No. 316475

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

CAMERON JONES,
a single man,

Plaintiff-Appellant,

v.

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

Defendants-Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages

CASES

RULES

A. INTRODUCTION

Plaintiff/Appellant Cameron Jones files this Motion seeking to **reverse** the Spokane County Superior Court decision entered on April 12, 2013 with respect only to the vacation of the Order of Default entered on October 4, 2012. Appellant does not seek reversal of the vacation of the money judgment entered on November 16, 2012. Plaintiff/Appellant seeks reinstatement of the Order of Default on liability, leaving the issue of damages for trial, based on Defendant's willful failure to timely respond to the Summons and Complaint after being properly served.

B. ASSIGNMENT OF ERROR

The Superior Court of Spokane County, State of Washington, erred in granting the Defendant/Respondents Motion to Vacate the Order of Default, at the same time it vacated the default money judgment of November 16, 2012 based on the Defendant/Respondent's mistake and/or inadvertence after being properly served but willfully ignoring the Summons and Complaint.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether, contrary to the decision of the Superior Court, wherein the Court vacated a default money judgment and ruled that ignoring a

properly served Summons and Complaint and subsequently failing to respond equates to mistake and/or inadvertence, Respondent was also entitled to an order vacating the separately entered order of default on liability.

D. STATEMENT OF THE CASE

This case stems from a physical altercation that occurred on or about September 28, 2011. (CP 1-6). The Plaintiff Cameron Jones was a patron at Wave Island Grill and Sushi Bar (hereinafter "Wave"), which is owned and operated by the Defendant Hapa United, LLC and Jordan Troutt. (CP 85-86). Ultimately, Mr. Jones was struck in the face with a club by one of the Defendant's employees, a security guard. (CP 1-6). The striking was unprovoked, was not made with permission or pursuant to any other legal privilege, and constituted illegal assault and battery. (*Id.*). Mr. Jones suffered serious and permanent damage to his face as a result of the assault. (*Id.*).

On February 13, 2012, counsel for Mr. Jones sent a letter to Noel Macagapal, who was thought to be the owner of Wave, requesting that he turn Mr. Jones' claim over to Wave's liability insurer. (CP 94-107). The letter, which was sent to Wave's physical address of 523 W. First Ave., Spokane, WA, also indicated that a lawsuit would be filed if no response

was received by the end of the month. (*Id.*). Mr. Macapagal responded to the letter on February 20, 2012 via e-mail stating that he no longer had anything to do with Wave and that correspondence needed to be directed to Hapa United, LLC at the same address[1]. (*Id.*). That same day, counsel sent a letter to Hapa United, LLC at Wave's physical address of 523 W. First Ave., Spokane, WA. (*Id.*). The February 20, 2012 letter indicated that Mr. Jones was represented by counsel, requested that Hapa United, LLC turn Mr. Jones' claim over to their liability carrier, and that a lawsuit would be filed if there was no response by the end of the month. (*Id.*).

There was no response from Hapa United, LLC. (CP 94-107). Counsel for Mr. Jones also made phone calls to Wave. (*Id.*). On one occasion, a woman answered the phone after leaving counsel on hold for a period of time, and indicated that the owner would get back to him. (*Id.*). Mr. Troutt failed to respond, even after being put on notice several times of Mr. Jones' claim. (*Id.*). Efforts then commenced to serve Hapa United, LLC and its owner, Jordan Troutt, prior to filing a lawsuit. (*Id.*).

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[1] Mr. Macapagal indicated in his February 20, 2012 e-mail that he had no involvement with the "operation formerly known as Raw Sushi & Grill" at 523 W. 1st Ave., Spokane, WA as of August 2011. However, it is believed that Mr. Macapagal was an employee of Wave and Mr. Troutt's at all times relevant hereto. On March 10, 2013, the Spokesman-Review printed an article about a different fight that had broken out at Wave. (CP 94-107). The article quotes Mr. Macapagal as "an employee and former owner of The Wave Sushi and Sports Grill." (*Id.*). Mr. Macapagal is extensively quoted throughout the article. (*Id.*).

Counsel for Mr. Jones retained Eastern Washington Attorney Services to serve Hapa United, LLC, though its registered agent Jordan Troutt. (CP 94-107). There were a total of eighteen (18) attempts made to serve Mr. Troutt before service was finally perfected. (CP 87-93). Attempts were made by multiple process servers between June 11 and July 19, 2012 to serve Mr. Troutt. (*Id.*). Finally, Brandi Thomas was able to effect service of the Summons and Complaint on Mr. Troutt on July 19, 2012 by personally handing him a copy of the pleadings. (*Id.*). Mr. Troutt was bartending at the time of service. (*Id.*). Despite claiming that he does not recall being served (CP 123-125), Mr. Troutt signed a document confirming that he received the Summons and Complaint. (CP 87-93).

On August 28, 2012, the Summons and Complaint were filed with the Court after still receiving no response from Mr. Troutt. (CP 1-6). A Declaration of Service was filed on August 30, 2012, which states that Jordan Troutt was personally served a copy of the Summons and Complaint on July 19, 2012 at 5:13 p.m. at his place of business, 523 West 1st Ave., Spokane, WA. (CP 7). There was never any response or communication from Hapa United, LLC or Jordan Troutt. (CP 94-107).

Over twenty (20) days had elapsed after the Summons and Complaint were served and filed with no response from the Defendant. (CP 94-107). As a result, an Order for Default was granted by the Court

on October 4, 2012. (CP 11). A default judgment for monetary damages was entered on November 16, 2012. (CP 19-20). As of November 16, 2012, there were still no communications from Hapa United, LLC or Mr. Troutt. (CP 94-107).

On November 21, 2012, counsel for Mr. Jones sent a letter to Jordan Troutt at Wave's physical address of 523 West 1st Ave., Spokane, WA, indicating that a default judgment had been entered against him and collections would be commencing. (CP 94-107). The letter also confirmed that Mr. Troutt had not responded to any of the previous letters or phone calls, but that counsel would still be open to discussing the matter. (*Id.*). A Notice of Appearance on behalf of Defendant was finally filed on December 19, 2012.

Defendant filed a Motion to Vacate the Order of Default and Default Judgment on March 18, 2013. (CP 67-76). The Motion alleged that "Mr. Trout does not remember being served the Summons and Complaint," therefore his failure to respond was a "mistake." (CP 67-76). This argument was repeated by defense counsel at oral argument. (VRP 6, ln. 24). In addition, the Motion contended that the Defendant had a prima facie defense to liability in that (1) "Defendant claims that no employee of Wave struck Plaintiff," and (2) "Defendant also disagrees with Plaintiff's version of the accident." (CP 74). No declarations or affidavits from

employees/former employees of Wave were submitted in support of Defendant's motion. (*See generally* Clerk's Papers). Plaintiff properly responded to the Motion (CP 108-117) and oral argument was heard by The Honorable Tari S. Eitzen on April 12, 2013. (VRP 1).

Despite claiming that Mr. Troutt did not recall being served with the Summons and Complaint in their motion papers (CP 67-76), defense counsel stated at oral argument that the Defendant "was served and did nothing with the papers." (VRP 3, ln. 21-22). Specifically, defense counsel stated that "[m]y client doesn't dispute he was served," but instead claims that he was bartending and multi-tasking when he was served so that instance should equate to a "mistake." (VRP 6, lns. 17-24; VRP 10, lns. 13-15). Defense counsel also argued that they presented a prima facie defense by submitting police records showing that the fight was chaotic (VRP 4, lns. 23-24) and by stating that "no one has ever identified this, quote, bartender." (VRP 5, lns. 7-9). The Defendant admits that he doesn't have supporting affidavits and declarations to prove a defense, but believes that by just stating a defense exists that the Order of Default should be vacated so discovery could occur. (VRP 10, ln.s 20-25). In response, Plaintiff's counsel agreed to allowing the Default Judgment on damages to be vacated, but not the order of default on liability. (VRP 13; 15). Plaintiff's counsel argued that there was no mistake or neglect in

Defendant's failure to answer the Summons and Complaint and that Defendant failed to forward at minimum a prima facie defense, which would have been required to set aside the order of default. (VRP 14).

After hearing oral argument, Judge Eitzen made the following ruling:

> "All right. Here is what we're going to do: this is your lucky day, all right? Because here is what I think happened. **You thought it was going to go away and you were going to ignore it.** You're real busy. Maybe you forgot about it, whatever, but you didn't really get it that this was serious business. And now we have your attention. This is serious business and you had to hire some lawyer from Seattle to come over here, right? And it's serious business. And you've got a serious look on your face and you're dressed up and here and everybody has got your attention now and you're not going to ignore anything anymore."
>
> "Mr. Beggs is right. I should just uphold the default, but I don't think, when you get to the bottom line, that's doing justice. So I'm going out on a limb because probably he could go to the Court of Appeals and they might reverse me. I want you to know that. I'm going to say that it was inadvertence, mistake on your part. But frankly, the inadvertence, mistake was you were doing a lot of other things and you maybe forgot about it or thought it would go away, because, I don't know, maybe immaturity, maybe a busy, forgot or if papers got wet and lost and you didn't think about it anymore."
>
> "So I'm going to call it inadvertence, mistake and I am going to vacate the default judgment and the default."

(VRP 17-18)(emphasis added). There was no ruling made on whether the Defendant presented enough evidence to establish a prima facie defense. (VRP 17-18).

This appeal follows, specifically asking this Court to reverse Judge Eitzen's decision to vacate the Order of Default, entered on October 4, 2012. (VRP 11). Plaintiff is not appealing the Judge's decision to vacate the Default Judgment and agrees to allow a trier of fact to determine appropriate damages.

E. STANDARD OF REVIEW

A trial court's ruling on a motion to vacate or to set aside a default order is reviewed for abuse of discretion. *Prest v. Am. Bankers Life Assur. Co.*., 79 Wn. App. 93, 97 (1995). Abuse of discretion is found if "the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable." *Id.* "Hence, although default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits, we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." *TMT Bear Creek Shopping Center v. PETCO Animal Supplies, Inc.,* 140 Wn. App. 191, 199 (2007)(citations omitted). "As our Supreme Court recently noted, litigation is inherently formal [and] all parties are burdened by

formal time limits and procedures." *Id.*, citing *Morin v. Burris*, 160 Wn.2d 745 (2007).

When determining whether to vacate a default, a court is to apply equitable principles to ensure that justice is done and a party's rights are preserved. *Johnson v. Cash Store*, 116 Wn. App. 833, 841 (2003). However, "[j]ustice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted." *Id.* "This system is flexible because what is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." *TMT*, 140 Wn. App. at 200.

F. LEGAL ARGUMENT

1. Defendant Failed to Present a Defense That Justified Granting his Motion to Vacate the Default Order.

WA CR 60 allows a party against whom a default order has been entered to move to vacate that judgment. The Washington Supreme Court case of *White v. Holm*, 73 Wn.2d 348 (1968), sets forth four factors that courts are to take into consideration when determining whether to vacate a default. A moving party must demonstrate:

> (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake,

> inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White, 73 Wn. 2d at 352. Importantly, the court elaborated the following:

> [W]here the moving party is able to demonstrate a strong or virtually conclusive defense to the opponent's claim, scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful. On the other hand, where the moving party is unable to show or conclusive defense, but is able to properly demonstrate a defense that would, prima facie at least, carry a decisive issue to the finder of the facts in a trial on the merits, the reasons for his failure to timely appear in the action before the default will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party.

Id. at 352-53. As a result, when determining whether a party is entitled to have an order vacated, a trial court must inquire into "whether the defendant can demonstrate the existence of a strong or virtually conclusive defense or, alternatively, a prima facie defense to the Plaintiff's claims." *TMT*, 140 Wn. App. at 201. The court's resulting inquiry depends on answering that question first. *Id. See also Johnson v. Cash Store*, 116 Wn. App. 833, 841 (2003)(holding that "[e]stablishment of the first factor avoids a useless subsequent trial.").

In this case, the Defendant Hapa United failed to present any evidence to the trial court of a defense to Mr. Jones' claims, let alone a strong/virtually conclusive defense or a prima facie defense.

i. Defendant did not present a strong or virtually conclusive defense.

If a "strong or virtually conclusive defense" can be demonstrated, then the court does not need to spend time inquiring into the defendant's other reasons for failing to answer the Summons and Complaint. *Johnson*, 116 Wn. App. at 841. Even if a Defendant can prove a "strong or virtually conclusive defense," however, equity will not afford a defendant relief from a default order if the defaulting party's actions in failing to answer the Summons and Complaint were willful. *TMT*, 140 Wn. App. at 205-06; *See infra for discussion.*

What's unique about this case is that the Court never ruled on whether the Defendant presented enough evidence of a defense, let alone a "strong or virtually conclusive defense." (VRP 17-18). Instead, the Court's ruling focused solely on whether the defendant's actions in failing to answer were excusable. (*Id.*).

Regardless, the Defendant failed to present any evidence of a defense in support of his motion. The Defendant admitted at oral

argument that he doesn't have supporting affidavits and declarations to prove a defense, but believes that by just stating a defense exists that the Order of Default should be vacated so discovery could occur. (VRP 10, lns. 20-25). Washington courts are clear that a defendant cannot rely merely on allegations and conclusions to prove a defense in support of a motion to vacate. *Johnson*, 116 Wn. App. at 847.

Similar to oral argument, the Defendant will likely claim that he has not had time to conduct discovery in order to establish a defense to Plaintiff's claims. However, affidavits and/or declarations are necessary to prove up a defense in order to vacate a default order, especially when the Defendant has sole access to the applicable witnesses. *Johnson,* 116 Wn. App. at 847. For example, in *Johnson v. Cash Store*, the Defendant moved to vacate a default order and to support their defense claimed that they "had no way of verifying" which of its employees made allegedly harassing comments to the Plaintiff, comments which were the basis of Plaintiff's claims against the Defendant corporation. 116 Wn.App. at 847. The Court held:

> On the contrary, Cash Store held the keys to its own defense. Ms. Johnson alleged that an unidentified male Cash Store employee called her at the end of October 2000. Cash Store could have submitted affidavits from the male employees working during this time period at its Pine Road store. Any discovery needed was within its own organization.

Id. Similar to the *Johnson* case, the Defendant Hapa United and Jordan Troutt have sole access to the witnesses, players, and evidence in this case. The Defendants failed to take any action in interviewing its employees/former employees regarding the events of September 28, 2011 and thus, have failed to present any evidence to support a defense to Plaintiff's claims. The Defendant had approximately three (3) months between the Notice of Appearance (CP 24-25) entered by counsel and the date he filed his motion to vacate (CP 67-76) and no action was taken. Blanket assumptions and hypothetical theories of how the Plaintiff's injuries occurred are not enough to establish a "strong or virtually conclusive defense." The Default Order on liability should be reinstated.

ii. Defendant did not present a prima facie defense.

In the alternative, "when the moving party's evidence supports no more than a prima facie defense, the reasons for failure to timely appear will be scrutinized with greater care." *Johnson,* 116 Wn. App. at 842. "To establish a prima facie defense, the affidavits submitted to support vacation of a default judgment must precisely set out the facts or errors constituting a defense and cannot rely merely on allegations and conclusions." *Id.* at 847. *See also* TMT, 140 Wn. App. at 202 (stating that "a defendant satisfies its burden of demonstrating the existence of a prima

facie defense if it is able to produce evidence which, if later believed by a trier of act, would constitute a defense to the claims presented."). The reason evidence of a defense is necessary is to avoid a useless trial, as vacation of a default judgment without a defense would result in another judgment for the plaintiff at trial. *TMT*, 140 Wn. App. at 203.

As set forth above, the trial court failed to rule on whether the defendant presented enough evidence of a defense. (VRP 17-18). Regardless, the defendant failed to present any evidence of a defense. (*See supra*).

At hearing on the motion, the Defendant argued that he submitted police records from the incident as evidence of a prima facie defense. (VRP 4-5). Allegedly, the police records were supposed to show that the altercation was chaotic and no one identified the bartender who hit the Plaintiff. (*Id.*). First, chaos surrounding an event is not a defense to battery, assault, or negligence. Battery is simply defined as "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." *McKinney v. City of Tuckwila*, 103 Wn. App. 391, 408 (2000), citing W. Page Keeton et al., Prosser and Keeton on Torts § 9, at 39 (5th ed.1984). "An assault is any act of such a nature that causes apprehension of a battery." *Id.*, citing Keeton § 10, at 43.

Negligence can be simply defined as a duty of care to conform to a standard of conduct. *See Honegger v. Yoke's Wash. Foods, Inc.*, 83 Wn. App. 293, 296 (1996). Evidence of chaos in and of itself does not suffice as a defense to any of the above theories. Second, the Plaintiff has had no way of determining the identity of the bartender who hit him because Defendant failed to answer and no discovery could be conducted. And in fact, the Defendant had sole access to any discoverable information. *See supra.* Regardless, the Defendant bears the burden of producing a prima facie defense to Plaintiff's claims in order to have a default vacated. *See White v. Holm*, 73 Wn.2d at 352. Submitting a police report that doesn't contradict Plaintiff's complaint does not prove that the Defendant has a valid defense and any such argument should be rejected.

The Defendant relied heavily on *Calhoun v. Merit*, 46 Wn. App. 616 (1986) to support his argument that he has a meritorious defense. In *Calhoun*, the appellate court agreed to reverse the portion of the default order related to damages, but the defendant failed to present any evidence of a defense so the default judgment of liability was allowed to stand. 46 Wn. App. at 617, 619-20. The *Calhoun* case focused thereafter on liability for damages, which Plaintiff is not disputing for purposes of this appeal. *Calhoun* therefore does not apply here.

Plainly, the Defendant has not presented evidence of even a prima facie defense in this case. The portion of the order vacating the October 4, 2012 order of default on liability should be reversed.

iii. Defendant's failure to appear was willful.

"Where the defaulting party's actions are deemed willful, equity will not afford that party relief, even if the party has a strong or virtually conclusive defense to its opponents' claims." *TMT*, 140 Wn. App. at 205-06. "Willful defiance of the court's authority can never be rewarded in an equitable proceeding." *Id.* at 206.

In response to the Defendant's failure to respond to the Summons and Complaint, the trial court ruled, "[y]ou thought it was going to go away and you were going to ignore it." (VRP 17). Thinking a court case against you is just "going to go away" implies that a conscious and willful decision was made to intentionally ignore the legal documents. Even equity cannot save a defendant from their willful defiance with respect to following court rules. As a result, even if the Defendant were to have presented enough evidence to establish at minimum a prima facie defense, the Defendant's willful failure to answer the Summons and Complaint justifies reversing the trial court's Order to Vacate the Default.

2. Even if the Defendant Presented Enough Evidence of a Prima Facie Defense, Defendant's Failure to Respond to the Summons and Complaint was Inexcusable Neglect.

The Defendant's burden to explain why he failed to answer the summons and complaint is equally as important as establishing that he has a valid defense. *Prest*, 79 Wn. App. at 99. Washington courts have repeatedly found that behavior similar to the Defendant's in this case equates to inexcusable neglect.

For example, in *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 370 (1989), the Defendant argued in support of her motion to vacate an order of default that she was not a sophisticated person and had a limited understanding of the law. The trial court upheld the order of default disagreeing with her by stating regardless, she had ample opportunity to challenge the contents of the default order. *Id.* The appellate court agreed and upheld the order of default. *Id.* at 372.

In *Johnson v. Cash Store*, the Court held that if a company fails to respond to a summons and complaint because someone other than general counsel for the company, i.e. a store manager, "accepted service of process and then neglected to forward the complaint, the company's failure to respond is deemed due to inexcusable neglect." 116 Wn. App. at 848. The *Johnson* court held that a store manager's failure to forward the summons and complaint through the appropriate channels "constituted at

least inexcusable neglect, if not willful noncompliance." *Id.* at 848-49 (emphasis added).

In *TMT*, the court held that it was inexcusable that the defendant:

> failed to ensure that the legal assistant responsible for entering the deadline into the calendaring system did so before she left on an extended vacation, subsequently failed to ensure that employees hired to replace that assistant were trained on the calendaring system and competent in operating it, and failed to institute any other procedures necessary to ensure that PETCO's general counsel received notice of the dispute.

140 Wn. App. at 213. The Court held that "if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable." *TMT*, 140 Wn. App. at 212.

In *Prest*, the Court held that it was inexcusable when the file containing a properly served summons and complaint was "mislaid" and not properly forwarded to the proper personnel in time to answer it. 79 Wn. App. at 100.

Finally, in *Hwang v. McMahill*, 103 Wn. App. 945, 951 (2000), the court rejected the Defendant's argument in support of her motion to vacate a default order that she was upset and did not understand the summons and complaint for unlawful detainer. The court held:

> But McMahill has a high school education, and does not claim she cannot read. While McMahill may have been too upset or impatient to read the eviction papers when served, that does not

> address why she could not have taken steps to read the papers and respond in the twelve days between the time of service of the summons and complaint and the entry of the default judgment. In short, there was no tenable basis for the court's finding of mistake, surprise, or excusable neglect under CR 60(b)(1).

Id. at 952.

Similar to the case law set forth above, Hapa United and Jordan Troutt have no justifiable excuse for failing to answer the Summons and Complaint in this case. Mr. Troutt argued that he does not dispute being served (VRP 6, 10), but that he made a "mistake" in not answering because he was bartending, multi-tasking, busy, and set it down and forgot it. (VRP 3, 6). The trial court acknowledged that Mr. Troutt inappropriately ignored the summons in hopes that it would go away, but then agreed with the Defendant and ruled that failure to answer was based on "inadvertence, mistake" based on Mr. Troutt's alleged busy bartending duties at the time he was served, his immaturity, or that he forgot. (VRP 17-18). However, there is no Washington case law to support vacating a judgment based on forgetfulness, being busy or immature; in fact, the opposite is true. Ignorance of the summons and complaint or the law is plainly not excusable. *See Hwang*, 103 Wn. App. at 952. The Superior Court should have taken into consideration the reason for Defendant's failure to timely appear – i.e. that he ignored the Summons and Complaint thinking it would just go away. (VRP 17). This reasoning is far beneath

an innocent breakdown in office procedures, which does not equate to excusable behavior as a matter of Washington law. What's more interesting is that defense counsel even appeared to agree that entry of the Default Order on liability was appropriate and implied that they only want a trial on damages. (VRP 7-9).

Plainly, Mr. Troutt as a downtown business owner should have known better than to ignore legal documents. The Defendant failed to present a justifiable reason to the trial court for his failure to answer. The Order of Default on liability should be reinstated, preserving defendant's right to argue the quantum of damages at trial.

G. CONCLUSION

Based on the foregoing, the Plaintiff respectfully requests that this Court reverse the portion of the April 12, 2013 decision of The Honorable Tari Eitzen which vacated the Order of Default entered on October 4, 2012 and reinstate said Order establishing Defendant's liability, leaving only damages to be determined by a trier of fact.

Respectfully submitted September 23, 2013.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Appellant's Brief to Defendant-Appellee Hapa United and Defendant-Appellee's attorney, William Spencer, at the following address, postage prepaid, on September 23, 2013.

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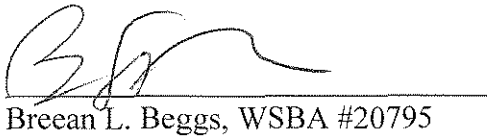

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