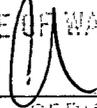


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NO. 49138-9-II

STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Galaxy Theatres, LLC,

Appellant,

v.

Gregorio Garza and Lizbeth Garza,

Respondents.

Brief of Appellant Galaxy Theatres, LLC

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Galaxy Theatres motion to vacate under CR 60(b)(11).

2. The trial court erred when it determined that the Garzas presented sufficient evidence, prior to the entry of the default judgment, to support every essential element of their claim.

3. The trial court erred when it determined that Galaxy Theatres was barred by the doctrine of judicial estoppel from seeking to vacate the judgment.

4. The trial court erred when it failed to grant Galaxy Theatres motion to vacate on the basis of unavoidable casualty or misfortune when Galaxy Theatres presented un rebutted expert testimony that that there was a failure in the email system not attributable to Galaxy Theatres.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The complaint alleges the plaintiff was injured at a movie theatre. The complaint states the defendant is a “company doing business” at the street address of the theatre using a business name that is similar to but not the same as the defendant. Is this allegation enough to establish that the defendant owed a duty to the plaintiff under a premises liability theory? (Assignments of Error 1 and 2)

2. On the plaintiffs' motion for entry of a default judgment, the complaint contains an allegation that the defendant "owed a duty to Plaintiff" Is this allegation a legal conclusion insufficient to establish that the defendant exercised the requisite control over the premises to create a duty owed to a person attending a movie in the theatre? (Assignments of Error 1 and 2)

3. To obtain a default judgment, the attorney for the plaintiffs testified that her clients were told (by a person they believed was the theater manager) the name of the insurance company that would be adjusting the claim. The attorney further testified that she had communicated with the same insurance company. Is this testimony by the attorney insufficient to establish that the defendant exercised the requisite control over the premises to create a duty owed to a person attending a movie in the theatre? (Assignments of Error 1 and 2)

4. On a motion to set aside the damages award of a default, if the defendant presents only evidence of a defense to damages and represents to the court at oral argument that the defendant is not presenting evidence of a defense to liability, is the defendant estopped from bringing a later motion to vacate on the basis that the plaintiffs failed to prove each element of their prima facie case including liability? (Assignment of Error 3)

5. Defendant's registered agent was served with the summons and complaint. Defendant did not receive the summons and complaint which the registered agent transmitted by email. Defendant's computer expert investigated and gave the un rebutted opinion that the email failed to reach the defendant's email server through no fault of the defendant. Does this set of facts constitute unavoidable casualty or misfortune under CR 60(b)(9)? (Assignment of Error 4)

III. STATEMENT OF THE CASE

Mr. Garza alleges he was injured after falling at the Galaxy Uptown Movie Theatres in Gig Harbor, Washington.¹ Galaxy Uptown Movie Theatres is not the name of a business entity. The retail complex where the theater is located is owned by Gateway Capital, LLC. Galaxy Gig Harbor, LLC leases the space from Gateway.²

Between July and January 2012, Channing Robinson of Gallagher Basset (a third party claims administrator) sent three letters to the Garza's

¹ CP 2. Plaintiffs' Complaint for Personal Injuries and Damages ("Plaintiffs' Complaint") at ¶¶ 8-9.

² CP 505. Memorandum of Lease between Gateway Capital, LLC (the landlord) and Galaxy Gig Harbor, LLC (the tenant).

attorney, Danica Morgan, seeking information regarding Mr. Gaza's claim.³

In response to Mr. Robinson's last letter, Ms. Morgan stated a demand was being prepared. A year and a half later, Ms. Morgan alleges she sent a demand package to Mr. Robinson. Ms. Morgan claims she made two follow-up phone calls to Mr. Robinson in September and October of 2014 and left him voice mails.⁴ Mr. Robinson denies that he ever received the demand package or any voice mails.⁵

The Garzas filed suit and named Galaxy Theatres LLC ("Galaxy Theatres") as the defendant. The Complaint did not name or mention the tenant Galaxy Gig Harbor, LLC. The Complaint did not explain Galaxy Theatres' relationship to the operation of the movie theater other than to say it "did business" at that address.⁶

According to the declaration of service, the Complaint was served on Galaxy Theatres' registered agent, Fairchild Record Search, Ltd.

³ CP 159. Declaration of Channing Robinson in Support of Defendant's Motion to Set Aside Amount of Damages ("Robinson Decl.") at ¶¶ 4-6.

⁴ CP 194. Declaration of Danica Morgan in Support of Plaintiff's Opposition to Defendant's Motion to Set Aside Amount of Damages ("Morgan Decl.") at ¶ 7-10.

⁵ CP 159 – 160. Robinson Decl. at ¶¶ 6-8.

⁶ CP 2.

(“Fairchild”), on December 2, 2014.⁷ Fairchild alleges Jacob Williams emailed the complaint to Pam Bush at Galaxy Theatres on December 2, 2014. However, Ms. Bush did not receive the complaint from Fairchild Records.⁸ Similarly, Ms. Morgan claims that she mailed Mr. Robinson a courtesy copy of the summons and complaint on December 5, 2014.⁹ Mr. Robinson denies receiving it.¹⁰

Jeff Alkazian of Alkazian & Associates, an outside information technology consultant, searched Galaxy Theatres’ primary and secondary mail servers for any email dated December 2, 2014 containing the text “Jacob” or “Williams” or any email from Fairchild’s email domain name. This search included archive files, files in Outlook’s spam filter, and any files still stored in the “Trash” folder. This search did not turn up the email Mr. Williams’ is alleged to have sent. Further, Mr. Alkazian found no indication that Ms. Bush deleted the email from the “Trash” folder. Rather, Ms. Bush’s trash folder contained numerous emails dated December 2, 2014, and thousands of emails dated earlier than December 2, 2014, indicating Ms. Bush did not delete the alleged December 2, 2014

⁷ CP 7.

⁸ CP 546 – 547. Declaration of Pamela Bush in Support of Defendant’s Motion to Vacate (“Bush Decl.”) at ¶¶ 2-3.

⁹ CP 195. Morgan Decl. at ¶ 14.

email. It is Mr. Alkazian's opinion that Galaxy Theatres' email system never received the alleged email containing the summons and complaint.¹¹

The Garzas obtained an order of default on January 13, 2015.¹² A month and half later, the Garzas asked the trial court for a hearing to set the amount of damages and to enter judgment.¹³ A hearing was held before the Honorable Ronald E. Culpepper who considered the complaint, documents submitted by counsel and heard the testimony offered by the Garzas and their attorney, Ms. Morgan.¹⁴ Galaxy Theatres was not notified of the hearing and accordingly no representative of Galaxy Theatres appeared to oppose the entry of judgment or the amount of damages awarded. Based on the evidence presented, Judge Culpepper entered a Default Judgment on March 13, 2015 in the amount of \$711,268.72.

¹⁰ CP 159 – 160. Robinson Decl. at ¶¶ 6-8.

¹¹ CP 536 – 541. Declaration of Jeff Alkazian in Support of Defendant's Motion to Vacate ("Alkazian Decl.") at ¶¶ 3-11.

¹² CP 28.

¹³ CP 30.

¹⁴ CP 512.

Ms. Morgan waited until a year had passed after the entry of the judgment and then initiated the collection process by sending a letter demanding payment to Mr. Robinson.¹⁵

On May 25, 2016, counsel for Galaxy Theatres, Ms. Leslie Fleming, filed a motion to set aside the damage award portion of the default judgment.¹⁶ The Garzas responded that the motion was barred by the one year time limitation for motions brought under CR 60(b)(1).¹⁷ In reply and at oral argument, Ms. Fleming argued that the motion was proper because she was only seeking to have the amount of damages set aside and that the amount of damages was excessive. Judge Culpepper ruled that the motion was time barred and that the damage award was proper.¹⁸ Galaxy Theatres timely appealed the trial court's order.¹⁹

Two months later, Galaxy Theatres filed a motion to vacate the entire judgment.²⁰ Galaxy Theatres moved under CR 60(b)(11) on the basis that the Garzas had failed to present sufficient factual evidence to support the legal conclusion that Galaxy Theatres owed the Garzas a duty,

¹⁵ CP 172.

¹⁶ CP 84.

¹⁷ CP 176.

¹⁸ CP 485, VRP (June 3, 2016 28:17 – 29:21).

¹⁹ CP 487.

an indispensable element of the claim.²¹ In the alternative, Galaxy Theatres argued the judgment should be vacated under CR 60(b)(9) because of the failure of an internet email system to deliver notice of the summons and complaint to Galaxy Theatres from its registered agent.²²

The trial court denied Galaxy Theatres motion to vacate the judgment. The court ruled that Ms. Flemings prior argument was a concession of liability which estopped Galaxy Theatres from seeking to vacate the judgment and ruled that the Garzas had met their evidentiary burden justifying the entry of the default judgment. The court did not comment on the argument regarding the failure of the email system and denied the motion to vacate.²³ Galaxy Theatres timely appealed and both appeals have been consolidated.

IV. SUMMARY OF ARGUMENT

The similarity of names between the defendant Galaxy Theatres, LLC and the business “Galaxy Uptown Movie Theatres” (in the complaint ¶ 4)²⁴ does not by itself establish that Galaxy Theatres, LLC is the correct

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²¹ CP 548.

²² CP 548.

²³ CP 643.

²⁴ CP 2.

defendant. In order to prove their claim for negligence, the Garzas were required to present facts which would establish that Galaxy Theatres owed them a duty of care. In a premises liability case, the person who owes a duty of care is the person who controls the premises. That person may be the title owner of the property (in this case Gateway Capital, LLC) or may be the person who has a leasehold interest in the property (in this case Galaxy Gig Harbor, LLC) or may be an entirely different person. The determinative issue is control. In their complaint and at the hearing to set the amount of damages, the Garzas failed to present facts, let alone evidence, to show the defendant they chose to sue, Galaxy Theatres, exercised sufficient control over the premises to give rise to a duty of care. The trial court should not have entered the default judgment and it was an abuse of discretion for the trial court not to vacate the default judgment when Galaxy Theatres moved to do so. The Court of Appeals should reverse the trial court, vacate the default judgment and remand the case to the trial court for further proceedings.

V. ARGUMENT

A. Standard of Review

“Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.” *Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wn. App.

366, 370, 203 P.3d 1069 (2009). A trial court's decision not to set aside a default judgment under CR 60(b) is reviewed for abuse of discretion. *Caouette v. Martinez*, 77 Wn. App. 69, 78, 856 P.2d 725 (1993). However, given the policy preference for resolution of cases on the merits, a decision not to set aside a default judgment is subject to a higher level of scrutiny than a court's decision to set aside a default judgment. *Morris*, 149 Wn. App. at 370; *see also, Topliff v. Chicago Ins., Co.*, 130 Wn. App. 301, 305, 122 P.3d 922 (2005). In determining whether the trial court has abused its discretion, the focus of the Court of Appeals is whether the default judgment is just and equitable considering the unique facts and circumstances of the case. *Morris*, 149 Wn. App. at 370.

“Discretion is abused if it is exercised without tenable grounds or reasons.” *Morris*, 149 Wn. App. at 370. “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362, 1366 (1997)

B. The Default Judgment Should Be Vacated Under CR 60(b)(11) because the Garzas Failed to Present Facts Necessary to Establish Control a Required Element of Their Claim.

The trial court's decision was based on untenable grounds because the facts presented by the Garzas in support of their default were not sufficient to establish that Galaxy Theatres controlled the premises where Mr. Garza was injured. Without sufficient facts to demonstrate control, the Garzas failed to establish an essential element of their claim and the default judgment against Galaxy Theatres should have been vacated.

"If a judgment by default has been entered, [a court] may set aside [the judgment] in accordance with rule 60(b)." *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007) (citing CR 55(c)(1)). CR 60(b)(11) allows a judgment to be vacated for "[a]ny other reason justifying relief from the operation of the judgment."

Under CR 60(b)(11) a default order and judgment based upon incomplete, incorrect, or conclusory factual information must be vacated. *Caouette*, 71 Wn. App. at 78. At a minimum, a party seeking a default judgment is required to set forth facts supporting each element of the claim. *Friebe v. Supancheck*, 98 Wn. App. 260, 268, 992 P.2d 1014 (1999).

Consequently, equity requires that prior to entering a default judgment, the trial court must assess the sufficiency of the complaint.

Kaye v. Lowe's HIW, Inc., 158 Wn. App. 320, 330, 242 P.3d 27 (2010).

[T]he plaintiff is not automatically entitled to a default judgment simply because the defendant in default has effectively admitted the plaintiff's allegations. A default is not an absolute confession by the defendant of his liability and of the plaintiff's right to recover, but is instead merely an admission of the facts cited in the Complaint, which by themselves may or may not be sufficient to establish a defendant's liability.

Kaye, 158 Wn. App. at 326 (internal quotations omitted). In deciding whether to enter a judgment, the trial court must "consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." *Kaye*, 158 Wn. App. at 326. Established case law from this division requires vacation of the default judgment in this case because the Garzas failed to present evidence establishing an essential element of their claim.

In *Caouette*, the plaintiff was injured when the car she was in was struck by a pickup truck. The plaintiff sued the driver of the truck (Augustine), and the alleged owner of the truck (Angelico), claiming Angelico negligently entrusted the truck to the Augustine. The plaintiff's complaint specifically stated that the pickup truck was: "operated by the defendant Augustine Martinez, and . . . was negligently entrusted and

provided to him and owned by, or co-owned with Defendant Angelico Martinez.” Neither Augustine nor Angelico appeared and a default judgment was entered. Augustine and Angelico moved to vacate the judgment under CR 60(b)(11), arguing that the plaintiff failed to present evidence establishing Angelico negligently entrusted the truck to Augustine or that Angelico owned the truck. The trial court vacated the judgment, finding that, despite the allegations in the plaintiff’s complaint, it was inequitable to enter a judgment against Angelico because there was “no factual basis upon which the trial court could have determined the relationship between Augustine and Angelico Martinez or who owned the vehicle that struck” the plaintiff. *Caouette*, 71 Wn. App. at 78 (underline added).

On appeal, this division of the court of appeals agreed. The court observed that in order to prevail on a negligent entrustment theory, the plaintiff must show that the vehicle owner “knew, or should have known in the exercise of ordinary care, that the person to whom the vehicle was entrusted is reckless, heedless, or incompetent.” However, “[n]owhere in the materials that [the plaintiff] submitted in support of her judgment did she set forth facts that would support a finding that [owner of the truck] negligently entrusted the pickup to [the driver]” or that the defendant owned the truck. *Id.* at 78. The plaintiff argued that she could rely on the

unanswered allegations in her complaint. The court of appeals expressly disagreed, noting “[i]t would be inequitable to allow the judgment to stand on a mere allegation that there was negligent entrustment of the pickup truck, particularly where, as here, the plaintiff submitted an affidavit in support of the judgment that failed to support the allegation in the complaint.” *Id.* at 79 (underline added).

Similarly, in *Kaye* the plaintiff was a pedestrian who was struck by a pickup truck in the parking lot of a hardware store. Among others, the plaintiff sued the alleged owner of the truck and the truck owner’s landscaping business alleging the owner and the owner’s business were “negligent in entrusting the vehicle to [the driver]. It further alleges that— ‘[a]t all times relevant hereto’—[the driver] was an agent of [truck owner] and [owner’s business] who was ‘acting within the scope of authority of the agency’ and for the benefit of [truck owner] and [owner’s business].” *Kaye*, 158 Wn. App. at 323. The truck owner and the owner’s business did not appear at trial and the trial court entered an order of default against them. The trial court refused to enter a default judgment against the alleged truck owner and the owner’s business on the injured parties’ theories of negligent entrustment and respondeat superior liability. On appeal, the court affirmed. The court explained that it was proper to deny the entry of a default judgment on the negligent entrustment claim because

the plaintiff failed to present facts showing the owner knew about the driver's history of poor driving. Further, the court explained that the allegations in the complaint related to the respondeat superior claim were legal conclusions "not deemed admitted by the defendants in default." *Kaye*, 158 Wn. App. at 333-334. The allegations were not facts sufficient to support the required elements of the claim that the driver was an employee of the owner or the owner's business or that the driver was acting within the scope of employment at the time of the accident. *Kaye*, 158 Wn. App. at 334-335. As in *Caouette* and *Kaye*, the Garzas failed to present sufficient factual evidence to establish Galaxy Theatres owed the Garzas a duty.

1. The Garzas were required to set forth facts establishing Galaxy Theatres LLC controlled the premises.

To establish an actionable claim for negligence, a plaintiff must show that (1) the defendant had a duty to conform to a particular standard of conduct; (2) the defendant breached that duty; (3) the plaintiff suffered an injury; and (4) the defendant's conduct was the proximate cause of the injury. *Kaye*, 158 Wn. App. at 332. In determining whether a duty is owed to the plaintiff, a court must decide who owes the duty, to whom the duty is owed, and what is the nature of the duty owed. *Keller v. City of Spokane*, 146 Wn.2d 237, 243, 44 P.3d 845 (2002).

In premises liability actions, “the common law duty of care existing in premises liability law is incumbent on the possessor of land.” *Coleman v. Hoffman*, 115 Wn. App. 853, 859, 64 P.3d 65, 68 (2003). Washington uses the Restatement (Second) of Torts definition of possessor of land.

A possessor of land is (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Coleman, 115 Wn. App. at 860.

As such, the Garzas were required to submit evidence to show that the defendant named in the lawsuit, Galaxy Theatres possessed the property. The Garzas failed to establish this necessary element with factual evidence.

2. The Garzas failed to set forth facts establishing Galaxy Theatres owed them a duty.

The Garzas rely on these statements to establish that Galaxy Theatres owed them a duty: 1) doing business at the location, 2) a hearsay statement by their attorney and 3) a legal conclusion. All of these are insufficient.

(a) Doing business at the location is not the same as control.

In their Complaint, the Garzas allege Galaxy Theatres is a “company doing business ... as Galaxy Theatres at 4649 Point Fosdick Drive Northwest.”²⁵ This conclusory allegation is insufficient to establish that Galaxy Theatres is the person who possess the land with the intent to control it.

The statement alone that a company does business at a location is a conclusion because it contains no facts which would illustrate what the company was doing that constituted conducting business.

A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion.

Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517, 519 (1988) (internal citations omitted).

The allegations do not provide any substance which could be used to demonstrate how Galaxy Theatres is the person who possesses and controls the land. Merely doing business at a location by itself is not sufficient evidence to establish that the person doing business at the location is the possessor of the location which would create a duty for premises liability purposes. For example, any vendor delivering product

²⁵ CP 2 - Plaintiffs’ Complaint at ¶ 3.

to the theatre such as popcorn, candy and soda would be a “company doing business” at the address of the theatre. However, the conclusion “doing business at” by itself doesn’t provide enough facts to establish that the vendor is the possessor of the premises for premises liability purposes. In the example of the soda vendor, simply delivering product to a movie theater means that the soda vendor is “doing business at” the premises but, without more, it would be unreasonable to conclude that the soda vendor was the possessor of the premises.

Likewise, the allegation that Galaxy Theatres does business at the location is not enough to establish facts which would support the conclusion that Galaxy Theatres exercises sufficient control over the premises to give rise to a duty owed to the Garzas.

(b) The presence of an insurance adjuster does not establish that Galaxy Theatres LLC controlled the premises.

In the hearing on the entry of the default judgment, the Garzas’ attorney (Danica Morgan) testified that the Garzas were told (by a person they believed was the theater manager) that Gallagher Bassett was adjusting the claim for the insurer. Ms. Morgan further testified that she had been in communication with Gallagher Basset.²⁶

²⁶ CP 515 (March 13 hearing 5:2-7).

2 THE COURT: Was anybody from Washington ever
3 involved in the case? The manager apparently.

4 MS. MORGAN: The manager gave us the name of
5 the adjustor at Gallagher Bassett, and that's who I was
6 dealing with after I was instructed to do so by the
7 movie theater.

This statement does not establish any fact which goes to whether Galaxy Theatres controlled the premises. There is no indication who the “manager” is or who the “manager” works for. Being provided the name of an insurance adjuster does not establish that the defendant Galaxy Theatres controlled the premises.

Further, the statements of counsel are not evidence. If Ms. Morgan was purporting to testify, there is no indication that she has personal knowledge of the hearsay statement of the “manager” as the statement was made to “us.” Evidence must be based on personal knowledge to be admissible. ER 602. Even if Ms. Morgan was included in the “us,” the alleged statement of the “manager” is hearsay under ER 801. It is not an admission by a party opponent because there is no foundation evidence that the “manager” is the employee or representative of Galaxy Theatres. The court has a duty to only consider evidence that is admissible.

(c) Statement that a duty is owed is a legal conclusion not a fact.

In their Complaint, the Garzas alleged “[t]he Defendant owed a duty to Plaintiff to make safe or warn against all potentially dangerous conditions and to maintain the theatre in a reasonably safe condition.”²⁷ The allegation that there is a duty is only a legal conclusion which is not admitted by a defendant in default. *Kaye*, 158 Wn. App. at 333-34. The Garzas failed to present a factual basis upon which the court could have determined that Galaxy Theatres owed a duty to the Garzas.

3. Available facts illustrate the insufficiency of the Garza’s pleadings.

Simply put, commonalities in a name are not sufficient to establish the entity named in the Garza’s complaint is the entity which controls the premises. According to publicly available records, Galaxy Theatres is not the owner or tenant of the property. The retail complex where the “Galaxy Uptown Movie Theatres” is located is owned by Gateway Capital, LLC. Galaxy Gig Harbor, LLC leases the theater space from Gateway. This simply illustrates the point that the Garzas and the Court cannot assume Galaxy Theatres is the owner or tenant of the property, because it is not. To prove their case, the Garzas needed to present “a factual basis upon

²⁷ CP 3, Plaintiff’s Complaint at ¶ 15.

which the trial court could have determined” Galaxy Theatres maintained a specific relationship to them as the possessor of the movie theater. In the absence of such evidence, the Garzas failed to establish the essential elements of their case and judgment should not have been entered. *Kaye*, 158 Wn. App. at 333-34. Under *Caouette*, the judgment should have been vacated.

Caouette and *Kaye* are dispositive and controlling. The default judgment against Galaxy Theatres should be vacated under CR 60(b)(11) because “it would be inequitable to allow the judgment to stand” where the Garzas presented “no factual basis upon which the trial court could have determined” the relationship between Galaxy Theatres and the property where Mr. Garza alleges he was injured, which was required to establish Galaxy Theatres owed Mr. Garza a duty.

C. Galaxy Theatres is Not Judicially Estopped From Requesting That the Judgment be Vacated.

Galaxy Theatres is not judicially estopped from vacating the default judgment. In order to understand the context of these arguments it is necessary to review the procedural background of these issues.

After discovery of the entry of the default judgment, counsel for Galaxy Theatres, Leslie Fleming, brought a motion to set aside the damages awarded on entry of the default judgment pursuant to CR

60(b)(1).²⁸ CR 60(b)(1) allows a court to set aside a default judgment for reasons of “[m]istake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” A motion under CR 60(b)(1) must be brought within a year of the entry of the judgment. CR 60(b). Further, in deciding whether to vacate a default judgment under CR 60(b)(1), the court applies the four factor test first announced in *White v. Holm*, 73 Wn. 2d. 348, 438 P.2d 581 (1968).²⁹ See, *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 448–49, 332 P.3d 991 (2014). The four factors are (1) there is substantial evidence supporting a prima facie defense; (2) the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) the defendant acted with due diligence after notice of the default judgment; and (4) the plaintiff will not suffer a substantial hardship if the default judgment is vacated.

²⁸ CP 84.

²⁹ Generally, courts do not engage in the *White* analysis when analyzing motions to vacate brought under other sections of CR 60(b). See, e.g., *Leen v. Demopolis*, 62 Wn. App. 473, 477-78, 815 P.2d 269 (1991) (“If a judgment is void for want of jurisdiction [CR 60(b)(5)], no showing of a meritorious defense is required to vacate the judgment.”); *Suburban Janitorial Services v. Clarke American*, 72 Wn. App. 302, 863 P.2d 1377 (1993) (vacating default judgment on the basis of fraud and misrepresentation under CR 60(b)(4) and alternatively under CR 60(b)(11) without applying *White* factors); *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993) (vacating under CR 60(b)(11) without applying *White* factors); but see *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 122 P.3d 922 (2005) (finding without analysis or explanation that the defendant satisfied the *White* factors on a CR 60(b)(11) motion to vacate). *Topliff* is a lone outlier.

1. Counsel for Galaxy Theatres did not contest liability and instead sought to vacate only the amount of damages under established Washington case law.

In her Motion to Set Aside the Amount of Damages, Ms. Fleming relied on *Calhoun v. Merritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986) for the proposition that a defendant is not required to present a prima facie defense to liability (the first *White* factor) in order to challenge the amount of damages awarded. Subsequent Washington cases have followed *Calhoun* and recognized that the trial court has discretion to vacate the damages portion of a default judgment regardless of whether or not a liability defense is argued or established. *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 241, 974 P.2d 1275 (1999).

2. Counsel for Galaxy Theatres argued only an alternative legal theory.

In reliance on *Calhoun*, Ms. Fleming did not argue a defense to liability and instead sought only to set aside the amount of damages.³⁰ In response, the Garzas argued that Galaxy Theatres' motion was barred because it was not brought within the one year time restriction under CR 60(b)(1).³¹ In reply, Ms. Fleming argued that this case was distinguishable

³⁰ CP 91.

³¹ CP 179.

because her motion sought only relief from the damages award.³² Ms. Fleming stated she: “recognizes the time limitations under the Civil Rules and for that reason has conceded liability under the circumstances.”³³

At oral argument, Ms. Fleming also engaged in the following colloquy with the court:

THE COURT: that’s kind of always what happens. The cases in Morin v. Burris that was in your reply brief, that’s kind of what happened in every one of those, and two of the defaults were reversed by the Court of Appeals, or default judgments were reversed, and then the Supreme Court reinstated them, so they kind of say, hey, you’ve got to get on this.

MS. FLEMING: Absolutely. But the distinction in this case is that we understand the time limits and the rules, and Galaxy has conceded, made a heavy concession that we’re not asking to have the entire judgment vacated. We’re seeking not vacation on -- we’re not seeking to have the order vacated on liability and damages. We’re just talking about damages and an opportunity to do what’s just and proper.

CP 588 (13:11 – 14:1)

MS. FLEMING: No. And I believe the Morin case was – again, there’s a distinction between asking for the entire judgment and liability and damages to be vacated and seeking to have just the damages portion set aside. We’re not seeking to actually have the judgment on liability and damages vacated.

³² CP 482.

³³ CP 482.

THE COURT: But do you have much of a defense to liability? If there's a hole in the theater and you're in the dark and step in it –

MS. FLEMING: Well, Your Honor, that's why we're here. We're not arguing that. We're not wasting the Court's time, quite frankly, with that argument because we believe the time has run on that argument.

THE COURT: That's not much of a concession, it seems to me, in this case, but damages is an issue.

CP 590 (15: 14 – 22) At the conclusion of the hearing, the court ruled:

THE COURT: Well, under Rule 60(b)(1), I think that's time barred. Mistakes, inadvertence, excusable neglect, et cetera, if there were any, it's too late to bring that. Under 60(b)(11), of course, this is very broad: Any other reasonable justifying relief from operation of the judgment.

Ms. Fleming kind of says it's just too darn big is that reason. I'm not convinced it's too big. I'm going to deny the motion to vacate.

CP 603 (28:17 – 25).

Galaxy Theatres subsequently moved to vacate the entire judgment under CR 60(b)(11) on the basis that the Garzas failed to present sufficient factual evidence to support the duty element of their premises liability claim.³⁴ At oral argument, the trial court denied the motion to vacate, in part, finding judicial estoppel applied:

THE COURT: [I] think judicial estoppel does apply here. Ms. Fleming conceded they weren't contesting liability. To

³⁴ CP 548. Galaxy Theatres also moved to vacate under CR 60(b)(9) on the basis of an unavoidable casualty or misfortune. Galaxy Theatres addresses this argument below.

me that means, well, okay, we're liable, and said she was making that concession partly tactically so I would vacate the judgment amount and they could re-litigate that issue. She could have argued alternatively. She chose not to, I think, as a tactic, and I think Galaxy Theatres, LLC, is bound by that tactic, so I'm going to deny the motion to vacate.

RP (September 20, 2016) 29:5 – 14. The trial court abused its discretion in applying the doctrine of judicial estoppel because judicial estoppel does not apply to legal arguments and the three factor test for applying judicial estoppel is not satisfied in this case.

3. The factors of judicial estoppel are not met.

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012). Clearly inconsistent means diametrically opposed, and the inconsistency “must be as to factual assertions”—the doctrine does not “prevent a party from proceeding upon inconsistent legal theories.” Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 810 (1985) (underline added). “There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time.” *Anfinson*, 174 Wn.2d at 861. In analyzing whether judicial estoppel applies, the trial

court “is guided by three core factors: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party. *Id.* at 861-62 (internal quotations omitted).³⁵ Galaxy Theatres’ arguments are not factual assertions, precluding application of judicial estoppel, and the three factor test is not satisfied in this case.

(a) The arguments are not clearly inconsistent.

The first factor to consider is whether Galaxy Theatres’ argument under CR 60(b)(11)--that the judgment should be vacated because the Garzas failed to present sufficient facts to establish the duty element of their claim—is clearly inconsistent with its earlier argument under CR 60(b)(1)--that Galaxy Theatres was not required to present a prima facie defense to liability in seeking to set aside the amount of damages. At the outset it should be noted that these are legal arguments and not factual assertions. This fact alone makes judicial estoppel inapplicable.

³⁵ A trial court’s decision to apply judicial estoppel is reviewed for abuse of discretion. *Anfinson*, 174 Wn.2d at 864.

Regardless, even if judicial estoppel applied, which it does not, these legal arguments are not clearly inconsistent.

In counsel's Motion to Set Aside Damages, counsel argued that Galaxy Theatres was not required to present a defense to liability but only a defense to damages pursuant to *Calhoun* and its progeny. This is not an admission of liability. This is a legal argument that Galaxy Theatres was not required to argue liability when presenting a defense to only damages.

In Galaxy Theatres' Motion to Vacate, Galaxy Theatres argued the Garzas failed to present sufficient evidence to establish Galaxy Theatres owed the Garzas a duty and that, as a result, the default judgment should be vacated in its entirety under CR 60(b)(11). Galaxy Theatres argued that, before entry of a default judgment, the court has a duty to ensure that the party seeking the default judgment has presented sufficient facts to establish each of the required elements of the claim. *Kaye*, 158 Wn. App. at 326. This duty exists to maintain the integrity of the legal process. If those facts are absent, a default judgment which has been entered should be vacated under CR 60(b)(11). *Caouette*, 77 Wn. App. 69. There is no requirement that the defendant affirmatively establish it has a defense. Instead, the focus is on whether the party seeking the default presented sufficient facts to support every essential element of its claim. *See, Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (the

absence of evidence to support the plaintiff's case is a defense on summary judgment).

These legal arguments are not clearly inconsistent or diametrically opposed: the arguments Ms. Fleming presented in her Motion to Set Aside the Amount of Damages did not challenge liability; the arguments Galaxy Theatres presented in its Motion to Vacate are that the Garzas failed to present sufficient facts to establish liability. The first factor for establishing judicial estoppel is not satisfied.

(b) The court was not misled.

Even if Galaxy Theatres' positions were inconsistent (which they are not), accepting the later position would not create the perception that the court was misled. In the Motion to Set Aside the Amount of Damages, Ms. Fleming chose not to argue the question of liability. In its Motion to Vacate, Galaxy Theatres argued that the Garzas had not met their burden to present sufficient evidence to demonstrate the Galaxy Theatres was liable. Neither argument is misleading.

Further, Ms. Fleming's first argument was rendered moot because it was time barred. The court did not rely on Ms. Fleming's decision to not argue liability. Rather, the court ruled that her motion under CR 60(b)(1) was barred by the one year limitation for such a defense. The presentation of a defense by Galaxy Theatres became irrelevant.

(c) No unfair detriment to the Garzas or advantage to Galaxy Theatres exists.

The last factor is whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party. Even if the positions were inconsistent, there would be no advantage to Galaxy Theatres or disadvantage to the Garzas. Under well-established case law the Garzas were required to present sufficient evidence establishing all elements of their claim. Whether the Garzas met this obligation was not impacted by Ms. Flemings' argument. This is because the Garzas either met this obligation, or (as is the case here) failed to meet this obligation, at the time of entry of the default judgment. Further, there is no unfair advantage to Galaxy Theatres—parties are entitled to assert alternative legal theories.

The trial court abused its discretion in applying the doctrine of judicial estoppel. Ms. Fleming's legal arguments are not factual assertions and are not subject to judicial estoppel. Regardless, even if the legal arguments presented were subject to judicial estoppel, which they are not, Galaxy Theatres' arguments are not inconsistent, did not mislead the court, and do not create an unfair detriment or advantage. The Garzas failed to meet their obligation to present evidence sufficient to establish each element of their claim at the time the default judgment was entered.

The trial court abused its discretion in applying the doctrine of judicial estoppel.

D. The Judgment Should Be Vacated Under CR 60(b)(9) Because Galaxy Theatres Never Received Notice of the Lawsuit.

The trial court did not discuss its reasoning for denying Galaxy Theatres motion under CR 60(b)(9) nor was there any explanation contained in the written order.

A judgment may be vacated under CR 60(b)(9) where “unavoidable casualty or misfortune” prevented the party from prosecuting or defending. No Washington case has addressed the issue of whether the failure of an internet server to deliver an email containing legal documents constitutes unavoidable casualty or misfortune under CR 60(b)(9). However, an out-of-state court interpreting a statute containing language nearly identical to Washington’s CR 60(b)(9) held the failure of the United States mail to deliver legal documents constituted unavoidable casualty or misfortune requiring vacation of a default judgment. See *Kellog v. Smith*, 171 Okla. 355, 42 P.2d 493 (1935).

In *Kellog*, a party obtained a default judgment against a garnishee when the clerk of the court did not receive or file the garnishee’s answer. The garnishee testified that he placed the answer in the mail, directed to the clerk. The court found that “the reliability of the United States mail

service . . . is such that the public generally have [sic] justified confidence” in transacting via the mail and vacated the judgment, holding that the failure of the post office to deliver the answer of the garnishee constituted unavoidable casualty or misfortune which prevented the garnishee from defending. *Kellog v. Smith*, 171 Okla. 355, 42 P.2d 493, 496 (1935).

Here, the judgment should be vacated because Galaxy Theatres never received copies of the summons or complaint by way of unavoidable casualty or misfortune. As in *Kellog*, Fairchild Records claims it forwarded service of process to Galaxy Theatres via email on December 2, 2014. However, Galaxy Theatres did not receive this alleged email. Indeed, despite an extensive search conducted by Mr. Alkazian, Galaxy Theatres located no evidence that it ever received the email. It is Mr. Alkazian’s opinion that Galaxy Theatres’ email system never received the alleged email from its registered agent due to a failure of the registered agent’s email system. The Garzas did not object to Mr. Alkazian’s report or submit any evidence to the contrary.

Kellog supports vacating the default judgment under CR 60(b)(9). Galaxy Theatres did not receive the email allegedly sent by its registered agent and the failure of an email server to deliver service of process is

analogous to the failure of the post office to deliver legal documents given the justified reliance on email.

VI. CONCLUSION

Similarity of names is not enough. The Garzas did not present facts sufficient to demonstrate that Galaxy Theatres owed them a duty of care. This is fatal to their claim and the default order and judgment should not have been entered and should have been vacated by the trial court.

The trial court misapplied the doctrine of judicial estoppel. Galaxy Theatres' attorney did not concede liability in her argument and it was not inconsistent for Galaxy Theatres to later ask that the Garzas be held to their proof. In the alternative, the trial court should have also granted Galaxy Theatres motion to vacate on the basis of unavoidable casualty or misfortune.

The Court of Appeals should reverse the trial court, vacate the default judgment and order of default against Galaxy Theatres LLC and remand the case to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 17th day of February, 2017.

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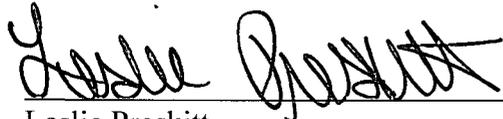
The undersigned declares under penalty of perjury, ^{BY} ~~under the laws~~ _{DEPUTY}
of the State of Washington, that the following is true and correct:

That on February 17, 2017, I caused to be served in the manner
noted a copy of Brief of Appellant Galaxy Theatres, LLC on the parties to
this action as follows:

Danica Morgan
Morgan & Koontz
730 South Fawcett Avenue
Tacoma, WA 98402

- By Messenger
- By U.S. Mail
- By Overnight Delivery
- By Facsimile
- By Electronic Service

DATED this 17th day of February, 2017, at Seattle, Washington.



Leslie Preskitt