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NO. 49138-9-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

Galaxy Theatres, LLC,

Appellant,

v.

Gregorio Garza and Lizbeth Garza,

Respondents.

PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

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I. IDENTITY OF PETITIONER

Petitioner is Galaxy Theatres, LLC ("Galaxy Theatres"), the defendant in the Superior Court and the appellant in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Galaxy Theatres respectfully requests that this Court grant review of the unpublished opinion filed on January 4, 2018, by Division II of the Washington State Court of Appeals captioned *Gregorio Garza and Lizbeth Garza v. Galaxy Theatres, LLC*, No. 49138-9-II, 2018 WL 286757 (2018). A copy of the Court of Appeals' unpublished opinion is attached in the appendix to this Petition.

III. ISSUES PRESENTED FOR REVIEW

1. Should a default judgment be vacated under CR 60(b)(11) where the plaintiff fails to prove each element of their claim?

2. Should a default judgment be vacated under CR 60(b)(9) where a party fails to receive notice of a lawsuit through unavoidable casualty or misfortune?

IV. INTRODUCTION

The underlying unpublished opinion is in conflict with controlling Washington authority. Under published Washington precedent, a party moving for entry of a default judgment must establish every element of

their claim. Failure to do so is grounds for vacation of the default judgment under CR 60(b)(11). Nevertheless, the Court of Appeals concluded that this burden had been met in this case because two separate entities with similar names 'did business at' the same location. The decision reached by the Court of Appeals is a troubling result which lowers the minimum bar for entry of default judgments, disfavored under Washington law.

In addition, this case presents an issue of substantial public interest as parties and courts incorporate increasing levels of technology into litigation: whether the failure of an electronic system to deliver notice of a lawsuit constitutes unavoidable casualty or misfortune under CR 60(b)(9). For the reasons set forth below, review should be granted by this Court.

V. STATEMENT OF THE CASE[1]

A. Background to the Lawsuit

Mr. Garza alleges he was injured after falling at the Galaxy Uptown Movie Theatres in Gig Harbor, Washington.[2] The retail complex where the theater is located is owned by Gateway Capital, LLC. Galaxy

[1] While Galaxy Theatres contends that review is appropriate based upon the unpublished Court of Appeals' opinion as written, the facts set forth herein are provided to clarify the facts presented in the Court of Appeals' opinion.

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

Gig Harbor, LLC leases the space from Gateway (not Petitioner Galaxy Theatres).[3]

B. The Garzas Sue Galaxy Theatres—Not Galaxy Gig Harbor

The Garzas filed suit and named Petitioner Galaxy Theatres LLC as the defendant. The Complaint did not name or mention the tenant Galaxy Gig Harbor, LLC. The Complaint did not explain Petitioner Galaxy Theatres' relationship to the operation of the movie theater, other than to allege Galaxy Theatres "did business" at that address.[4]

C. Galaxy Theatres Never Receives Notice of the Lawsuit

According to the declaration of service, the Complaint was served on Galaxy Theatres' registered agent, Fairchild Record Search, Ltd. ("Fairchild"), on December 2, 2014.[5] Fairchild alleges it emailed the complaint to Galaxy Theatres that same day. However, Galaxy Theatres never received the summons and complaint.[6]

Indeed, an outside information technology consultant searched Galaxy Theatres' mail servers for any email from Fairchild's email

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

[4] CP 2.

[5] CP 7.

[6] CP 546 – 547. Declaration of Pamela Bush in Support of Defendant's Motion to Vacate ("Bush Decl.") at ¶¶ 2-3.

domain name. This search included archive files, files in Outlook's spam filter, and any files stored in the "Trash" folder. This search did not, however, turn up the email Fairchild alleges it sent. Additionally, the technology consultant found no indication that Galaxy Theatres deleted the email. Instead, the technology consultant concluded that Galaxy Theatres' email system never received the alleged email containing the summons and complaint.[7]

D. The Garzas Obtain a Large Default Judgment against Galaxy Theatres and Strategically Wait to Enforce the Judgment

Having never received notice of the summons and complaint, Galaxy Theatres did not respond and the Garzas obtained an order of default on January 13, 2015.[8] A month and half later the Garzas held a hearing to establish damages and enter default judgment against Galaxy Theatres. Galaxy Theatres was not notified of the hearing, and accordingly did not appear or oppose entry of judgment or the amount of damages awarded (over $700,000.00).

The Garzas tactically waited just over a year to initiate collection on the judgment.[9] Having become aware of the lawsuit for the first time,

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

[8] CP 28.

[9] CP 172.

counsel for Galaxy Theatres[10] filed a motion to set aside the damage award portion of the default judgment.[11] The Garzas responded that the motion was barred by the one year time limitation for motions brought under CR 60(b)(1).[12] Counsel for Galaxy Theatres indicated that Galaxy Theatres recognized the one-year time bar under CR 60 (for motions to vacate brought under CR 60(b)(1), (2), and (3)) and has "conceded, made a heavy concession that we're not asking to have the entire judgment vacated." The trial court held that the motion was time barred and that the damage award was proper.[13]

E. Galaxy Theatres Moves to Vacate the Default Judgment under Established Washington Law

Two months later, Galaxy Theatres retained new counsel and filed a motion to vacate the default judgment entirely.[14] Galaxy Theatres argued that vacation was proper under CR 60(b)(11) and established Washington law because the Garzas failed to present sufficient evidence to demonstrate Galaxy Theatres owed the Garzas a duty, an indispensable

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[10] Prior counsel for Galaxy Theatres was Ms. Leslie Fleming.

[11] CP 84.

[12] CP 176.

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

[14] CP 548 – 560.

element of the claim.[15] Galaxy Theatres also argued the judgment should be vacated under CR 60(b)(9) because the failure of an email system to deliver notice of the summons and complaint to Galaxy Theatres constituted an unavoidable casualty (an issue of first impression in Washington).[16]

F. The Trial Court Denies Galaxy Theatres' Motion to Vacate

The trial court denied Galaxy Theatres' motion to vacate. The court ruled that Ms. Fleming's 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.[17] Galaxy Theatres timely appealed.

G. The Court of Appeals Affirms the Trial Court's Decision

The Court of Appeals, Division II affirmed the trial court's order denying Galaxy Theatres' motion to vacate. The Court of Appeals cited its published decision in *Caouette v. Martinez*, 71 Wn. App. 67, 78, 856 P.2d 725 (1993), noting that Galaxy Theatres "was entitled to vacation of

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[15] CP 548.

[16] CP 548.

[17] CP 643.

the default judgment only if the Garzas failed to set forth facts that could show that Galaxy [Theatres] occupied the premises with intent to control." The Court of Appeals then held that the Garzas had met their burden by alleging that "Galaxy Theatres, LLC" was a company "doing business . . . as Galaxy Theatres at 4649 Point Fosdick Drive Northwest, and is the location where the subject incident occurred." This allegation was made in the "Status of Parties" section of the Garzas' complaint.

The Court of Appeals also denied Galaxy Theatres' argument that the failure of an electronic server to deliver notice of the lawsuit constituted unavoidable casualty or misfortune under CR 60(b)(9) because it was a type of foreseeable, avoidable breakdown in office communication that was more appropriately argued under CR 60(b)(1) (mistake, inadvertence, excusable neglect).

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Galaxy Theatres respectfully requests that this Petition be granted because the decision of the Court of Appeals is in direct conflict with previous published decisions of the Court of Appeals. RAP 13.4(b)(2). In addition, the Petition implicates matters of substantial public interest, which should be determined by this Court. RAP 13.4(b)(4). If the underlying opinion is allowed to stand, the minimum threshold for asserting factual allegations in support of a default judgment will be

greatly reduced, in conflict with controlling Washington law. Additionally, Washington litigants will face unpredictable consequences arising from the increased use of, and reliance on, technology in the legal field.

A. The Underlying Opinion Conflicts with Established Washington Legal Authority

The underlying Court of Appeals' opinion cannot be reconciled with important Washington authority. Under Washington law, a party moving for entry of a default judgment must establish every element of their claim before entry of a default judgment. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 330, 242 P.3d 27 (2010). A party's failure to do so is grounds for vacation of the default judgment under CR 60(b)(11). *Caouette*, 71 Wn. App. 69, 78. These legal principles are well-established, and were in fact cited by the Court of Appeals in its underlying opinion. Nevertheless, the Court of Appeals' opinion is in direct conflict with this controlling Washington authority.

1. *Caouette* and *Kaye* establish minimum pleading standards for entry of a default judgment

The published decisions in *Caouette* and *Kaye* establish minimum pleading requirements which a party must meet before entering a default judgment. The underlying opinion in this case conflicts with those minimum pleading standards.

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 <u>or who owned the vehicle that struck</u>" the plaintiff. *Caouette*, 71 Wn. App. at 78 (underline added).

On appeal, the Court of Appeals, Division II 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]" <u>or that the defendant owned the truck</u>. *Id.* at 78. The takeaway being that the plaintiff's allegation of ownership was too conclusory to support entry of a default judgment. In an effort to save her default judgment, the plaintiff argued that she could rely on the unanswered allegations in her complaint. The court of appeals 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). The court's holding in *Caouette* demonstrates a heightened standard of proof where the party moving for entry of a default judgment has an opportunity to submit evidence but fails to prove each element of their claim.

Similarly, in *Kaye* the plaintiff was a pedestrian who was struck by a pickup truck in the parking lot of a hardware store. 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 allege[d] 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, however, 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 of Appeals 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 takeaway being that the factual allegations were insufficient to support a finding that the driver was an employee of the owner or the 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.

The Court of Appeals' decisions in *Caouette* and *Kaye*, which set forth minimum pleading standards, cannot be reconciled with the underlying opinion in this case.

2. The underlying opinion conflicts with the pleading standards set forth in *Caouette* and *Kaye*

Although Washington precedent (*Caouette* and *Kaye*) established minimum pleading standards which a plaintiff must meet before entry of a default judgment, the underlying opinion disregarded these standards in affirming the trial court's decision.

To establish their premises liability claim, the Garzas were required to demonstrate that Galaxy Theatres "actually possessed the premises" "because the common law duty of care existing in premises liability law is incumbent on the *possessor* of land." *Garza v. Galaxy Theatres, LLC*, No. 49138-9-II, 2018 WL 286757 at 3 (2018) (citing *Coleman v. Hoffman*, 115 Wn. App. 853, 859, 64 P.3d 65 (2003)). "A possessor of land is (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)." *Id.*

As such, and as recognized by the Court of Appeals, "Galaxy

Theatres was entitled to vacation of the default judgment" "if the Garzas failed to set forth facts that could show that Galaxy occupied the premises with intent to control." *Id.* (underline added). Nevertheless, the Court of Appeals held the Garzas had met their burden in alleging that "Galaxy Theatres, LLC" was a company "doing business . . . as Galaxy Theatres at 4649 Point Fosdick Drive Northwest, and is the location where the subject incident occurred." The Garzas asserted this allegation in the "Status of Parties" section of the Garzas complaint.[18]

This allegation is facially insufficient to demonstrate that Galaxy Theatres "occupied the premises with intent to control" the premises, and runs directly contrary to the minimum pleading standards set forth in *Caouette* and *Kaye*. "Doing business at" a location does not evidence occupation with intent to control. This is readily evidenced by the fact that the food vendors for the movie theater also "do business at" the location where the incident occurred, but do not "occupy" the premises "with intent to control." Further, the Garzas' declarations do not cure their insufficient pleadings. In support of their unopposed request to enter default judgment against Galaxy Theatres, the Garzas submitted evidence that:

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[18] CP 2. Interestingly, the next section of the Garzas' complaint is entitled "Facts of

- The Garzas were at a movie theatre (leased by Galaxy Gig Harbor, LLC) colloquially referred to as "Galaxy Theatres" when the incident occurred;
- An email exchange between the Garzas and an employee of Galaxy Gig Harbor, LLC demonstrated the Galaxy Gig Harbor, LLC employee's email contained the same domain name as employees of Galaxy Theatres, LLC (@galaxytheatres.com); and
- An email from the Galaxy Gig Harbor, LLC employee indicated that someone from the "corporate office" would contact the Garzas about their alleged claim.

None of these allegations support a finding that Galaxy Theatres occupied the premises with intent to control. It is common for companies to share similar names and have the same domain name for email addresses.[19] Notably, the existence of a "corporate office," implies a separate corporate parent company which does not occupy the premises. The record contains no factual allegations addressing Galaxy Theatres' connection to the movie theatre where the incident occurred. This lack of factual support is

Injury/Liability." CP 2.

particularly concerning because the Garzas had an opportunity to present evidence, unopposed, to the trial court. *See Caouette*, 71 Wn. App. at 79 (noting it would be particularly inequitable to allow a default judgment to stand where the plaintiff submitted an affidavit in support of the judgment that failed to support the allegations in the complaint).

Indeed, the Garzas' allegations do not even rise to the level of the factual allegations expressly rejected in *Caouette* and *Kaye*: in *Caouette*, the Court of Appeals found the assertion that the co-defendant "owned or co-owned" the vehicle insufficient to demonstrate the co-defendant owned the vehicle. *See Caouette*, 71 Wn. App. at 78 ("there was no factual basis upon which the trial court could have determined . . . who owned the vehicle that struck [the plaintiff]."). Similarly, in *Kaye*, the court found that the plaintiff's allegations failed to demonstrate the owner of the truck was liable under a theory of *respondeat superior*, despite the fact that the plaintiff's findings stated that the driver worked for the owner of the truck.

The underlying opinion cannot be reconciled with *Caouette* and *Kaye*. The opinion implies that a party no longer needs to plead facts which support their claim, and instead can rely upon tenuous allegations in

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[19] For example, many University of Washington law school students share the email address [name]@uw.edu. This does not explain nor evidence those students' relationship to the University of Washington.

the complaint to obtain a default judgment. Such a rule lowers the already minimal threshold for obtaining a default judgment, threatening to increase the entry of meritless (and potentially non-existent) claims against unsuspecting defendants. The result reached by the Court of Appeals is particularly troubling in light of the fact that *Caouette* requires courts closely scrutinize whether the plaintiff has proved each element of their claim where the plaintiff has an opportunity to submit evidence in support of the entry of a default judgment (as was the case here).

Caouette and *Kaye* are binding law, and Galaxy Theatres respectfully requests that this Court accept review to affirm the principles that have been called into doubt by the underlying opinion.

B. The Underlying Opinion Implicates an Issue of Substantial Public Importance

The underlying opinion also implicates an issue of substantial public importance: whether the failure of an electronic server outside of a litigant's control constitutes unavoidable casualty justifying relief. As the courts and litigants increasingly rely upon technology during litigation it is important to establish guidelines governing the effect of electronic failure outside of a litigant's control. In fact, such issues have the potential to affect a significant number of proceedings in light of the fact that many parties now use electronic means to serve and file pleadings and serve

discovery. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903, 904 (2005) (granting petition for review under RAP 13.4(b)(4) where issue presented had the potential to affect substantial number of proceedings in the lower courts).

Under CR 60(b)(9), a judgment may be vacated where "unavoidable casualty or misfortune" prevented the party from prosecuting or defending the lawsuit. 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) has 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 Court of Appeals ignored this out-of-state authority in favor of general rule principles not contrary to *Kellog's* holding. The underlying opinion states that "[r]elief under CR 60(b)(9) is justified if 'events beyond a party's control—such as a serious illness, accident, natural disaster, or similar event—prevent the party from taking actions to pursue or defend the case.'" *Garza*, No. 49138-9-II, 2018 WL 286757 at 3 (2018). Such is the case here. Galaxy Theatres never received the summons and complaint, which prevented Galaxy Theatres from taking action to defend the case. This event was beyond Galaxy Theatres' control.

Kellog supports vacating the default judgment under CR 60(b)(9). It is undisputed that Galaxy Theatres did not receive the email containing the summons and complaint 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 upon email as a means of communication. The consequences arising from the failure of an electronic communication to reach its sender is a matter of public importance in light of the fact that such issues have the potential to impact

a significant number of proceedings in the lower courts below. This Court should accept review under RAP 13.4(b)(4) to provide guidance to the lower courts on the impact the failure of electronic communication will have on the vacation of default judgments under CR 60(b)(9).

VII. CONCLUSION

The underlying unpublished opinion is in conflict with controlling Washington authority, and presents an issue of substantial public interest. In order to reaffirm the long standing doctrine of *stare decisis*, resolve conflicts of law, and address issues which have a likelihood of recurring in other cases, Galaxy Theatres respectfully requests that this Court grant review under RAP 13.4(b)(2) and/or (4).

RESPECTFULLY SUBMITTED this 2nd day of February, 2018.

MONTGOMERY PURDUE
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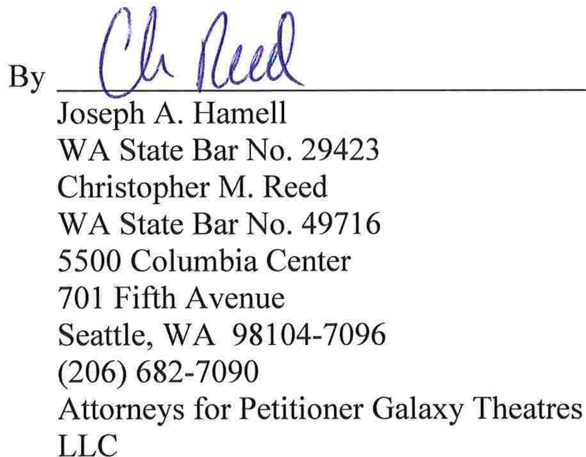

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 2, 2018, I caused to be served in the manner noted a copy of Petition for Review by the Washington State Supreme Court on the parties to this action as follows:

Danica Morgan
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2601 N. Alder Street
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☒ By Messenger
☐ By U.S. Mail
☐ By Overnight Delivery
☐ By Facsimile
☐ By Electronic Service

DATED this 2nd day of February, 2018, at Seattle, Washington.

Verna M. Garton

MPBA{19582/003/01565455-5}

Filed
Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GREGORIO GARZA and LIZBETH GARZA, husband and wife and their marital community composed thereof, Respondents, v. GALAXY THEATRES, LLC, Located at 4649 Point Fosdick Drive Northwest, Gig Harbor, WA 98335, a California limited liability company doing business in the State of Washington, Appellant.	No. 49138-9-II Consolidated with 49518-0-II UNPUBLISHED OPINION

JOHANSON, J. — Gregorio and Lizbeth Garza obtained a default judgment in their negligence action against Galaxy Theatres LLC (Galaxy). Galaxy then moved to vacate the damages award and when that motion was unsuccessful, moved to vacate the default judgment under CR 60(b)(9) or (11). Galaxy appeals the denial of its motion to vacate. It argues that the superior court abused its discretion because Galaxy was not judicially estopped from requesting that the default judgment be vacated and because the Garzas failed to set forth any facts to support an essential element of their claim. Because the superior court did not abuse its discretion when it denied Galaxy's motion to vacate the default judgment, we affirm.

FACTS

I. Complaint and Default Judgment

In December 2014, the Garzas sued Galaxy for negligence. The Garzas' complaint alleged that Galaxy "is a California limited liability company doing business . . . as Galaxy Theatres at 4649 Point Fosdick Drive Northwest, and is the location where the subject incident occurred." Clerk's Papers (CP) at 2. The complaint set forth that in February 2012, the Garzas were at "Galaxy Uptown Movie Theatres" to see a movie and that Gregorio[1] stepped in a "'hole'" in the dark theater and was injured. CP at 2. The Garzas reported the incident to the manager on duty, who thanked the Garzas for bringing the hazard to her attention. The Garzas alleged that Galaxy "owed a duty to [them] to make safe or warn against all potentially dangerous conditions and to maintain the theatre in a reasonably safe condition." CP at 3. The Garzas served Galaxy's registered agent with the summons and complaint and mailed courtesy copies to Galaxy's insurance claims administrator, Gallagher Bassett Services, Inc.

Approximately one month after filing the complaint, the Garzas obtained an order of default under CR 55(a). They then requested that the superior court "find [Galaxy] liable . . . and enter judgment." CP at 228. In support of this request, the Garzas submitted materials including an e-mail exchange between Gregorio and the "General Manager" of "Galaxy Uptown." CP at 302. The general manager's e-mail address was "[her name]@galaxytheatres.com." CP at 302. In the exchange, Gregorio referenced that the general manager had "mentioned that someone with your [the general manager's] corporate office would be" in contact with him, and the manager

[1] We use the Garzas' first names for clarity when necessary.

replied by asking Gregorio to submit his medical bills to her. CP at 302. The Garzas also submitted their own declarations, in which they stated they were at "Galaxy Theatres" when Gregorio was injured. CP at 270, 276. The Garzas provided documentation of their damages, including the cost of surgical treatment for Gregorio's injury, Gregorio's lost wages, and general damages for both Garzas.

In March 2015, the superior court entered judgment against Galaxy. When the superior court entered judgment, it found that Galaxy was liable and set the amount of the damage award.

After a year passed, the Garzas mailed the judgment to Galaxy and demanded payment.

II. Denial of Motion To Vacate Damages

In May 2016, Galaxy filed a motion to vacate the damages award under CR 60(b)(1) and (11). The Garzas opposed Galaxy's motion to vacate damages and argued that Galaxy's motion under CR 60(b)(1) was time-barred and that CR 60(b)(11) did not allow relief because Galaxy had not shown an extraordinary circumstance. In its reply memorandum, Galaxy stated that it "recognizes the time limitations under the Civil Rules, and for that reason has conceded liability under the circumstances." CP at 482.

In June, the superior court heard argument on whether it should vacate the damages award. At that hearing, Galaxy stated, "[W]e 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. . . . [W]e're not seeking to have the order vacated on liability and damages. We're just talking about

damages." Report of Proceedings (RP) (June 3, 2016) at 13. The superior court denied the motion to vacate damages.[2]

III. DENIAL OF MOTION TO VACATE THE DEFAULT JUDGMENT

In August, Galaxy filed a motion to vacate the default judgment under CR 60(b)(9) and (11). Galaxy now argued that the *entire* judgment should be vacated because the Garzas "failed to present sufficient factual evidence to support the legal conclusion that Galaxy owed the Garzas a duty" or because of unavoidable casualty or misfortune—the failure of the registered agent's e-mail system. CP at 548.

The Garzas opposed Galaxy's motion to vacate the entire judgment and argued that Galaxy's CR 60(b)(9) and (11) arguments were precluded by its admission that it was liable at the June hearing and by judicial estoppel. The Garzas alternatively argued that they had submitted sufficient evidence to support the existence of a duty.

The superior court denied the motion to vacate the entire judgment. In its oral ruling, the superior court accepted Galaxy's argument that the court looked only to the facts at the time the default judgment was entered. The superior court ruled that "there were sufficient facts at the time of the hearing" on the entry of judgment to establish that Galaxy was "properly before" the superior court.[3] RP (Sept. 30, 2016) at 29.

[2] Galaxy appealed both the order denying the motion to vacate damages and the subsequent order denying Galaxy's motion to vacate the entire judgment. We consolidated the appeals. On appeal, Galaxy advances no argument challenging the superior court's denial of Galaxy's May 2016 motion to vacate the damages award.

[3] The superior court alternatively grounded its decision upon the application of judicial estoppel.

ANALYSIS

I. CR 60

We review for an abuse of discretion the decision not to vacate a default judgment under CR 60(b). *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 199, 165 P.3d 1271 (2007). In determining whether to deny a motion to vacate a default judgment, "'[t]he trial court must balance the requirement that each party follow procedural rules with a party's interest in a trial on the merits.'" *Rosander v. Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 403, 196 P.3d 711 (2008) (alteration in original) (quoting *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004)).

CR 60(b) provides for relief from a judgment under certain circumstances:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
>
> . . . .
>
> (9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;
>
> . . . .
>
> (11) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

II. Denial of Galaxy's Motion under CR 60(b)(9)

Galaxy argues that the superior court abused its discretion when it denied Galaxy's motion under CR 60(b)(9) because the failure of the registered agent's e-mail server constituted "unavoidable casualty or misfortune" that prevented Galaxy from defending. Br. of Appellant at 32. We disagree.

Relief under CR 60(b)(9) is justified if "events beyond a party's control—such as a serious illness, accident, natural disaster, or similar event—prevent[] the party from taking actions to pursue or defend the case." *Stanley v. Cole*, 157 Wn. App. 873, 882, 239 P.3d 611 (2010). In *Stanley*, Division One of this court explained that relief is not merited for "'something other than an accident or disease or natural catastrophe preventing the appearance of a party or his witness.'" 157 Wn. App. at 882 (quoting *State v. Scott*, 20 Wn. App. 382, 386 n.1, 580 P.2d 1099 (1978), *aff'd*, 92 Wn.2d 209, 595 P.2d 549 (1979)). An unavoidable casualty is one "that cannot be avoided because it is produced by an irresistible physical cause that cannot be prevented by human skill or reasonable foresight." BLACK'S LAW DICTIONARY 18, 1756 (10th ed. 2014); *see also Stanley*, 157 Wn. App. at 882 n.14 (relying on the same definition).

In support of its motion to vacate, Galaxy submitted evidence that the registered agent had e-mailed the summons and complaint to Pamela Bush, Galaxy's "corporate contact," but that the registered agent's e-mail server had failed, preventing Bush from receiving the documents. But failure of an e-mail server is not an occurrence that is unavoidable "because it is produced by an irresistible physical cause that cannot be prevented by human skill or reasonable foresight." *See* BLACK'S 18, 1756. Nor can it reasonably be characterized as an accident, a disease, or a natural catastrophe that prevented Galaxy's appearance. *See Stanley*, 157 Wn. App. at 882.

Rather the e-mail server failure is the type of foreseeable, avoidable breakdown in office communications that may—or may not—constitute "excusable" neglect under CR 60(b)(1). *See Rosander*, 147 Wn. App. at 407. Indeed, the superior court came to precisely this conclusion at the hearing on Galaxy's motion to vacate damages, stating that it did not think that the e-mail server's failure was the type of neglect that was "excusable" under CR 60(b)(1).

We conclude that CR 60(b)(9) is inapplicable here. Thus, we affirm the superior court's denial of Galaxy's motion brought under CR 60(b)(9).

III. Denial of Galaxy's Motion Under CR 60(b)(11)

Galaxy argues that the superior court should have granted Galaxy's motion to vacate the judgment under CR 60(b)(11), a catch-all provision authorizing a trial court to vacate a judgment if there is "[a]ny other reason justifying relief from the operation of the judgment." Galaxy contends that the superior court's rationale for denying Galaxy's motion—that the Garzas had introduced sufficient facts to establish duty—was untenable. Again, we disagree.[4]

"[T]he party seeking a default judgment [must] set forth facts supporting, at a minimum, each element of the claim." *Friebe v. Supancheck*, 98 Wn. App. 260, 268, 992 P.2d 1014 (1999). The unchallenged facts must be sufficient to constitute a legitimate cause of action. *Kaye v. Lowe's HIW, Inc.*, 158 Wn. App. 320, 326, 242 P.3d 27 (2010).

A defaulting defendant admits the factual allegations in the complaint. *Kaye*, 158 Wn. App. at 326. We also look to the "materials . . . submitted in support of" the plaintiff's request for default judgment to determine whether the plaintiff had provided a factual basis to support an

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[4] Because we hold that the superior court properly denied Galaxy's motion under CR 60(b)(11) on the basis that the Garzas had presented sufficient facts to establish duty, we do not address Galaxy's other arguments that the superior court abused its discretion. We also do not address the Garzas' claim that Galaxy's motion was precluded by judicial estoppel.

essential element of her claim. *Caouette v. Martinez*, 71 Wn. App. 69, 78, 856 P.2d 725 (1993). Mere unsupported legal conclusions—such as an allegation that a truck was "negligently entrusted" to another—are insufficient to support a default judgment. *Caouette*, 71 Wn. App. at 78-79.

"[P]rior to entering a default judgment, the trial court must assess . . . the sufficiency of the complaint." *Kaye*, 158 Wn. App. at 330. This is so because a default judgment that would inevitably be vacated if challenged should not be entered. *Kaye*, 158 Wn. App. at 330.

To establish breach of duty in premises liability cases, the party alleged to owe a duty must have "actually possessed the premises" "because 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 (2003). "'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 (quoting *Ingersoll v. DeBartolo, Inc.*, 123 Wn.2d 649, 655, 869 P.2d 1014 (1994)).

Under these rules, Galaxy was entitled to vacation of the default judgment only if the Garzas failed to set forth facts that could show that Galaxy occupied the premises with intent to control. *See Coleman*, 115 Wn. App. at 860; *Kaye*, 158 Wn. App. at 326. In their complaint, the Garzas alleged that "Galaxy Theatres, LLC" was a company "doing business . . . as Galaxy Theatres at 4649 Point Fosdick Drive Northwest, and is the location where the subject incident

occurred."[5] CP at 2. This factual allegation that Galaxy did business at and was the location where the incident occurred is taken as true. *Kaye*, 158 Wn. App. at 326. It is sufficient to establish that Galaxy possessed the location, and we reject Galaxy's arguments to the contrary.

Additionally, the Garzas submitted their own declarations that they were at "Galaxy Theatres" when the incident occurred and an e-mail exchange occurred between the general manager of the theater, whose e-mail address was "[her name]@galaxytheatres.com." CP at 270, 276, 302. In his e-mail to the general manager, Gregorio stated, "I am emailing you because when [y]ou and [I] talked the day after my injury at your theatre you mentioned that someone with your corporate office would be contacting me to let me know where I can send my medical bills from the injury." CP at 302.

Taken collectively, the Garzas' evidence at the time the default judgment was entered constituted a sufficient factual basis to support their allegation that Galaxy possessed the premises. Accordingly, the superior court did not abuse its discretion when it ruled that there were "sufficient facts" that Galaxy owed a duty to the Garzas and denied Galaxy's motion to vacate the default judgment under CR 60(b)(11).

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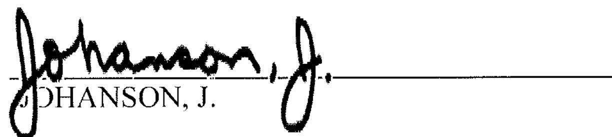
[5] The Garzas also alleged in their complaint that Galaxy owed a duty to the Garzas. But this allegation is a legal conclusion, not a factual basis to support that Galaxy in fact owed such a duty. *See Caouette*, 71 Wn. App. at 78-79.

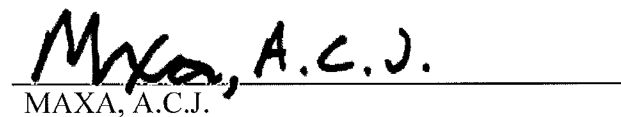
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



JOHANSON, J.

We concur:



MAXA, A.C.J.

MELNICK, J.

CR 60
RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b);

(4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(5) The judgment is void;

(6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(7) If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200;

(8) Death of one of the parties before the judgment in the action;

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(10) Error in judgment shown by a minor, within 12 months after arriving at full age; or

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than 1 year after the judgment, order, or proceeding was entered or taken. If the party entitled to relief is a minor or a person of unsound mind, the motion shall be made within 1 year after the disability ceases. A motion under this section (b) does not affect the finality of the judgment or suspend its operation.

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

(d) Writs Abolished--Procedure. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(e) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion filed in the cause stating the grounds upon which relief is asked, and supported by the affidavit of the applicant or the applicant's attorney setting forth a concise statement of the facts or errors upon which the motion is based, and if the moving party be a defendant, the facts constituting a defense to the action or proceeding.

(2) Notice. Upon the filing of the motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.

(3) Service. The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide; but in case such service cannot be made, the order shall be published in the manner and for such time as may be ordered by the court, and in such case a copy of the motion, affidavit, and order shall be mailed to such parties at their last known post office address and a copy thereof served upon the attorneys of record of such parties in such action or proceeding such time prior to the hearing as the court may direct.

(4) Statutes. Except as modified by this rule, RCW 4.72.010-.090 shall remain in full force and effect.

[Amended effective September 26, 1972; January 1, 1977; April 28, 2015.]

MONTGOMERY PURDUE BLANKINSHIP & AUSTIN PLLC

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