SUPREME COURT NO.

90703-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CAMERON JONES

Plaintiffs/Respondents,

v.

HAPA UNITED, LLC

Defendant/Petitioner.

PETITIONER'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Hapa United, LLC (d/b/a Wave Island Grill and Sushi Bar), Petitioner, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

On June 10, 2014 the Court of Appeals filed a decision overturning the trial court's ruling setting aside a Default Order stating, "Because Wave does not establish a conclusive defense and does not show excusable mistake or inadvertence, it has not met its burden justifying vacation of the Default Order under CR 60(b)(1)." A copy of the decision is in the Appendix at pages A-1 through A-9.

This Court denied Petitioner's Motion for Reconsideration on August 7, 2014. A copy of the decision is in the Appendix at pages A-10.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals had jurisdiction when the appeal was improperly filed; since rulings vacating Default Orders are not appealable as a matter of right.

2. Whether the Court of Appeals' decision finding the trial court abused its discretion is contrary to well established case law that

decisions setting aside Default Orders are within the sound discretion of the trial court and cases should be decided on the merits.

3. Whether the Court of Appeals' ruling that Petitioner's actions amounted to inexcusable neglect is in conflict with other decisions by the Court of Appeals.

D. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Plaintiff filed a Summons and Complaint on August 27, 2012 and claims Jordan Troutt, the only officer of Hapa United, LLC, was personally served on July 19, 2012. (CP 1-7) However, Mr. Troutt does not remember being served the Summons and Complaint. (CP 85) Plaintiff has presented service of process paperwork with the name Jordan Troutt handwritten next to "Person Served." (CP 92) Mr. Troutt acknowledges that the handwriting is similar to his, although it is not his standard signature. (CP 123) However, the service of process paperwork does not refresh his recollection of being served, nor does he remember writing his name on the documents. (CP 124) Mr. Troutt signed a Declaration stating:

> I do acknowledge, though, that if I was served the Summons and Complaint I must have set aside the documents or forgot about them while I was tending to the bar and restaurant that evening. If so, it was a mistake on

> my part. I did work at the restaurant on the evening Plaintiff claims I was served and did not clock out until 2:00 a.m. I have a very busy restaurant business and if Plaintiff is correct that I was tending bar when I was served then I was most likely juggling many tasks at one time. My time tending to the bar and restaurant is very stressful and I usually have a lot on my mind between making sure customers are taken care of to ensuring that my staff is on task. I did not "choose to ignore" any papers that were served on me. On the contrary, I take this matter very seriously.

(CP 124).

An Order of Default was entered against Hapa United, LLC on October 4, 2012. (CP 11) Judgment was then entered in the amount of $350,000 against Hapa United, LLC on November 16, 2012. (CP 21)

On November 21, 2012 Mr. Troutt received a letter from Plaintiff's counsel indicating a Default Judgment had been entered against Hapa United, LLC. (CP 104) Mr. Troutt contacted Travelers Insurance Company who retained attorney William Spencer. (CP 84, CP 29) A Notice of Appearance was filed by Mr. Spencer on December 21, 2012. (CP 24) A Motion to Vacate Default Judgment was then filed within three (3) months, on March 18, 2013. (CP 67)

In its Motion to Vacate Default Judgment Defendant asked the court to set aside both the Default Order and the Default Judgment. (CP 67) In its moving papers, Defendant indicated it had had no time to

conduct formal discovery or develop any of its defenses prior to filing the Motion to Vacate Default Judgment. (CP 74) Defendant stated:

> At this point in time, Defendant knows of at least six (6) current and former employees of the Wave that were witnesses to the incident although Defendant has not been able to locate or contact all of them yet. Defendant also has names of other witnesses and individuals involved in the incident although Defendant has not yet been able to locate or contact all of them, as well. Further discovery is required.

(CP 29) It also wrote in its moving papers to the court, "If this court feels it requires more information on the facts of the incident than what has been provided, Defendant requests leave to provide further Declarations from witnesses." (CP 121)

The trial court heard Defendant's Motion to Vacate Default Judgment on April 12, 2013. (VP 1) In the Court's ruling it considered all the briefing by the parties, as well as argument of counsel, and made two rulings: it vacated the Judgment and, in addition, the Court specifically wrote in a separate line of the order, "The Default Order entered into on October 16, 2012 is also vacated." (CP 128) On May 6, 2013 Plaintiff filed a Notice of Appeal. (CP 129) On September 23, 2013 Plaintiff filed his opening brief indicating he was only appealing the trial court's ruling setting aside the Default Order. Plaintiff did not appeal the ruling vacating the Default Judgment.

2. ***SUBSTANTIVE FACTS***

The incident in this case stems from a chaotic evening inside and outside the Wave Island Grill and Sushi Bar (hereinafter "Wave") that involved employees of the Wave, over 20 patrons of the Wave and/or individuals outside the restaurant and various law enforcement personnel including police, fire and medics. (CP 86, CP 49-54, CP 106-07) Plaintiff claims to have been hit in the face during the incident. (CP 50)

At the time the Motion to Vacate Default Judgment was filed Plaintiff had never provided the name or physical description of the individual who assaulted him to Defendant or to the police. (CP 50, 120) It is not clear why Plaintiff believes it was a security guard from the Wave that hit him and Defendant has strongly contested that it was such a person. (CP 120) Jordan Troutt, in support of this position, filed a Declaration in the trial court indicating that no security guard from the Wave hit Plaintiff. (CP 86)

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS LACKED JURISDICTION TO HEAR THIS MATTER, BECAUSE THE APPEAL WAS IMPROPERLY FILED.

Rulings vacating Default Orders are not appealable as a matter of right; they are subject to the discretionary review of the court. RAP 2.2 & 2.3; *Gutz v. Johnson*, 128 Wash. App. 901, 910, 117 P.3d 390 (2005). In this case, Plaintiff failed to properly file its appeal of the trial court's ruling vacating the Default Order and the Court of Appeals failed to decide whether discretionary review should be accepted. Therefore, the decision by the Court of Appeals was in direct conflict with case law. RAP 13.4(b)(2) It also violated Petitioner's rights to due process since proper procedure was not followed in filing the appeal and the Court of Appeals did not have jurisdiction to hear the matter. RAP 13.4(b)(3). U.S. Const. Amend. V and XIV; Wash. Const. Art. 1 §3.

RAP 2.1(a) provides there are two methods for seeking review of a decision of the superior court by the Court of Appeals:

> (1) Review as a matter of right, called "appeal;" and
>
> (2) Review by permission of the reviewing court, called "discretionary review."

RAP 2.2 outlines which decision of the superior court may be appealed as a matter of right. RAP 2.2(a)(10) states: "An order granting or denying

Motion to Vacate a Judgment is appealable as a matter of right." (Emphasis added). However, rulings on Default Orders are not appealable as a matter of right according to RAP 2.2 and are subject to discretionary review according to Division II of the Court of Appeals in its ruling in *Gutz v. Johnson*, 128 Wash. App. 901, 910, 117 P.3d 390 (2005). In this case, Plaintiff made a decision not to appeal the trial court's ruling vacating the Default Judgment; he only appealed the trial court's ruling vacating the Default Order.

There is a reason that the Rules of Appellate Procedure have divided appeals into two categories; those as a matter of right and those based on discretionary review. The judgments, orders, and rulings listed in RAP 2.2 are all characterized by a measure of finality. 2A WAPRAC RAP 2.2. Those decisions that are not characterized by a measure of finality are subject to discretionary review. RAP 2.3.

The Rules of Appellate Procedure outline a strict process for the Court of Appeals to decide whether to accept discretionary review of a case under RAP 2.3. RAP 6.2(b) provides that: "The party seeking discretionary review must file in the Appellate Court a Motion for Discretionary Review within fifteen (15) days after filing the Notice for Discretionary Review." (Emphasis added). The Court of Appeals then

considers whether to accept review according to the four specific circumstances listed in RAP 2.3(b):

> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
>
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a department by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involved a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

In this case, Plaintiff did not file a Motion for Discretionary Review. In turn, the Court of Appeals did not consider whether to accept review of the trial court's ruling vacating the Default Order based on the four criteria outlined in RAP 2.3(b).

If Plaintiff had followed proper procedure and filed a Motion for Discretionary Review, the Court of Appeals would not have had tenable grounds for granting discretionary review. It would have been difficult for Plaintiff and the Court of Appeals to make out "probable error" within the

meaning of RAP 2.3(b)(2), let alone obvious error according to RAP 2.3(b)(1), when the decision of the superior court was reviewable only for abuse of discretion. *See In Re Matter of Lewis' Welfare*, 89 Wn.2d 113, 569 P.2d 1158 (1977). Moreover, there was no evidence the superior court departed from the accepted and usual course of judicial proceedings according to RAP 2.3(b)(3), since the decision to grant or deny a default is within the trial court's sound discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). RAP(b)(4) was inapplicable, since there was no certification or stipulation in this case.

2. ***THE COURT OF APPEALS' DECISION FINDING THE TRIAL COURT ABUSED ITS DISCRETION IS CONTRARY TO WELL ESTABLISHED CASE LAW.***

a. ***THE DECISION TO GRANT OR DENY A DEFAULT IS WITHIN THE TRIAL COURT'S SOUND DISCRETION.***

The policy of the courts is to set aside defaults liberally. *Hull v. Vining*, 17 Wash. 352, 360, 49 P. 537 (1897). The decision to grant or deny a default is within the trial court's sound discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). A trial court has "broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." *Id.* A trial court's decision, "is manifestly unreasonable if it is outside the range of acceptable choices."

Landstar Inway, Inc. v. Samrow, 325 P.3d 327, 335 (2014) (Emphasis added.).

In reviewing a Motion to Vacate, the Court's principle inquiry should be whether a default is just and equitable. *Little v. King*, 160 Wn.2d 696, 710-711, 161 P.3d 345 (2007). The inquiry is not a mechanical test. *Little*, 160 Wn.2d at 704. This system is flexible because what is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome. *Little*, 160 Wn.2d at 703. In this case, when looking at the unique set of facts and circumstances, the trial court applied justice and equitable principles in deciding to set aside the Default Order. The Court's decision was not outside the range of acceptable choices given to it in making a decision.

Under *Fowler v. Johnson*, 167 Wash. App. 596, 601, 273 P.3d 1042 (2012), "only if no other reasonable person could conclude the same," should the Court's decision be reversed. (Emphasis added.) It is unimaginable that no other reasonable person could conclude the same as Judge Eitzen did in the trial court by setting aside the Default Order in this case. Moreover, a reasonable person would not find that her choice was outside the range of acceptable choices. Therefore, the Court of Appeals'

decision reversing the trial court's decision setting aside the Default Order in this case was contrary to law. RAP 13.4(b)(2).

b. CASES SHOULD BE DECIDED ON THE MERITS.

The prevailing opinion in Washington State is that courts do not favor defaults. *See Calhoun v. Merritt,* 46 Wash. App. 616, 618-19, 731 P.2d 1094 (1986). Defaults are considered a drastic action and it is the policy of the law that controversies be determined on the merits rather than by default. *Griggs v. Averbeck Realty, Inc.,* 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (Emphasis added). The Court of Appeals' decision to reverse the trial court's ruling vacating the Default Order takes away Hapa United LLC's ability to have its liability defense heard on the merits. RAP 13.4(b)(1)&(2).

The Court of Appeals, in its opinion reversing the trial court, scrutinized the element of excusable neglect more closely since it believed Respondent did not present a conclusive defense. However, Respondent was never able to present a conclusive defense at the time it filed its Motion to Vacate Default Judgment. In its moving papers Respondent was frank with the court on this issue. It had no time to conduct formal discovery or develop any of its defenses prior to filing the Motion to

Vacate Default Judgment, including serving Interrogatories on Plaintiff or deposing Plaintiff.

At the time Defendant filed its Motion to Vacate Default Judgment it did not know who may have struck Plaintiff, but had no reason to believe it was a security guard of the Wave. Without a name and physical description of the assailant, Defendant was working in a vacuum. Plaintiff was the only person, other than potentially some unknown witnesses at the time, who could give a physical description of his assailant. Therefore, a true question of fact existed as to who actually struck Plaintiff at the time the Motion to Set Aside Default Judgment was filed.

This was not a simple incident that occurred; over 30 people were involved and it was a chaotic situation. Not only were there questions as to who the identity of the person was that hit Plaintiff, but there were also questions as to how the incident unfolded, whether it was an employee of the restaurant that hit Plaintiff, who and how many people were involved in the incident, what each person saw and why the incident occurred. There were a myriad of people to interview including persons not employed by the restaurant and persons not listed in the police report, in order to fully determine what occurred on the night in question. Defendant did not have all the witness names or contact information at the time it

filed its Motion to Vacate Default Judgment. Defendant also did not have sole access to witnesses, because those witnesses were not just employees of the restaurant, but several dozen patrons and people on the street as well as police, fire and medic personnel.

Hapa United, LLC should have the opportunity to conduct further discovery and have its liability defense heard on the merits in order to have a just and equitable outcome in this case.

3. ***THE DECISION BY THE COURT OF APPEALS THAT PETITIONER'S ACTIONS AMOUNTED TO INEXCUSABLE NEGLECT IS IN CONFLICT WITH OTHER DECISIONS BY THE COURT OF APPEALS.***

The decision by the Court of Appeals that Hapa United LLC's actions were inexcusable neglect is in conflict with other Court of Appeals cases. RAP 13.4(b)(2) While it is true that Mr. Troutt is a local downtown Spokane business owner, he is young, inexperienced and this was the first business he had owned that had been sued. His restaurant was not a sophisticated business operation such as the big corporations, insurance companies or law firms in other cases decided by the Court of Appeals.

In *TMT v. Bear Creek Shopping Center, Inc. v. PETCO Animal Supplies, Inc.*, 140 Wash. App. 191, 165 P.3d 1271 (2007), relied upon by the Court of Appeals, a landlord obtained a Default Judgment against its

tenant PETCO. PETCO filed a Motion to Vacate the Default Judgment, which was denied. *Id.* The Court of Appeals affirmed the trial court's ruling stating that PETCO's failure to appear was not due to excusable neglect. *Id.* The *TMT* case is distinguishable.

In *TMT*, the landlord served the Summons and Complaint on PETCO'S registered agent in Washington, who forwarded the documents to PETCO's general counsel's office. 140 Wash. App. at 197-98. A legal assistant in the office of PETCO's general counsel who received the documents did not enter the information regarding the Summons and Complaint into the general counsel's calendaring system nor did she notify general counsel of the documents. 140 Wash. App at 198. There was a further breakdown in procedure with regard to other employees, as well. *Id.* The court determined that PETCO's neglect was due to a breakdown in internal office management and procedure involving more than a single omission and was, therefore, inexcusable. 140 Wash. App. at 212-213.

PETCO is a large corporation and their general counsel specializes in legal matters including the filing and service of lawsuits. In this case, Mr. Troutt is not a large corporation or a law firm; he is a young man who runs a local restaurant and was being sued for the first time. The one omission on his part was a mistake; he set aside and/or lost documents that

he does not remember being served. In contrast, the court in *TMT* determined the general counsel's office made many mistakes and there was a breakdown in the system of the office as a whole.

The *Prest v. American Bankers Life Assurance Company*, 29 Wash. App. 93, 900 P.2d 595 (1995) case relied upon by the Court of Appeals is also distinguishable. In that case a default was entered against a large insurance company. *Id.* Service of the Summons and Complaint was on the Office of the Washington Insurance Commissioner. 29 Wash. App. at 95. It was then forwarded to Dennis DiMaggio who was general counsel for the insurance company. *Id.* The insurance company failed to appear or respond. *Id.* It argued that Mr. DiMaggio had been assigned to a new position prior to service being made on it and that Mr. DiMaggio's duties did not include handling of legal matters or defense of lawsuits anymore. 29 Wash. App. at 96. Mr. DiMaggio had also been on vacation when served. *Id.* In determining the insurance company's actions were not excusable, the court reasoned it is an important part of the business of an insurance company to respond to legal process that is served upon it and that it had failed in several regards. 29 Wash. App. at 100.

American Bankers Life Assurance Company was a sophisticated business and their counsel hired to handle service of process matters

specialized in legal matters as did PETCO's counsel in the *TMT* case. As in *TMT*, there was also a systemic failure in the system and not one isolated mistake. In our case, as has been previously pointed out, the individual being served papers was not a sophisticated or experienced individual in these matters; he was a young man who had never been sued before and made one mistake.

The case of *Boss Logger, Inc. v. Aetna Casualty & Surety Company*, 93 Wash. App. 682, 970 P.2d 755 (1999), which the Court of Appeals did not rely upon, is illustrative. In *Boss Logger, Inc.* a large insurance company was sued and did not respond to the Summons and Complaint. 93 Wash. App. at 684. The court set aside the default even though it was determined that the correct person did receive the papers, but they were lost. 93 Wash. App. at 689. The court reasoned that:

> Unlike the insurer in *Prest*, Aetna's failure to respond was not a systemic failure which would prevent all litigants from achieving actual notice to the insurer...The system itself was not flawed, but someone in the process lost the papers. The trial court's determination that this was a mistake, and not inexcusable neglect, was therefore not an abuse of discretion.

Id. (Emphasis added).

Similarly, in our case, there was not a systemic failure at the Wave restaurant. Instead, one individual mislaid or lost the paperwork that was

served upon him, which was a mistake.

Finally, the case of *Brooks v. University City, Inc.*, 154 Wash. App. 474, 225 P.3d 489 (2010) relied upon by the Court of Appeals is distinguishable, as well. In *Brooks* the plaintiff sued ICT Group, Inc., which is a large corporation that runs a multinational call center. *Id.* In determining there was inexcusable neglect, the court's focus was on the fact it took two years for the corporation to enter a Notice of Appearance after it was served the Summons. 154 Wash. App. at 479. In our case, the timing of the Notice of Appearance or Motion to Vacate Default Judgment were not at issue.

As the court in *Estate of Meyers v. US*, 842 F. Sup. 1297 (E.D. Wash., 199) so eloquently stated:

> The court prefers to dispose of cases on their merits. In this case default judgment as a sanction for a single failure to adhere to a court deadline would [in itself] be an abuse of discretion.

(Emphasis added).

In our case, a young and inexperienced small business owner made one mistake by not remembering he was served papers and/or setting them aside. It is unbelievable that "no other reasonable person could conclude" that a 27 year old man who was very busy on the night he was served made a mistake and set aside the documents and forgot about them. In

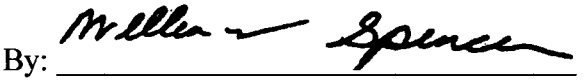
hearing evidence from Mr. Troutt about the circumstances of service of papers on him the trial court made a discretionary ruling it believed was just and equitable.

F. ***CONCLUSION***

Petitioner asks the Supreme Court to overturn the decision of the Court of Appeals and remand this case back to the trial court so that this case may be heard on its merits.

Respectfully submitted this 4th day of September, 2014.

MURRAY DUNHAM & MURRAY

By: 

William Spencer, WSBA #9592
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Tammy Bolte, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 4th day of September, 2014, I caused a true and correct copy of Petitioner's Petition for Review to be filed with the Washington State Supreme Court via Federal Express.

Copies were also emailed (via agreement of counsel) and sent via federal express to:

Plaintiff's Attorney
Mr. Breean L. Beggs
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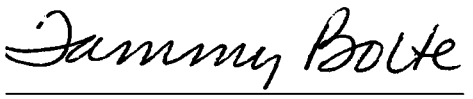

Tammy Bolte, Declarant

APPENDICES

1. Unpublished Opinion – dated June 10, 2014 – pgs. A1-9

2. Order Denying Motion for Reconsideration - dated August 7, 2014 – pg. A-10

FILED
JUNE 10, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CAMERON JONES, a single man, Appellant, v. HAPA UNITED LLC, a Washington Limited Liability Company, doing business as Wave Island Grill and Sushi Bar, Respondent.	)	No. 31647-5-III UNPUBLISHED OPINION

BROWN, J. — Cameron Jones appeals the trial court's decision to vacate a liability default order against Hapa United, LLC d/b/a Wave Island Grill and Sushi Bar (Wave) concerning personal injuries Mr. Jones alleges occurred in a bar fight at the hand of Wave's employee. The trial court, without discussing Wave's potential defense, reasoned the bartender served with the summons and complaint inadvertently and mistakenly ignored them. Mr. Jones contends Wave did not present a strong or virtually conclusive defense and its failure to appear was willful. We decide the trial court abused its discretion when vacating the default and reverse.

FACTS

During the late hours of September 28, 2011, Mr. Jones was at Wave, a restaurant and nightclub in downtown Spokane. Mr. Jones claims he was struck in the face by one of the club's security guards with a club, and consequently he suffered a fractured jaw.

On February 13, 2012, counsel for Mr. Jones sent a letter to Noel Macagapal, who he thought was Wave's owner. The letter was sent to Mr. Macagapal at Wave's physical address. The letter requested that the matter be turned over to Wave's insurance carrier or, if no response was received by the end of the month, a lawsuit would be filed. Mr. Macapagal responded to the letter on February 20, 2012 via e-mail stating that he no longer was associated with Wave and correspondence needed to be directed to Hapa United at the same address. That same day, counsel sent a letter to Hapa United at Wave's physical address. The letter dated February 20 indicated Mr. Jones was represented by counsel, requested that Hapa United turn Mr. Jones' claim over to their liability carrier, and that a lawsuit would be filed if there was no response by the end of the month. Mr. Jones' attorney made several calls to the establishment to no avail.

Mr. Jones retained Eastern Washington Attorney Services to serve his summons and complaint on Hapa United though its registered agent Jordan Troutt. After 18 attempts to serve Mr. Troutt, service was finally perfected on Thursday, July 19, 2012 at 5:18 p.m. The process server personally handed Mr. Troutt a copy of the pleadings.

Mr. Troutt was bartending at the time of service, but signed a document confirming he received the summons and complaint. Mr. Troutt was 27 years old and had never been involved in a lawsuit involving a restaurant. Wave did not respond. Mr. Troutt later claimed he had not been served until shown his signature on the service papers.

On October 4, 2012, the court signed an order of default. And, on November 16, 2012, the court entered a judgment in favor of Mr. Jones for $350,000.

On November 21, 2012, counsel for Mr. Jones sent a letter to Mr. Troutt, notifying him that a judgment had been entered against Wave and that collections would commence. Wave retained counsel and responded with a motion to vacate the default order and judgment under CR 60(b). The motion alleged Wave's nonresponse was due to Mr. Troutt not remembering he had been served. In support, Wave submitted police reports, characterizing the incident as chaotic and reporting that a witness observed the bouncer strike a man in the face (apparently referring to Mr. Jones' friend). Mr. Jones stated to police that he was hit by the bouncer and "the bouncer hit him because the bouncer thought [Mr. Jones] was going to jump the guy who was running away." Clerk's Papers (CP) at 50. Mr. Jones claims he was trying to follow his friend down the street.

Without discussing whether Wave presented a conclusive defense, the court granted Wave's motion to vacate, stating, "This is your lucky day, all right? Because here is what I think happened. You thought it was going to go away and you were going to ignore it. You're real busy. Maybe you forgot about it, whatever, but you didn't really get it that this was serious business. And now we have your attention." Report of

Proceedings (RP) at 17. The court concluded, "but I don't think, when you get to the bottom line, [denying the motion to vacate is] doing justice. So I'm going out on a limb . . . . I'm going to say it was inadvertence, mistake on your part." RP at 17. The court did not rule or discuss whether Wave established a prima facie defense.

Mr. Jones appeals solely the vacation of the liability default order and does not challenge the trial court's vacation of the default judgment.

ANALYSIS

The issue on appeal is whether the trial court erred by abusing its discretion in granting Wave's motion to vacate under CR 60(b)(1).

Generally, we review for abuse of discretion a superior court's ruling on a motion to vacate a default order under CR 60(b)(1). *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 199, 165 P.3d 1271 (2007).

Strong policy disfavors default judgments because the law favors determination of controversies on their merits. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979). This policy, however, must be balanced against the "necessity of having a responsive and responsible system which mandates compliance with judicial summons." *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 237-38, 974 P.2d 1275 (1999).

Grounds for vacating a default judgment under CR 60(b)(1) include mistake, inadvertence, surprise, and excusable neglect. Typically, this court evaluates a motion to vacate under CR 60(b)(1) under the following four factors: (1) substantial evidence supports a prima facie defense to the claims asserted; (2) the moving party's failure to appear timely was occasioned by mistake, inadvertence, surprise, or excusable neglect; (3) the moving party acted with due diligence after notice of entry of default; and (4) no substantial hardship will result to the opposing party. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). "The first two factors are primary." *Luckett v. Boeing Co.*, 98 Wn. App. 307, 314, 989 P.2d 1144 (1999). The burden is on the moving party, in this case Wave, to demonstrate that the *White* factors are satisfied. *Id.* At issue here are factors one, two, and four.[1]

"To establish a prima facie defense, affidavits supporting motions to vacate default judgments must set out the facts constituting a defense and cannot merely state allegations and conclusions." *Shepard Ambulance*, 95 Wn. App. at 239. Here, Wave submitted with its motion to vacate police reports from the night in question. The reports show the incident was chaotic with several individuals fighting. A witness reported she was waiting in line at Wave and observed one of the club's bouncer's strike a man. The report indicates Mr. Jones told a responding officer a bouncer hit him

[1] While the trial court based its decision solely on factor two, the parties raised, briefed and argued all factors below; thus, consideration of the three factors raised here is appropriate. *See Graham Neighborhood Ass'n v. F.G. Assocs.*, 162 Wn. App. 98, 111, 252 P.3d 898 (2011) (appellate courts have discretion to decide an issue raised by party below but not addressed by trial court).

and he thought it was "because the bouncer thought [Mr. Jones] was going to jump the guy who was running away." CP at 50. Under RCW 9A.16.020(3), the use, attempt, or offer to use force is lawful if, "used by a party about to be injured, or by another lawfully aiding him or her." Defense of others would, therefore, negate negligence. While Wave does not present a conclusive defense, it provides a prima facie defense sufficient to carry the issue of liability forward. *White*, 73 Wn.2d at 352-53.

Next, regarding mistake or inadvertence, when the moving party does not have a virtually conclusive defense, the reason for the party's delay is also a primary factor to be weighed by the trial court. *White*, 73 Wn.2d at 353-54. Whether a party's failure to appear constitutes excusable neglect depends on the case facts. *Griggs*, 92 Wn.2d at 582. The moving party must show his or her failure to timely appear and respond was due to mistake, inadvertence, surprise, or excusable neglect. CR 60(b)(1).

In *White*, the plaintiff's complaint alleged Mr. Holm was negligent when he ran into her on foot outside his business, causing her to fall and break her leg. *White*, 73 Wn.2d at 349. Defendant Holm first heard about the suit in a radio newscast and immediately consulted his insurance agent, an insurance adjuster, and a separate attorney. As a result of these conversations, and an agreement the adjuster had Mr. Holm sign, Mr. Holm believed "although coverage was questioned, his insurance carrier would provide legal counsel." *Id.* at 349. Once he was served, Mr. Holm sent the papers to the insurance adjuster, who forwarded them to the insurance carrier with a statement that Mr. Holm would be represented by his own attorney until coverage was

determined. "Because of this misunderstanding as to who would provide interim legal counsel," Mr. Holm failed to timely appear or answer. *Id.* at 350. Our Supreme Court found this was an excusable mistake. *Id.* at 355.

Similarly, in *Calhoun v. Merritt*, 46 Wn. App. 616, 618, 731 P.2d 1094 (1986), the defendant did not answer the summons and complaint because he believed his insurer was already involved in the case. And, in *Berger v. Dishman Dodge, Inc.*, 50 Wn. App. 309, 748 P.2d 241 (1987), the defendant did not appear because the insurance company's claims manager sent the wrong case file to the assigned law firm. Although this mistake was not discovered until after entry of the default judgment, it was held that the trial court properly vacated the default judgment because the "insured had no reason to believe that his interests were not being protected after promptly forwarding the documents to the insurer." *Id.* at 312. The courts found the oversights excusable.

Here, Mr. Troutt received communication that a lawsuit was forthcoming. He was served with a summons and complaint (after 18 attempts) and provided a signed acknowledgement that he received the documents. He, then, did nothing. No evidence shows he contacted Wave's insurance carrier or an attorney as in *White*, *Calhoun*, or *Berger*. Initially, Mr. Troutt denied service but later conceded his signature was on the service documents. To justify his lack of action, Mr. Troutt maintains he forgot because he was exceptionally busy tending bar on a Thursday afternoon.

This case is analogous to *Brooks v. University City, Inc.*, 154 Wn. App. 474, 225 P.3d 489 (2010). There, the defendant was served with a summons and negligence

complaint, but the defendant did not respond. After a default judgment was entered, the trial court denied the defendant's request to vacate, finding the defendant's agent "got it, sat on it, didn't do anything." *Brooks*, 154 Wn. App. at 479. This court affirmed, holding "The trial court, then, had tenable reasons to conclude that [the defendant] failed to show excusable neglect." *Id.* at 479-80. Similarly, in *TMT Bear Creek*, Division One of this court held a breakdown in the internal office management and procedure does not constitute excusable neglect justifying failure to respond to a properly served summons and complaint. 140 Wn. App. at 212-13. Lastly, Division Two of this court held in *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 99-100, 900 P.2d 595 (1995) that a defendant's non-response was unexcusable when the summons and complaint were "mislaid" and not "forward[ed] . . . to the proper personnel."

While the trial court in this case has considerable discretion and showed compassion for Wave's predicament, compassion alone does not offset Wave's complete lack of response to service. In other words, the trial court's decision to vacate the default order lacks tenable grounds or reasons to justify a complete non-response to a properly served summons and complaint. Balancing the policy favoring the determination of controversies on their merits and the necessity of having a responsive system that mandates compliance with judicial summons, we conclude Wave's explanations do not amount to excusable neglect.

Because Wave does not establish a conclusive defense and does not show excusable mistake or inadvertence, it has not met its burden justifying vacation of the

default order under CR 60(b)(1). Accordingly, the trial court erred in vacating the order.

Reversed.

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.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

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COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

CAMERON JONES, a single man, Appellant, v. HAPA UNITED LLC, a Washington Limited Liability Company, doing business as Wave Island Grill and Sushi Bar, Respondent.	)	No. 31647-5-III ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER DENYING MOTION TO PRESENT ADDITIONAL EVIDENCE

THE COURT has considered respondent's motion for reconsideration of this court's decision of June 10, 2014, and motion to present additional evidence filed July 7, 2014, and having reviewed the records and files herein, is of the opinion the motions should be denied. Therefore,

IT IS ORDERED, the motions are denied.

DATED: August 7, 2014

PANEL: Jj. Brown, Siddoway, Lawrence-Berrey

FOR THE COURT:

Laurel H. Siddoway, CJ

LAUREL H. SIDDOWAY
CHIEF JUDGE

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