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DIVISION II

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STATE OF WASHINGTON

NO. 49138-9-II

BY


DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GALAXY THEATRES, LLC,
Appellant,

v.

GREGORIO GARZA and LIZBETH GARZA,
Respondents.

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

This case involves application of well-settled case law to a case in which the defendant, Galaxy Theatres, LLC (“Galaxy Theatres”), admittedly was properly served with the Summons and Complaint and failed to appear and defend. Plaintiffs Gregorio Garza and Lizbeth Garza (the “Garzas”) ultimately obtained an order of default and Judgment. Prior to obtaining a Judgment, the Garzas put on extensive evidence of their damages, including expert and lay declarations and live testimony. More than one year after entry of the Judgment, Galaxy Theatres finally appeared and attempted on two separate occasions to attack the Judgment. The trial court denied both motions. During the hearing on the first motion to vacate the Judgment, Galaxy Theatres conceded that it was liable to the Garzas, and attacked only the amount of damages awarded. After this Court accepted jurisdiction over that appeal, Galaxy Theatres again moved to vacate the Judgment, this time with different counsel. During the second hearing, Galaxy Theatres attempted to deny liability for the first time, and refused to answer the Court’s questions about the relationship between Galaxy Theatres and a similarly-named entity.

Galaxy Theatres has failed to demonstrate that the trial court has abused its discretion in denying both of Galaxy Theatres’ motions to vacate the judgment. The trial court’s orders should be affirmed.

II. RE-STATEMENT OF THE ISSUES

1. Should this Court hold that the trial court did not abuse its discretion denying Galaxy Theatres’ motion to vacate when Galaxy

Theatres was properly served with the Summons and Complaint and more than a year passed since entry of Judgment?

2. Should this Court find that the trial court did not abuse its discretion denying Galaxy Theatres' motion to vacate when the second motion to vacate, upon which Galaxy Theatres appears to base its entire appeal, was untimely?

3. Should this Court find that the trial court did not abuse its discretion denying Galaxy Theatres' motion to vacate when Galaxy Theatres conceded liability?

4. Should this Court find that the trial court did not abuse its discretion denying Galaxy Theatres' motion to vacate when judicial estoppel operates to bar Galaxy Theatres from taking inconsistent positions as to liability?

5. Should this Court find that the trial court did not abuse its discretion denying Galaxy Theatres' motion to vacate when Galaxy Theatres failed to satisfy CR 60(e)(1)'s requirement to show evidence of a defense and evidence that supports the trial court's finding that Galaxy Theatres controlled the premises on which the Garzas' injuries occurred?

III. FACTS

On February 19, 2012, Gregorio Garza was injured at Galaxy Theatres in Gig Harbor, Washington, causing substantial injury to his right foot and ankle, which necessitated surgery.¹ Following his injury, a

¹ Clerk's Papers ("CP") at 188.

manager told Mr. Garza, “This was an accident waiting to happen, thank you for bringing this to our attention.”² The manager then provided Mr. Garza and his wife with a business card for Galaxy Theatres’ General Manager, Adrienne Ingham.³ Ms. Ingham subsequently instructed Mr. Garza that “someone with [her] corporate office would be contacting [him] to let [him] know where [he could] send his medical bills from the injury.”⁴ Ms. Ingham then told Mr. Garza to “submit the medical bills to [her].”⁵

On December 10, 2014, Respondents Gregorio Garza and Lizbeth Garza filed a Complaint for Personal Injuries and Damages in the Pierce County Superior Court alleging physical and emotional damages relating to the fall he suffered in 2012.⁶ The Garzas served Galaxy Theatres with a copy of the Summons and Complaint by way of service on its registered agent, Fanny Sparling.⁷ Galaxy Theatres does not dispute that its registered agent was properly served. The Garzas followed up with a courtesy copy of the Summons and Complaint by U.S. Mail to Galaxy Theatres’ insurance carrier, Gallagher Bassett Services, Inc.⁸ The Summons warned Galaxy Theatres that “[i]n order to defend against this this lawsuit, you must respond to the Complaint by stating your defense in writing, and serve a copy upon the undersigned attorney for the Plaintiffs

² CP at 188.

³ CP at 188.

⁴ CP at 192.

⁵ CP at 192.

⁶ CP at 1 – 4.

⁷ CP at 7 – 8.

⁸ CP at 11, 14.

within twenty (20) days after service of this Summons . . . or a default judgment may be entered against you without notice. A default judgment is one where Plaintiffs are entitled to what they ask for because you have not responded.”⁹

On January 13, 2015, more than 20 days after Galaxy Theatres’ service of the Summons and Complaint without any notice of appearance or Answer filed, the Garzas moved for and obtained an Order of Default.¹⁰

On March 4, 2015, the Garzas moved for entry of default judgment, presenting evidence of their damages.¹¹ On March 13, 2015, the trial court entered findings of fact and conclusions of law against Galaxy Theatres, including a finding that Galaxy Theatres was served with a copy of the Summons and Complaint on December 2, 2014.¹² The trial court entered a Judgment against Galaxy Theatres in the amount of \$711,268.72 that same day.¹³

On May 25, 2016, more than one year after the trial court entered Judgment against Galaxy Theatres, Galaxy Theatres filed a Motion to Set Aside Amount of Damages pursuant to CR 60(b)(1) and (11).¹⁴ In its motion, Galaxy Theatres admitted that it was properly served through its registered agent and that its registered agent emailed a copy of the Summons and Complaint to Galaxy Theatres’ corporate office in

⁹ CP at 5 – 6.

¹⁰ CP at 10, 28 – 29.

¹¹ CP at 65 – 75.

¹² CP at 76 – 81.

¹³ CP at 82 – 83.

¹⁴ CP at 84.

California.¹⁵ Galaxy Theatres claimed that its corporate office did not receive this email nor the courtesy copy mailed by the Garzas' counsel.¹⁶ Galaxy Theatres argued that the Judgment should be set aside because (1) its failure to appear and defend was a result of "mistake, inadvertence, surprise, excusable neglect, and irregularity," and (2) damages were allegedly excessive.¹⁷

Galaxy Theatres argued that the evidence was insufficient to support the damages awarded because jury verdicts from other, unrelated cases resulted in lower damages awards.¹⁸ Galaxy Theatres admitted that service was proper on its registered agent, but argued that an unknown failure caused its corporate office to not receive a copy of the Summons and Complaint from the registered agent.¹⁹ Galaxy Theatres contended that this amounted to an inadvertent mistake that justified vacating the judgment.²⁰

In its supporting materials, Galaxy Theatres admitted that it operated the theater at issue. For example, Galaxy Theatres admitted that "Galaxy Theatre, they're the defendants here. They've had a judgment entered against them. Their business, they have, I believe, a dozen theaters around California and Nevada, one up here in Gig Harbor."²¹ Galaxy Theatres also conceded that Adrienne Ingham, the General

¹⁵ CP at 86.

¹⁶ CP at 86 – 87.

¹⁷ C Pat 88 – 89.

¹⁸ CP at 91 – 93.

¹⁹ CP at 93 – 94.

²⁰ CP at 95.

²¹ CP at 599.

Manager of the Galaxy Uptown 10 movie theater in Gig Harbor, where Mr. Garza was injured, is an employee of Galaxy Theatres.²² The “Incident / Accident Investigation” form is on “Galaxy Theatres” letterhead.²³ And Ms. Ingham and Pamela Bush, an employee in Galaxy Theatres’ “corporate office,” share email addresses with the same domain name: “galaxytheatres.com.”²⁴

The Garzas opposed the Galaxy Theatres’ Motion, arguing that a motion under CR 60(b)(1) for mistake or inadvertence was untimely because more than a year had passed since entry of Judgment.²⁵ Additionally, the Garzas argued that the damages were reasonable and supported by live and expert testimony, and that the damages calculation did not qualify as an “extraordinary circumstance” under CR 60(b)(11).²⁶

In reply, Galaxy Theatres argued that “Defendant Galaxy Theatre recognizes the time limitations under the Civil Rules, and for that reason has conceded liability under the circumstances. However, Defendant does not seek to set aside the judgment itself. Rather Defendant seeks only to vacate the *amount of damages*.”²⁷

At the hearing on the Motion, Galaxy Theatres conceded liability:

THE COURT: That’s kind of 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

²² CP at 97, 102.

²³ CP at 104.

²⁴ CP at 102, 108.

²⁵ CP at 176.

²⁶ CP at 176 – 77.

²⁷ CP at 482 – 83 (emphasis in original).

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.²⁸

Later in the hearing, Galaxy Theatres again clarified that it was not contesting liability:

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.²⁹

On June 3, 2016, the trial court denied Galaxy Theatres' Motion to Set Aside the Amount of Damages.³⁰

Galaxy Theatres appealed the Order denying its motion to this Court.³¹ In addition to designating the June 3 Order, Galaxy Theatres also designated in its Notice of Appeal the Judgment and Findings of Fact and Conclusions of Law.³² The Garzas objected, arguing that Galaxy Theatres was attempting to appeal the Judgment and Findings of Fact and

²⁸ CP at 588 (emphasis added).

²⁹ CP at 563 (emphasis added).

³⁰ CP at 485 – 86.

³¹ CP at 487 – 498.

³² CP at 493 – 98.

Conclusions of Law more than 30 days after entry of those Orders.³³ A Commissioner of this Court denied the Motion, but warned Galaxy Theatres that “[i]f Appellant engages in the bootstrapping about which the Respondent is concerned, the Respondent may bring a motion at that time.”³⁴

On August 16, 2016, Galaxy Theatres filed another Motion to Vacate, this time arguing that the Garzas “failed to present sufficient factual evidence to support the legal conclusion that Galaxy owed the Garzas a duty,” and that, [a]lternatively,” the judgment should be vacated under CR 60(b)(9) because an internet email system failure prevented them from receiving notice of the Summons and Complaint.³⁵ Galaxy Theatres included a “Memorandum of Lease” filed with the Pierce County Auditor’s Office in 2007, which stated that the tenant was “GALAXY GIG HARBOR, LLC,” “whose mailing address is c/o Galaxy Theatres, LLC.”³⁶ In fact, Pamela Bush notarized one of the signatures on the Memorandum of Lease.³⁷

The Garzas opposed the second motion, arguing that (1) Galaxy Theatres could not withdraw its prior admission of liability absent a showing of fraud, mistake, or want of jurisdiction;³⁸ (2) judicial estoppel prohibited Galaxy Theatres from taking an inconsistent position on

³³ See *Spindle*, Motion to Strike.

³⁴ See *Spindle*, July 28, 2016 Ruling by Commissioner Schmidt.

³⁵ CP at 548, 552 – 55.

³⁶ CP at 505.

³⁷ CP at 507.

³⁸ CP at 565 – 66.

liability; and (3) they presented sufficient facts to support a conclusion that Galaxy Theatres owed them a duty.³⁹

At the hearing, the trial court attempted multiple times to determine the relationship between Galaxy Theatres, LLC and Galaxy Gig Harbor, LLC, and Galaxy Theatres' counsel was evasive each time:

THE COURT: Well, as a matter of fact, do we know what the relationship between Galaxy Gig Harbor, LLC, and Galaxy Theatres, LLC, is?

MR. HAMELL: Based on the record in front of you, you don't, Your Honor. And, again, that is the point of my argument.

THE COURT: Well, it would seem like if they were unrelated, Galaxy Theatres, LLC, would want to make it real clear that this is a franchisee or something, so why haven't they provided that?

MR. HAMELL: Well, Your Honor, because first that would go against the legal theory we're advancing . . .⁴⁰

Although counsel for Galaxy Theatres argued, without authority, that the trial court could consider only that evidence before the Court at the time of default, Judge Culpepper pointed out that Galaxy Theatres had introduced new evidence, such as the Memorandum of Lease, while being evasive about the relationship between the two entities at issue.⁴¹

When counsel tried to move on, Judge Culpepper again noted that Galaxy Theatres had not answered his question:

³⁹ CP at 565 – 570.

⁴⁰ Verbatim Report of Proceedings (“VRP”) (Sept. 30, 2016) at 12 – 13.

⁴¹ VRP (Sept. 30, 2016) at 26.

THE COURT: But you didn't really answer. Galaxy Gig Harbor, LLC, Galaxy Theatres, LLC, what is the relationship; do we know?

MR. HAMELL: That evidence isn't before Your Honor, and I'm going to continue to dodge that question.

THE COURT: It's not before me and that's actually why I asked the question, and you're going to dodge it; okay. It's not before me; you're right.⁴²

The trial court denied the Motion to Vacate.⁴³ Galaxy Theatres appealed this Order as well, and this Court consolidated the two appeals.⁴⁴

IV. ANALYSIS

A. **Standard of Review**

A motion to vacate or set aside a default judgment is addressed to the trial court's sound discretion.⁴⁵ A trial court's decision in this regard will not be disturbed on appeal unless the trial court abused its discretion.⁴⁶ Discretion is abused when the trial court exercised its discretion on untenable grounds or for untenable reasons, or the discretionary act was manifestly unreasonable.⁴⁷

B. **Galaxy Theatres' arguments about the sufficiency of service are factually incorrect and yet another attempt to skirt the time requirements of CR 60(b).**

Galaxy Theatres incorrectly alleges that it "never received notice of the lawsuit" and the undisputed facts show they were properly served

⁴² VRP (Sept. 30, 2016) at 14.

⁴³ CP at 643 – 44.

⁴⁴ *See Spindle*.

⁴⁵ *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 97, 900 P.2d 595 (1995), *rev. denied*, 129 Wn.2d 1007 (1996).

⁴⁶ *Prest*, 79 Wn. App. at 97.

⁴⁷ *Prest*, 79 Wn. App. at 97.

with the Summons and Complaint. This argument is simply an attempt to circumvent the time requirements of CR 60(b).

Galaxy Theatres argues that the Judgment should be vacated because it “never received notice of the lawsuit.”⁴⁸ Galaxy Theatres argues that the alleged failure of its or its registered agent’s email server to deliver a copy of the summons and complaint constitutes an unavoidable casualty or misfortune that justifies vacating the judgment.⁴⁹ These arguments lack merit.

First, this argument is merely another attempt to circumvent the time limitations of CR 60(b)(1), which applies to mistakes, inadvertence, or surprise. Other sections of CR 60(b) cannot be used to circumvent the one-year time limitation applicable to a motion to vacate judgment.⁵⁰ Galaxy Theatres attempts to cast the supposed error in its registered agent’s email system as a “misfortune” or “unavoidable casualty,” which is simply another way of saying that a mistake was made at some point and they were surprised by the lawsuit. It is a matter of well-settled law that this attempt to circumvent the one-year rule for CR 60(b)(1) is inappropriate. This Court should reject this argument.

Additionally, even if the motion to vacate had occurred within one year, Washington Courts have already rejected the idea that a registered agent’s failure to forward information does not satisfy CR 60(b)(1).⁵¹

⁴⁸ *Appellant’s Brief* at 31 – 32.

⁴⁹ *Appellant’s Brief* at 31 – 33.

⁵⁰ *See Friebe v. Supancheck*, 98 Wn. App. 260, 267, 992 P.2d 1014 (1999).

⁵¹ *Brooks v. Univ. City, Inc.*, 154 Wn. App. 474, 479 – 80, 225 P.3d 489 (Holding trial court did not abuse its discretion in finding no excusable neglect when registered agent

Galaxy Theatres' attempt to rely on an out-of-state case from the 1930s does not change this holding.

The trial court did not abuse its discretion and should be affirmed.

C. Galaxy Theatres' Second Motion to Vacate was Untimely.

Galaxy Theatres' second motion to vacate was untimely and the trial court did not abuse its discretion denying the motion.⁵² Galaxy Theatres' second motion to vacate was an obvious response to this Court's ruling that Galaxy Theatres could not attempt to attack the Judgment through the appellate process. Galaxy Theatres did not file the second motion to vacate until nearly five months after allegedly learning of the Judgment.⁵³

Motions filed under CR 60(b)(11) must be filed within a reasonable time from the date of the challenged judgment, order, or proceeding.⁵⁴ What is reasonable depends on the facts and circumstances of each case.⁵⁵ The critical period for determining whether a motion to vacate is brought within a reasonable time is the period between when the

failed to forward the summons to defendant's legal department), *rev. denied*, 169 Wn.2d 1004 (2010); *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995) (Finding inexcusable neglect where party's failure to timely respond was due to the summons and complaint being mislaid and not forwarded to corporate counsel), *rev. denied*, 129 Wn.2d 1007 (1996).

⁵² This Court can affirm on any ground supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

⁵³ See CP at 172 (letter from Garza's counsel, dated March 30, 2016); CP at 548.

⁵⁴ *Luckett v. Boeing Co.*, 98 Wn. App. 307, 311, 989 P.2d 1144 (1999), *rev. denied*, 140 Wn.2d 1026 (2000).

⁵⁵ *Luckett*, 98 Wn. App. at 312.

moving party became aware of the judgment and the filing of the motion.⁵⁶

In *Luckett*, the defendant's attorney waited four months before filing a motion to vacate a dismissal order.⁵⁷ Although the delay caused no demonstrable prejudice, the court concluded that the motion was not filed within a reasonable time because Luckett had shown no good reason for the delay.⁵⁸

Similarly, there is no explanation for the nearly five month delay bringing the second motion. Galaxy Theatres had all facts available to it at the time it filed the first motion to vacate as were available in August. Galaxy Theatres has offered no justification for the delay, nor any authority suggesting that changing legal strategy and counsel is justification for delay. Galaxy Theatres' second motion was untimely and the trial court did not abuse its discretion denying the motion.

D. Galaxy Theatres' Counsel Conceded Liability and Cannot Withdraw that Admission Absent a Showing of Fraud, Mistake, or Lack of Jurisdiction.

The trial court did not abuse its discretion in denying Galaxy Theatres' motion to vacate because Galaxy Theatres' counsel conceded liability during the first hearing.⁵⁹ Galaxy Theatres argues that the Garzas failed to show that Galaxy Theatres had control of the theater at issue and that Galaxy Theatres owed a duty to the Garzas. However, Galaxy

⁵⁶ *Luckett*, 98 Wn. App. at 312.

⁵⁷ *Luckett*, 98 Wn. App. at 313.

⁵⁸ *Luckett*, 98 Wn. App. at 313.

⁵⁹ This analysis is separate from the judicial estoppel argument discussed below.

Theatres conceded liability to the trial court. By conceding liability, Galaxy Theatres admitted that it owed a duty to the Garzas, that it breached that duty and that its breach was a proximate cause of the Garzas' injuries. Galaxy Theatre's counsel made it clear in the first hearing that Galaxy was conceding liability (duty, breach and proximate cause), and it was only contesting the damages awarded. Therefore, the doctrine of judicial admission bars Galaxy Theatres from withdrawing its prior admission of liability and arguing lack of duty.

A judicial admission of liability or non-liability made in open court during trial assumes that the legal consequences of the action are known and understood. Were this not true, the appellate courts would be obliged to review many errors of law which counsel for the parties by agreement caused or persuaded the trial court to make. This would throw great uncertainty on the efficacy of the trial process.⁶⁰

During the first hearing, counsel for Galaxy Theatres clearly and plainly conceded liability. Counsel appears to have done so out of recognition that otherwise, she would not have met the requirements of CR 60(e)(1), which requires a party moving to vacate a judgment to provide prima facie evidence of a defense. Counsel acknowledged there is no such evidence and that she was focusing on damages, not liability. Had counsel attempted to argue liability, she would have failed for lack of evidence.⁶¹

⁶⁰ *Fite v. Lee*, 11 Wn. App. 21, 26, 521 P.2d 964, 967 (citing *State ex rel. Eastvold v. Sup. Court*, 48 Wn.2d 417, 294 P.2d 418 (1956)), *rev. denied*, 84 Wn.2d 1005 (1974).

⁶¹ CR 60(e)(1).

Galaxy Theatres' argument on its liability to the Garzas is undermined by the facts in the record that are clear and the law well-settled. This Court should affirm the trial court's denial of the motion to vacate.

E. Judicial Estoppel bars Galaxy Theatres' inconsistent positions.

Moreover, the doctrine of judicial estoppel prevents Galaxy Theatres from withdrawing its admission of liability. At the June 3, 2016 hearing, Galaxy Theatres stated that it was making a "heavy concession" by admitting liability. Galaxy Theatres made a tactical decision to admit liability in order to distinguish its case from cases cited in *Morin v. Burris*. Only after the trial court rejected its request to set aside the damages did Galaxy Theatres attempt to withdraw its admission of liability and vacate the judgment in its entirety – the very thing Galaxy Theatres told this Court it would not do.

Washington courts have adopted the doctrine of judicial estoppel:

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. "The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and waste of time."⁶²

⁶² *Cunningham v. Reliable Concrete*, 126 Wn. App. 222, 224 – 25, 108 P.3d 147 (2005) (quoting *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001)).

“Judicial estoppel applies only if a litigant’s prior inconsistent position benefited the litigant *or was accepted by the court*. Either of these two results permits the application of judicial estoppel.”⁶³

In *Cunningham*, the plaintiff was injured prior to his filing for bankruptcy.⁶⁴ Plaintiff failed to identify his personal injury claim as an asset in bankruptcy documents.⁶⁵ The bankruptcy was discharged because the bankruptcy estate had no assets.⁶⁶ After the discharge, plaintiff filed a personal injury lawsuit from the pre-bankruptcy injury.⁶⁷ The defendant moved for a dismissal on the personal injury case based on judicial estoppel.⁶⁸ The trial court granted the motion to dismiss, and the plaintiff appealed.⁶⁹ The Court of Appeals upheld the dismissal.⁷⁰ The Court found (1) that the plaintiff’s failure to list the personal injury case as an asset on bankruptcy documents was a prior inconsistent statement,⁷¹ (2) that the bankruptcy court’s discharge of the bankruptcy operated as an acceptance of the plaintiff’s statement that he had no assets,⁷² and (3) that the plaintiff benefited from the prior statement because it allowed his bankruptcy case to be discharged without any dividend to unsecured creditors.⁷³ The Court added that an intent to mislead the Court is not necessary to apply judicial

⁶³ *Cunningham*, 126 Wn. App. at 230 – 31 (emphasis added).

⁶⁴ *Cunningham*, 126 Wn. App. at 225.

⁶⁵ *Cunningham*, 126 Wn. App. at 225.

⁶⁶ *Cunningham*, 126 Wn. App. at 226.

⁶⁷ *Cunningham*, 126 Wn. App. at 226.

⁶⁸ *Cunningham*, 126 Wn. App. at 226.

⁶⁹ *Cunningham*, 126 Wn. App. at 226.

⁷⁰ *Cunningham*, 126 Wn. App. at 235.

⁷¹ *Cunningham*, 126 Wn. App. at 230.

⁷² *Cunningham*, 126 Wn. App. at 233.

⁷³ *Cunningham*, 126 Wn. App. at 233.

estoppel.⁷⁴ The Court upheld the trial court's remedy of dismissal of the plaintiff's case because of the plaintiff's inconsistent prior statement.⁷⁵

Here, it is without question that by contesting liability and arguing that it did not operate the theater, Galaxy Theatres is taking a position inconsistent from its prior position. As detailed above, Galaxy Theatres' counsel made it clear that Galaxy Theatres was not contesting liability. In fact, she stated it would be "wasting the Court's time" to argue liability. Moreover, Galaxy Theatres' counsel filed a declaration under oath that Ms. Ingham was an employee of Galaxy Theatres and attached an Exhibit showing that Ms. Ingham was the General Manager of the theater at issue. Clearly, the prior statements are inconsistent with Galaxy Theatres' current position. The next question is whether the prior inconsistent statement *either* benefited Galaxy Theatres *or* was accepted by the trial court. Plaintiff need not show both. In fact, Galaxy Theatres' prior statements both benefited Galaxy Theatres and were accepted by the Court.

Galaxy Theatres admitted liability on June 3, 2016 in order to improve its argument on its Motion to Set Aside Amount of Damages. First, Galaxy Theatres thought that arguing liability was a losing argument, so it made a tactical decision to admit liability in an effort to focus the Court on its damages argument. Second, Galaxy Theatres wanted to distinguish this case from other cases interpreting CR 60(b). In order to distinguish this case, it admitted liability and only argued damages, whereas the other cases

⁷⁴ *Cunningham*, 126 Wn. App. at 234.

⁷⁵ *Cunningham*, 126 Wn. App. at 235.

sought to vacate the judgment entirely. Again, this was a tactical decision that was made in an effort make its argument more appealing to the Court. While the Court ultimately denied Galaxy Theatres' motion, the liability admissions on June 3, 2016 were made to benefit its damages argument.

Moreover, Galaxy Theatres' admission of liability was accepted by the trial court. The trial court's order denying Galaxy Theatres' Motion to Set Aside Amount of Damages did not in any way find that liability was disputed. By upholding the Judgment entered on March 13, 2015, the Court implicitly found that Galaxy Theatres had admitted liability.⁷⁶

Judicial estoppel clearly applies in this case. As a result, Galaxy Theatres is bound by its prior position that it was liable for the Garzas' damages and that it operated the theater.

Galaxy Theatres argues that it did not have to contest liability in order to argue in its first motion to vacate that the Judgment setting damages should be vacated.⁷⁷ This is incorrect. Under CR 60(e)(1), Galaxy Theatres had an obligation to put forth the facts of its alleged defense. Additionally, under CR 60(b), Galaxy Theatres had an obligation to bring its motion within a reasonable time. Allowing Galaxy Theatres to repeatedly restyle its defense in successive motions, without explanation for the delay, flies in the face of CR 60's mandate that these motions be handled within a reasonable time. Galaxy Theatres waited until after it

⁷⁶ See *Cunningham*, 126 Wn. App. at 233 ("the bankruptcy court's discharge of Cunningham's debts was an implicit acceptance of his position that he had no assets that could be liquidated for the benefit of his creditors").

⁷⁷ *Appellant's Brief* at 23.

had filed its own notice of appeal and briefing was conducted on that notice before filing its second motion. This was an unreasonable delay, and Galaxy Theatres should have brought its arguments together in its first motion to vacate.

Galaxy Theatres argues that its counsel argued in the alternative during its initial motion to vacate and that it did not concede liability. *Appellant's Brief* at 23 – 26. This argument is disingenuous and contrary to the plain language of its counsel.

At the hearing on the Motion, Galaxy Theatres' counsel, Ms. Fleming, conceded liability:

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.⁷⁸

Later in the hearing, Galaxy Theatres again clarified that it was not contesting liability:

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.⁷⁹

⁷⁸ CP at 588 (emphasis added).

⁷⁹ CP at 563 (emphasis added).

Galaxy Theatres contends that judicial estoppel is inapplicable because it took inconsistent legal positions, not inconsistent factual positions.⁸⁰ However, Galaxy Theatres' counsel admitted that there was no basis to contest liability as to whether the Galaxy Theatres would be liable for "a hole in the theater and you're in the dark and step in it."⁸¹ These are matters of fact, not law.

Finally, Galaxy Theatres argues that there is no unfair detriment to the Garzas or unfair advantage to Galaxy Theatres because the Garzas still have to provide sufficient evidence establishing all elements of their claims.⁸² As the trial court noted during oral argument on the motion, this is incorrect. More than three years have passed since the Garzas' injuries, making it questionable whether the Garzas would be able to amend their complaint to bring in other defendants. When the trial court attempted to determine whether counsel for Galaxy Theatres believed the Garzas would be time-barred to amend the Complaint, counsel was again evasive. This evasiveness is particularly telling given Galaxy Theatres' wholesale failure to present evidence of its alleged defense that it did not control the premises.

⁸⁰ *Appellant's Brief* at 27 – 28.

⁸¹ CP at 563.

⁸² *Appellant's Brief* at 30.

F. Galaxy Theatres failed to meet the requirements of CR 60(e)(1) to show prima facie evidence of a defense and sufficient evidence in the record supports the trial court's entry of default and Judgment.

Galaxy Theatres failed to meet their basic responsibility under CR 60(e)(1) to provide prima facie evidence of a defense. When the trial court attempted to elicit that information from Galaxy Theatres' second counsel, he refused to answer the question, ultimately admitting that he wanted to "dodge" the question.⁸³ Moreover, the record is more than sufficient to support a finding of all elements of the claims brought by the Garzas, and vacation of the Judgment under CR 60(b)(11) was properly denied.

CR 60(e)(1) sets forth the procedure for bringing a motion to vacate a judgment. Part of that subsection states that a motion to vacate a judgment must be supported by an affidavit setting forth "the facts constituting a defense to the action or proceeding."⁸⁴ Galaxy Theatres argues, without evidence, that because this is allegedly not a motion under CR 60(b)(1), it does not have to provide evidence of a defense. However, the plain language of CR 60(e)(1) demonstrates otherwise. CR 60(e)(1)'s requirement for submitting evidence of a defense is not limited to any particular subsection of CR 60(b), and is applicable to all bases on which a motion to vacate is brought.

⁸³ CP at 643-44.

⁸⁴ CR 60(e)(1).

As the trial court repeatedly noted, Galaxy Theatres failed to present evidence that it did not control the premises, and Galaxy Theatres' counsel refused to answer straightforward questions about the issue. Galaxy Theatres' counsel incorrectly stated that no evidence of a defense was required and admitted that he was "dodg[ing]" the question.⁸⁵

In *Calhoun*,⁸⁶ the court excused a defendant's failure to put on evidence of a defense to the plaintiff's pain and suffering damages because the facts of any defense would be virtually impossible to determine without discovery.⁸⁷ In contrast, all facts relating to the alleged defense are within Galaxy Theatres' control. For instance, Galaxy Theatres could have put forth the actual lease, instead of a "Memorandum of Lease," any management agreement between the entities involved, or sworn statements of the owners and managers of the entities demonstrating who controlled the premises. As the trial court noted, the Memorandum of Lease did not provide any clarity on whether Galaxy Theatres controlled the premises, particularly when all correspondence was directed to Galaxy Theatres at its corporate address in California. Galaxy Theatres chose not to put the facts supporting its alleged defense before the trial court, and coupled with counsel's admission that he was dodging questions about the relationships between the entities, the only reasonable conclusion for this failure is that the facts are not favorable to

⁸⁵ CP at 643-44.

⁸⁶ *Calhoun v. Meritt*, 46 Wn. App. 616, 731 P.2d 1094 (1986).

⁸⁷ 46 Wn. App. at 620.

Galaxy Theatres. Galaxy Theatres failed to comply with the basic requirements of CR 60(e)(1) and the trial court properly denied the motion.⁸⁸

Moreover, the trial court did not abuse its discretion in denying Galaxy Theatres' motion to vacate under CR 60(b)(11) where there was sufficient evidence that Galaxy Theatres controlled the premises. The use of CR 60(b)(11) "should be confined to situations involving extraordinary circumstances not covered by any other section of the rule."⁸⁹ Such circumstances must relate to irregularities extraneous to the action of the court or questions concerning the regularity of the Court's proceedings.⁹⁰ Extraordinary circumstances have been found when a lack of due process occurred,⁹¹ and due to an attorney's severe mental illness.⁹² CR 60(b)(11) cannot be used to circumvent the one-year limit in CR 60(b)(1).⁹³ Errors of law do not justify vacating an order under CR 60(b)(11).⁹⁴

As an initial matter, Galaxy Theatres appears to have abandoned on appeal its argument that the trial court should have vacated the

⁸⁸ See also *Commercial Carrier Serv. Inc. v. Miller*, 13 Wn. App. 98, 104, 533 P.2d 852 (1975) (Holding that "[a]ffidavits supporting motions to vacate judgments must set out the facts constituting a defense. It is insufficient to merely state allegations and conclusions.") (citing CR 60(e)(1)).

⁸⁹ *Yearout v. Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985).

⁹⁰ *Yearout*, 41 Wn. App. at 902.

⁹¹ *Topliff v. Chicago Ins. Co.*, 130 Wn. App. 301, 305 – 06, 122 P.3d 922 (2005), *rev. denied*, 157 Wn.2d 1018 (2006).

⁹² *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (2003).

⁹³ *Friebe*, 98 Wn. App. at 267; see also *Bergen v. Adams Cnty.*, 8 Wn. App. 853, 857, 509 P.2d 661, *rev. denied*, 82 Wn.2d 1009 (1973).

⁹⁴ *Union Bank, N.A. v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 843, 365 P.3d 223 (2015).

Judgment because damages were allegedly unreasonable.⁹⁵ Instead, Galaxy Theatres' arguments focus on the issues raised in its second attempt to vacate the Judgment. As such, the Garzas do not address issues relating to the propriety of the damages awarded.⁹⁶

Galaxy Theatres argues that the Garzas did not allege any facts supporting the conclusion that Galaxy Theatres controlled the premises.⁹⁷ Galaxy Theatres contends that the Garzas alleged only that Galaxy Theatres did business at the location, which is supposedly insufficient.⁹⁸ Galaxy Theatres argues that the facts demonstrate that it was not the tenant or owner of the premises.⁹⁹ However, Galaxy Theatres' arguments fail to look at the evidence as a whole presented to the trial court.

The Garza's Complaint alleges that Galaxy Theatres did business as "Galaxy Theatres" at 4649 Point Fosdick Drive Northwest, Gig Harbor, WA 98338, "the location where the subject incident occurred."¹⁰⁰ The Garzas also alleged that a manager admitted that the condition of the theater was "an accident waiting to happen," and thanked the Garzas for bringing that to their attention.¹⁰¹ The manager then provided Mr. Garza and his wife with a business card for the Theatre's General Manager,

⁹⁵ See *Appellant's Brief*.

⁹⁶ See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding that an appellant waives an issue by failing to argue it in their opening brief).

⁹⁷ *Appellant's Brief* at 17 – 18.

⁹⁸ *Appellant's Brief* at 17 – 18.

⁹⁹ *Appellant's Brief* at 20 – 21.

¹⁰⁰ CP at 2.

¹⁰¹ CP at 2, ¶¶ 13 – 14.

Adrienne Ingham.¹⁰² Ms. Ingham subsequently instructed Mr. Garza that “someone with [her] corporate office would be contacting [him] to let [him] know where [he could] send his medical bills from the injury.”¹⁰³ Ms. Ingham then told Mr. Garza to “submit the medical bills to [her].”¹⁰⁴ The “Incident / Accident Investigation” form is on “Galaxy Theatres” letterhead.¹⁰⁵ And Ms. Ingham and Pamela Bush, an employee in Galaxy Theatres’ “corporate office,” share email addresses with the same domain name: “galaxytheatres.com.”¹⁰⁶ Galaxy Theatres has admitted that Ms. Ingham, the General Manager of the Galaxy Uptown 10 movie theater in Gig Harbor, where Mr. Garza was injured, is an employee of Galaxy Theatres.¹⁰⁷

There are sufficient facts for the trial court to have found that Galaxy Theatres controlled the premises on which the Garzas’ injuries occurred. Moreover, the trial court was required to treat these facts as true. Once a trial court enters an order of default, it treats all factual allegations as admitted by the defaulting defendant.¹⁰⁸

Galaxy Theatres’ reliance on *Kaye* and *Caouette* is misplaced. In *Caouette*, the trial court granted the defendants’ motion to vacate a judgment that was brought six weeks after the judgment was entered. The Court of Appeals emphasized the substantial discretion of the trial court in

¹⁰² CP at 188.

¹⁰³ CP at 192.

¹⁰⁴ CP at 192.

¹⁰⁵ CP at 104.

¹⁰⁶ CP at 102, 108.

¹⁰⁷ CP at 97, 102.

¹⁰⁸ *Kaye v. Lowe’s HIW, Inc.*, 158 Wn. App. 320, 326, 242 P.3d 27 (2010).

ruling on motions to vacate a judgment.¹⁰⁹ The Court of Appeals ultimately affirmed the trial court's decision. In *Kaye*, the trial court entered an order of default against three defendants, but it only entered a judgment against one of the defendants.¹¹⁰ The plaintiff appealed the trial court's refusal to enter judgment against the other two defendants.¹¹¹ The Court of Appeals again recognized the wide discretion of the trial court in entering judgments against defendants and ultimately upheld the trial court's decision.¹¹² Both *Kaye* and *Caouette* confirm the substantial discretion that appellate courts give to the trial court in entering orders of judgment.

The facts in *Kaye* and *Caouette* are distinguishable from the facts in our case. The plaintiff in *Kaye* failed to present any factual basis to support her claim. Similarly, in *Caouette*, the plaintiff failed to plead sufficient facts supporting a necessary element *and* failed to provide any facts in support of that element in her supporting affidavit.¹¹³ As demonstrated above, the facts alleged in both the Complaint and the supporting declarations provide sufficient evidence that Galaxy Theatres controlled the premises on which the Garzas' injuries occurred.

Moreover, *Caouette* is inconsistent with other case law requiring an irregularity "extraneous to the action of the court or questions

¹⁰⁹ *Caouette v. Martinez*, 71 Wn. App. 69, 77, 856 P.2d 725 (1993).

¹¹⁰ *Kaye* at 325.

¹¹¹ *Kaye* at 325.

¹¹² *Kaye* at 326 -- 27.

¹¹³ *Caouette*, 71 Wn. App. at 78 – 79.

concerning the regularity of the court's proceedings."¹¹⁴ While *Caouette* cites to *State v. Scott*¹¹⁵ for the proposition that CR 60(b)(11) may be used to vacate a judgment for "incomplete, incorrect, or conclusory factual information,"¹¹⁶ *Scott* does not support this citation.

In *Scott*, a criminal case, the defendant was given a suspended sentence for a drug charge.¹¹⁷ One of the conditions of the sentence was that defendant take periodic drug tests. The State moved to revoke the suspended sentence alleging that the defendant had not taken the drug tests as required.¹¹⁸ At the hearing, the defendant said he had taken the test but was unable to provide proof that he had taken the test. The trial court called the agency that administered the test, but the supervisor was not available. The person who answered the phone indicated that he could not find any record that defendant had taken the test. The trial court entered judgment against defendant. The next day, the defendant produced documentation from the agency that defendant had in fact reported several times for the drug test. Based on this corrected information, the trial court vacated the judgment.¹¹⁹ The Supreme Court upheld the vacation, holding that "CR 60(b)(11) controls and permits vacation of the orders under the unusual circumstances of this case."¹²⁰ but offered very little analysis. The following is the entirety of its analysis:

¹¹⁴ *Yearout*, 32 Wn. App. at 141.

¹¹⁵ 92 Wn.2d 209, 595 P.2d 549 (1979).

¹¹⁶ 71 Wn. App. at 78.

¹¹⁷ 92 Wn.2d at 210.

¹¹⁸ *Scott*, 92 Wn.2d at 211.

¹¹⁹ *Scott*, 92 Wn.2d at 212.

¹²⁰ *Scott*, 92 Wn.2d at 212.

It has long been the rule in Washington, both under prior statute [RCW 4.72.010], and now by court rule, that motions to vacate or for relief from judgments are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion. (Footnote and citations omitted.) In the instant case there was good reason for the vacation of the judgment and no abuse of discretion.¹²¹

Nowhere in the opinion does the *Scott* Court state that CR 60(b)(11) may be used to vacate a judgment for “incomplete, incorrect, or conclusory factual information” as *Caouette* suggests. While *Scott* cited CR 60(b)(11), the analysis is more appropriate under CR 60(b)(3), which allows a vacation pursuant to “newly discovered evidence.” The *Caouette* Court expanded the holding in *Scott*, an expansion not adopted by the Supreme Court to date.

Finally, Galaxy Theatres argues that certain statements made at a hearing are barred by ER 602 and ER 801.¹²² Galaxy Theatres did not object to hearsay at the hearing and cannot raise the issue for the first time on appeal.¹²³

Galaxy Theatres failed to produce evidence of their alleged defense, and the trial court did not abuse its discretion denying the motion to vacate. Moreover, the Garzas presented sufficient evidence to show that Galaxy Theatres controlled the theater where their injuries occurred.

V. CONCLUSION

The trial court has upheld the Garzas’ Judgment twice. Galaxy Theatres has failed to show that the trial court abused its discretion.

¹²¹ *Scott*, 92 Wn.2d at 212.

¹²² *Appellant’s Brief* at 19.

¹²³ *See* VRP (Sept. 30, 2016); RAP 2.5(a).

Galaxy Theatres has already admitted liability – that it had control of the premises and owed a duty to the Garzas. Galaxy Theatres’ counsel refused to answer direct questions from the trial court about whether Galaxy Theatres controlled the premises. From the record below, there is no doubt that Galaxy Theatres controlled the theater and owed the Garzas a duty. This Court should affirm the trial court’s orders denying Galaxy Theatres’ motions.

RESPECTFULLY SUBMITTED this 21st day of March, 2017.

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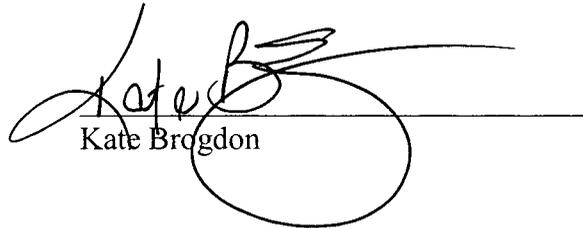
CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now ~~and at all times~~ ^{STATE OF WASHINGTON} herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Joseph A. Hamell Montgomery Purdue Blankinship & Austin 5500 Columbia Center 701 Fifth Avenue Seattle, WA 98104-7096	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input checked="" type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
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DATED this 22nd day of March 2017, at Tacoma, Washington.


Kate Brogdon