

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0823**

Cheryl Orcutt,
Respondent,

vs.

Jon Crews, et al.,
Appellants.

**Filed March 1, 2021
Affirmed in part, reversed in part, and remanded
Connolly, Judge**

Olmsted County District Court
File No. 55-CV-19-1135

Andrew L. Davick, Meshbeshier & Spence, Rochester, Minnesota; and

Gregory J. Johnson, G. Johnson Law, PLLC, Apple Valley, Minnesota (for respondent)

Ken D. Schueler, John T. Giesen, Dunlap & Seeger, P.A., Rochester, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellants, the owner and the driver of a vehicle that injured respondent in a 2012 accident, challenge the default judgment entered against them after they failed to answer

respondent's complaint, arguing both that they have at least a weak reasonable excuse for failing to answer because their insurer was partly to blame and that the damages awarded in the default judgment were speculative. Because there is no evidence of a reasonable excuse in the record, we affirm the grant of the default judgment; because there are no findings to explain the amount awarded for future medical expenses, we reverse that award and remand it for explanatory findings.

FACTS

On October 25, 2012, respondent Cheryl Orcutt was injured by a pickup truck driven by appellant Jon Crews and owned by appellant David Gosch. In 2016, respondent notified her insurer that she had agreed to settle the liability aspect of the case for \$100,000 and intended to pursue an underinsured motorist (UIM) claim. The UIM claim was settled in 2018 for \$55,000, after respondent brought a declaratory-judgment action.

Respondent had entered into a *Drake-Ryan* settlement agreement with appellant Gosch's primary insurer.¹ It provided that the insurer would pay the policy limit of \$100,000, and respondent would (1) release the insurer, (2) collect any future judgments against appellants only from insurance proceeds, and (3) after all proceedings against any other insurer were concluded, discharge appellants from liability under any judgment she might have against them.

¹ See *Drake v. Ryan*, 514 N.W.2d 785, 786 (Minn. 1994) (concerning an arrangement in which "plaintiffs have fully released the defendant and his primary liability insurer up to the limits of the primary liability coverage but have expressly retained the right to pursue their claims against the defendant for additional damages up to the limits of the defendant's excess liability insurance coverage").

Respondent then served the complaint in this action on appellants. They tendered it to the insurer who had also handled respondent's UIM claim. The insurer told appellants that: (1) it was denying coverage, (2) it would not defend the action, (3) appellants needed to hire counsel at their own expense, and (4) if appellants failed to respond to the complaint, a default judgment would result. Appellants did not respond to the complaint. In February 2019, respondent filed the complaint in district court, and in April 2019, she moved for a default judgment.

Appellants did not receive notice of the hearing on the default-judgment motion and were neither present nor represented at it. Respondent testified about the five surgeries on her knee and two on her shoulder, as well as the possibility of future surgery on her hip; she also submitted a letter from her surgeon, R.K. Respondent's attorney provided the district court with special-verdict claims of \$187,100.01 in past medical expenses, \$275,000 in probable future medical expenses, and \$300,000 each for past and future pain, disability, and emotional distress, totaling \$1,062,100.01. The district court accepted these figures and awarded respondent a default judgment against appellants in that amount.

Appellants moved to vacate the default judgment under Minn. R. Civ. P. 60.02, arguing that they had at least a weak reasonable excuse for their failure to answer the complaint and that the damages award was speculative. Their motion was denied, and they reiterate these arguments in challenging the denial.

DECISION

1. Reasonable Excuse

Appellate courts “review a district court’s decision under [Minn. R. Civ. P.] 60.02 for an abuse of discretion.” *Safeco Ins. Co. v. Holmgren Building Repair, Inc.*, 946 N.W.2d 638, 644 (Minn. App. 2020), *review denied* (Minn. Sept. 15, 2020). “The decision whether to grant rule 60.02 relief is based on all the surrounding facts of each specific case, and is committed to the sound discretion of the district court.” *Gams v. Houghton*, 884 N.W.2d 611, 620 (Minn. 2016).

A party may seek relief from a default or any other final judgment for:

- (a) Mistake, inadvertence, surprise or excusable neglect;
- (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial . . . ;
- (c) Fraud . . . , misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released, or discharged[, . . . or
- (f) Any other reason justifying relief from the operation of the judgment.

Minn. R. Civ. P. 60.02. Those seeking relief under (a), (b), (d) or (e) must show that: (1) they have a reasonable claim on the merits, (2) they have a reasonable excuse for failure or neglect to act, (3) they acted with due diligence after learning of the error or omission, and (4) their relief will not cause substantial prejudice to their opponent (the *Finden* factors). *Finden v. Klaas*, 128 N.W.2d 748, 750 (Minn. 1964). “[T]he district court must consider, and expressly find that a party satisfied all four of the *Finden* factors in order to

grant relief. . . . [The] holding that a party seeking relief from a judgment need not categorically establish all four of the [*Finden*] factors is not consistent with our precedent.” *Gams*, 884 N.W.2d at 619-20 (citation and quotations omitted). However, “[t]he relative weakness of one factor should be balanced against a strong showing on the other three.” *Valley View, Inc. v. Schutte*, 399 N.W.2d 182, 185 (Minn. App. 1987), *review denied* (Minn. Mar. 18, 1987); *see also Cole v. Wutzke*, 884 N.W.2d 634, 637 (Minn. 2016) (“Although some showings may be stronger than others, the moving party must establish all four requirements for relief to be warranted.” (citations omitted)).

Appellants argue that, because the district court found “that a reasonable claim on the merits exists,” that appellants “acted with due diligence following the second order of judgment,” and that “[s]ubstantial prejudice cannot be inferred merely from the fact of delay without any additional facts,” the first, third, and fourth factors were satisfied and should balance their “weak showing” on the second.

But the district court found *no* showing, not even a weak showing, of any reasonable excuse for appellants’ failure to answer the complaint, as was stated in the memorandum accompanying the denial of the motion to vacate.

[Appellants] argue that the [default] judgment is a surprise because [respondent] settled her bodily injury claims and pursued a UIM claim. [But appellants] had ample opportunity to respond to the complaint in this matter. . . . Only after a second order for judgment was entered, nearly five months after the initial filing [of the complaint], did [appellants] finally appear.²

² Because “[a] party need only be served with written notice of the application for a default judgment if it has appeared in the action,” *Howard v. Frondell*, 387 N.W.2d 205, 208

A favorable outcome for [respondent] should not come as a surprise. [Appellants] were served with the complaint, and therefore had notice of the action. . . . [Appellants'] apathy will not be construed against [respondent, who] gave notice of the lawsuit as required. [Appellants'] failure to respond because they mistakenly believed there was no need to, is not a reasonable excuse.

Based on the arguments and the record, the Court finds that the default judgment was not a surprise, and there is no reasonable excuse for [appellants'] failure to act. . . . [T]he second *Finden* factor is not satisfied.

This court has reversed the denial of a motion to vacate a default judgment because it concluded that the defaulting party's "weak showing on the reasonable excuse factor [was] outweighed by the other three factors and thus he ha[d] met the four part [*Finden*] test." *Valley View*, 399 N.W.2d at 186. But in *Valley View*, the defaulting party claimed he "had a reasonable excuse for failing to answer" because he "believed that settlement negotiations extended his time to answer and that [the opposing party] had expressly waived demand for a written answer." *Id.* at 185. He supported this with two letters from the opposing party's counsel, one saying that counsel had indicated he "was much more interested in a payment schedule than in obtaining a formal written answer" and the other asking the defaulting party's attorney, "Please advise if you are representing [the opposing party] with regard to the claim of my client." *Id.* Here, no evidence was presented before or at the hearing on the motion to vacate to indicate that appellants had a reasonable excuse, and they were not present to provide any evidence.³

(Minn. App. 1986), the fact that appellants were not notified of the motion for default judgment did not mitigate their failure to attend the hearing on that motion.

³ Their counsel's offer at the conclusion of the hearing "to go get some affidavits from my clients to let the Court know what it is that they were thinking" was too little, too late.

Appellants also rely on *Wiethoff v. Williams*, 413 N.W.2d 533, 536 (Minn. App. 1987) (holding that “[an] insurer’s negligence should not be imputed to the insured”) and on the fact that both the district court and opposing counsel agreed that appellants’ insurer was partly to blame: the district court stated in its memorandum that the insurer “may also be partly responsible for the situation created by [appellants’] inaction as [it] had an opportunity to disclose the additional insurance policy information to their client and failed to do so,” and respondent, in her memorandum opposing the motion to vacate, said that appellants’ insurer “held not ONE but TWO liability policies for the same event and did not disclose them. . . . [and] misled everyone in this case.” But “if a party himself is guilty of neglect, the neglect is inexcusable regardless of whether his [insurer] is also negligent. [A defaulting party] cannot invoke [an insurer’s] negligence, if any, as an excuse because he himself has provided no excuse for his failure to respond to the complaint.” *Wiethoff*, 413 N.W.2d at 536 (citations omitted). Because appellants were also negligent, they cannot use their insurer’s negligence as a “reasonable excuse.”

The district court did not abuse its discretion in denying appellants’ motion to vacate the default judgment against them, and we affirm the denial.

2. Damages Award

The total limit of appellants’ policies was \$1,050,000. At the conclusion of the default judgment hearing, at which there was no financial discussion, the district court asked respondent’s attorney to provide a special-verdict form. Respondent’s attorney did so, stating in the special-verdict form he submitted after the hearing that: (1) in the years following the accident, respondent’s medical expenses had been \$187,100.01; (2) her pain,

disability, and emotional distress during that period were \$300,000; (3) her future pain, disability, and emotional distress were also likely to be \$300,000; and (4) her “reasonably certain” future medical expenses would be \$275,000. The district court accepted respondent’s attorney’s estimates and, with no discussion or explanation, awarded respondent the entire \$1,062,100.01. We see no abuse of discretion in the awards for past medical expenses or for pain, disability, and emotional distress.

“There are two requirements in the award of future medical expenses. The first is whether future damages in the form of future medical treatments will be required. The second requirement is that . . . ‘the plaintiff must prove the reasonable certainty of such expenses by a fair preponderance of the evidence.’” *Lind v. Slowinski*, 450 N.W.2d 353, 358 (Minn. App. 1990) (quoting *Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. App. 1987)), (citation omitted), *review denied* (Minn. Feb. 21, 1990). Respondent’s attorney based his calculation of her future medical treatments and expenses on a two-page narrative report from her surgeon, R.K., and on various other sources, none of them specific to respondent. R.K., who has done multiple surgeries on respondent’s knee and shoulder, wrote that he was “unable to determine whether her current knee and shoulder difficulties will persist permanently or lead to further surgery.”

Respondent’s attorney concluded from an article in *Arthroplasty Today* that respondent would need two or three further total knee arthroplasties, each of which would last 15 to 20 years. Respondent is now 52 years old; only two arthroplasties, each lasting 15 years, would take her to age 82, while three would take her to age 97. Her attorney gave

no explanation for his view that “[a]t the likely cost and inflation over time,” medical expenses for her knee will be between \$50,000 and \$75,000.

Although respondent’s attorney said that respondent had made an “OK” recovery in her shoulder and that her future care “may not be surgical but may involve injection and physical therapy,” respondent testified, “there’s a chance [she] may need” future shoulder surgery. Her attorney did not mention the probable cost of her future shoulder treatment.

Respondent has recently begun to experience pain in her hip. She testified that R.K. “doesn’t do hips” and referred her to another doctor, who did not recommend surgery but gave her an injection. Respondent’s need for hip surgery is far from immediate; R.K. predicted that “[a]ssuming the arthritis progresses as it usually does, [respondent] will ultimately require hip replacement surgery, but not until the benefits of doing so outweigh the risks in her mind.” Respondent’s attorney read an article about hip replacement costs and concluded that respondent will require not only hip surgery but one or two “revisions of the surgical site,” which will cost between \$90,000 and \$135,000.

As to the costs incurred from treatment of respondent’s knee and hip, the district court adopted the maximum amounts in the ranges provided by her attorney, \$75,000 and \$135,000. As to her shoulder treatment, the district court awarded her the \$65,000 remaining in the \$275,000 her attorney requested as future medical expenses. Absent any explanation of how the preponderance of the evidence proved respondent’s future medical costs to a reasonable certainty, *see id.*, we cannot review this award. We therefore reverse

the award for future medical expenses and remand for the district court to provide the reasoning behind it.

Affirmed in part, reversed in part, and remanded.