

No. 676130

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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REGAL CINEMAS, INC., *et al.*,

Defendants and Appellants,

v.

THE WASHINGTON STATE COMMUNICATIONS ACCESS PROJECT,

Plaintiff and Respondent.

Appeal From The Superior Court Of The State Of Washington For King County
Hon. Regina S. Cahan, Judge
Case No. 09-2-0633-2 SEA

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ARGUMENT	4
A. The Trial Court Erred By Ruling As A Matter Of Law That The WLAD Regulates Goods And Services, As Opposed To The Accessibility Of Public Accommodations That Provide Them, And Requiring Defendants To Provide The “Excess Service” Of Captioned Movie Exhibitions	4
B. The Trial Court Erred By Interpreting Vague Provisions Of The WLAD And Its Implementing Regulations To Create A New Accessibility Obligation And Then Subjecting Defendants To Liabilities Arising From The Newly Created Obligation	7
C. The Trial Court Erred When It Unlawfully Circumvented The Washington APA’s Rulemaking Requirements To Facilitate Establishing And Applying New Accessibility Obligations	11
D. The Trial Court Erred By Summarily Dismissing Defenses At Trial That Defendants Voluntarily Provided Captioned Movie Exhibitions To Their Hearing-Disabled Patrons That Were “Reasonably Possible In The Circumstances” – Both Before And After Digital Conversion.....	13
E. The Trial Court Erred By Refusing To Dismiss Claims For Declaratory Relief Against Cinemark And Regal As Moot	16
F. The Trial Court Erred By Adjudicating Unripe Claims As To AMC’s Future, Undecided Plans.....	19
G. The Trial Court Erred By Awarding Declaratory Relief For Plaintiff And Against Defendants Under The WLAD.....	21
H. Wash-Cap Was Not Entitled To The Fees Awarded By The Trial Court	21
1. There Was No Finding That Defendants Violated The Law Or That Wash-Cap Was Injured.....	21
2. The UDJA Does Not Permit An Award Of Attorney’s Fees To A Party Who Prevails On A Declaratory Judgment Claim.....	24
3. The Fee Award Was Excessive.....	25
III. CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES

<i>Alaska Prof'l Hunters Assoc., Inc. v. FAA</i> , 177 F.3d 1030 (D.C. Cir. 1999)	8
<i>Arizona ex rel. Goddard v. Harkins Amusements Enterp., Inc.</i> , 603 F.3d 666 (9th Cir. 2010)	6, 7
<i>Cornilles v. Regal Cinemas, Inc.</i> , No. Civ. 00-173-AS, 2002 WL 31440885 (D. Or. Jan. 3, 2002)	7, 12
<i>DBSI/TRI IV Ltd. P'ship v. United States</i> , 465 F.3d 1031 (9th Cir. 2006)	19
<i>Doe v. Mutual of Omaha Ins. Co.</i> , 179 F.3d 557 (7th Cir. 1999)	5
<i>Feldman v. Pro Football, Inc.</i> , 579 F. Supp. 2d 697 (D. Md. 2008), <i>aff'd</i> 419 Fed. Appx. 381, 387 (4th Cir. 2011).....	18
<i>Forest Guardians v. Johanns</i> , 450 F.3d 455 (9th Cir. 2006)	17
<i>Gen. Elec. Co. v. EPA</i> , 53 F.3d 1324 (D.C. Cir. 1995).....	8
<i>Halkin v. Helms</i> , 690 F.2d 977 (D.C. Cir. 1982).....	17
<i>Hoctor v. Dep't of Agric.</i> , 82 F.3d 165 (7th Cir. 1997)	13
<i>McInnis-Misenor v. Maine Med. Ctr.</i> , 319 F.3d 63 (1st Cir. 2003).....	20
<i>McNeil v. Time Ins. Co.</i> , 205 F.3d 179 (5th Cir. 2000)	5
<i>Reno v. Catholic Soc. Servs., Inc.</i> , 509 U.S. 43 (1993).....	19
<i>United States v. AMC Entertainment, Inc.</i> , 549 F.3d 760 (9th Cir. 2008)	8, 10

<i>Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.</i> , 455 U.S. 489 (1982).....	8
<i>Weyer v. Twentieth Century Fox Film Corp.</i> , 198 F.3d 1104 (9th Cir. 2000)	5, 7

STATE CASES

<i>American Legion Post #149 v. Washington State Dep't of Health</i> , 164 Wn.2d 570 (2008)	8
<i>Collins v. Clark County Fire Dist. No. 5</i> , 155 Wn. App. 48 (2010)	23
<i>Eugster v. City of Spokane</i> , 110 Wn. App. 212 (2002)	16
<i>Fahn v. Civil Service Comm'n of Cowlitz County</i> , 95 Wn.2d 679	23
<i>Fell v. Spokane Transit Auth.</i> , 128 Wn.2d 618 (1996)	4, 9
<i>First Covenant Church v. City of Seattle</i> , 114 Wn.2d 392 (1990)	20
<i>Negron v. Snoqualmie Valley Hosp.</i> , 86 Wn. App. 579 (1979)	5
<i>Pham v. City of Seattle</i> , 151 Wn.2d 527 (2007)	25
<i>Port of Seattle v. Wash. Utilities & Transp. Com'n</i> , 92 Wn.2d 789 (1979)	16
<i>Spokane Research and Defense Fund v. City of Spokane</i> , 155 Wn.2d 89 (2005)	18, 23
<i>State v. White</i> , 97 Wn.2d 92 (1982)	8
<i>Thomas v. Lehman</i> , 138 Wn. App. 618 (2008)	18

<i>To-Ro Trade Shows v. Collins</i> , 144 Wn.2d 403 (2001)	16
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<i>Todd v. American Multi-Cinema, Inc.</i> , No. Civ.A. H-02-1944, 2004 WL 1764686 (S.D. Tex. Aug. 5, 2004)	7
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FEDERAL REGULATIONS

28 C.F.R. § 36.303(b)(1).....	9
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STATE STATUTES AND REGULATIONS

RCW 7.24.100	24
--------------------	----

RCW 7.24.101	21, 24
--------------------	--------

RCW 49.60.030(2).....	12, 22, 23
-----------------------	------------

WAC 132D-315-005(9)(c).....	9, 10
-----------------------------	-------

WAC 162-26-060(2).....	4
------------------------	---

WAC 162-26-080	10
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I. INTRODUCTION

In its response, Wash-Cap distorts key facts concerning the claims it first prosecuted, the different claims it eventually tried, and the changing positions it took at trial. Nevertheless, it remains undisputed that:

- ◆ Wash-Cap filed its lawsuit against Defendants when the movie industry was preparing to convert from 35 mm film to digital cinema.
- ◆ Before Defendants answered, they informed Wash-Cap that they were preparing to convert from 35 mm film to digital cinema, and would be providing captioned movie exhibitions after completing the conversions and acquiring new digital captioning equipment. Defendants asked Wash-Cap to voluntarily dismiss or stay its lawsuit, but Wash-Cap declined, and proceeded to litigate against Defendants.
- ◆ Wash-Cap initially sought to require Defendants to increase the number of captioned 35 mm movie exhibitions at their King County theaters. For many reasons, including the fact that forced investments in 35 mm captioning technology would quickly be rendered obsolete when digital conversion was completed, Defendants opposed Wash-Cap's claims, and defended against Wash-Cap's lawsuit.
- ◆ During the lawsuit, but before trial, Regal and Cinemark completed their digital cinema conversions in King County. Shortly thereafter, Regal and Cinemark began exhibiting closed-captioned movies using new digital captioning technology at their theaters – as they already planned to do prior to the lawsuit, and as they already told Wash-Cap they would do.
- ◆ At trial, all Defendants presented evidence that they did not violate the WLAD before or after digital conversion because (i) each had voluntarily provided captioned movie exhibitions prior to digital conversion, (ii) each was providing, or would provide, captioned movie exhibitions after digital conversion, and (iii) it was unreasonable (and unduly burdensome) to provide more captioned movie exhibitions than they were providing. Wash-Cap responded by abandoning its claims that Defendants violated the WLAD.

- ♦ At trial, the only claims Wash-Cap litigated were claims for declaratory relief against all Defendants, and a claim for injunctive relief against AMC regarding its future captioning plans.

- ♦ After trial, despite making no finding that any Defendant violated the WLAD, the trial court awarded “declaratory relief” as to all Defendants, injunctive relief as to AMC, and awarded Wash-Cap over \$400,000 in attorney’s fees.

It is against this changing factual and procedural backdrop that Defendants ask the Court to reject Wash-Cap’s arguments, reverse the trial court’s judgment, and render judgment for Defendants for multiple reasons.

First, Wash-Cap’s argument that the WLAD extends to regulate the goods and services provided by places of public accommodation, as opposed to places of public accommodation themselves, is an unlawful and expansive interpretation of the WLAD that is not supported by the WLAD, its regulations, or legal precedent. Moreover, the interpretation Wash-Cap advocates would impose enormous burdens on retailers and the courts that the Washington Legislature never intended, a point numerous federal courts have recognized when rejecting similar arguments under federal accessibility law, but Wash-Cap ignores.

Second, Wash-Cap not only fails to explain how subjecting Defendants to substantial liabilities for failing to comply with new, judicially-created accessibility obligations allegedly arising from the WLAD can be squared with fundamental due process and fair notice

rights, it even concedes that Defendants “might not have been able to anticipate a caption display requirement.” Further, Wash-Cap cannot credibly assert on one hand that “no defendant’s due process rights were infringed,” while seeking on the other hand to hold Defendants liable for attorney’s fees exceeding \$400,000 for prevailing at trial.

Third, Wash-Cap cannot justify the trial court’s erroneous rulings at trial, including (i) refusing to adjudicate whether Defendants violated the WLAD before or after digital conversion, (ii) denying timely requests to dismiss claims for declaratory relief against Regal and Cinemark that were moot, and (iii) denying a timely request to dismiss claims against AMC that were not ripe.

Fourth, Wash-Cap cannot explain how the trial court could award attorney’s fees under the WLAD absent predicate findings that the WLAD was violated or that Wash-Cap was injured – findings Wash-Cap neither sought nor secured. Nor can Wash-Cap square the trial court’s decision to award fees for securing declaratory relief with the fact that the UDJA, the sole cause of action by which a declaratory judgment may be sought under Washington law, does not permit attorney’s fees awards.

For all of these reasons, the Court should reverse the trial court’s judgment and render judgment for Defendants.

II. ARGUMENT

A. **The Trial Court Erred By Ruling As A Matter Of Law That The WLAD Regulates Goods And Services, As Opposed To The Accessibility Of Public Accommodations That Provide Them, And Requiring Defendants To Provide The “Excess Service” Of Captioned Movie Exhibitions.**

Wash-Cap’s argument that “operative provisions of the [WLAD’s] implementing regulations . . . effectively mandate caption[ed] [movie] display[s]” (Resp. Br. at 15-16) is predicated on the incorrect assumption that the WLAD regulates the content of goods and services provided by places of public accommodation. It doesn’t. The WLAD regulates access to places of public accommodations and the right to enjoy the goods and services they regularly provide, but does not regulate the content of those goods and services, and does not require special goods and services to be provided. *See Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 639 (1996) (“the statutory mandate to provide access to places of public accommodation is not a mandate to provide services.”); WAC 162-26-060(2) (obligating store owner to provide a wheelchair-using patron with elevator access to goods and services it regularly provides on the second floor, but not requiring store owner to provide special goods and services specially designed for wheelchair-using patrons).¹

¹ As discussed in Defendants’ Opening Brief, the Fifth, Seventh, and Ninth Circuits analyzed the same issue under federal accessibility law and determined that Title III requires access to places of public accommodation and the right to use and enjoy goods

Contrary to Wash-Cap's argument, *Negron v. Snoqualmie Valley Hosp.*, 86 Wn. App. 579 (1979), does not support its position. In that case, a deaf plaintiff alleged that a hospital violated the WLAD by failing to provide her with a sign language interpreter to allow access to medical treatment. The case turned on "[l]ack of communication access" to the hospital's regularly provided medical goods and services, which included "the opportunity to explain symptoms, ask questions, and understand the treatment being performed, including options," not whether the hospital was required to provide excess medical services to the hearing disabled plaintiff. *See id.* at 584, 586. There is no comparable "access barrier" to "same service" here. Wash-Cap is not alleging, for example, that due to a lack of box office signage listing show times and prices, deaf patrons were unable to purchase tickets to access "same service" movie exhibitions that Defendants regularly provide. Rather, it is alleging that Defendants failed to provide "excess" captioned movie exhibitions.

Wash-Cap's argument that captioned movies are simply "a different way to deliver the service of movies" (Resp. Br. at 14) is also

and services as they are regularly provided to the general public, but does not regulate the content of those goods and services or require the provision of special goods that are specifically designed for persons with disabilities. *See* Opening Br. at 17-23 (discussing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1119 (9th Cir. 2000); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 186-87 (5th Cir. 2000); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999)). Wash-Cap ignores these cases and the strong policy considerations discussed in them.

incorrect. Movie exhibitions and captioned movie exhibitions are two different things. Extending Wash-Cap's reasoning, bookstores would be subject to lawsuits to stock Braille books because a Braille book is just "a different way" to deliver the contents of the book in tactile form, retailers would be subject to lawsuits to stock flashing-light alarm clocks for deaf patrons because a flashing light alarm clock is just "a different way" to deliver the "wake" signal in visual form, and restaurants would be subject to lawsuits to prepare special gluten-free menus for patrons with celiac disease because special menus are just "a different way" to deliver meals in gluten-free form. The list of other potential lawsuits is endless.

Of course, special goods and services specially designed for disabled patrons are desirable, and of course, well-intentioned businesses may elect to voluntarily provide them (as Defendants have done prior to and since this lawsuit with respect to exhibiting captioned movies). But there is no indication that the Legislature intended this much intrusion into the commercial decisions of public accommodations when it enacted the WLAD. Had the Legislature or the Human Rights Commission truly intended to impose such enormous compliance burdens on so many Washington businesses, they would have made their intentions clearer.

Wash-Cap's reliance on *Arizona ex rel. Goddard v. Harkins Amusements Enterp., Inc.*, 603 F.3d 666 (9th Cir. 2010), is misplaced.

The *Harkins* decision turned entirely on whether captioning and audio description are correctly classified as “auxiliary aids” under federal law, *Harkins*, 603 F.3d at 668, and as Wash-Cap admits, there is no auxiliary aid requirement applicable to places of public accommodation under the WLAD. *See* Resp. Br. at 19.² This distinction is important. The *Harkins* court expressly recognized that *Weyer* was still controlling as to “the provision of goods and services generally.” *See Harkins*, 603 F.3d at 672. Thus, where, as here, no auxiliary aid requirement exists, the *Weyer* court’s holding that federal law “does not require provision of different goods or services, just non-discriminatory enjoyment of those that are provided” (198 F.3d at 1115) should be followed.³

B. The Trial Court Erred By Interpreting Vague Provisions Of The WLAD And Its Implementing Regulations To Create A New Accessibility Obligation And Then Subjecting Defendants To Liabilities Arising From The Newly Created Obligation.

Wash-Cap does not dispute that due process requires that “the

² While Wash-Cap argues that the WLAD and its regulations accomplish in “far fewer words” the same thing as Title III’s “auxiliary aids and services” clause, there is nothing in the WLAD’s regulations applicable to places of public accommodation that requires, or even mentions, auxiliary aids or captioning. Moreover, the fact that Wash-Cap’s claim is entirely dependant on interpretations arising from “far fewer words” that do not mention captioning presents serious due process and fair notice problems. *See infra*.

³ As discussed in Defendants’ Opening Brief, the District of Oregon and the Southern District of Texas independently reached conclusions similar to *Weyer* when granting summary judgment for defendants in movie captioning cases where, as here, auxiliary aid requirements were not at issue. *See* Opening Br. at 21-22 (discussing *Todd v. American Multi-Cinema, Inc.*, No. Civ.A. H-02-1944, 2004 WL 1764686 (S.D. Tex. Aug. 5, 2004); *Cornilles v. Regal Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885 (D. Or. Jan. 3, 2002), *findings adopted in part and recommendation adopted*, 2002 WL 31469787, at *1-2 (D. Or. Mar. 19, 2002)). Wash-Cap ignores these cases.

government [must] provide citizens and other actors with sufficient notice as to what behavior complies with the law,” that “laws must provide explicit standards,” and that a statute is void for vagueness “if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *United States v. AMC Entertainment, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008); *State v. White*, 97 Wn.2d 92, 98-99 (1982).⁴ Nor does Wash-Cap dispute that fair notice requires that citizens receive clear, prospective instruction on what they must do to comply with the law before being subjected to liabilities under the law, and interpretations of a regulation must be “ascertainably certain” from the regulation’s plain language. *See AMC Entm’t, Inc.*, 549 F.3d at 770; *Alaska Prof’l Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995).

Wash-Cap summarily concludes that Defendants did in fact “receive clear, prospective instruction on what they must do to comply

⁴ In *American Legion Post #149 v. Washington State Dep’t of Health*, 164 Wn.2d 570 (2008), the sole case Wash-Cap cites, the Washington Supreme Court recognized that “a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application” violates the “first essential” of due process of law. *Id.* at 612; *see also id.* at 621 (recognizing that a vague statute violates due process if it fails to either “provide fair notice of the proscribed conduct” or “provide clear standards”).

with the law.” Resp. Br. at 21. This flawed argument should be rejected for multiple reasons.

First, Wash-Cap makes no attempt to explain how a purported captioned movie exhibition requirement the trial court interpreted from a “few words” in the WLAD’s “vague standards” (as the Washington Supreme Court characterized them in *Fell*, 128 Wn.2d at 628, and as Wash-Cap calls “a bit roundabout” (CP 504)), complies with due process. It plainly doesn’t – the WLAD contains no captioned movie requirement. Had the Legislature and Commission intended to require places of public accommodation to provide “closed caption devices” to disabled patrons, they knew how to say so. *See, e.g.*, WAC 132D-315-005(9)(c) (requiring college to provide disabled students with “closed caption devices”); 28 C.F.R. § 36.303(b)(1) (defining “auxiliary aids” under federal law to include “open and closed captioning”).

Nebulous references to “reasonable accommodation” and “understandable” – the “fewer words” from which Wash-Cap’s captioned movie requirement are interpreted – are different. They are not specific, they do not outline conduct that is required or prohibited, and they do not mention, much less clearly require, “captioning.” Even Wash-Cap admits there was a time when Defendants “might not have been able to anticipate a caption display requirement” (Resp. Br. at 21), a point evidenced by the

fact that Wash-Cap sued every major movie exhibitor in King County to enforce its novel captioned movie interpretation.

Second, Defendants did not receive fair notice of a captioned movie exhibition requirement prior to this lawsuit. There is no captioning requirement applicable to public accommodations that is “ascertainably certain” from the WLAD’s plain language. *Compare* WAC 162-26-080 (requiring store owner to provide disabled patron with elevator access to regular goods and services on the second floor, but silent as to captioning) *with* WAC 132D-315-005(9)(c) (requiring college to provide disabled students with “closed caption devices”). And Wash-Cap’s arguments that it “asked specifically for captioning display capability and use” in its complaint, that “Wash-Cap and the court agreed [at trial] that displaying captions makes movie soundtracks understandable,” and that “[t]his was all done in open court” (Resp. Br. at 21-22) simply miss the point. The due process clause guarantees citizens fair notice of legal requirements prior to being sued, when they are “free to steer between lawful and unlawful conduct,” not after being sued, when their allegedly unlawful behavior is being adjudicated. *See AMC Entm’t*, 549 F. 3d at 768, 770.⁵

Third, Wash-Cap’s argument that Defendants were not deprived of

⁵ Wash-Cap’s argument that *AMC Entertainment* is a distinguishable case that turned on “detrimental reliance” should be rejected. The *AMC* court did not find that defendant lacked fair notice because it had “detrimentally relied” on a prior interpretation of the law (Resp. Br. at 22), and the fair notice doctrine does not turn on detrimental reliance.

due process because they “were not held liable for a failure to take actions in the past, when arguably they might not have been able to anticipate a caption display requirement” (Resp. Br. at 21) simply makes no sense. This lawsuit was predicated on allegations that Defendants violated the WLAD by failing to exhibit what Wash-Cap deemed to be a sufficient amount of captioned movies. The litigation resulted in a final judgment ordering Defendants to pay Wash-Cap more than \$400,000 in attorney’s fees. Requiring Defendants to pay \$400,000 to Wash-Cap for failing to comply with a new movie captioning requirement interpreted from a “few words” in the WLAD’s “vague standards,” that is not “ascertainably certain” from the plain language of those standards, and that Wash-Cap concedes Defendants “might not have been able to anticipate,” is a classic violation of due process and fair notice that warrants reversal.

C. The Trial Court Erred When It Unlawfully Circumvented The Washington APA’s Rulemaking Requirements To Facilitate Establishing And Applying New Accessibility Obligations.

In their Opening Brief, Defendants explained why the trial court’s decision to “interpret” into existence and then apply a new mandatory movie captioning accessibility obligation against them, when neither the obligation nor its underlying technical requirements have been subjected to proper APA rulemaking procedures, was error. *See* Opening Br. at 28-33 (discussing why legislative rulemaking through advanced notice and

specific instruction – not litigation – is the proper lawful mechanism for promulgating new accessibility obligations). Defendants cited numerous cases that chastised plaintiffs for sidestepping legislative rulemaking and pursuing judicially-created relief through litigation, decrying those efforts as inefficient, miscalculated, time-consuming, and costly. *See id.*

Ignoring these cases and policy considerations, Wash-Cap asserts that the trial court “unquestionably had the power to hear Wash-Cap’s complaint” (Resp. Br. at 23), and appropriately exercised that power. This argument misses the point. Defendants do not argue that the trial court lacked power to adjudicate complaints that the WLAD was violated or that Wash-Cap was injured, as defined by RCW 49.60.030(2). There came a time during this case, however, when the trial court no longer was asked to adjudicate these issues, because Wash-Cap abandoned them. *See* Final Order (CP 1517) (“Plaintiff did not seek any finding that any Defendant engaged in discriminatory practices.”). Once that happened, over timely objections, the trial court began assuming the quasi-legislative duty of interpreting into existence a new captioned movie exhibition requirement – and then assessing what is “reasonably possible” to comply with it – from “vague standards” in the WLAD that do not even reference movie captioning. The trial court should not have sidestepped the APA to create new accessibility law. *See Cornilles*, 2002 WL 31440885, at *7 (ruling

that appropriate venue for resolving disputes concerning federal captioned movie requirements is before the agencies empowered by Congress to implement and enforce the ADA, not the federal courts); *Hector v. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1997) (courts should not make legal standard “interpretations” that should otherwise be made through notice and comment rulemaking).⁶ Because the trial court did, this Court should reverse and render judgment in favor of Defendants.

D. The Trial Court Erred By Summarily Dismissing Defenses At Trial That Defendants Voluntarily Provided Captioned Movie Exhibitions To Their Hearing-Disabled Patrons That Were “Reasonably Possible In The Circumstances” – Both Before And After Digital Conversion.

In their Opening Brief, Defendants explained that (i) trial in this matter was conducted on written submissions, (ii) Defendants presented evidence that they did not violate the WLAD before or after digital conversion because (a) each had voluntarily provided captioned movie exhibitions prior to digital conversion, (b) each was providing, or would provide, captioned movie exhibitions after digital conversion, and (c) it was not reasonably possible (and also unduly burdensome) to provide

⁶ Wash-Cap’s reliance on the fact that the District of Arizona refused to stay the *Harkins* lawsuit pending federal agency rulemaking is misplaced. The defendant sought to stay a determination of whether installing captioning equipment in particular movie theaters would be unduly burdensome until the DOJ issued final captioned movie exhibition standards, and the district court denied the stay, reasoning that, if and when the DOJ’s standards issued, it would still have to adjudicate individualized undue burden defenses. *See Resp. Br.* at 24. That decision has no application to this case.

more captioned movie exhibitions, (iii) Wash-Cap responded by abandoning its claims that Defendants violated the WLAD, but (iv) the trial court failed to enter findings that no Defendant violated the WLAD before or after digital conversion. *See* Opening Br. at 33-35.

Wash-Cap's responses – that the issue of whether Defendants violated the WLAD before digital conversion is “hypothetical” and “moot,” that the issue “was never litigated below,” and that Defendants are trying to set some kind of remand “trap” – should be rejected.⁷

First, whether Defendants violated the WLAD before digital conversion is neither hypothetical nor moot, and Wash-Cap makes no competent argument to the contrary. Wash-Cap initiated this lawsuit with claims that Defendants violated the WLAD, and should not be permitted to argue that the claims it pleaded became “hypothetical” or “moot” after Defendants presented undisputed evidence to defend against the claims at trial, after Plaintiff abandoned the claims at trial, and while Plaintiff is seeking to affirm a judgment for \$400,000 in attorneys' fees that covers work performed prosecuting the claims it abandoned.

⁷ Wash-Cap makes no response to Defendants' arguments that the trial court erred by failing to enter findings that no Defendant violated the WLAD after digital conversion. As to Regal and Cinemark, Wash-Cap conceded this point at trial, acknowledging that both Defendants had “fulfill[ed] their WLAD obligations,” and had “done everything reasonably possible.” CP 1167-69. As to AMC, Wash-Cap abandoned the claim, and sought instead to adjudicate the legality of AMC's future digital captioning plans.

Second, Wash-Cap cannot seriously argue that the issue of whether Defendants violated the WLAD before digital conversion was not litigated below. It certainly was. It is extensively discussed in Defendants' April 26, 2011 trial brief. CP 841-861. Wash-Cap responded to Defendants' trial brief on May 11, 2011, made evidentiary objections, took the position that pre-digital violations were moot, and declined to make any further substantive response. CP 1167-69, 1182. Wash-Cap was given a full and fair opportunity to litigate this issue, but chose to abandon it.

Third, there is no remand "trap" for two reasons. One, the issue of whether Defendants violated the WLAD before digital conversion should not be remanded. Wash-Cap pled the claims, Defendants presented undisputed evidence to rebut the claims at trial, and Wash-Cap declined to litigate the claims at trial. On this record, the Court should render judgment for Defendants on the claims, not remand them. Two, assuming for purposes of this appeal that the claims were remanded, what is reasonably possible in the circumstances should be determined under the circumstances that existed at the time. It makes no sense to suggest that conduct occurring before digital conversion should be judged by post-digital concepts of what is reasonably possible. The simple truth remains that, at the time Wash-Cap filed its complaint, with digital conversion looming, and all Defendants actively planning for it, it would have been

unreasonable – and unduly burdensome – to compel Defendants to make additional investments in soon-to-be obsolete 35 mm captioning technology. There is no “trap.”

E. The Trial Court Erred By Refusing To Dismiss Claims For Declaratory Relief Against Cinemark And Regal As Moot.

Washington courts recognize, as a general rule, that when a claim for injunctive relief is rendered moot, a claim for declaratory relief will also be rendered moot. *See, e.g., Eugster v. City of Spokane*, 110 Wn. App. 212, 228-29 (2002) (“no continuing justiciable controversy existed, [and] thus no clear need existed for injunctive or declaratory relief”); *To-
Ro Trade Shows v. Collins*, 144 Wn.2d 403, 415 (2001) (declaratory relief not justiciable absent “an actual, present and existing dispute . . . as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement”); *Port of Seattle v. Wash. Utils. & Transp. Com’n*, 92 Wn.2d 789, 806 (1979) (declaratory judgment that “appear[ed] to be founded on a hypothetical factual situation” was inappropriate).⁸ In the present case, the trial court should have followed the general rule and dismissed Wash-Cap’s claim for declaratory relief against Regal and Cinemark as moot once Wash-Cap conceded that its related claim for

⁸ As discussed in Defendants’ Opening Brief, in the analogous context of federal accessibility claims, it is well established that, when a defendant takes actions that remediate a plaintiff’s accessibility claims, the claims become moot and must be dismissed. *See* Opening Br. at 36-37 (citing multiple federal cases).

injunctive relief was moot. By failing to do so, the trial court erred.

In its response, Wash-Cap identifies four exceptions to the general rule that permit trial courts to award declaratory relief when a claim is otherwise moot. These exceptions do not, however, validate the trial court's declaratory ruling against Regal and Cinemark. Moreover, the trial court did not "note these points," nor did it make findings that any exceptions applied to the present case, as required by the applicable rules of procedure. *See* CR 52(a)(1), (4).

In any event, none of exceptions are applicable. While Wash-Cap correctly notes that "Defendants refuse to recognize a legal obligation under the WLAD to provide caption display equipment," it is well settled that the mere fact of an ongoing disagreement about the law is insufficient to create a "continuing justiciable controversy." *See Halkin v. Helms*, 690 F.2d 977, 1007 (D.C. Cir. 1982) (declaratory relief moot where, despite defendant's refusal to renounce power to conduct complained-of programs in the future, no controversy existed). Simply put, more is needed, and the "more" that Wash-Cap points to is merely "possible, hypothetical, [and] speculative" disagreement that is insufficient to establish the existence of a continuing justiciable controversy.⁹

⁹ The cases Wash-Cap cites are distinguishable. In *Forest Guardians v. Johanns*, 450 F.3d 455 (9th Cir. 2006), the defendant was subject to a 10 year agreement to monitor grazing in environmentally sensitive areas, but failed to do so within the first few years.

For example, Wash-Cap speculates that “new managers” may choose to abandon the closed-captioning equipment Regal and Cinemark have purchased, installed, tested, and that their hearing-disabled patrons in King County are now using, but there is no competent evidence to support this allegation – Wash-Cap even conceded at trial that “the issue may not so much be the danger of future violations.” CP 1175. Wash-Cap fares no better by speculating that unidentified theaters may derive unspecified “benefits” from the trial court’s ruling, or asserting generally that this case is one of considerable public interest. There is no evidence to support these allegations. And while it is true that a declaratory judgment that resolved a true “continuing justiciable controversy” may give a litigant “rights” that it would not otherwise have, that argument is inapplicable to a declaratory judgment issued where, as here, there was no actual, present,

Id. at 462. Declaratory relief was needed to ensure proper monitoring for the remainder of the agreement. In *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89 (2005), the court’s holding turned on the fact that “penalties must be assessed” arising from the plaintiff’s right to inspect and copy documents that were improperly denied to him. There are no penalties at issue here. In *Thomas v. Lehman*, 138 Wn. App. 618 (2008), the court held that declaratory relief would be effective because the prison’s policy remained in place and was deemed likely to recur. There is no continuing policy at issue here. Lastly, while Wash-Cap relies heavily on *Feldman v. Pro Football, Inc.*, 579 F. Supp. 2d 697, 706 (D. Md. 2008), *aff’d* 419 Fed. Appx. 381, 387 (4th Cir. 2011), that case does not support Wash-Cap’s arguments that declaratory relief against Regal and Cinemark should survive a mootness challenge, either. That case could not have been dismissed as moot because no actions were taken to remediate two substantive claims (concerning captioned music and line of sight). Moreover, unlike here, where digital captioning equipment was purchased and installed, the actions taken by the defendant to arguably remediate a third claim (hiring an independent contractor to provide captioning of some of the stadium announcements) did not rise to the level of “permanent changes.” *See id.* at 706.

and existing dispute left to resolve, as Wash-Cap demonstrated when it conceded at trial that Regal and Cinemark had “fulfill[ed] their WLAD obligations,” “done everything reasonably possible under the present circumstances,” and that its claims for injunctive relief against them were moot. CP 1167-69.¹⁰

F. The Trial Court Erred By Adjudicating Unripe Claims As To AMC’s Future, Undecided Plans.

At trial, upon learning that Wash-Cap had abandoned its claims that Defendants violated the WLAD prior to digital conversion and then conceded that, as to AMC, “the only remaining issue before [the trial court] is determining what is reasonably possible in the circumstances – after [future] digital conversion – for AMC to do” (CP 1060-61), AMC moved to dismiss the claims against it on the ground that whether AMC may or may not violate the WLAD when its future plans were completed was not ripe for decision. CP 1461-64.¹¹

¹⁰ That is particularly true where, as here, the form of the declaratory order is improper. Here, the “declaratory relief” is merely a recital of the alleged legal standard, does not find that Defendants violated the law, does not require Defendants to take any action, and allows Wash-Cap to sue to adjudicate anew what is “reasonably possible” to provide “[s]hould circumstances materially change in the future, such as by development of new technologies,” CP 1526, something Wash-Cap could do without the order. *See, e.g., Williams v. Glickman*, 936 F. Supp. 1, 5 n.7 (D.D.C. 1996); *Browning Debenture Holders’ Comm. v. Dasa Corp.*, 524 F.2d 811, 816 (2d Cir. 1975).

¹¹ AMC’s request was timely. Contrary to Wash-Cap’s suggestions, the ripeness doctrine is not waivable and can be raised at any time. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n. 18 (1993); *DBSI/TRI IV Ltd. P’ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006). Moreover, Wash-Cap consented to address ripeness in supplemental

In its Opening Brief, AMC explained that, based on applicable Washington precedent and analogous federal case law, because Wash-Cap chose to litigate claims against AMC at trial involving contingent future events that may not occur as anticipated, and made no showing that the future events would cause it injury or “direct and immediate” harm, Wash-Cap’s claims against AMC were not ripe, the trial court’s rulings as to AMC were improper advisory opinions, and the trial court’s judgment as to AMC was reversible error. *See* Opening Br. at 38-42.

Wash-Cap makes no meaningful attempt to respond to AMC’s position on appeal, rather, it dismissively characterizes AMC’s position as “nothing more than a request for a do-over on an issue that was fully litigated.” (Resp. Br. at 32, 34). This argument lacks merit. AMC “fully litigated” the legality of its future captioning plans subject to its position that this claim was not ripe for adjudication. In accordance with *First Covenant Church v. City of Seattle*, 114 Wn.2d 392, 399 (1990), which establishes the legal standard, and *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63 (1st Cir. 2003), which applies the same standard to analogous accessibility claims and is directly on-point, the Court should conclude that Wash-Cap’s claims against AMC were unripe and reverse the trial

briefing on a mutually agreeable schedule, and did so. RP (5/20/11) 30:13-31:15, CP 1432-44, 1518.

court's judgment against AMC. *See* Opening Br. at 38-42.¹²

G. The Trial Court Erred By Awarding Declaratory Relief For Plaintiff And Against Defendants Under The WLAD.

Mindful of page limitations, Defendants stand on their prior argument that the trial court erred by awarding declaratory relief for Plaintiff under the WLAD. The plain language of the WLAD does not authorize granting declaratory relief, and the UDJA establishes the sole cause of action by which a declaratory judgment may be sought, RCW 7.24.101, which preempts the trial court's ruling that the WLAD authorizes declaratory relief. *See* Opening Br. at 42-45.

H. Wash-Cap Was Not Entitled To The Attorney's Fees Awarded By The Trial Court.

1. There Was No Finding That Defendants Violated The Law Or That Wash-Cap Was Injured.

In its final order, the trial court found that “[Wash-Cap] did not seek any finding that any Defendant engaged in discriminatory practices” (CP 1517), and made no finding that any Defendant violated the WLAD. As discussed in Defendants' Opening Brief, the WLAD entitles plaintiffs

¹² Wash-Cap argues that *McInnis-Misenor* is “totally inapposite” because the district court “dismissed the case for lack of standing, and the appellate court decision simply affirmed that dismissal.” Resp. Br. at 33 n.10. Wash-Cap is incorrect. The First Circuit expressly noted that, “for purposes of [its] analysis, the cases dealing with ripeness present a closer fit.” *McInnis-Misenor*, 319 F.3d at 71. The court then analyzed whether dismissal of plaintiff's claims was proper under a two-prong test for ripeness that considered “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Id.* at 70. This is the same test used in Washington. *See First Covenant Church*, 114 Wash. 2d at 399.

who are injured “by an act in violation of this chapter” to recover fees, RCW 49.60.030(2), accordingly, Wash-Cap’s inability to establish a violation of the WLAD should have precluded any fee award under the WLAD.

Wash-Cap’s attempt to justify the award of attorney’s fees lacks merit. Seeking to finesse the changing nature of its claims, Wash-Cap argues that, when Defendants secured financing to convert to digital cinema and digital captioning, “the operative question ceased being how much caption-display capability the theaters could have provided when they were using film projection, and became how much capability they could provide using digital projection.” (Resp. Br. at 38-39.) Wash-Cap argues that, at this point, it changed gears and “sought a determination of how much captioning capability could be provided post-conversion,” which would be in the form of an injunction. (*Id.* at 39.) At this point, however, Regal and Cinemark had already converted to digital cinema and were already providing captioning in all of their King County theaters. Thus, as to Regal and Cinemark, Wash-Cap never proved a pre-conversion WLAD violation – again, it abandoned that claim – or a post-conversion violation – again, it conceded that claim was moot.

Accordingly, while Wash-Cap argues that Regal and Cinemark should not avoid attorney’s fees because “Washington law does not

support that position” (Resp. Br. at 39), Wash-Cap cites no Washington law recognizing that, contrary to the express language of the WLAD, it can somehow recover attorney’s fees without proving a statutory violation or an injury. In fact, precisely the opposite is true. RCW 49.60.030(2); *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 104 (2010) (“RCW 49.60.030(2) entitles persons injured by an act in violation of WLAD to reasonable attorney fees”); *Fahn v. Civil Service Comm’n of Cowlitz County*, 95 Wn.2d 679, 682-83 (1981).¹³

As to AMC, Wash-Cap argues that attorney’s fees were properly awarded because, even though AMC argued that claims against it were not ripe, AMC “does not assign error to the entry of the injunction itself,” and thus fees somehow are appropriate. (Resp. Br. at 39.) But AMC has

¹³ As to *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89 (2005), which Wash-Cap cites for the proposition that Defendants cannot “avoid paying fees” by “surrender[ing]” pre-trial, that case is factually and procedurally dissimilar to this one, as well as based on an entirely different statutory scheme. In that case, the plaintiff maintained certain records were unlawfully withheld by the government under an improper claim of privilege under the public disclosure act. While another court in other litigation found that government had waived the privilege and the government thereafter disclosed the records sought, the Supreme Court held that this disclosure did not moot the plaintiff’s claims in *Spokane Research* because the plaintiff’s claim was that the “previously withheld records were never privileged or work product from the outset and thus should have been immediately disclosed.” *Id.* at 102. Consequently, given the structure of the PDA, which permits sanctions calculated each day disclosure is unlawfully denied, the Court concluded that, if the plaintiff was correct, the plaintiff still had a valid claim for daily penalties. The court was not addressing attorney’s fees, nor was it dealing with a case where the plaintiff itself acknowledged that its initial claim was mooted by events that occurred during litigation. *Spokane Research* does not stand for the proposition that a plaintiff can obtain attorney’s fees without showing a statutory violation.

consistently maintained that the trial court erred by failing to dismiss all claims for multiple reasons, including, without limitation, that the WLAD claims Wash-Cap asserted were invalid, that AMC established with uncontroverted evidence that it did not violate the WLAD, that the claims were not ripe, and other reasons. The key point, however, is that Wash-Cap never secured a finding that AMC violated the WLAD. Once Wash-Cap abandoned any claim of statutory violation or injury at trial, and sought only to adjudicate the legality of AMC's future digital captioning plans, AMC was no different than Regal or Cinemark. As with Regal and Cinemark, Wash-Cap's failure to meet the statutory requirement for securing attorney's fees under the WLAD as to AMC must preclude any fee award under the WLAD against AMC.

2. The UDJA Does Not Permit An Award Of Attorney's Fees To A Party Who Prevails On A Declaratory Judgment Claim.

Mindful of page limitations, Defendants stand on their prior argument that the UDJA does not permit an award of attorney's fees to a party who prevails on a declaratory judgment claim. The UDJA establishes the sole cause of action by which a declaratory judgment may be sought, RCW 7.24.101, the UDJA allows a prevailing party to recover costs, but not attorney's fees, RCW 7.24.100, and the trial court erred in allowing Plaintiff to circumvent a barrier to attorney's fees established by

a clear legislative enactment and more than thirty years of judicial precedent that expressly governs declaratory relief under Washington law. *See* Opening Br. at 45-46.

3. The Fee Award Was Excessive.

Mindful of page limitations, Defendants stand on their prior argument that the trial court abused its discretion in awarding excessive fees and granting an unwarranted fees multiplier. *See* Opening Br. at 47-49. Wash-Cap was more than fully compensated by the lodestar in this case because the lodestar included hours Wash-Cap spent addressing what it calls the “risky” elements of its claim. *Pham v. City of Seattle*, 151 Wn.2d 527, 541 (2007) (“The difficulty of establishing the merits of the case is thus already reflected in the lodestar amount because the more difficult the case is, the more hours an attorney will have to prepare . . . a contingency enhancement would result in double payment.”).

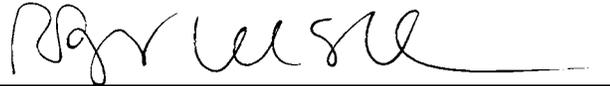
III. CONCLUSION

This Court should reign in the unprecedented expansion of the WLAD’s scope, void the unlawful creation of a new legal obligation to exhibit captioned movies without due process and fair notice, void the award of attorney’s fees to a plaintiff that admittedly failed to establish that the new legal obligation was violated or that it was injured, reverse the trial court’s judgment, and render judgment for Defendants.

DATED this 19th day of March, 2012.

Respectfully Submitted By:

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A handwritten signature in black ink, appearing to read "Roger Leishman", written over a horizontal line.

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CERTIFICATE OF SERVICE

I declare that on March 19, 2012 I caused to be filed with the Clerk of the Court and served upon counsel of record below by E-mail, the above and attached **APPELLANT'S REPLY BRIEF** on:

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