IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KELLY SCHERZA, a single woman,	)	**No. 28154-0-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
TAWNY YOUNGMAN and JOHN DOE YOUNGMAN, individually, and as husband and wife, and GREGORY YOUNGMAN and JANE DOE YOUNGMAN, individually, and as husband and wife,	)	**UNPUBLISHED OPINION**
Respondents.	)	

Kulik, C.J. — Tawny Youngman's vehicle collided with Kelly Scherza's vehicle on July 20, 2005. Ms. Scherza filed a personal injury lawsuit two years later, on July 24, 2007. Ms. Scherza served the Washington Secretary of State because she was unable to locate Ms. Youngman and her husband, Gregory Youngman, to effect personal service. The trial court entered a default judgment for Ms. Scherza. The Youngmans' insurance company, Farmers Insurance Company, was notified of the default judgment and promptly located the Youngmans and filed a motion to vacate the default judgment. The

trial court granted the Youngmans' motion, finding that the Youngmans produced substantial evidence of a prima facie defense and that their failure to appear was reasonable under the circumstances. We agree and affirm.

FACTS

On July 20, 2005, Tawny Youngman's vehicle collided with Kelly Scherza's vehicle on North Monroe in Spokane, Washington. Ms. Scherza stated that she pulled over to the side of the road to allow an ambulance to pass, and Ms. Youngman slammed into her from behind. Ms. Scherza testified that her car's bumper was hanging down following the collision.

Ms. Youngman recalled the collision differently, stating that when she pulled over to allow the emergency vehicle to pass, she came to a complete stop behind Ms. Scherza's vehicle. Once the emergency vehicle passed, both Ms. Scherza and Ms. Youngman drove their vehicles back onto the road when Ms. Scherza stopped suddenly and Ms. Youngman, who was momentarily distracted, hit Ms. Scherza's vehicle from behind. Ms. Youngman estimated that her vehicle was traveling at approximately five or six miles per hour and stated that she felt "very little in the way of a jolt." Clerk's Papers (CP) at 248. Ms. Youngman reported no damage to her vehicle, a 1979 Jaguar sedan.

The parties exchanged insurance information. The following morning, July 21,

Ms. Scherza informed Ms. Youngman and her husband that she was seeking medical treatment as a result of the collision. The Youngmans reported the collision to their insurer, Farmers Insurance Company, the same day.

On August 3, 2005, Jeffrey Storment, an employee of Farmers, inspected Ms. Scherza's vehicle. Mr. Storment later received photographs from Progressive Insurance showing damage to the rear portion of Ms. Scherza's vehicle from a previous collision. Mr. Storment stated that the damage to Ms. Scherza's vehicle could not feasibly have been caused by the Youngmans' vehicle considering the height of the Youngmans' bumper and the fact that the Youngmans' vehicle sustained no damage. He opined that the damage to Ms. Scherza's vehicle was preexisting.

Ms. Scherza obtained a damage estimate from City Auto Body Center. Coincidentally, the person who inspected Ms. Scherza's vehicle and wrote the damage report was Mr. Youngman, who was then employed by City Auto Body Center. Mr. Youngman wrote his estimate based on the damages Ms. Scherza indicated were caused by the collision with Ms. Youngman, but opined that much of the damage, if not all, was preexisting or could not have been caused by the Youngmans' vehicle due to the difference in bumper heights.

Mr. Youngman left City Auto Body Center in May 2006, but has continued to

work in the Spokane area. Mr. Youngman has lived at his current address since September 2007.

Ms. Youngman was incarcerated sometime between January 2007 and September 2008 under the name Tawny Michelle Rhodes.

Ms. Scherza filed her summons and complaint on July 24, 2007. On November 5, Ms. Scherza filed an affidavit of due diligence, outlining her attempts to serve the Youngmans. The Youngmans' last known address, a house on North Ash Street, was vacant, and the Youngmans failed to leave a forwarding address with the post office. Calls to both Mr. Youngman's and Ms. Youngman's last known places of employment failed to yield information about either of their whereabouts.

On November 19, Ms. Scherza served the Washington Secretary of State, who sent a copy of the summons and complaint to the Youngmans' last known address—the North Ash Street address.

On February 15, 2008, the court entered an order of default. The court held a default hearing on March 14, and entered its default judgment for Ms. Scherza on March 21. The court awarded Ms. Scherza $12,000 in general damages, $9,163.15 for past medical damages, $1,890.72 for property damage, $28,600 for future medical damages, $23,346.13 for past lost wages and future earning capacity, and $1,244.91 for

statutory costs, for a total of $76,244.91.

Farmers received a letter dated October 6, 2008, from Ms. Scherza's attorney notifying it of the default judgment. Farmer's counsel filed a notice of appearance on behalf of the Youngmans on November 12, 2008, and filed a motion to vacate in January 2009, asserting they were entitled to relief under CR 60. After a hearing, the court vacated the default judgment on May 6, 2009. The court found that the Youngmans acted diligently in pursuing the motion to vacate, that their failure to appear was reasonable, and that they established substantial evidence of a prima facie defense to damages.

Ms. Scherza appeals, asserting the trial court erred by ruling that the Youngmans produced substantial evidence of a prima facie defense and by ruling that the Youngmans' failure to appear was reasonable under the circumstances.

ANALYSIS

This court reviews a trial court's decision to vacate a default judgment for an abuse of discretion. A trial court abuses its discretion if it bases its decision on untenable grounds or reasons. *Little v. King*, 160 Wn.2d 696, 702-03, 161 P.3d 345 (2007).

Default judgments are not favored in the law. The law prefers that controversies are resolved on the merits. *Calhoun v. Merritt*, 46 Wn. App. 616, 618-19, 731 P.2d 1094 (1986) (quoting *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289

(1979)). However, the judiciary also values litigants who are responsive and comply with court rules. *Little*, 160 Wn.2d at 703. The trial court's decision to vacate a judgment should be guided by equitable principles. *Calhoun*, 46 Wn. App. at 619. Thus, the trial court must base its decision on "'whether or not justice is being done.'" *Id.* (quoting *Griggs*, 92 Wn.2d at 582). An appellate court is less likely to find an abuse of discretion if the trial court vacated the default judgment as opposed to if it upheld the default judgment. *Calhoun*, 46 Wn. App. at 619.

CR 60(b)(1) allows a trial court to vacate a judgment for "[m]istakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order." The party moving to vacate a default judgment must show

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

White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The factors are not weighed equally; the first two factors are primary, while the second two factors are secondary. *Little*, 160 Wn.2d at 704. Here, Ms. Scherza raises arguments regarding the first two prongs.

The moving party must submit affidavits in support of his or her defense; mere allegations and conclusory statements are insufficient. *Calhoun*, 46 Wn. App. at 620 (quoting *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 104, 533 P.2d 852 (1975)). Facts should be viewed in the light most favorable to the party moving to vacate the default judgment. *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000).

Here, the Youngmans admitted liability for the collision, but contested the damages awarded to Ms. Scherza in the default judgment. Particularly, they contested the amounts awarded for property damage, future medical expenses, past medical expenses, lost wages, and future loss of earning capacity, and lastly, the causation of Ms. Scherza's injuries. The trial court vacated the default judgment, finding that the Youngmans presented substantial evidence of a prima facie defense to damages. Ms. Scherza asserts that this finding, regarding the first *White* factor, was error.

Ms. Youngman stated that she collided with Ms. Scherza's vehicle as the vehicles were pulling back onto the road, after she came to a full stop to allow the emergency vehicle to pass. Ms. Youngman asserts her vehicle was traveling at 5 or 6 miles per hour at the time of the collision. The Youngmans' vehicle was unharmed.

In contrast, Ms. Scherza asserted that Ms. Youngman's vehicle slammed into hers

without stopping, at a speed between 20 and 30 miles per hour. Ms. Scherza asserts that Ms. Youngman caused significant damage to her vehicle. Ms. Scherza also told various healthcare providers that her car was hit from behind at 20 to 30 miles per hour, causing her injuries.

The Youngmans presented an affidavit and pictures from Mr. Storment, an employee of Farmers, showing that Ms. Scherza's vehicle was in a prior collision. The Youngmans assert, and Mr. Storment's affidavit supports, that some, if not all the damage to Ms. Scherza's vehicle, was preexisting. Furthermore, Ms. Scherza's doctors concluded that her injuries were likely caused as a result of the collision, but perhaps their conclusions would differ if they thought that Ms. Scherza was hit at 5 or 6 miles per hour, instead of 20 to 30 miles per hour.

The Youngmans have presented substantial evidence of a prima facie defense to Ms. Scherza's damages and, thus, have satisfied the first of the *White* factors.

Ms. Scherza next asserts that the trial court erred by finding that the Youngmans' failure to appear was reasonable under the circumstances. The second prong of the *White* test is whether the defendant's failure to timely appear was due to mistake, surprise, inadvertence, or excusable neglect.

It is undisputed that the Youngmans and their insurer first became aware of the

lawsuit when Farmers was notified of the default judgment. Once Farmers knew of the lawsuit, it retained a lawyer, located the Youngmans, and timely filed a motion to vacate the default judgment.

At the time of the collision, Ms. Youngman gave her home address on North Ash Street to Ms. Scherza. Ms. Youngman lived at the North Ash address until March 2006. Subsequently, Ms. Youngman was incarcerated for a period of time, sometime between January 2007 and September 2008. She was incarcerated under the name "Tawny Michelle Rhodes." CP at 372. Mr. Youngman resided at the North Ash house until June 2007, at which point he moved. Mr. Youngman has continuously lived and worked in the Spokane area. Neither of the Youngmans left a forwarding address.

Ms. Scherza attempted service in July and August 2007. Ms. Scherza's affidavit of due diligence outlines her efforts to locate the Youngmans. Ms. Scherza attempted to serve the Youngmans at their last known address, the North Ash address, and found the house was vacant. The post office did not have a forwarding address for the Youngmans. Both Mr. Youngman's and Ms. Youngman's last known places of employment were called, but the calls did not yield either of their whereabouts.

Patricia O'Brien was able to locate the Youngmans at the request of Farmers, following its receipt of Ms. Scherza's default judgment. Ms. O'Brien submitted an

affidavit on behalf of the Youngmans opining that, with some additional effort, Ms. Scherza would have been able to locate the Youngmans to effect personal service. First, she notes that the lawsuit was not commenced until two years after the collision. Next, she suggests that Ms. Scherza could have contacted neighbors, coworkers, or people with the same last name in the telephone book to determine the Youngmans' whereabouts. Ms. O'Brien found Ms. Youngman by doing a criminal check.

Ms. Scherza asserts that the Youngmans were concealing themselves to avoid service. However, case law shows that if a person merely moves before a lawsuit is filed, there is no basis to assert that that person left to avoid service. *Kennedy v. Korth*, 35 Wn. App. 622, 624, 668 P.2d 614 (1983). Notably, the defendant in *Kennedy* moved from Washington to West Germany, where here, the defendants moved but did not leave the Spokane area and, thus, in theory, made it easier for one to locate them. Furthermore, the Youngmans reported the collision to their insurance company the day after it occurred. Mr. Youngman lived in the North Ash house until June 2007, one month before Ms. Scherza attempted service at that location. It does not appear that the Youngmans were attempting to avoid service of Ms. Scherza's lawsuit.

The courts have found excusable neglect in instances where the defendants were aware of the lawsuit against them and failed to respond. *See White v. Holm*, 73 Wn.2d

348 (defendant failed to respond because he believed the insurance company was defending the lawsuit and the insurance company believed the defendant was represented by independent counsel); *Showalter v. Wild Oats*, 124 Wn. App. 506, 101 P.3d 867 (2004) (defendant failed to respond due to internal miscommunication regarding whether the paralegal or the manager was supposed to give the claims to the internal claims administrator); *Calhoun v. Merritt*, 46 Wn. App. 616 (defendant did not understand that he needed to respond because he believed his insurance company would). Here, the Youngmans notified Farmers of the collision, but contrary to many of the cases where the court has found excusable neglect, they had no notice of the lawsuit. The Youngmans' failure to respond was not purposeful and falls under the category of excusable neglect. The Youngmans have satisfied the second of the *White* factors.

The last two *White* factors—that the defendant acted diligently after notice of the lawsuit and that the plaintiff would not suffer a substantial hardship if the judgment was vacated—are not disputed.

The trial court properly vacated the default judgment. We affirm.

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

Kulik, C.J.

WE CONCUR:

Brown, J.

Korsmo, J.