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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MADISON EVANS, individually, and as parent and guardian of R.A.C., a minor child, Respondents, v. ZACHARY M. FIRL, and JANE DOE FIRL, husband and wife, individually and the marital community composed thereof, Appellants.	)	No. 38364-4-III OPINION PUBLISHED IN PART

SIDDOWAY, C.J. — Zachary Firl appeals the denial of his motion to vacate an $834,567.54 default judgment entered against him for a personal injury claim he had tendered to his homeowner's insurer. He claims he was never served with process, that his insurer and lawyer had appeared but were not given required notice, and that equitable grounds supported vacating the $800,000.00 awarded as noneconomic damages.

The only evidence presented in support of the sizeable noneconomic damage award was evidence that R.A.C.[1] incurred $26,067.79 in medical expenses after being bitten by Mr. Firl's dog, that the toddler was a candidate for scar revision surgery at a cost of $8,500.00 to $10,000.00, and skeletal hearsay information about six settlements allegedly negotiated by R.A.C.'s lawyers for other clients with dog bite injuries. No hearing was held.

One of the ways Washington law permits a defaulting party to demonstrate a prima facie defense to a large noneconomic damage award is by showing that the trial court was presented with legally insufficient evidence to support the award. The plaintiffs' evidence was insufficient here. In the published portion of this opinion, we hold that applying equitable principles and CR 55(b)(2), the clear deficiency in that evidence overcomes even marginal demonstrations of excusable neglect and diligence. In the unpublished portion of the opinion, we affirm the trial court's rejection of Mr. Firl's arguments that he overcame the plaintiffs' proof of service and that he had appeared and was entitled to notice before default.

[1] Initials are used to protect the privacy interests of R.A.C., a minor child. Gen. Orders of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III.

We affirm the judgment as to liability, the $34,567.54 awarded as special damages, and the $701.95 awarded as statutory costs. We reverse the award of noneconomic damages and remand for a trial on that element of the plaintiffs' damages.

FACTS AND PROCEDURAL BACKGROUND

On a January 2019 play date at a home owned by Zachary Firl, Madison Evans's then two-year-old son, R.A.C., was bit in the face by Mr. Firl's dog. The injuries and a resulting infection allegedly required five days of in-patient hospitalization.

When Mr. Firl was contacted months later by a lawyer representing Ms. Evans and her son, Mr. Firl referred the lawyer to his homeowner's insurer, Allstate Insurance Company, where Mr. Firl had dealt with adjuster Craig Peters. In July 2019, R.A.C.'s lawyers wrote to Allstate's claims department, informing it of their representation and that they would compile a settlement letter with supporting documentation when R.A.C. attained maximum medical improvement. Mr. Peters promptly responded, requesting, among other information and documentation, medical records, the identification of all medical care providers, and a signed medical authorization.

Over the next six months, Mr. Peters followed up twice requesting information on R.A.C.'s injuries and treatment, receiving no response until a settlement demand letter was provided on January 15, 2020. The letter made a total demand of $335,718.54—materially more than Mr. Firl's $250,000.00 insurance limits. Mr. Peters made a

counteroffer of $66,731.49 three weeks later, proposing to pay $18,231.49 toward medical specials, $8,500.00 for future surgery, and $40,000.00 in noneconomic damages.

Mr. Peters claims to have followed up by letter or phone call to R.A.C.'s lawyers monthly thereafter through June 2020, largely without response, but contends he spoke with a case manager at the law firm on May 12, 2020. The case manager allegedly said she would try to reach the client and get back to him. Instead, in late June 2020, R.A.C.'s lawyers prepared a summons and complaint on behalf of R.A.C. and his mother that were allegedly served on Mr. Firl at 3:28 p.m. on July 25, 2020. They filed the summons and complaint in August 2020 and obtained an order of default on September 28, 2020.

Mr. Peters, having no knowledge of the lawsuit, claims he sent a follow-up letter to the law firm on November 2, 2020, and left a phone message on January 6, 2021, again requesting contact. His contacts went unanswered.

On January 20, 2021, R.A.C.'s and his mother's lawyers filed a motion for default judgment, seeking $784,567.54 in damages for R.A.C. and $50,000.00 for his mother. They noted it for hearing on the afternoon of January 27, 2021.

The plaintiffs' lawyers' first acknowledgment of Mr. Peters's post-May 2020 contacts was received by him on February 1, 2021, when he received a letter from attorney Maridith Ramsey dated January 28, 2021. Ms. Ramsay's letter stated that "[a]s indicated at the time of the initial offer in this case, my client is not willing to negotiate

with the carrier due to the insistence that it take improper reductions and avail itself to the benefit of collateral source payments. . . . As a result, we opted to initiate litigation . . . I do not have the authority to proceed with further settlement discussions at this time." Clerk's Papers (CP) at 82. The letter attached a "courtesy copy" of the summons and complaint. *Id.* The letter did not disclose, and the attachment did not reveal, that Mr. Firl had already been served or that an order of default, and possibly a judgment, had already been entered.

Court records indicate that R.A.C.'s and Ms. Evans's lawyers failed to appear for the January 27 hearing, which was struck. Nevertheless, on February 1, 2021, and apparently without conducting a hearing, the trial court entered the plaintiffs' proposed findings, conclusions, and judgment, awarding the $834,567.54 in total damages and $701.95 in costs they had requested.

Having learned on February 1 that a lawsuit had been filed, Mr. Peters called Mr. Firl on February 3, 2021, to see if he had received a copy of the complaint. Mr. Firl stated he had not. He agreed to notify Mr. Peters if and when he was served. Mr. Peters then arranged for Allstate to retain an attorney to represent Mr. Firl.

Several weeks after defense counsel was retained, he discovered the default judgment entered on February 1. According to the defense lawyer, he made the discovery on March 26, 2021, and immediately wrote, faxed and attempted to phone Ms.

Ramsey to inform her the default had been taken improperly. The only response he received was a notice of unavailability filed on April 19, 2021, stating that the firm and its lawyers would be unavailable from April 28, 2021 through May 7, 2021.

Defense counsel filed a motion for relief from the judgment on June 23, 2021. Mr. Firl's lead argument was that he had never been served, and that under CR 60(b)(5) the judgment was void. Alternatively, he sought relief on equitable grounds under CR 60(b)(1). He argued that R.A.C.'s lawyers' failures to respond to Mr. Peters's contacts were deceptive, particularly Ms. Ramsey's failure to disclose in her January 28, 2021 letter that Mr. Firl had already been served and that an order of default, and possibly judgment, had already been entered. He argued that the damages attributable to the claim were "much closer to [Allstate's] $66,731.49 offer than the $834,567.54 judgment entered," and no substantial hardship would result if the judgment were vacated, "since the reasonable amount of damages will be either agreed upon or determined by a jury." CP at 58. Even if the judgment's finding of liability was not set aside, Mr. Firl argued that the money judgment should be, relying on this court's 1999 decision in *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 241-42, 974 P.2d 1275.

Mr. Firl's motion was supported by declarations from his lawyer, Mr. Firl and Mr. Peters. Mr. Firl testified that he had never been served and the description of the person

served on the return of service did not fit him, as he was 23 years old at the time of the alleged service, not 27. The return of service had described the person served as "Age: 27, Sex: M, Race/Skin Color: WHITE, Height: 5'9, Weight 180, Hair: BROWN, Glasses: N." CP at 9. Mr. Firl testified that the description of the person served "appears to match a former renter . . . who was 27 years old at the time" and who he believed moved out of the residence "in late summer of 2020." CP at 64. Defense counsel argued in Mr. Firl's briefing that "a temporary renter . . . would not be a person of 'suitable discretion' sufficient for RCW 4.28.080(16)." CP at 57.

Mr. Peters's and defense counsel's declarations addressed their actions taken on Mr. Firl's behalf and their belated discovery of the lawsuit, order of default, and default judgment. Mr. Peters testified to the $335,718.54 settlement demand he had received from plaintiffs' counsel and testified that after reviewing the information provided to him, he had offered $66,731.49, which he believed to be a reasonable amount of damages.

Mr. Firl appeared and testified at the hearing on the motion to vacate the default judgment. He testified that his birth date was July 9, 1996, making him 24 on the day of alleged service rather than 23. He denied being served. He testified that in July 2020, there were five others of about his age living with him in his home, and that visitors and friends were "always . . . coming in and out." Report of Proceedings (RP) at 17. He

testified that his housemates had no responsibility other than to pay rent and implied they were irresponsible. *E.g.*, RP at 18 ("[i]t was always a mess and they never did anything anyways"). He testified that no housemate or visitor to his house ever told him they had received legal documents for him. He testified that if served, he would have contacted Allstate and asked what he needed to do.

After the lawyers concluded their examination of Mr. Firl, the judge asked Mr. Firl where he was on July 25, 2020, at 3:30 in the afternoon, and he answered, "Honestly, Your Honor, I have no idea. If it was on a Monday through Saturday, I was at work[.] I get off work at three o'clock when I leave the job site." RP at 22. The court continued, "And you have no way to reconstruct that[?]" to which Mr. Firl responded, "I could try and find an old pay stub." *Id.*

After hearing the evidence and argument, the court denied Mr. Firl's motion to vacate the judgment. The court expressed surprise that Mr. Firl had not presented evidence beyond his own declaration and testimony that he had not been present and was not served:

> THE COURT: . . . Look, the burden is on the defendant to show that he wasn't served and that he didn't receive it. . . . [The return of service] says Saturday, July 25th, at 3:28 p.m. It was on him to figure out where he was and what could have happened that day, and he hasn't done that, at least not to the Court's satisfaction. I'm not convinced by a preponderance of the evidence, not to mention clear and convincing, that he didn't get it. . . .

> . . . .
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> It seems like he could have figured out whether he was even home that day or not. He could have gone back and looked at his phone records. He could have looked at what he was doing and where he was going and checkbooks—where did he make Visa purchases, if he did . . . . He could have looked at his work record . . . . So he comes here without it, and I am just unable to make a finding that he for sure wasn't the one—didn't get service.

RP at 29-31. The court discounted the importance of Mr. Firl not being 27 years old, stating: "I mean, he looks like—I couldn't tell his age if I looked at him. I couldn't tell whether he was 23 or 27 or 24. I have no idea. And I just assume that's what the process server just assumed." RP at 31. The plaintiffs had argued that Mr. Firl essentially admitted that his 27-year-old roommate *was* served, which would itself suffice, but the court rejected that argument, observing that the return of service "doesn't say, 'I served a suitable person.' It says: I served him." RP at 31.

The court also questioned the delay between defense counsel learning of the default judgment and his moving to vacate it.

Mr. Firl's argument at the hearing had addressed his alternative challenge to the noneconomic damage award, reminding the court that "the vast majority of damages in this case are non-economic damages." RP at 23. He argued that while plaintiffs' counsel had provided Mr. Peters with evidence of R.A.C.'s medical expenses, Mr. Firl lacked information with which to respond to the noneconomic damages. Plaintiffs did not respond to the challenge to the noneconomic damage amount at the hearing. Their

briefing opposing Mr. Firl's motion had argued that Mr. Peters's declaration that $66,731.49 was a reasonable total damages amount was speculative opinion. The court did not offer any reason for rejecting Mr. Firl's argument that the noneconomic damages, at a minimum, should be set aside.

The court's handwritten order entered at the conclusion of the hearing states, "The defendant has not proved that service did not occur by any burden of proof," and, "The court finds no other equitable grounds on which to vacate the default or void the judgment." CP at 123. Mr. Firl appeals.[2]

ANALYSIS

Mr. Firl makes three assignments of error. He prevails on his third assigned error, which is the one we address in the published portion of the opinion.

[2] Represented by new counsel on appeal, Mr. Firl initially moved for leave to submit five documents as additional evidence under RAP 9.11, either for consideration by the trial court or for this court's consideration on appeal. Mr. Firl contends that some of the documents provide the corroboration of his absence from home at the time of service that the trial court ruled was lacking. Our commissioner denied the motion, finding that the proposed evidence was available at the time of the hearing and Mr. Firl did not demonstrate good cause for failing to present it to the trial court.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER AND GRANT MR. FIRL'S CHALLENGE TO THE NONECONOMIC DAMAGE AWARD, BECAUSE NO SUBSTANTIAL EVIDENCE SUPPORTS IT

Mr. Firl's third assignment of error is that the trial court failed to consider and grant his request for relief from excessive noneconomic damages under CR 60(b)(1) and *White v. Holm*, 73 Wn.2d 348, 438 P.2d 581 (1968).[3]

CR 60(b)(1) authorizes the trial court to relieve a party from a judgment for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." The longstanding showing that supports vacating a default judgment for these reasons is "(1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated." *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007) (citing *White*, 73 Wn.2d at 352 (citing, in turn, *Hull v. Vining*, 17 Wash. 352, 49 P. 537 (1897))).

[3] The assigned error also challenges the trial court's failure to grant relief under CR 60(b)(11), but Mr. Firl did not adequately brief or argue subsection (11) as a basis for relief in the trial court or on appeal. We will not consider issues that are not adequately briefed and argued, even if they are included as assignments of error. *See Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

The first two factors are the major elements to be demonstrated by the moving party. *White*, 73 Wn.2d at 352. When 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." *Id.* On the other hand, if the moving party demonstrates a weaker defense but one that would, prima facie at least, warrant 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 his diligence after notice of the default, and the potential hardship on the opposing party. *Id.* at 352-53.

In determining the primary factor of whether the CR 60 movant has presented substantial evidence of a prima facie defense, the court reviews the evidence in the light most favorable to the moving party. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000). This is consistent with the primary purpose for requiring a meritorious defense, which is to avoid the useless trial that would occur if the defendant has no factual basis on which to defend. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 583, 599 P.2d 1289 (1979). We review a trial court's decision on a motion to set aside a default judgment for abuse of discretion. *Little*, 160 Wn.2d at 702 (citing *Yeck v. Dep't of Lab. & Indus.*, 27 Wn.2d 92, 95, 176 P.2d 359 (1947)). An abuse of

discretion is more readily found when the trial court *denies* a trial on the merits than when a judgment is set aside and a trial is had. *White*, 73 Wn.2d at 351-52.

A. Washington decisions recognize three ways to address the prima facie defense factor when an allegedly excessive award of noneconomic damages is challenged

In *Little*, the Supreme Court accepted it as a given that a party can rely on CR 60(b)(1) to request the setting-aside of an allegedly excessive default damage award without also seeking to set aside the finding of liability. 160 Wn.2d at 704 (majority), 716 (Madsen, J., concurring/dissenting). Little was injured in two rear-end collisions caused in quick succession by King, a 16- to 17-year-old driver. *Id.* at 699. King responded in person after being served and allowed a judgment by default to be taken against her. She had no defense to liability. *Little v. King*, noted at 127 Wn. App. 1021, 2005 WL 1090134 at *4 & n.3 (unpublished), *aff'd*, 160 Wn.2d 696, 161 P.3d 345 (2007). After the court awarded damages totaling $2.1 million, King retained counsel and sought to set aside only the award of damages. *Little*, 160 Wn.2d at 702.

The opinions in *Little* recognize three ways to address *White*'s prima facie defense factor when a default damage award determined under CR 55(b)(2) is challenged. One is a fact-based showing of a defense; a second is excuse-based, pointing to the difficulty of rebutting a large general-damages claim without the benefit of discovery; and the third is a challenge to the legal sufficiency of evidence to support the damage award.

1. Fact-based showing

A fact-based showing is common and literally conforms to *Little*'s statement that the first primary consideration is whether "substantial evidence support[s] a prima facie defense." 160 Wn.2d at 703-04. It is illustrated by *White.* In *White,* the defendant had stepped back from the recessed entryway to his office and, when he turned on the sidewalk, either collided with or brushed an elderly passer-by. She fell and was injured. 73 Wn.2d at 349. White, the passer-by, sued, and as a result of a misunderstanding between Holm and his insurer, no answer was filed. *Id*. at 349-50. After a $16,497 default judgment was taken, Holm moved to set it aside, claiming his failure to appear and respond was due to mistake, inadvertence, surprise or excusable neglect.

To demonstrate at least a prima facie defense, Holm testified by affidavit that White was not visible to him from the recessed entry; his presence and actions were clearly visible to her; in turning onto the sidewalk, he merely brushed her with his arm; and her fall was occasioned by her own evasive action. *Id.* at 350-51. The Supreme Court observed that the facts presented could give rise to "a factual issue revolving about either negligence on the part of Mr. Holm or contributory negligence on the part of Mrs. White, or both." *Id.* at 353.

Fact-based showings of a prima facie defense can be made not only to liability, but also to an allegedly excessive award of damages. In *Showalter v. Wild Oats*, 124 Wn.

App. 506, 101 P.3d 867 (2004), a grocery customer obtained a default judgment for injuries sustained when she slipped and fell on a grocery floor. Of the over-$28,000 judgment amount, $25,000 was for past and future noneconomic damages. *Id.* at 513. In moving to vacate the judgment, the grocer offered evidence of reasonable care as a defense to liability: the floor had been swept 20 minutes before the fall, the staff had no notice of a hazardous condition, and the grocer adopted and followed policies to protect against overlooked debris on the floor. *Id*. The grocer also offered a fact-based prima facie defense to the general damages award: it pointed to evidence that Ms. Showalter had preexisting medical conditions, including having received chiropractic and spinal treatment for injuries sustained in 1997 and 1999. *Id.* The court held that this evidence, viewed in the light most favorable to the grocer, "persuasively challenge[d] the amount of damages for past and future noneconomic loss." *Id.*

Other evidence that has been recognized as presenting at least a prima facie defense to a large general damage award includes evidence in an auto accident case that one injured party did not seek treatment for over two years and another, who admitted prior neck and back problems at the time of the accident, had sought only six months of massage therapy. *Gutz v. Johnson*, 128 Wn. App. 901, 917-18, 117 P.3d 390 (2005), *aff'd sub nom. Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). In a more recent auto accident decision, a prima facie defense was demonstrated by evidence that medical

progress notes reported the injured party was pain free and returning to full activities within five weeks after surgery for a herniated disc caused by the accident. *VanderStoep v. Guthrie*, 200 Wn. App. 507, 523, 402 P.3d 883 (2017).

Mere speculation is not substantial evidence of a defense. *Little*, 160 Wn.2d at 705 (citing *White*, 73 Wn.2d at 352). Instead, a defendant generally must submit affidavits identifying specific facts that support a defense; allegations or conclusory statements are insufficient. *VanderStoep*, 200 Wn. App. at 519 (citing *Shepard*, 95 Wn. App. at 239). In *Little*, the Supreme Court characterized an insurance adjuster's declaration that Little's medical records revealed prior reports of headaches, hip pain, and depression as presenting no "competent" evidence of a defense because the insurer offered no proof that Little's prior complaints were causally related to her postaccident damages. *Little*, 160 Wn.2d at 705.

Little can be distinguished from other cases in which tenuous or even incompetent evidence of a defense has not been fatal to a defaulting party's motion for relief, because in *Little*, King failed to demonstrate both of *White*'s primary factors. Not only was competent evidence of a defense lacking, but King "fail[ed] to show that [her] failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect," leaving the trial court with "*no* equitable basis for vacating judgment." *Id.* at 706 (emphasis

added). King had appeared in the lawsuit but declined to file an answer even when the trial court adjourned the default hearing to give her that opportunity.

Little held that the trial court abused its discretion by vacating the default judgment on these facts, but the court did not retreat from *White*'s holding that even a tenuous defense may sufficiently support a motion to vacate. As this court observed in *VanderStoep*, the court in *Little* seemed to acknowledge that depending on the other equitable considerations, even incompetent evidence might suffice, when it stated, "'*Except in unusual circumstances*, a party who moves to set aside a judgment based upon damages must present evidence of a prima facie defense to those damages.'" *VanderStoep*, 200 Wn. App. at 521 (quoting *Little*, 160 Wn.2d at 704).

2. Excuse-based showing

In *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986), this court allowed the prima facie defense factor to be addressed by an explanation why the defendant would have difficulty presenting a defense without discovery. *Calhoun* was an auto accident case in which the defendant challenged a default judgment in an amount slightly exceeding $55,000, $50,000 of which was for damages for pain and suffering. The trial court denied a motion to set the judgment aside.

The "evidence" offered as Merritt's prima facie defense was an insurance adjuster's affidavit expressing the view that the claim "has a value far less than the

judgment entered." *Id.* at 618. This court agreed with the trial court that because the affidavit merely stated allegations and conclusions, it was insufficient. *Id.* at 620. This court was nevertheless persuaded by Merritt's argument that presenting a defense to damages for pain and suffering requires some opportunity for discovery. *Id.* The court observed:

> [D]evelopment of a defense to the damages would require the examination of Mr. Calhoun by a defense expert. Here, the default was entered before any such discovery could take place. Moreover, presenting a defense to damages for pain and suffering is always complicated by the subjective as opposed to objective nature of such damages.

Id. Taking the position that "it would be inequitable and unjust," to deny the motion to vacate for failure to present a prima facie defense, this court looked to *White*'s three remaining considerations and concluded that they weighed in favor of vacating the damages. *Id*.

Calhoun has been relied on in later published and unpublished cases. For published cases relying on *Calhoun*, *see Shepard*, 95 Wn. App. at 241; *Little*, 160 Wn.2d at 714 (Madsen, J., concurring/dissenting); and *VanderStoep*, 200 Wn. App. at 523-24.

In *Farmers Insurance Co. v. Waxman Industries, Inc.*, 132 Wn. App. 142, 130 P.3d 874 (2006), this court rejected an argument that it is always inequitable to let a large noneconomic damages award stand without allowing an opportunity for discovery. Waxman, a manufacturer and marketer-distributor of hoses, was sued by Farmer's for the

insurance company's cost of covering a homeowner's claim for major damage caused by a broken water supply line. The broken line was labeled with Waxman's name. *Id.* at 144. Farmers sent the broken line to Waxman for inspection in April 2003, made inquiries of Waxman thereafter to which it received no response, and did not obtain a default judgment against Waxman until June 2004. *Id.* at 144-45. Waxman successfully moved to set aside the judgment by presenting evidence that its failure to appear was due to mistake and arguing that it should be permitted to explore defenses through discovery. *Id.* at 146.

This court reversed the setting aside of the judgment, distinguishing the case from *Calhoun* because Waxman had been "unable to identify or substantiate a defense despite having the allegedly defective line in its possession for a number of months." *Id.* at 148. The court observed that to accept Waxman's argument "as a general rule would mean that no default judgment could ever stand, because a default judgment by definition is entered before the discovery phase of litigation begins." *Id.* at 147; *see also Johnson v. Cash Store*, 116 Wn. App. 833, 847, 68 P.3d 1099 (2003) (rejecting argument that discovery was necessary to defend where prescient witnesses would be store employees, so "Cash Store held the keys to its own defense").

The dissenting justices in *Little* endorsed the approach followed by *Calhoun*, reasoning that "[t]he practical difficulty of defending a claim in the absence of discovery

may be a relevant consideration in evaluating whether a defendant has presented a meritorious defense sufficient to support a motion to vacate a default judgment." 160 Wn.2d at 714 (Madsen, J., concurring/dissenting). They characterize the majority opinion in *Little* as rejecting the reasoning of *Calhoun* in favor of the reasoning in *Waxman. Id*. The majority opinion in *Little* voices no disagreement with *Calhoun*, however. As earlier discussed, the majority's decision can be distinguished from *Calhoun* as turning on the fact that King presented "no equitable basis for vacating judgment." 160 Wn.2d at 706.

3. Law-based challenge

The third showing addressing the prima facie defense factor is a challenge as a matter of law, recognized in *Shepard* and endorsed in *Little.* It turns the tables on which party's evidence is examined for its sufficiency, looking back to the evidence the plaintiff offered in support of the default judgment. It is the easiest challenge to avoid: the party moving for a default judgment need only present substantial evidence.

Shepard was a legal malpractice case in which the law firm's liability turned on whether a $204,000 judgment against Shepard would have been set aside if its lawyers had made a timely CR 60(b)(1) motion. 95 Wn. App. at 233. The judgment against Shepard was obtained by a quadriplegic patient who allegedly sustained injuries from a fall as he was removed from Shepard's ambulance. The parties agreed that whether a

timely motion would have been granted presented an issue of law and submitted it to the trial court as a matter of partial summary judgment. The trial court ruled that the motion to set aside the judgment would not have been granted and dismissed the malpractice claim. The law firm appealed.

One of Shepard's unsuccessful arguments for vacating the judgment had been that a timely challenge to the damage amount would have succeeded, because the damages awarded were excessive. The appeals court observed, citing *Calhoun*, that "a trial court has discretion to vacate the damages portion of a default judgment even where no meritorious defense is established." *Id.* at 241. The court expressed concern that *Calhoun* had not set forth a standard as to when default damages should be vacated, however. *Id.* Looking to case law from other jurisdictions that applied rules similar to CR 60(b)(1), *Shepard* adopted a standard applied in Indiana: default damages should be vacated on "a showing that the evidence before the court granting the award was insufficient to support the amount of damages." *Id.* at 241-42. It observed that this is analogous to Washington's standard for setting aside awards of damages from trials. *Id.* at 242. "Evidence is substantial," *Shepard* observed, "if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Id.* (citing *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994)).

Among the trial court findings that had supported the $204,000 damage amount was a finding that the patient injured in the fall suffered two or more broken ribs. *Id.* Even the patient's own declaration did not support that finding, however. *Id.* For that and other reasons, the *Shepard* court held that a timely challenge to the damages award *would* have been successful. It reversed dismissal of the malpractice claim. *Id.* at 244-45.[4]

While noneconomic damages especially are within the factfinder's discretion, "there must be evidence on which the award is based." *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 180, 116 P.3d 381 (2005). A claimant has the burden of proof on the amount of damages, and must come forward with sufficient evidence to support a damages award. *Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 715-16, 315 P.3d 1143 (2013) (citing *O'Brien v. Larson*, 11 Wn. App. 52, 54, 521 P.2d 228 (1974)). "'Evidence of damage is sufficient if it affords a reasonable basis for estimating loss and does not subject the trier of fact to mere speculation or

[4] In *VanderStoep*, Division Two was presented with an argument that *Shepard*'s standard—whether the plaintiff's evidence in support of a default judgment was legally sufficient—was endorsed by the Supreme Court in *Little*, and had become the exclusive standard for determining the first *White* element. The VanderStoeps relied on the statement in *Little*, citing *Shepard*, that "[t]he amount of damages in a default judgment must be supported by substantial evidence." 160 Wn.2d at 704. Division Two rejected the VanderStoeps' argument, holding that *Little* merely recognizes the legal sufficiency of evidence supporting a default damages award is a *minimal* requirement. *VanderStoep*, 200 Wn. App. at 524-25. It observed that nothing in *Little* abandons long-settled precedent that a prima facie defense can defeat a legally sufficient claim. We agree.

conjecture.'" *Clayton v. Wilson*, 168 Wn.2d 57, 72, 227 P.3d 278 (2010) (quoting *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)).

If a case is tried and a legally-insupportable amount of damages is requested or awarded, the defending party can move for judgment as a matter of law on the damages issue under CR 50.[5] The trial court is required to view the evidence and all inferences in favor of the nonmoving party, but it would err if it denied the motion and the evidence and inferences were legally insufficient to support a damages award. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989) (citing *Cherberg v. Peoples Nat'l Bank*, 88 Wn.2d 595, 606, 564 P.2d 1137 (1977)).

Where a defaulting party is able to demonstrate that the evidence presented to support an award of noneconomic damages is legally insufficient, its defense can fairly be characterized as conclusive. The more conclusively a defense can be shown, the more readily the court will vacate the default judgment. *Beckett v. Cosby*, 73 Wn.2d 825, 828, 440 P.2d 831 (1968). Legal defenses can be conclusive defenses. *E.g.*, *Merrell v. Hamilton Produce Co.*, 55 Wn.2d 684, 686, 349 P.2d 597 (1960) (surety's defense to damages awarded was its statutory right to have claims exceeding the face value of its bond prorated; "[s]uch a conclusive defense requires little excuse on a prompt motion to

[5] CR 50(a)(1) allows judgment as a matter of law "where 'there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue.'" *Coogan v. Borg-Warner Morse Tec, Inc.*, 197 Wn.2d 790, 812, 490 P.3d 200 (2021).

vacate"); *Yeck*, 27 Wn.2d at 98-99 (defense that the statute under which damages were awarded did not apply was a conclusive legal defense, and the court abused its discretion in refusing to set aside the judgment).

CR 55 and case law construing it provides a further basis for requiring that legally sufficient evidence support the amount of noneconomic damages awarded by a default judgment. CR 55(b)(2) governs the entry of default judgment "[w]hen [a]mount [u]ncertain," and provides:

> 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 . . . , the court may conduct such hearings as are deemed necessary or, when required by statute, shall have such matters resolved by a jury.

The subsection requires the entry of findings and conclusions. *See id.* Our Supreme Court has held that findings and conclusions are required "in part to allow appellate scrutiny of the trial court's decision in uncontested cases." *Little*, 160 Wn.2d at 706 (citing CR 55(b)(2)). "This protects the integrity of the justice system because it allows the reviewing court (and others) to evaluate the factual and legal basis for the trial court's decision." *Id.*

It is well settled that "'[j]udges 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)). The fact

that a default judgment was entered without the court independently assessing the evidence is a factor that weighs in favor of allowing a trial on the merits. *Little*, 160 Wn.2d at 724 (Madsen, J., concurring/dissenting).

B. The trial court abused its discretion in refusing to vacate the award of damages

Applying the *White* elements, the trial court abused its discretion in refusing to vacate the damages award—not based on Mr. Firl's fact-based or excuse-based showing of the prima facie defense factor, but based on the legal insufficiency of the plaintiffs' evidence.

1. Fact-based showing

As plaintiffs pointed out in responding to Mr. Firl's motion to vacate, the only fact-based evidence he offered as a defense to the damages was Mr. Peters's opinion that, having reviewed the information provided by the plaintiffs in support of settlement, he believed a reasonable total damage amount was $66,731.49. The plaintiffs argued that Mr. Peters's declaration, viewed in the light most favorable to Mr. Firl, offered only a speculative opinion. We agree.

On appeal, Mr. Firl advances the plaintiffs' January 2020 settlement offer of $335,718.54—$300,000.00 of that being general damages—as another piece of evidence that $800,000.00 in noneconomic damages alone is excessive. Plaintiffs respond that the evidence of their offer is inadmissible under ER 408. Mr. Firl disagrees, arguing that he

is not offering the evidence to establish the amount of the plaintiffs' damages, but only to highlight the "discrepancy" between damages representations to the trial court and to Allstate. Reply Br. of Appellants at 31 (emphasis omitted). Use for this purpose operates "to prove . . . [the] invalidity of the claim or its amount," however, which is the proscribed purpose under ER 408.

As for Mr. Firl's explanation for his failure to appear, he continues to claim on appeal that he was not served. But for purposes of weighing the *White* factors, we rely on the trial court's finding that Mr. Firl failed to overcome process server John Knight's presumptively correct return of service. The trial court did not find that Mr. Firl was served, however; both in the court's oral ruling and its order it found that Mr. Firl simply fell short of meeting his burden to prove otherwise. The trial court did not find that Mr. Firl's failure to appear was willful and the evidence does not support such a finding. Mr. Firl put plaintiffs' lawyers in contact with his insurer, apparently cooperated with his insurer, and attended the hearing to testify in support of setting the default aside. While his explanation for his failure to appear does not weigh in his favor, it does not support willfulness.

Turning to whether Mr. Firl acted with due diligence after notice of the default, his lawyer did not appear until over four months after Mr. Peters was informed of the lawsuit. The failure to learn of the default until March 26 can be excused. Plaintiffs'

counsel's half-truth in reporting only that a lawsuit had been filed would lead Mr. Peters to reasonably believe it was enough to contact Mr. Firl and obtain assurance that Mr. Firl would notify him if served. Upon learning of the default, however, it still took counsel three months to move to vacate the default. Due diligence does not weigh in Mr. Firl's favor. Nevertheless, we have no reason to believe the lack of diligence was Mr. Firl's fault.

Finally, plaintiffs have not demonstrated that they will suffer a substantial hardship if the judgment is vacated. The only argument of hardship made in the trial court was that "[y]ou've . . . got witnesses leave, you've got problems with memory." RP at 15. But the limited evidence the plaintiffs presented in the trial court was all opinion evidence based on record review. The records could be reviewed anew in a future trial.

Looking at Mr. Firl's fact-based showing for setting aside the damages award, only the absence of any substantial hardship to the plaintiffs weighs in favor of setting aside the award of noneconomic damages. No abuse of discretion in denying relief is shown.

2. Excuse-based showing

Mr. Firl also made an excuse-based showing for setting aside the noneconomic damages award. Although he did not cite *Calhoun*, his briefing and oral argument

emphasized that without discovery, he lacked information needed to respond to an $800,000 noneconomic damage claim. Documentation filed by the plaintiffs in support of the default judgment did not provide information usable by Mr. Firl. Unlike in *Waxman* and *Cash Store*, the plaintiffs have not demonstrated that information available to Mr. Firl would have enabled him to respond.

In *Calhoun*, however, Merritt's excuse for being unable to present a fact-based defense was accepted where he was able to make strong showings on the second, third, and fourth *White* factors. Merritt admitted to being served, and the court accepted his explanation that he thought his insurer knew of the lawsuit and would respond, characterizing Merritt's failure to act as "a bona fide mistake." *Calhoun*, 46 Wn. App. at 621. The court observed that Merritt "acted promptly" in moving to vacate the default. *Id.* at 622. Merritt's lawyer evidently appeared in Calhoun's action within days of Merritt's insurer learning of the default, and he moved to vacate the judgment a month later. *Id.* at 618. Nothing in the record indicated that Calhoun had been prejudiced in asserting his damage claim by the lapse of time. *Id.* at 622.

Here, by contrast, Mr. Firl did not make a strong showing of an excusable failure to appear or due diligence. Again, no abuse of discretion in denying relief on this basis is shown.

3. Law-based challenge

Finally, Mr. Firl's motion asked the trial court to set aside the $800,000 award of noneconomic damages under *Shepard.* The *Shepard* standard asks whether the evidence before the court granting the award was insufficient to support the amount of damages. "Appellate and trial courts are equally competent to review the record for legal sufficiency," so even if the trial court intended, implicitly, to reject Mr. Firl's challenge to the damage amount, "appellate courts owe no deference to trial courts' conclusions" on that score. *Coogan v. Borg-Warner Morse Tec, Inc*., 197 Wn.2d 790, 812, 490 P.3d 200 (2021). We review the evidence and reasonable inferences in the light most favorable to the judgment. *Id.*

No substantial evidence supports R.A.C.'s and Ms. Evans's noneconomic damage awards. The only evidence presented in support of the $800,000.00 noneconomic damage award was evidence that R.A.C. incurred $26,067.79 in medical expenses, that the toddler was a candidate for scar revision surgery at a cost of $8,500.00 to $10,000.00, and skeletal hearsay information about six settlements allegedly negotiated by R.A.C.'s lawyers for other clients with dog bite injuries.[6] Although plaintiffs' briefing in the trial

[6]This might have been partially inadvertent. Almost none of the exhibits purportedly attached to the plaintiffs' supporting declarations appear in the record on appeal. We have confirmed that they are not present in the trial court record. A declaration of Madison Evans is also referred to in plaintiffs' briefing but no such declaration was ever filed with the court.

court characterized the six settlements as "Jury Verdicts," they are characterized in counsel's declaration as settlements. *Compare* CP 90 *and* 96 *with* CP at 28-29, ¶¶ 5-10. The information about the settlements is too limited to be useful and there is no identifying information that would enable Mr. Firl or the trial court to confirm or investigate them. The trial court was provided with none of the underlying medical records and no photographs of R.A.C.'s injuries. Because no hearing was held, the shortcomings in the written submissions were never compensated for by testimony.

No witness provided an explanation why $750,000 and $50,000 would be reasonable measures of R.A.C.'s and Ms. Evans's noneconomic damages. Those figures appear only in the findings, conclusions, and judgment that plaintiffs proposed for entry by the court. A declaration from Ms. Ramsey offers allegations and conclusory statements in support of her opinion that "the plaintiff's damages likely fall at the high-end range of settlements and/or jury verdicts researched." CP at 29. But her speculative opinion on reasonable damages is just as inadequate as Mr. Peters's opinion, which plaintiffs persuade us to reject.

The application of the *White* considerations "is not a mechanical test; whether or not a default judgment should be set aside is a matter of equity." *Little*, 160 Wn.2d at 704 (citing *White*, 73 Wn.2d at 351). It is not difficult to present legally sufficient evidence of bona fide noneconomic damages in an uncontested default judgment hearing.

Plaintiffs who do not make that effort are not in a position to argue that the equities favor them, even where a defendant is unable to make a strong showing of a reason for failing to appear or due diligence. Mr. Firl did not willfully fail to appear, and the shortcoming in diligence was not extreme nor is it fairly imputed to him. Given a conclusive defense of legally insufficient supporting evidence, it was an abuse of discretion not to vacate the award of noneconomic damages.

We affirm the judgment as to liability, the $34,567.54 awarded as special damages, and the $701.95 awarded as statutory costs. We reverse the award of noneconomic damages and remand for a trial on that element of the plaintiffs' damages.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO VACATE THE JUDGMENT AS VOID FOR LACK OF PERSONAL JURISDICTION

Under CR 60(b)(5), a court may relieve a party from a final judgment if the judgment is void. A default judgment against a party is void if the court did not have personal jurisdiction over that party. *Delex Inc. v. Sukhoi Civ. Aircraft Co.*, 193 Wn. App. 464, 468, 372 P.3d 797 (2016). A court does not have personal jurisdiction over a party if service of the summons and complaint was improper. *Id.*

Under Washington law, the plaintiff bears the initial burden of proving a prima facie case of sufficient service. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). An affidavit of service that is regular in form and substance is presumptively correct. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) (citing *Lee v. W. Processing Co. Inc.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983)). The return is subject to attack, however, and may be discredited by competent evidence. *Lee*, 35 Wn. App. at 469 (citing *Dubois v. W. States Inv. Corp.*, 180 Wash. 259, 39 P.2d 372 (1934)). When the plaintiff meets its burden of proving a prima facie case of sufficient service (by the presumption or otherwise), the burden is on the person attacking the service to show by clear and convincing proof that the service was improper. *See Leen*, 62 Wn. App. at 478 (citing *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); *McHugh v. Conner*, 68 Wash. 229, 231, 122 P. 1018 (1912)). Evidence is "clear and convincing" when it shows the ultimate fact in issue to be highly probable. *Dalton v. State*, 130 Wn. App. 653, 666, 124 P.3d 305 (2005). Whether service of process was proper, such that the exercise of personal jurisdiction was appropriate, is a question of law reviewable de novo. *Sutey v. T26 Corp.*, 13 Wn. App. 2d 737, 749, 466 P.3d 1096 (2020).

When a motion to set aside a default judgment presents the court with conflicting affidavits addressing whether service occurred, a triable issue of fact is presented. *Roth v. Nash*, 19 Wn.2d 731, 732, 144 P.2d 271 (1943); *Woodruff v. Spence*, 76 Wn. App. 207,

210, 883 P.2d 936 (1994). We conduct substantial evidence review of a trial court's findings on disputed facts that bear on whether process was served. *Sutey*, 13 Wn. App. 2d at 750. "'Substantial evidence' is 'a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *Id.* (quoting *Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). We cannot review credibility determinations on appeal. *Id.* (citing *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)).

The trial court did not enter written findings articulating its reasons for concluding that Mr. Firl failed to rebut the presumptively correct return of service. But the court's oral ruling announced findings, including that Mr. Firl appeared to the court to be someone who could be mistaken for 27 years old. The court also announced that Mr. Firl's testimony denying he was served was not only *not* clear and convincing, it did not preponderate over the sworn return of John Knight, the process server, that he personally served Mr. Firl.

Mr. Firl's presence and the court's ability to observe him qualifies as substantial evidence supporting its finding that Mr. Firl could be mistaken for 27 years old. Mr. Knight's presumptively correct return of service (whose description of the person he served apparently fit Mr. Firl in every respect except for Mr. Firl's age) is substantial evidence that service of process took place as attested.

Additionally, Mr. Firl's failure to produce evidence corroborating his alleged absence from his residence at the time of service would support an adverse inference. "When a party fails to produce relevant evidence within its control without satisfactory explanation, the trial court is permitted to draw the inference that the evidence would be unfavorable to the nonproducing party." *Northwick v. Long*, 192 Wn. App. 256, 264, 364 P.3d 1067 (2015) (citing *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994)).

Finally, Mr. Firl suggests the trial court applied the wrong standard to his burden of rebutting the return of service because when announcing its decision, the court said it was unable to find that Mr. Firl "*for sure* wasn't the one—didn't get the service." RP at 30-31 (emphasis added).

The fact that Mr. Firl's burden of overcoming the return of service was by clear and convincing evidence was briefed by the parties and argued during the hearing. The trial court commented itself on the clear and convincing standard. *See* RP at 29 ("I'm not convinced by a preponderance of the evidence, not to mention clear and convincing, that he didn't get it."). In entering its written order, the court did not say that Mr. Firl failed to disprove service by a "for sure" burden of proof, it said he failed to disprove service "by any burden of proof." CP at 123.

In the context of the briefing and argument, the court's "for sure" reference is most reasonably seen as unfortunate vernacular. A court's written decision, not any different oral ruling, is considered its ultimate understanding of the issue presented. *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980).

Mr. Firl fails to demonstrate that the court erred in rejecting his argument that the judgment was void.

III. AN ARGUMENT THAT MR. FIRL HAD APPEARED WITHIN THE MEANING OF CR 55 WAS NOT RAISED IN THE TRIAL COURT, AND FAILS

Mr. Firl's second assignment of error conflates two bases for challenging a default judgment. The first is an argument that a defendant who has appeared in a lawsuit is entitled to notice of motions for default and default judgment. The second is an argument that acts of concealment that prevent a defendant from appearing and responding can support vacating the judgment under CR 60(b)(1) or (4) and the *White* criteria. Only the first is a true "appearance" argument.

CR 55(a)(3) provides that "[a]ny party who has appeared in the action for any purpose shall be served with a written notice of motion for default . . . at least 5 days before the hearing." A defendant appears in an action and is thereby entitled to notice when he "answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of . . . her appearance." RCW 4.28.210; *see also* CR 4(a)(3) ("A notice of appearance, if made, 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."). If a default judgment is rendered against a party who was entitled to notice but did not receive it, the judgment will be set aside. *Morin*, 160 Wn.2d at 749 (citing *Tiffin v. Hendricks*, 44 Wn.2d 837, 847, 271 P.2d 683 (1954)).

In *Morin*, our Supreme Court accepted review of three decisions of this court that vacated default judgments on the basis that the defendants' substantial compliance with the appearance requirement had given them a right to notice of the plaintiffs' motions for an order of default. The Supreme Court was concerned that this court was sometimes applying a "doctrine of informal appearance" that failed to measure substantial compliance against the fact that "litigation is a formal process." *Id.* It emphasized that "where we have applied the substantial compliance doctrine, the defendant's relevant conduct occurred *after litigation was commenced.*" *Id.* at 755 (emphasis added). This is consistent with the impossibility of "appearing" in an action that does not yet exist. "[*P*]*re*litigation communication alone is insufficient" to constitute an appearance. *Id.* at 749 (emphasis added). Were it otherwise, the Supreme Court observed, any claims representative to a potential dispute could simply write a letter conveying an intent to contest litigation and then "ignore the summons and complaint . . . and wait for the notice of default judgment before deciding whether a defense is worth pursuing." *Id.* at 757.

Addressing *post*litigation contacts, the *Morin* court clarified that a defendant served with a summons and complaint "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.* at 749. "Parties must take some action acknowledging that the dispute is in court before they are entitled to a notice of default judgment hearing." *Id.* at 757.

Mr. Firl complains that in ruling on his motion, the trial court failed to address whether, having appeared, he was entitled to notice. We see no suggestion in Mr. Firl's motion that he *claimed* to have appeared, however. His motion spoke only of his "failure to appear." *See* CP at 58.

Mr. Firl has no viable argument that he had appeared and was entitled to notice. Mr. Peters's prelitigation contacts do not count, because there was not yet a lawsuit in which to appear. His and defense counsel's postlitigation contacts do not count because they did not "acknowledge that a dispute exists *in court*" before the plaintiffs moved for default and default judgment. *Morin,* 160 Wn.2d at 756. The trial court understandably did not rule on an argument that Mr. Firl had appeared and was entitled to notice.[7]

[7] Mr. Firl's second assignment of error also suggests that *Morin* announced a new basis on which a party will be deemed to have "appeared": the party will be deemed to have appeared if and when it is the victim of inequitable concealment by its adversary. We disagree.

We affirm the judgment as to liability, the $34,567.54 awarded as special damages, and the $701.95 awarded as statutory costs. We reverse the award of noneconomic damages and remand for a trial on that element of the plaintiffs' damages.

Siddoway, C.J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

The discussion in *Morin* on which Mr. Firl relies had to do with the remand of one of the three appeals consolidated in *Morin*, *Gutz v. Johnson.* In *Gutz*, the Court of Appeals not only found an "informal appearance" but also concluded that "the Johnsons satisfied their evidentiary burden under CR 60(b)." 128 Wn. App. at 921 It was in connection with remanding *Gutz* because of the viable CR 60(b)(1) basis for setting aside the judgment that the Supreme Court discussed the fact that Gutz representatives had spoken with an Allstate adjuster about settlement without disclosing they had already filed suit and effected service, and later, that they had obtained a default order—something the Supreme Court said "appears to be an inequitable attempt to conceal the existence of the litigation." *Morin*, 160 Wn.2d at 759.