IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ELIZABETH YVONNE KIMBALL, a single person, Respondent,	No. 41821-5-II
v.	UNPUBLISHED OPINION
MASAYOSHI ICHIKAWA and JANE DOE ICHIKAWA, husband and wife, Appellants.	

Van Deren, J. — Masayoshi Ichikawa appeals the trial court's denial of his motion to vacate an order of default and default judgment against him. He argues: (1) Elizabeth Kimball failed to exercise due diligence in attempting to locate him before serving the secretary of state under RCW 46.64.040, and such service, coupled with the lack of actual notice to Ichikawa, violated Ichikawa's due process rights; (2) the trial court abused its discretion in finding that Ichikawa did not substantially comply with CR 55(a)(3)'s appearance requirement through contacts with Kimball after she sued him and, thus, he was not entitled to notice of the default motion and hearing; and (3) the trial court abused its discretion in finding that Ichikawa failed to demonstrate that his failure to appear constituted excusable neglect under CR 60(b)(1) or that Kimball's conduct was inequitable under CR 60(b)(4). Finding no error or abuse of discretion, we affirm.

FACTS

On June 10, 2009, Ichikawa was involved in a rear-end collision with Kimball's vehicle. Ichikawa provided a California address to a responding law enforcement officer, although Ichikawa had a Washington driver's license. On June 11, Ichikawa reported the incident to his insurer, American Commerce Insurance Company (ACIC). Kimball's counsel and ACIC communicated about the status of Kimball's insurance claim and her treatment on June 17, June 24, August 17, and October 20.

On December 8, Kimball sued Ichikawa. On January 16, 2010, Kimball attempted to serve Ichikawa at the California address, but the current resident said that she had resided there since November 2009 and did not know Ichikawa. Internet database searches provided a NE 98th Way, Redmond, Washington, address for Ichikawa. On January 19, Kimball attempted to serve Ichikawa at that address, but the current resident stated that Ichikawa had moved in May 2009 and had not left a forwarding address. Because additional database searches indicated a high likelihood that the Redmond address was actually Ichikawa's, Kimball attempted to serve him again on February 16, but the current resident repeated that Ichikawa had moved.

The United States Postal Service (USPS) provided two additional Redmond addresses for Ichikawa in response to Kimball's request for change of address information regarding both the California address and the NE 98th Way address. On August 9, Kimball's process server discovered that the first new address was for a mailbox in a United Parcel Service (UPS) Store franchise. On August 26, Kimball's process server discovered that the second new address was for the physical location of a USPS post office.

Kimball and ACIC remained in contact during the time Kimball attempted to serve

Ichikawa. On February 24, 2010, Kimball told ACIC that she would make a settlement demand and deliver supporting medical records within 60 days. On June 4 and July 20, Kimball and ACIC communicated about the status of Kimball's demand. On August 4, ACIC received a settlement demand for $115,000.00 from Kimball, including medical expenses of $13,934.11, along with a "significant amount of medical records and other documentation in support of her claim." Clerk's Papers (CP) at 18. In an August 18 letter, Kimball rejected ACIC's counteroffer, stating that the correct claim for medical expenses was $15,305.41, and stating that she would "continue to secure service on the elusive Mr. [Ichikawa] and continue to trial — until and unless there is a response to our demand that indicates a sincere desire to negotiate." CP at 31. ACIC never contacted Kimball's counsel about Kimball's clear references to a pending lawsuit in the August 18 letter nor did ACIC request additional notice of the suit.

On September 3, Kimball served the secretary of state a copy of the summons and complaint against Ichikawa; a declaration of compliance with RCW 46.64.040, the non-resident motorist statute; and a declaration of due diligence describing Kimball's four attempts to personally serve Ichikawa. Kimball also sent copies of these documents, as well as notice of service on the secretary of state, via certified mail, return receipt requested, to Ichikawa's two last known addresses: the UPS Store address and the USPS post office address. At the UPS Store address, Stacy Larkin, apparently a store employee, signed the certified mail receipt as Ichikawa's agent.

Neither Ichikawa nor ACIC, or anyone on their behalf, filed a notice of appearance or answer to Kimball's complaint. On November 3, Kimball moved for an order of default and a default judgment. Kimball did not serve notice of the default motion on Ichikawa or ACIC.

At the hearing on Kimball's motion for default and judgment, the trial court considered Kimball's medical records[1] and took Kimball's testimony. According to Kimball, before the accident she was very active in bicycling, swimming, running, and hiking, and she wore high-heeled shoes every day. After the accident, she was unable to ride her bicycle because she was unable to turn her neck to watch for traffic; she also was unable to wear high heels every day, to do yard work, or to play football with her young son. She suffered ongoing headaches, backaches, neck aches, numbness in her arms and feet, radiating pain in her legs, and sleeplessness due to the pain. She also suffered post-concussion syndrome, light-headedness, and problems with her balance and short-term memory immediately after the accident, and the short-term memory problems persisted. Physicians prescribed Cymbalta after the accident, which, according to Kimball, the physicians said, "[I]t looked like [she would] be taking it the rest of [her] life" at a cost of $150 per month. Report of Proceedings (RP) at 10-11.

At the hearing, the trial court asked about Kimball's efforts to serve Ichikawa:

> [Trial Court]: Okay. And I noticed there's an insurance company listed here in the police report. Do you — did you contact the insurance company to — to see if there's — if —
> [Kimball's Counsel]: They were not helpful.
> [Trial Court]: — you — you did try to contact them and —
> [Kimball's Counsel]: Oh yes. Oh yes.

RP at 17.

Kimball requested $150,000 in general damages. In assessing general damages, the trial court stated:

> You came up with a hundred and fifty thousand dollar figure and independently of that — I guarantee it's independent of that — I was thinking about the symptoms

[1] The trial court admitted these medical records as Exhibits A and B, but the medical records are not part of the record on appeal.

> she described — the on-going pain and disability and loss of the enjoyment of activities in life and I set a figure of five hundred dollars a month for that. I —
>
> A thirty-five year life expectancy but you know your last ten years [of] life [are not] worth much anyway so . . . I multiplied that five hundred dollars a month times twenty-five years — it came out at a hundred fifty thousand dollars.

RP at 19-20. In calculating her special damages, the trial court reasoned that, because Kimball's need for Cymbalta was indefinite and, thus, speculative, it would multiply the $150.00 per month by half her life expectancy—18 years—for a total of $32,400.00. Combined with $16,250.00 for past special damages, the trial court awarded Kimball a total of $48,650.00 for special damages. On November 30, the trial court entered a default judgment in favor of Kimball and against Ichikawa for general damages, special damages, fees, and costs totaling $199,809.90 plus interest.

Kimball sent ACIC a letter that it received on December 16, informing ACIC of the default judgment. The letter stated, "As I indicated we would do in my letter of August 18, 2010, we obtained service on [Ichikawa], and we proceeded to trial. In view of the failure of [Ichikawa] to appear, we obtained an order of default." CP at 32. The letter had a copy of the default judgment and a digital versatile disc of the default hearing enclosed. ACIC's claims adjuster then checked the Washington Courts' website and discovered that Kimball had filed the complaint on December 8, 2009.

On January 3, 2011, Ichikawa's counsel filed a notice of appearance. On January 4, Ichikawa unsuccessfully moved under CR 55(a)(3), CR 60(b)(1), and CR 60(b)(4) to vacate the default judgment. He appeals.

ANALYSIS

I. Service Due Process Issues

Ichikawa argues for the first time on appeal that (1) Kimball violated his due process rights by failing to exercise due diligence in attempting to locate him before serving the secretary of state under RCW 46.64.040 and (2) service under RCW 46.64.040, coupled with the lack of a return receipt of notice of service signed by Ichikawa, violated Ichikawa's due process rights.[2] We disagree.

A. Standard of Review

Due process requires "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Martin v. Meier*, 111 Wn.2d 471, 477-78, 760 P.2d 925 (1988) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). We review constitutional issues de novo. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 503, 198 P.3d 1021 (2009), *review denied*, 173 Wn.2d 1012 (2012).

Kimball contends that Ichikawa's arguments concern insufficient service of process and are properly framed as jurisdictional questions. "Proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party." *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1994). We agree with Kimball that Ichikawa's claim relates to due process only in the context of giving notice reasonably calculated to apprise Ichikawa of the

[2] Ichikawa's brief suggests that RCW 46.64.040 is unconstitutional but does not support this assertion with adequate argument or authority; thus, we do not provide a full constitutional analysis seeking to answer his vague assertion. We respond to his concerns in addressing due process and jurisdiction in this context.

action and to afford him an opportunity to raise objections to the claims. Because RAP 2.5(a)(1) allows parties seeking review to raise issues of trial court jurisdiction for the first time on appeal, and we review de novo whether service of process was proper, we address Ichikawa's claim. *Pascua v. Heil*, 126 Wn. App. 520, 527, 108 P.3d 1253 (2005).

B. Due Diligence

RCW 46.64.040 provides:

> [E]ach resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents.

Due diligence requires that the plaintiff make "honest and reasonable efforts to locate the defendant," but it does not require the plaintiff to use "all conceivable means" to find him. *Meier*, 111 Wn.2d at 482.

In *Meier*, the plaintiff tried to serve the defendant at a Washington address listed on the accident report. 111 Wn.2d at 473. Meier asked neighbors and the defendant's former university about defendant's whereabouts. *Meier*, 111 Wn.2d at 474-75. Neighbors told him the defendant had moved to California. *Meier*, 111 Wn.2d at 474-75. He found no listing in telephone and police records. *Meier*, 111 Wn.2d at 475. The court found that Meier's efforts constituted due diligence. *Meier*, 111 Wn.2d at 482-83. Accordingly, the court found service under the nonresident motorist statute appropriate. *Meier*, 111 Wn.2d at 483.

In *Martin v. Triol*, 121 Wn.2d 135, 150, 847 P.2d 471 (1993), the plaintiff began looking for the defendants only five days before the service of process period expired. A process server

could not locate the defendants, and neighbors did not know where the defendants were. *Triol*, 121 Wn.2d at 150. The plaintiff accordingly served the secretary of state under the statute. *Triol*, 121 Wn.2d at 150. Our Supreme Court found that the statute applied because defendants had temporarily left the state on vacation, and plaintiff had used due diligence in searching for them. *Triol*, 121 Wn.2d at 150-51. Similarly, in *Carras v. Johnson*, 77 Wn. App. 588, 594, 892 P.2d 780 (1995), the plaintiff's efforts, which consisted of hiring a professional process server and relying on the accident report for defendants' addresses, "while certainly not exhaustive, were both honest and reasonable," and satisfied the statute.

Here, as in *Meier* and *Carras*, Kimball tried serving Ichikawa at the California address he gave on the accident report. And, as in *Triol* and *Carras*, Kimball used professional process servers in her subsequent attempts to locate and to serve Ichikawa. Additionally, Kimball used multiple databases and USPS change of address information requests, and her process server questioned the current residents where he found them at the four addresses at which he tried to serve Ichikawa.

Ichikawa contends that Kimball did not exercise due diligence to locate him because she did not ask ACIC whether it knew his current whereabouts. But our focus is on what Kimball did, not on what she failed to do. *Carras*, 77 Wn. App. at 593. Although Kimball did not exercise all conceivable means of locating and serving Ichikawa, the means she used were diligent and reasonable. Accordingly, Ichikawa fails to demonstrate that the trial court did not have jurisdiction over this dispute or that his due process rights were violated based on Kimball's service through the secretary of state.

C. Actual Notice Not Required under RCW 46.64.040

Ichikawa also argues that he was entitled to actual notice of Kimball's suit under RCW 46.64.040. But actual notice is not required to satisfy due process and a plaintiff satisfies due process by mailing notice to the defendant's last known address only after exercising due diligence in attempting to personally serve the defendant. *Meier*, 111 Wn.2d at 477-78.

Kimball exercised due diligence in attempting to personally serve Ichikawa. After doing so, she served the secretary of state and mailed notice to Ichikawa's two last known addresses.[3] ccordingly, Kimball complied with RCW 46.64.040's service requirements, and Ichikawa fails to demonstrate a lack of due process.

II. Substantial Compliance with CR 55(a)(3)

Ichikawa further contends that the trial court abused its discretion in denying his motion to vacate the default judgment because he substantially complied with CR 55(a)(3)'s appearance requirement, thus entitling him to notice of the default motion and judgment. We disagree.

We review a trial court's decision on a motion to vacate a default judgment for an abuse of discretion. *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007). A trial court abuses its discretion when its decision is based on untenable grounds or reasons, and a decision is

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[3] Ichikawa, citing Division One's decision in *Goettemoeller v. Twist*, 161 Wn. App. 103, 253 P.3d 405 (2011), contends that a UPS Store mailbox address is not a sufficient "last known address" for purposes of substitute service under RCW 46.64.040. But *Goettemoeller* is distinguishable. Unlike this case, the *Goettemoeller* court considered whether the evidence supported that Twist's private mailbox was his "usual mailing address" for purposes of substitute service by mail under RCW 4.28.080(16). 161 Wn. App. at 107-08. Furthermore, the *Goettemoeller* court observed that "a private mailbox may serve as a defendant's 'usual mailing address' to effectuate statutory substitute service." *Goettemoeller*, 161 Wn. App. at 109. It held that the private mailbox was not Twist's "usual mailing address," however, because Goettemoeller knew that Twist resided in England and because there was no evidence that Twist continued to use the mailbox or had mail forwarded from it. *Goettemoeller*, 161 Wn. App. at 108-110. Here, Kimball's database searches and USPS change of address information requests led her to believe that either the USPS post office address or the UPS Store was Ichikawa's last known address, and she mailed notice of service on the secretary of state to both.

untenable if it rests on an erroneous application of law. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); *Morin*, 160 Wn.2d at 753. Because Washington law disfavors default judgments, we are more likely to find an abuse of discretion and to reverse a trial court decision refusing to vacate a default judgment than one that sets aside such a judgment. *White v. Holm*, 73 Wn.2d 348, 351-52, 438 P.2d 581 (1968); *Showalter v. Wild Oats*, 124 Wn. App. 506, 511, 101 P.3d 867 (2004).

We will set aside a default judgment entered against a party who was entitled to notice but who did not receive it. *Morin*, 160 Wn.2d at 749. CR 55(a)(3)[4] requires notice of a motion for default to be given to any party who has appeared in the action. In *Morin*, our Supreme Court observed that "[s]ubstantial compliance with the appearance requirement can be accomplished informally." 160 Wn.2d at 749. But it rejected the doctrine of "informal appearance" through prelitigation communication alone, as the Court of Appeals had formulated. *Morin*, 160 Wn.2d at 749.

In addressing the parameters of informal notice of appearance, the court observed the types of conduct after litigation commenced that it had recognized as substantially complying with the appearance requirement: (1) a defendant serving interrogatories on the plaintiff despite failing to file a formal notice of appearance, (2) a defendant personally appearing in court in a divorce action to oppose a temporary restraining order, (3) a defendant serving a demand for security for

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[4] CR 55(a)(3) provides:

> 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 a notice of the motion.

costs, and (4) a defendant appearing on a bond in an unlawful detainer action. *Morin*, 160 Wn.2d at 755-56. Thus, the court reasoned, "It appears to us that mere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*." *Morin*, 160 Wn.2d at 756. Accordingly it held:

> Parties formally served by a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment. Accordingly, we hold that parties cannot substantially comply with the appearance rules through prelitigation contacts. Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing.

Morin, 160 Wn.2d at 757.

Ichikawa, citing Division One's decision in *Colacurcio v. Burger*, 110 Wn. App. 488, 41 P.3d 506 (2002), argues that the *Morin* court limited its holding to prelitigation (i.e., prefiling) contacts and, thus, he substantially complied with the appearance requirement through ACIC's postfiling contacts with Kimball. In *Colacurcio*, the defendant's insurer engaged in settlement negotiations both before and after the plaintiff filed suit. 110 Wn. App. at 491. Division One affirmed the trial court's vacation of a default judgment in favor of the plaintiff, holding that the defendant had informally appeared through the settlement negotiations by her agent, her insurance company. *Colacurcio*, 110 Wn. App. at 491.

Ichikawa's argument fails for several reasons. The *Colacurcio* court did not distinguish between postlitigation contacts and prelitigation contacts as a basis for its holding. *See* 110 Wn. App. at 495-97. Furthermore, the *Colacurcio* court relied on the informal appearance doctrine as formulated in *Batterman v. Red Lion Hotels, Inc.*, 106 Wn. App. 54, 59, 21 P.3d 1174 (2001), *abrogated by Morin*, 160 Wn.2d at 749, a doctrine *Morin* expressly rejected and expressly

abrogated. *Compare Morin*, 160 Wn.2d at 749, 756, *with Colacurcio*, 141 Wn. App. at 497. Accordingly, *Colacurcio* is no longer good law after *Morin*. Finally, Ichikawa is correct that the *Morin* court limited its express holding to prelitigation contacts being insufficient for substantial compliance with the appearance requirement. 160 Wn.2d at 757. But the *Morin* court's reasoning clearly extended to postlitigation contacts as well: "mere intent to defend, *whether shown before or after a case is filed*, is not enough; the defendant must . . . acknowledg[e] that a dispute exists in court." 160 Wn.2d at 756 (original emphasis omitted) (emphasis added).

Accordingly, ACIC's contacts with Kimball after she filed the complaint were not sufficient for Ichikawa to substantially comply with CR 55(a)(3)'s appearance requirement. Further, Ichikawa's first acknowledgement that a dispute existed in the trial court occurred when his counsel filed a notice of appearance on January 3, 2011, one month after Kimball obtained her default judgment and two weeks after Kimball sent a demand letter for payment of the judgment. Thus, the trial court did not abuse its discretion in concluding that Ichikawa was not entitled to notice of the default hearing under CR 55(a)(3).

III. CR 60 Excusable Neglect and Inequitable conduct

Ichikawa also argues that the trial court abused its discretion in denying his motion to vacate the default judgment under CR 60 because (1) Kimball's alleged concealment of the complaint's filing, combined with a lack of actual notice to Ichikawa of substitute service on the secretary of state, caused his lack of appearance and his conduct constituted excusable neglect, and (2) Kimball's alleged concealment of the lawsuit was inequitable conduct warranting vacation. We again disagree.

We review a trial court's denial of a motion to vacate under CR 60 for abuse of discretion.

Morin, 160 Wn.2d at 753. CR 55(c)(1) provides, "For good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with [CR] 60(b)."

CR 60(b)(1) provides that the trial court may relieve a party from a final judgment or order for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." CR 60(b)(4) provides for relief from a judgment or order where there is "[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

Washington does not favor default judgments, and proceedings to vacate a default judgment are equitable in character and courts administer relief from default judgments according to equitable principles. *Morin*, 160 Wn.2d at 754. Accordingly, we interpret CR 55 and CR 60 liberally in favor of vacating default judgments. *Morin*, 160 Wn.2d at 754-55.

A. Excusable Neglect

A trial court may vacate a default judgment under a liberal, equitable interpretation of CR 60(b)(1) if the moving party meets a four-part test: (1) the moving party had a prima facie defense supported by substantial evidence to the opposing party's claims, (2) the moving party failed to timely appear before default because of "excusable neglect," (3) the moving party acted with due diligence after discovering the judgment, and (4) the opposing party would not experience substantial hardship if the court vacated the judgment. *Morin*, 160 Wn.2d at 755; *Puget Sound Med. Supply v. Dep't of Soc. & Health Servs.*, 156 Wn. App. 364, 373 n.9, 234 P.3d 246 (2010). The first two factors are "primary," and the latter two are "secondary." *Little v. King*, 160 Wn.2d 696, 704, 161 P.3d 345 (2007). Whether a defendant presents a strong

defense or a prima facie defense will affect how much scrutiny the trial court gives the other factors:

> [W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show a strong or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the [promptness] of his application and the element of potential hardship on the opposing party.

White, 73 Wn.2d at 352-53.

Regarding the first factor, Ichikawa does not dispute liability for Kimball's damages. Ichikawa argues that he presented a prima facie defense to the amount of damages awarded because substantial evidence, i.e., medical expert testimony, did not support them, and because the award was excessive on its face.

But the trial court indicated that it considered Kimball's medical records in calculating the damages award. Her medical records, however, are not part of the record on appeal. Accordingly, we are unable to review the evidence before the trial court when it entered the award. A party seeking review bears the burden of perfecting the record on appeal, and an insufficient appellate record precludes review of the alleged errors. RAP 9.2(b); *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Accordingly, we are unable to review Ichikawa's claim that he presented a prima facie defense to the amount of damages, other than the argument he raises for the first time on appeal that the trial court abused its discretion in awarding $32,400 for future medical special damages without hearing expert testimony. But he

fails to provide argument or citation to authority supporting why we should now consider this claim that he did not raise in his motion to vacate the default judgment. RAP 2.5(a)(3); RAP 10.3(a)(6). Further, his opening brief fails to support his claim that general damages of $150,000 were excessive on their face with citation to authority or evidence he presented to the trial court showing the excessive nature of the damages award.

Additionally, Ichikawa argues that the trial court failed to consider the evidence his counsel presented at the default hearing, i.e., the ACIC claims adjuster's affidavit showing that Kimball offered to settle for a lesser amount than the damages she requested at the default hearing. But "[i]t is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing." *Little*, 160 Wn.2d at 704.

Finally, Ichikawa claims that he was unable to contest the amount of Kimball's damages without the benefit of discovery and expert testimony. But here Ichikawa ignores Kimball's medical records that were included in her August 18, 2010, demand letter, and Ichikawa did not refer to these records at the hearing on his motion to vacate the default judgment. For all these reasons, he fails to establish that he had a prima facie defense to the damages the trial court awarded.

Regarding the second factor, Ichikawa argues only that the lack of actual notice to him, coupled with Kimball's alleged concealment of the complaint's filing from ACIC, excused his failure to appear. But, as we discuss above, Kimball met the statutory requirements for substitute service on the secretary of state, and actual notice to Ichikawa was not required. *Supra*, at 6-7.

Further, Kimball's August 18 letter to ACIC clearly stated that she would continue trying

to serve Ichikawa and would proceed to trial if the parties did not settle. The reference to service on Ichikawa and the statement that Kimball would proceed to trial were sufficient to notify ACIC that Kimball had filed a complaint in court. Accordingly, Kimball did not conceal the complaint's filing from Ichikawa, and Ichikawa offers no other explanation why he or ACIC did nothing during the subsequent three months before learning of the default judgment. Thus, Ichikawa fails to satisfy the second factor.

Because Ichikawa fails to satisfy either of the two primary factors, we need not discuss the remaining, secondary factors.[5] *See Morin*, 160 Wn.2d at 758 (ending analysis where defendants failed to establish excusable neglect); *Puget Sound Med. Supply*, 156 Wn. App. at 373 n.9 (declining to address the remaining elements where defendant failed to show excusable neglect). Accordingly, the trial court did not abuse its discretion in denying Ichikawa's motion under CR 60(b)(1) to vacate the default judgment.

B. Inequitable Conduct

A trial court should also vacate a default judgment under CR 60(b)(4) where the plaintiff's conduct would make enforcing the judgment inequitable. *Morin*, 160 Wn.2d at 755. Ichikawa, citing *Morin*, 160 Wn.2d at 759, contends that the trial court abused its discretion in denying his motion to vacate the default judgment based on Kimball's inequitable conduct in allegedly concealing the complaint's filing from him and ACIC. We have already concluded that she did

[5] Ichikawa, citing Division Three's decision in *Norton v. Brown*, 99 Wn. App. 118, 124, 992 P.2d 1019 (1999), argues that the trial court abused its discretion in failing to consider the two secondary factors. But, in *Norton*, the trial court found that Brown had demonstrated a prima facie defense but had not shown excusable neglect. 99 Wn. App. at 124. Division Three disagreed, holding that Brown had also shown excusable neglect, and proceeded to analyze the remaining two secondary factors. *Norton*, 99 Wn. App. at 124-26. Unlike *Norton*, in this case Ichikawa demonstrated neither a prima facie defense nor excusable neglect. The trial court did not abuse it discretion in not considering the two secondary factors, and Ichikawa's claim fails.

not conceal the filing of the complaint or her desire to obtain service on Ichikawa. Nevertheless, we briefly address this claim.

Morin consolidated three cases. 160 Wn.2d at 753. In one of the cases, the Gutzes and the Johnsons were involved in an automobile accident. *Morin*, 160 Wn.2d at 758. The Gutzes' counsel engaged in settlement discussions with the Johnsons' insurer. *Morin*, 160 Wn.2d at 751. Shortly after the statute of limitations ran, the insurer called Gutzes' counsel to discuss settlement and asked whether there would be litigation. *Morin*, 160 Wn.2d at 758. The Gutzes had filed suit shortly before the statute of limitations ran, but their attorney made no mention of the suit to the insurer during the conversations about settlement. *Morin*, 160 Wn.2d at 758. Without informing the insurer that a default judgment was pending, counsel continued to negotiate a settlement with the insurer. *Morin*, 160 Wn.2d at 758-59.

Our Supreme Court observed that "[the] Gutzes' counsel had no duty to inform [the insurer] of the details of the litigation." *Morin*, 160 Wn.2d at 759. But the *Morin* court believed that the Gutzes' counsel's failure to disclose may have been an inequitable attempt to conceal the litigation that would allow for the default judgment to be set aside and, thus, our Supreme Court remanded for the trial court to consider whether "the Johnsons' failure to appear was excusable under equity and CR 60." 160 Wn.2d at 759.

Here, ACIC never asked Kimball whether litigation would or did exist. More importantly, Kimball disclosed to ACIC in her August 18 letter that she would continue to attempt to serve Ichikawa and, thus, disclosed the existence of the lawsuit. Ichikawa claims that Kimball misled the trial court during the following exchange at the hearing on the motion to vacate:

> [Trial Court]: Okay. And I noticed there's an insurance company listed here in the police report. Do you — did you contact the insurance company to to see if

> there's — if —
> [Kimball's Counsel]: They were not helpful.
> [Trial Court]: — you — you did try to contact them and —
> [Kimball's Counsel]: Oh yes. Oh yes.

RP at 17. Although Kimball never asked ACIC whether it knew Ichikawa's whereabouts, she disclosed her attempts to serve him and, thus, the existence of the lawsuit. Even if her representation to the trial court was little more than technically correct, it does not change the fact that she disclosed the lawsuit's existence to ACIC several months before the default judgment. Accordingly, the trial court did not abuse its discretion in finding that Kimball did not engage in inequitable conduct warranting vacation under CR 60(b)(4), and Ichikawa's claim fails.

IV. Frivolous Appeal

Kimball requests an award of attorney fees and costs under RAP 18.9(a) as a sanction for Ichikawa's frivolous appeal. An appeal is frivolous when, considering the record in its entirety and resolving all doubts in favor of the appellant, no debatable issues are presented upon which reasonable minds might differ; i.e., it is so devoid of merit that no reasonable possibility of reversal exists. *In re Marriage of Meredith*, 148 Wn. App. 887, 906, 201 P.3d 1056 (2009). An appeal that we affirm is not frivolous simply because we reject its arguments. *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980).

Here, although we reject Ichikawa's arguments, several of them involve intensive factual inquiries in which, theoretically, reasonable minds might differ. Accordingly, we hold that

Ichikawa's appeal is not frivolous and we deny Kimball's request for attorney fees and costs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Armstrong, J.

Worswick, A.C.J.