NO. 316475

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CAMERON JONES, a single man,

Plaintiff/Appellant

v.

HAPA UNITED, LLC, a Washington Limited Liability Company, d/b/a The Wave Island Grill & Sushi Bar

Defendant/Respondent

DEFENDANT/RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL CASES

APPELLATE CASES

OTHER AUTHORITY

I. STATEMENT OF THE CASE

This case arises out of a melee at a Spokane restaurant called the Wave Island Grill on or about September 28 - 29, 2011.

Defendant/Respondent Hapa United, LLC owns the business, a restaurant - bar - nightclub featuring live music and catering to the 18 to 30 age group. The Wave is operated by Jordan Troutt who is its manager, sole officer, and agent for Service of Process. Prior to this event, Mr. Troutt, age 27, had never been involved in a lawsuit involving one of his restaurants.[1]

The events of that night and early morning were chaotic and involved intoxicated young people running amok inside and outside the premises. Plaintiff/Appellant Jones claims to have been a patron of the Wave that night. According to the police report, attached to Defendant's Motion to Vacate, and reviewed by the trial court prior to its ruling, a man was observed kicking a female in the face.[2] The Wave had security guards who responded and went to her defense, but the situation escalated to involve the local police.

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[1] CP 85 - 85
[2] CP 49 - 52

According to the police report, Plaintiff/Appellant was contacted by police that night and made the allegation to the reporting officer that he had been assaulted by a bouncer from the Wave. According to the report, Plaintiff/Appellant Jones declined medical treatment and also declined to press charges. Plaintiff/Appellant Jones stated to the officer that he believed he was struck because the bouncer thought he (Jones) was going to hit someone else.[3] The officer apparently did not pursue Plaintiff/Appellant Jones' claims.

Plaintiff/Appellant subsequently filed a Complaint alleging that he was assaulted and injured by an un-named, un-identified bouncer from the Wave. [4]

Defendant/Respondent, in his Declaration, considered by the trial court in its ruling, adamantly denies that security personnel ever struck Plaintiff/Appellant.[5]

What is not disputed is that Defendant/Respondent Jordan Troutt did not personally assault the Plaintiff/Appellant. Plaintiff/Appellant has not named or identified the person he believes was an employee of the Wave.

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[3] CP 49 - 52
[4] CP 1- 6
[5] CP 85 - 86

Plaintiff/Appellant alleges that his agents served Mr. Troutt with the Summons and Complaint on or about July 19, 2012 while Mr. Troutt was working behind the bar at the Wave, serving as its bartender. Plaintiff/ Appellant's Declaration attests that a female process server handed Defendant/Respondent some papers and thus affected service.[6] According to Plaintiff/Appellant's agent, there had been eighteen (18) prior attempts to serve Defendant/Respondent.[7]

Defendant/Respondent concedes he did not respond to the Summons and Complaint because he did not remember being served. Plaintiff/ Appellant Jones took a default on October 4, 2012.[8] Thereafter, Plaintiff/Appellant sought a default judgment against Defendant/ Respondent in the sum of $350,000 on November 16, 2012, which was granted. [9]

That same day, Plaintiff/Appellant's counsel sent a letter to Defendant/Respondent stating that the judgment had been entered on November 16, 2012. Upon receipt of that letter, Defendant/Respondent

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[6] CP 87 - 92
[7] CP 87 - 93
[8] CP 11
[9] CP 21 - 23

became aware that there was a legal action, and promptly contacted his insurance carrier. Counsel was immediately obtained and a Notice of Appearance was entered on December 19, 2012, within one month of the Default Judgment.[10] Thereafter, a Motion to Vacate the Default and Default Judgment was filed on March 13, 2013.[11] The Motion to Vacate was filed well within the year set forth in CR 60(b)11.[12]

Defendant/Respondent provided a Declaration that he did not recall being served with court papers, that he was multi-tasking, and that he had no memory of signing the Service Declaration.[13]

After full briefing by both Plaintiff/Appellant and Defendant/ Respondent, the Honorable Tari Eitzen heard the matter on April 12, 2013 and entered an Order vacating both the default and the default judgment.[14] In the Order, Judge Eitzen included mention of her review of seven (7) separate documents: Defendant's Motion to Vacate, Declaration of Daira Waldenberg in Support of Motion to Vacate, Declaration of Jordan Troutt in Support of Motion to Vacate, Appellant's Response to Defendant's

[10] CP 24 – 25
[11] CP 67 - 76
[12] CR 60(b)11
[13] CP 85 - 87
[14] CP 127 - 128

Motion, Declaration of Breean Beggs in Support of Appellant's Response, Declaration of Gail Sauerland, Defendant's Reply to Plaintiff's Response and Declaration of Jordan Troutt in Support of Defendant's Reply.[15] The Trial Court imposed costs upon Defendant/Respondent and strongly reminded Defendant/Respondent of his obligations. From that ruling, Plaintiff/Appellant takes this appeal.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1) Did the trial court abuse its discretion?

2) Was the trial court correct in granting Defendant's Motion to Vacate the Default?

3) Was the trial court correct in granting Defendant's Motion to Vacate the Default Judgment?

III. ARGUMENT

The Trial Court may set aside an Oder of Default for good cause and upon terms the court deems just.

The Court may set aside a Default Judgment under the four factors set forth in *White v. Holm*[16] below.

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[15] *Id.*
[16] *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968)

A. ***THE STANDARD OF REVIEW FOR THE TRIAL COURT'S DECISION TO VACATE A DEFAULT***

The decision to grant or deny a Motion to Vacate a Default Judgment is within the Trial Court's sound discretion.[17] Having exercised its discretion, the Trial Court's decision on a Motion to Vacate shall not be overturned unless the trial court abused its discretion.[18]

The standard for review by the Appellate Court reviewing a Trial Court's decision to vacate a default judgment in *Little v. King* is abuse of discretion.[19]

The Appellate Court reviews the Trial Court's actual findings for substantial evidence. *Sunnyside Valley Irrigation Dist v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true.

Since the Trial Court's discretion in fashioning relief from default is both equitable as well as legal in nature, the findings of the trial court shall not be overturned absent an abuse of discretion. Therefore, the Court's

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[17] *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P. 3d 956 (2007)
[18] *Griggs v. Averbeck Realty, Inc.*, 902 Wn. 2d 576, 582, 599 P. 2d 1289 (1979)
[19] *Little v. King*, 160 Wn. 2d 696, 702

principle inquiry should be whether the default judgment is just and equitable. [20]

B. ABUSE OF DISCRETION

Abuse of discretion exists only when no reasonable person would take the position adopted by the trial court.[21]

The Trial Court was presented with evidence consisting of oral testimony and the seven (7) documents listed by the Court in her Order to Vacate. Within those documents were contradictory statements of how the events at the Wave transpired. Also within those documents, and in the oral testimony, was the evidence of how Defendnat/Respondent came to be served and missed the deadline for filing an Answer to the Complaint.

The Trial Court made a decision based on the evidence she heard and with the standard of doing justice. Judge Eitzen, in her discretion, chose to vacate the default and the default judgment and have the case heard on the merits. Under *Fowler v. Johnson*, only if no other reasonable person could conclude the same, should the Court's decision be reversed.[22]

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[20] Id. at 704
[21] *Little v. King* at 710. (*citing Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000))
[22] *Fowler v. Johnson,* 167 Wash. App. 596, 601, 273 P.3d 1042 (2012)

Abuse of discretion is less likely to be found if the default is set aside.[23]

In order to have the Court's decision reversed, its decision must be manifestly unreasonable.

A Trial Court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wash. App. 191, 199, 165 P.3d. 1271 (2007).

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; and if it is based on an incorrect standard or the facts do not meet the correct standard. *In Re the Marriage of Littlefield*, 133 Wn.2d, 39, 47, 940 P.2d 1362 (1997).

The record supports contradictory statements uttered by the Plaintiff/Appellant to the police, Defendant/Respondent's denial that personnel from the Wave struck the Plaintiff/Appellant and no

[23] *Griggs v. Averbeck Realty*, Inc. 92 Wn.2d 576, 599 P.2d 1289 (1979).

identification of the alleged assailant. The Trial Court did not abuse its discretion in setting aside the default to see that justice was done. Further, the trial court heard evidence of Defendant/Respondent's inadvertence, neglect and mistake and, under the standards of a light most favorable to the party moving to vacate, found his actions to not be willful.

C. PREFERENCE TO HAVE CASES HEARD ON THE MERITS

Default Judgments are disfavored in Washington. Case law supports a strong preference to have cases heard on their merits rather than by default.[24]

The reviewing court is less likely to find that the Trial Court based its decision on untenable grounds when the court vacated the default that when it did not.[25] Absent in this instance is the lengthy delay or egregious behavior that would justify not vacating a default.

D. MOTIONS TO VACATE ARE EQUITABLE IN NATURE.

Judge Eitzen admonished Defendant/Respondent from the bench in the passage quoted in Appellant's Brief. Her words even bear the prediction that the matter would be brought before the Appellate Court.[26]

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[24] *Griggs*, Wn.2d. at 581.
[25] *Griggs*, 92 Wn.2d at 582.
[26] Appellant's Brief, P. 7

In her ruling she explained her decision to vacate the Orders by saying that to not do so would not do justice.

In reviewing a Motion to Vacate a Default Judgment, the Court's principle inquiry should be whether a default judgment is just and equitable.[27]

The criteria used by the Trial Court was what was just and equitable as the evidence was presented to it. Such a determination is within the discretion of the Trial Court.

As the court held in *White v. Holm*, "The trial court may exercise its discretion liberally, as well as equitably to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done."[28]

E. COURT MAY SET ASIDE A DEFAULT JUDGMENT UNDER THE FOUR WHITE V. HOLM FACTORS.

To vacate a default judgment, a moving party must demonstrate that: (1) the defendant presented substantial evidence of a prima facia case; (2) the failure to appear was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) the party acted within a timely fashion and with due

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[27] *Little*, 160 Wn.2d at 710 -711
[28] *White v. Holm*, 73 Wn.2d 348, 351 438 P. 2d 581 (1968)

diligence after the entry of the default; and (4) that no substantial hardship would befall the plaintiff if the Motion was granted.[29]

(1) Defendant/Respondent Presented Substantial Evidence of a Prima Facia Case.

Plaintiff/Appellant's words to the police officer on the night in question give rise to at least an inference that if he was, in fact struck, that the individual has a "defense of others" claim. Plaintiff/Appellant Jones is quoted as saying, "he thinks the bouncer hit him because the bouncer thought he (Jones) was going to jump the guy who was running away."[30] In determining whether the defednant presented substantial evidence of a prima facia defense, the court views the facts proffered in the light most favorable to the defendant assuming the truth of that evidence favorable to the defendant and disregarding inconsistent or unfavorable evidence. *TMT Bear Creek Shopping Center., Inc. v. Petco Animal Supplies, Inc.* 140 Wash. App. 191, 203, 165 P.3d 1271.

Under this standard, the Trial Court was obligated to take the evidence contained in the police report and Defendant/Respondent's

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[29] Id.
[30] CP 46

Declaration in the light most favorable to Defendant/Respondent. Thus, the claim by Plaintiff/Appellant, that the bouncer may have thought he was about to strike someone, must be given credence for the purposes of the hearing on the Motion to Vacate in establishing a prima facia case of defense. Likewise, Defendant/Respondent's claim of ignorance, forgetfulness and excusable neglect and mistake does not rise to the level of willful or intentional disregard of the service of process.

2. ***The Failure To Appear Was Occasioned By Mistake, Surprise, Inadvertence or Excusable Neglect.***

Defendant/Respondent stated in his Declaration that he is 27 years old and has never been involved with a business that was sued. He was handed papers when he was working behind a busy bar. He put them aside and forgot about them. That behavior is clearly a mistake, it is neglectful, but it is not, without additional evidence, willful.

Washington Pattern Jury Instruction 14.01 defines Willful Misconduct as:

> Willful misconduct is the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has the duty to do when he or she has actual knowledge of the peril that will be

> created and intentionally fails to avert injury [or] actually intends to cause harm.[31]

Under the standards set forth in *TMT Bear Creek* of reviewing a Motion to Vacate, the Court views the facts proffered in the light most favorable to the defendant, assuming the truth of that evidence favorable to the defendant and disregarding inconsistent or unfavorable evidence.[32] There is no evidence that Defendant/ Respondent's failure to answer the Complaint timely was anything more than mistake or neglect. There is no evidence of willfulness, chicanery or deceit. Rather, as the Trial Court chose to characterize it, it was based perhaps on fatigue, denial, ignorance and a desire to make it go away.

The Trial Court made a discretionary ruling that should not be overturned unless the exceptionally high standards of *Griggs* and *Little* make the ruling so untenable that the result is not equitable and just.[33]

3. ***Respondent Acted Within a Timely Fashion and With Due Diligence After The Entry of Default.***

A Motion to Vacate a Default Judgment must be brought within a reasonable time, and not more than a year after the judgment under CR

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[31] WPI 14.01
[32] *Bear Creek* , 140 Wash. App at 203
[33] *Morin v. Burris,* 160 Wn.2d 745, 754

60(b)(11). A reasonable time is determined by examining the facts and circumstances of the critical period when a party becomes aware of an order and when he or she files the Motion to Vacate that Order. [34]

Respondent first became aware of the default judgment when he received Appellant's letter on November 21, 2012 informing him of the judgment entered a week before. Within a month, Respondent had obtained counsel who had filed a Notice of Appearance, and within another three (3) months, the Motion to Vacate had been filed. This is well within the one year . Four (4) months was found to be a reasonable delay in *Luckett v. Boeing Co.*[35]

Due diligence after the discovery of a default judgment contemplates the prompt filing of a Motion to Vacate.[36] Defendant/Respondent acted with due diligence and in a timely manner in responding to promptly vacate the judgment.

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[34] *Topliff v. Chigago Ins., Co.,* 130 Wash. App. 301, 305, 122 P. 3d 922 (2005)
[35] *Luckett v. Boeing Co.*, 98 Wash. App. 307, 314, 989 P. 2d. 1144 (1999)
[36] *Shepard v. Helsell, Fetterman, Martin, Todd & Hoakanson*, 95 Wash. App 231, 974 P. 2d. 1275 (1999)

4. *No Substantial Hardship Would Befall Appellant if the Motion was Granted.*

Appellant has presented no evidence of hardship beyond that normal in litigation. The trial court sanctioned Defendant /Respondent with costs for his failure to promptly respond to the Summons and Complaint.

IV. CONCLUSION

The Court may set aside an Order of Default for good cause and upon terms the court deems just, and set aside a Default Judgment under the four *White v. Holm* factors.

Substantial questions of both fact and law exists as to who may have struck the Plaintiff/Appellant on that particular night. If in fact is was an employee of the Wave, there are significant questions raised by Plaintiff/Appellant's statements to the police, when the matter was fresh, as to warrant the need for additional discovery. The Trial Court properly considered those factors in setting aside the Default in order to see that justice is done and the proper parties are held responsible.

The Trial Court properly considered the four (4) *White v. Holm,* factors when making is Order listing the seven (7) documents with specificity in her Order. Included in that list of seven (7) is the police

report where, when the incident was fresh, Plaintiff/Appellant did not identify any particular person, declined aid for his injuries, and, in words attributed to him, set forth a "defense of others" claim. The police report, attached to attorney Daira Waldenberg's Declaration, was one of the documents upon which the trial court relied in framing her Order to Vacate. Under the legal standard that all evidence, for the purposes of the Motion to Vacate, must be taken in the light most favorable to the moving party, Defendant/ Respondent has established a prima facia defense that whoever the assailant was has a lawful "defense of others" claim. Added to Defendant/Respondent's Declaration, that none of his bouncers struck anyone other than the man kicking the woman, and a prima facia case exists to support the Trial Court's finding, whether or not Judge Eitzen mentioned it in her statements from the bench.

Washington law favors a resolution on the merits. The Trial Court heard the evidence and declared that it reviewed the record set forth in its Order. The Trial Court's decision indicates that it found the evidence sufficiently compelling to render its decision. The standard of review dictates that only if no reasonable person could find prima facia evidence of doubt that it was in fact a bouncer that struck Plaintiff/Appellant.

Plaintiff/Appellant's own words to the police officer on the night in question give rise to at least a presumption that whoever struck him was acting in defense of others. "He hit me because he thought I was going jump the guy who was running away."

In hearing evidence from Defendant/Respondent about the circumstances of his service while being on the job at a bar, and being inexperienced and distracted, the Court made a discretionary ruling. The standard of review is that no other reasonable person could conclude that a 27 year old man, who had never been involved with service of process, acted willfully, intentionally, and with a desire to refrain from an act he was bound to do. The Trial Court exercised its discretion, couching it in the words that to not so find would not be doing justice. [37]

Case law dictates that the finding of the Trial Court shall not be overturned unless it is manifestly unreasonable or based on untenable grounds or reasons. A true question of fact of how this melee unfolded and who was an instigator and who was a victim must be heard on the merits as

[37] Appellant's Brief, p. 7

well as the need to identify the person who allegedly struck Plaintiff/Appellant to determine if he, in fact, was an employee of the Wave.

The Trial Court properly found that Defendant/Respondent's inexperience with the legal process, his desire to make this "go away" was excusable neglect or inadvertence. There is certainly no record to show that it was willful or intentional.

Defendant/Respondent missed a single deadline – that of answering the Complaint in a timely fashion. Defendant/Respondent acted promptly when he received the letter regarding the judgment, and the Motion to Vacate was filed well within the time limits of CR 60(b)11.

Finally, Plaintiff/Appellant presented no evidence that hardship would result from vacating this Order.

Ample case law from the State of Washington exists to support upholding the Trial Court's Order. The Federal Court, Eastern District also weighed in, saying most eloquently Defendant/ Respondent's position:

> The Court prefers to dispose of cases on their merits. In this case default judgment as a sanction for a single failure to adhere to a court deadline would be an abuse of discretion."[38]

[38] *Estate of Meyers v. US*, 842 F. Supp. 1297 (E.D. Wash, 1993)

For the above-stated reasons, Defendant/Respondent asks that the decision of the Trial Court be affirmed.

Respectfully requested this 23rd day of October, 2013.

MURRAY, DUNHAM & MURRAY

By: _____
William W. Spencer, WSBA #9592
Elizabeth a. Frieberg, WSBA #23944
of Attorneys for Respondent

DECLARATION OF SERVICE

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

1. I am an employee of Murray, Dunham & Murray, am over 18 years and competent to testify to the matters contained herein.

2. On this 23rd day of October, 2013, I caused Respondent's Brief to be sent via Federal Express to the Court of Appeals, Division III, and a copy was also ~~emailed~~ faxed and sent via Federal Express to Plaintiff's counsel at the address noted below:

Breean L. Beggs
Paukert & Troppmann, PLLC
522 West Riverside Avenue, Ste. 560
Spokane, WA 99201-0519

Dated this 23rd day of October, 2013.

Tammy Bolte

Tammy Bolte, Declarant