No. 316475

COURT OF APPEALS,
DIVISION III,
OF THE STATE OF WASHINGTON

CAMERON JONES,
a single man,

Plaintiff-Appellant,

v.

HAPA UNITED, LLC,
A Washington Limited Liability Company, doing business as Wave Island Grill and Sushi Bar,

Defendants-Respondent.

APPELLANT'S REPLY BRIEF

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A. LEGAL ARGUMENT

1. Judge Eitzen's April 12, 2013 Decision to Vacate the Order of Default Was an Abuse of Discretion.

Judge Eitzen's decision to vacate the Order of Default qualifies as an abuse of discretion in this case. The parties agree that the four factor test enumerated in *White v. Holm* govern whether vacation of the April 12, 2013 Order of Default was proper. However, the Defendant/Respondent fails to recognize that evidence of a valid defense to liability was not presented to the trial court. The evidence was so lacking that Judge Eitzen failed to rule whether Defendant met the required burden under *White v. Holm*. (VRP 17-18). Without evidence of a prima facie defense, the elements of *White v. Holm* are not met and vacation of a Default Order is not proper. In other words, vacating the Order of Default without sufficient evidence of at least a prima facie defense is an abuse of discretion under the law.

Alternatively, the Defendant/Respondent's failure to act in response to the numerous attempts to contact him about this case, including proper service of the Summons and Complaint, rise to a level of willful failure to respond and justice requires that he not be rewarded with a vacated Order of Default. Instead, equity requires that Defendant/Respondent adhere to Washington's court rules and

acknowledge the formal time limits and procedures required of litigants. *TMT Bear Creek Shopping Center v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 199 (2007). Justice and equity should also apply to benefit Plaintiff/Appellant who properly preserved his rights and continually attempted to contact Defendant/Respondent about this case, including completing proper service of the Summons and Complaint. *Johnson v. Cash Store*, 116 Wn. App. 833, 841 (2003).

i. Defendant/Respondent failed to present evidence of a prima facie defense.

Defendant/Respondent relies heavily, if not solely, on the police report from the date in question as evidence of a prima facie defense. However, even when taking evidence of the police report in light most favorable to Defendant/Respondent, the contents thereof do not rise to the level of a prima facie defense to battery, assault, or negligence. (*See* Appellant's Brief, p. 14-15). The Defendant has consistently changed its tune with regard to what evidence they have to show a prima facie defense to Plaintiff's claims. First, in the Motion to Vacate Default Judgment, the Defendant claimed that "no employee of Wave struck Plaintiff" and that "Defendant also disagrees with Plaintiff's version of the accident." (CP 67-76). In support thereof, Mr. Troutt declared that "the security guards at Wave did not punch any other individuals in the face that evening;"

however such a statement is hearsay and should not be taken into consideration by the Courts. (CP 85-86). Then at oral argument the Defendant claimed that he had a prima facie defense because the police report allegedly showed that the altercation was chaotic and no one identified the bartender who hit the Plaintiff (VRP 4-5). Now on appeal, the Defendant/Respondent is attempting for the first time to raise a "defense of others" claim. (Defendant/Respondent's Brief, p. 11-12). Despite the fact that the Defendant provides no authority for such a defense and the fact that new evidence/claims are not allowed to be raised on appeal, the police report itself plainly does not provide enough evidence to establish a prima facie defense. The Defendant/Respondent has been the sole party in possession of the identity of the Wave employee who struck the Plaintiff and was provided ample opportunity to present evidence via declarations or otherwise to either establish the identity of the employee or disprove Plaintiff's claims. Nothing was done by the defense and it's the Defendant's burden of producing a prima facie defense to Plaintiff's claims in order to have a default vacated. *White v. Holm, 73 Wn.2d at 352.* Clearly, vacating the Order of Default was an abuse of discretion because Defendant/Respondent failed to provide any evidence of a prima facie defense to the trial court.

ii. Defendant/Respondent's failure to Answer the Complaint was willful.

Judge Eitzen categorized, without actually finding, the Defendant/Respondent's conduct as inadvertence/mistake. However, the Defendant/Respondent's intentional decision not to respond to the Complaint was willful and the defense should not be entitled to vacation of the Order of Default. The defense claims that a twenty-seven (27) year old new business owner who was properly served with a Summons and Complaint, after being contacted numerous times previously by opposing counsel, and who put the papers aside and forgot about them qualifies as excusable neglect and that such conduct was not wilful. (Defendant/Respondent's Brief, p. 12). Note, however, that this claim is an extreme departure from Mr. Troutt's original statement that he just didn't remember being served. (CP 85-86). Regardless, and in direct contradiction to Mr. Troutt's declarations to the Court, Judge Eitzen ultimately ruled that "you [Mr. Troutt] thought it was going to go away and you were going to ignore it." (VRP 17). Any reasonable person would agree that choosing to ignore a legal pleading is willful. Such conduct even qualifies as willful under WPI 14.01 as cited by the defense, which states, "willful misconduct is the ... intentional failure to do an act which one has a duty to do when he has actual knowledge of the peril that

will be created and intentionally fails to avert injury." So even under the law cited by the Defendant/Respondent, it is clear that that ignoring a Summons and Complaint with the intention that it just "go away" is a conscious and willful decision by the Defendant not to respond to the pleadings. "Fatigue, denial, ignorance, and a desire to make it go away," does not qualify under the law as inadvertence/mistake. (Defendant/Respondent's Brief, p. 13). Instead, Washington courts have repeatedly found that behavior similar to the Defendant's in the case equates to inexcusable neglect and/or willfulness. (*See* Appellant's Brief, p. 17-20). Further, opposing counsel made numerous attempts to contact the Defendant prior to attempting service of the Summons and Complaint, so the defense cannot claim that service was the first he heard of Plaintiff's claims. (CP 94-107).

Based on the facts presented to the trial court, Mr. Troutt's failure to respond to the Summons and Complaint in this case was willful. It is not equitable and/or just to award such behavior by vacation a Default Judgment. As a result, the Default Judgment should not have been vacated and should be reinstated.

iii. Plaintiff/Appellant will suffer a hardship if the Order to Vacate is upheld.

Judge Eitzen's ruling failed to recognize that the Plaintiff/Appellant will suffer a substantial hardship if this case is allowed to proceed to trial on liability. As set forth *supra*, Defendant/Respondent failed to present evidence of a defense to the claims against them. The evidence was so lacking that Judge Eitzen failed to even rule whether a defense was properly presented. (VRP 17-18). Without a defense, the Defendant/Respondent has nothing to present to a jury regarding liability and Plaintiff/Appellant will be granted a directed verdict in his favor. Allowing a case to proceed without evidence of a defense to liability would waste not only the parties' time and money, but the courts. Plaintiff/Appellant would be required to spend time, money, and energy preparing to present a case to which there is no defense, thus creating a substantial hardship. As a result, the Order of Default must be reinstated to prevent such a hardship from occurring.

B. CONCLUSION

Based on the record, the Plaintiff respectfully requests that this Court reverse the portion of the April 12, 2013 decision of The Honorable Tari Eitzen which vacated the Order of Default entered on October 4,

2012 and reinstate said Order establishing Defendant's liability, leaving only damages to be determined by a trier of fact.

Respectfully submitted November 18, 2013.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Appellant's Reply Brief to Defendant-Appellee Hapa United and Defendant-Appellee's attorney, William Spencer, at the following address, postage prepaid, on November 18, 2013.

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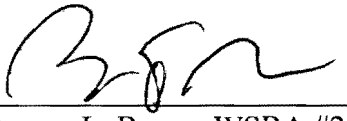

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