of a car collision. Id. at 750. After those failed, the plaintiff served the defendants, who did not respond in any way. Id. The plaintiff obtained a default order and judgment. Id. In another of the cases, Matia, the city of Tacoma failed to answer a lawsuit or formally appear and the plaintiff obtained an order of default and a default judgment. Id. at 72. The plaintiff had caused a summons and complaint to be served on the city clerk's office, which was not forwarded to the city attorney. Id. After the plaintiff attempted to collect the judgment more than a year later, the city filed a motion to vacate the default judgment which was granted. Id. at 753. The Supreme Court held the defendants in Morin and Matia were not entitled to notice of the default judgment hearings because they had not substantially complied with the appearance rules and had taken no action in acknowledging that the disputes were in court. Id. at 757-58.

In the final case, Gutz, the parties, similarly to Morin, engaged in unsuccessful settlement negotiations following a car collision. Id. at 758. After a complaint was filed and served on the defendant, a claims representative from the defendant's insurance company contacted plaintiff's counsel with an offer to settle

and inquired whether the case would be litigated. Id. 758. The plaintiffs moved for and obtained a default order against the defendants and their insurer without notice to either. Id. at 758-59. The claims representative contacted a paralegal at Gutzes' counsel's office who reported the action had been filed but did not mention the default order. Id. The defendant unsuccessfully sought to set aside the default order and appealed. Id. at 751-52.

For Gutz, the Morin court remanded for the trial court to consider whether the defendant met the standards of White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968) or CR 60(b)(1) or (4). Morin, 160 Wn.2d at 755, 759. The court did not call the adjuster's contacts an appearance, informal or otherwise, but stated that the plaintiffs' counsel's "failure to disclose the fact that the case had been filed and that a default judgment was pending" in the context of the parties' discussion appeared to be "an inequitable attempt to conceal the existence of the litigation." Id. at 759. The court remanded for analysis of whether the plaintiffs' counsel's efforts to conceal the litigation "induced" the defendant's failure to appear. Id.

The Morin court explicitly rejected the informal appearance doctrine applied by previous case law, such as Gage v. Boeing Co., 55 Wn. App. 157, 160, 776 P.2d 991 (1989).[3] Morin, 160 Wn.2d at 756, 760. In applying CR 55 and CR 60

[3] The informal appearance doctrine as applied in Colacurcio v. Burger, 110 Wn. App. 488, 497, 41 P.3d 506 (2002), which Eagle West relies on, appears to have been first formulated and applied in Batterman v. Red Lion Hotels, Inc., 106 Wn. App. 54, 60, 21 P.3d 1174 (2001). The Colacurcio court summarized that doctrine as follows: "A defendant's acts . . . need not acknowledge the lawsuit in order to amount to an informal appearance." 110 Wn. App. at 496. Morin explicitly rejected this doctrine and abrogated Batterman. Morin, 160 Wn.2d at 749. Eagle West apparently relies on and cites these cases only for the proposition that

liberally, the Washington Supreme Court has nevertheless required defendants seeking to set aside a default judgment to be prepared to establish that they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice. Id. at 755. Thus, the mere intent to defend, whether shown before or after a case is filed is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*. Id. at 756. A party must appear when served with a summons and complaint, because "[t]here must be some potential cost to encourage parties to acknowledge the court's jurisdiction." Id. at 759.

In Sacotte Construction, Inc. v. National Fire & Marine Insurance. Co., the court held that the trial court abused its discretion when it denied the motion to vacate the default judgment because the defendant made an informal telephonic appearance in the case. 143 Wn. App. 410, 416, 419, 177 P.3d 1147 (2008). The plaintiff tendered the defense of claims against it to its insurers, including the defendant, but they failed to respond, so the plaintiff filed a lawsuit. Id. at 413. The plaintiff caused the summons and complaint to be served on the insurance commissioner, and the defendant forwarded the complaint to its counsel. Id. at 414. Defense counsel called plaintiff's counsel to enter an informal appearance for the defendant, but the plaintiff moved a week later and obtained an order of default without giving notice to the defendant. Id. The Sacotte court held the defense attorney's phone call was sufficient because it was made after the

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contact by non-attorneys may be sufficient to trigger notice requirements under CR 55(a)(3). We need not reach this issue.

complaint was filed specifically to avoid default without notice, which showed the defendant's intent to defend against the lawsuit in court. Id. at 416.

Gotchall's April 21, 2022 letter failed to comply with the requirements of Morin and is distinguishable from the informal appearance in Sacotte. Eagle West was properly served with a summons and copy of the first amended complaint and Eagle West failed to file an answer or formally appear in the case. Gotchall's letter acknowledged Shangri-La's March 17, 2022 letter "regarding the above-captioned claim," referring only to Shangri-La's insurance claim. Gotchall's letter made no acknowledgement of the jurisdiction of the court or the existence of the matter in court. Unlike the communication in Sacotte, Gotchall's letter did not show an intent to defend against a lawsuit in court, but acknowledged no more than that Shangri-La's counsel had indicated they represented Shangri-La. Because Gotchall's letter does not substantially comply with the appearance requirement, Eagle West was not entitled to notice of default. The superior court misapplied the standard for whether a party has informally appeared under Morin and thus abused its discretion in vacating the default judgment based on its finding that "an informal appearance was made on behalf of the defendant."

C

Eagle West contends Gotchall's letter triggered the requirement under CR 55(a)(3) that Shangri-La provide notice of any motion for default, thus making the default judgment "void" under CR 60(b)(5) or subject to being vacated under CR 60(b)(11). We disagree.

Under CR 60(b)(1), a party may move for relief from a final judgment due to mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining the judgment or order. A CR 60(b)(1) motion must be made no more than one year after the judgment or order was entered. CR 60(b). Eagle West did not file a timely motion under CR 60(b)(1), and does not argue that it is entitled to relief under this provision. Instead, it seeks relief under other provisions of the rule not subject to the one year time limit. A motion made under provisions of CR 60(b) not subject to the one year time limit need only be made "within a reasonable time." CR 60(b).

Under CR 60(b)(5), a party may move for relief from a final judgment if the judgment is void. A void judgment is a "judgment, decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void." Dike v. Dike, 75 Wn.2d 1, 7, 448 P.2d 490 (1968). Generally, only a jurisdictional defect renders a judgment void. Rabbage v. Lorella, 5 Wn. App. 2d 289, 299, 426 P.3d 768 (2018). Under CR 60(b)(11), a party may move for relief from a final judgment for any reason other than those specified in CR 60(b)(1)-(10) that justifies relief from the operation of the judgment. This rule " 'should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.' " Gustafson v. Gustafson, 54 Wn. App. 66, 75, 772 P.2d 1031 (1989) (quoting In re Marriage of Flannagan, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985)).

The failure to provide notice when required is a serious procedural error that renders the judgment voidable, not void, and justifies vacation only when the

requirements of CR 60 are met. Rabbage, 5 Wn. App. 2d at 298; In re Marriage of Orate, 11 Wn. App. 2d 807, 813, 455 P.3d 1158 (2020). As Rabbage explains, the failure to provide notice of a motion for default does not divest a court of jurisdiction. 5 Wn. App. 2d at 299. A judgment entered without authority may be set aside if a motion to vacate is brought within time constraints of CR 60. Id. at 300; see also Orate, 11 Wn. App. 2d at 808-09 ("If a trial court has jurisdiction when a judgment is entered, judgments entered without proper notice are voidable, not void.").

CR 60(b)(5) and (b)(11) are inapplicable. Eagle West does not point to any jurisdictional defect that exists to void the default judgment. Under Rabbage and Orate, an erroneous entry of a default order and judgment where the defendant was entitled to notice under CR 55(a)(3) does not render the judgment void, but voidable. Even if Eagle West was entitled to notice, CR 60(b)(5) is not a proper basis for relief from the default judgment. Eagle West further claims a court's failure to comply with the requirements of CR 55 when entering default judgment is deemed to be an "irregularity" in the proceedings sufficient to justify vacation under CR 60(b)(11). But challenges to irregularities in default judgments fall under CR 60(b)(1), so CR 60(b)(11) cannot be a basis for relief. CR 60(b)(11) cannot be used to circumvent the time limit of CR 60(b)(1). Gates v. Homesite Ins. Co., 28 Wn. App. 2d 271, 284, 537 P.3d 1081 (2023).

As explained above, Eagle West was not entitled to notice under CR 55(a)(3), so it does not establish a procedural defect in the default judgment. And

even if it had, it also does not establish a procedural defect remediable under either CR 60(b)(5) or CR 60(b)(11), making its motion untimely as well.

D

Eagle West argues that the amounts awarded for damages and treble damages were not supported by findings sufficient under CR 55(a)(2) and that Shangri-La is not entitled to attorney fees as they were awarded in the default judgment. Its arguments are time barred.

In a legal malpractice case, we held "a trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense is established." Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson, 95 Wn. App. 231, 241, 974 P.2d 1275 (1999). "[T]he standard for vacating awards of damages from default judgments is the same as the standard for setting aside awards of damages from trials." Id. at 242. That standard permits vacatur "if there was not substantial evidence to support the award of damages." Id. However, relief for this reason falls under, and subject to the one year time limit applicable to, CR 60(b)(1). Id. at 242, 243, 244. Thus, in that legal malpractice case, the client exposed to a default judgment could have obtained a trial on the merits as to damages if the client's attorney had submitted a motion to vacate within CR 60(b)(1)'s one year time limit. Id. at 244.

Any reliance on CR 60(b)(1) is time-barred, and Eagle West is precluded from separately challenging whether substantial evidence supports the amounts awarded in the default judgment. Under Shepard Ambulance, Eagle West could have contested the damages portion of the default judgment, including treble

damages and the attorney fee award, but only if Eagle West had filed its motion to vacate within one year of the judgment's entry. Eagle West failed to do so.

III

Both parties request attorney fees on appeal. We grant Shangri-La's request and deny Eagle West's.

"We will award attorney fees to the prevailing party 'only on the basis of a private agreement, a statute, or a recognized ground of equity.' " Buck Mountain Owner's Ass'n v. Prestwich, 174 Wn. App. 702, 731, 308 P.3d 644 (2013) (quoting Equitable Life Leasing Corp. v. Cedarbrook, Inc., 52 Wn. App. 497, 506, 761 P.2d 77 (1988)). "When insureds are forced to file suit to obtain the benefit of their insurance contract, they are entitled to attorneys' fees." Weyerhaeuser Co. v. Com. Union Ins. Co., 142 Wn.2d 654, 687 n.15, 15 P.3d 115 (2000) (citing Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991)). "The entitlement to necessary expenses as part of a reasonable attorney fee award also fulfills the rationale behind this equitable ground." Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). "Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section." RCW 48.30.015(1). Shangri-La is entitled to and is awarded its reasonable attorney fees and necessary expenses

on appeal under both Olympic Steamship and RCW 48.30.015(1) and (3). We remand the determination of these fees and expenses to the superior court.

Because Eagle West does not prevail, we deny Eagle West's request for attorney fees.

We reverse the order vacating the default order and judgment and remand for the superior court to reinstate the default judgment against Eagle West and determine the reasonable attorney fees and necessary expenses awarded to Shangri-La herein.

Birk, J.

WE CONCUR:

Díaz, J.

Hazelrigg, ACJ

WILLIAMS KASTNER

September 25, 2024 - 2:07 PM

Transmittal Information

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