

TABLE OF CONTENTS

I. INTRODUCTION 1

II. MS. CAMPBELL’S BRIEF SHOULD BE STRICKEN PURSUANT TO RAP 10.3(5) BECAUSE IT ASSERTS FACTS NOT IN THE RECORD AND DOES NOT CITE TO THE RECORD AS REQUIRED BY RAP 10.4(F). 1

A. Ms. Campbell’s Brief Cites to “Facts” Not in the Record..... 1

B. Ms. Campbell’s Brief Does Not Properly Cite to the Record.....5

C. Ms. Campbell’s Defective Brief is Prejudicial to Mr. Cleverley.....6

III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT REQUIRING MS. CAMPBELL TO MEET HER BURDEN OF PROOF ALLEGING IMPROPER SERVICE 7

A. An Affidavit of Service is Presumed Correct. A person Challenging the Service must do so by clear and convincing evidence..... 7

B. Ms. Campbell submitted no evidence of improper service.8

C. The trial court abused its discretion by finding improper service without any evidence9

IV. THE TRIAL COURT ERRED WHEN IT VACATED THE DEFAULT JUDGMENT BECAUSE MS. CAMPBELL PRESENTED NO EVIDENCE OF A DEFENSE TO ANY OF THE CLAIMS 10

A. The Trial Court Abused its Discretion when it Vacated the Default Judgment Without Evidence of a Prima Facie Defense. 10

B. The Trial Court Abused Its Discretion in Failing to Properly Apply the Four-Part Test 13

C. The Trial Court Abused Its Discretion Because Ms. Campbell Did Not Offer Any Substantial Evidence to Support a Defense to the Defamation Claim	14
D. Ms. Campbell Did Not Offer Any Substantial Evidence to Support a Defense to the Tortious Interference Claim or the Outrage Claim.....	16
V. ANY ERRORS IN VENUE WERE WAIVED	18
A. Ms. Campbell Waived Improper Venue as a Defense by Filing an Answer without Raising it as a Defense.....	18
B. A Default Judgment Filed in the Wrong County Is Still Valid.....	19
VI. THERE ARE NO IRREGULARITIES THAT SUPPORT VACATING THE DEFAULT JUDGMENT	20
A. Filing a Complaint and Default Judgment at the Same Time is a Common Procedure Under Washington’s Rules.....	20
B. Ms. Campbell Lost the Opportunity to Present Her Defenses By Failing to Present them to the Trial Court.	20
VII. NO ATTORNEY FEES MAY BE AWARDED.....	21
A. There is no Contract, Statute or Equity.....	21
B. There is No Basis for Fees Under CR 11 or RAP 18.1.....	21
VIII. CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Allen v. Starr</i> , 104 Wash. 246, 247, 176 P. 2 (1918).....	8
<i>Berge v. Gorton</i> , 88 Wn.2d 756, 759 (Wash. 1977).....	17
<i>Caouette v. Martinez</i> , 71 Wn. App. 69 (Wash. Ct. App. 1993).....	7, 10, 16
<i>Christ v. Hamilton</i> , 2008 Wash. App. LEXIS 2844 (Wash. Ct. App. Dec. 2, 2008).....	22
<i>Commercial Courier Serv. v. Miller</i> , 13 Wn. App. 98, 104 (Wash. Ct. App. 1975).....	12
<i>Griggs v. Averbeck Realty, Inc.</i> , 92 Wn. 2d 576, 599 P.2d 1289 (1979)...	10,11, 12
<i>Kahclamat v. Yakima County</i> , 31 Wn. App. 464, 466 (Wash. Ct. App. 1982).....	18
<i>Lawson v Boeing Co.</i> , 58 Wn. App. 261, 271 (Wash. Ct. App. 1990).	5
<i>Lee v. Western Processing Co.</i> , 35 Wn. App. 466, 469, 667 P.2d 638 (1983).	8
<i>Leen v. Demopolis</i> , 62 Wn. App. 473, 478 (Wash. Ct. App. 1991).....	8
<i>Little v. King</i> , 160 Wn.2d 696, 706 (Wash. 2007).	10
<i>State v. Olson</i> , 126 Wn.2d 315, 323 (Wash. 1995).....	7
<i>Streater v. White</i> , 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).....	21
<i>White v. Holm</i> , 73 Wn.2d 348, 352, 438 P.2d 581 (1968).....	14

Statutes

<i>R.C.W.</i> 4.28.080(15)	10
----------------------------------	----

Rules

CR 1121

CR 320

CR 420

CR 55(c)(2) 19

CR 60(b)(1)..... 19

RAP 10.4(f).....5

RAP 10.7..... 1

RAP 18.1.....21

I. INTRODUCTION

This is a case where the Defendant, Carol Campbell, was served with a Summons and Complaint, did not respond to the Complaint, and a default judgment was entered against her. After Ms. Campbell began receiving wage garnishments, she filed a motion to vacate the default judgment. Ms. Campbell presented no evidence to the trial court that she was not properly served, offered no evidence as to prima facie defenses to the claims in the lawsuit, and offered no evidence that the damages awarded in the default judgment were excessive. Nonetheless, the trial court vacated the default judgment. Plaintiff, Matthew Cleverley, appeals because the trial court abused its discretion in vacating the default judgment when it had no evidentiary or legal basis for doing so.

II. MS. CAMPBELL'S BRIEF SHOULD BE STRICKEN PURSUANT TO RAP 10.3(5) BECAUSE IT ASSERTS FACTS NOT IN THE RECORD AND DOES NOT CITE TO THE RECORD AS REQUIRED BY RAP 10.4(f).

A. *Ms. Campbell's Brief Cites to "Facts" Not in the Record*

Ms. Campbell's Brief should be stricken Pursuant to RAP 10.7 for violations of RAP 10.3(a)(5) because her Brief fails to properly cite to the record. Ms. Campbell also inappropriately alleges facts that are not

in the record at all. It is not just that the facts presented by Ms. Campbell are not properly cited – it is that the purported “facts” *do not exist in the record at all*. Ms. Campbell then uses the “facts” that are not in the record as the basis for her arguments that there was improper service.

Ms. Campbell’s False and Unsupported Factual Assertions:

The following “facts” are alleged by Ms. Campbell. However, they are either not found anywhere in the record or are misstatements of the facts in the record:

“No such person was residing with Ms. Campbell at that time; in fact, Ms. Campbell lived alone.”¹ Respondent’s Brief at 1.

“Ms. Campbell is a single woman who lives alone in the top story of a two story home. The two stories are completely independent, and she rents out the lower portion of the home as an apartment.”² Respondent’s Brief at 3.

“In October 2009, Ms. Campbell was renting out the lower portion of her home to a Hawaiian family.”³ Respondent’s Brief at 3.

¹ This factual statement has no reference to the record and is not found in the record at all. Ms. Campbell was not living alone.

² This factual statement has no reference to the record and is not found in the record at all. There is nothing in the record about the nature of the house or it being rented as an apartment.

³ There is no support anywhere in the record for the statement that the people living with Ms. Campbell were renters. The record indicates that they simply lived in her basement.

“We know that no such person was living either with Ms. Campbell, or in the basement apartment of her home.”⁴ Respondent’s Brief at 14.

“The only person that could come close to fitting such a description was a 15 year old Hawaiian boy living in the completely separate basement apartment with his family...He did not live with Ms. Campbell...”⁵ Respondent’s Brief at 14.

“Ms. Campbell is a single woman who lives alone in the top story of a two story home. The two stories are completely independent, and she rents out the lower portion of her home as an apartment.”⁶ Respondent’s Brief at 3.

“Service was attempted on an unidentified man who does not reasonably fit the description of anyone residing with Ms. Campbell; in fact, Ms. Campbell lived alone.”⁷ Respondent’s Brief at 21.

“They were served on an unidentified man of whom we know very little.”⁸ Respondent’s Brief at 20.

⁴ Ms. Campbell stated people were living in her home with her. Judge Verser found that the 15 year old being referred to lived in her home.

⁵ This factual statement has no reference to the record. Further, no description of the basement as a separate residence is found in the record at all.

⁶ This factual statement has no reference to the record. Further, no description of the basement as a separate residence is found in the record at all.

⁷ Ms. Campbell did not live alone. She lived with Elzada Campbell, age 90, and a Hawaiian family who lived in her basement. Judge Verser found that the person who was served was a resident of Ms. Campbell’s house.

⁸ Ms. Campbell stated he lived in her home and Judge Verser found that the 15 year old being referred to lived in her home.

Actual Facts from the Record

In illustration of Ms. Campbell’s misrepresentations of the record, the following contrary facts come straight from the Respondent’s Declaration and Motion to set aside the default judgment:

“Carol Campbell currently lives alone in her residence at 11506 E 38th Ave., Spokane Washington. In October 2009, she was caring for her elderly mother-in-law, Elzeda Campbell, age 90.” CP at 44.

“There was also a Hawaiian family living in her basement....The Hawaiian family living in the basement was a husband and wife with their son and daughter.”⁹ CP at 44.

“I had the Manors’ family living in my basement – a husband, wife, son and daughter. The husband is Hawaiian in his late 40s, the son, Kalani, also has dark skin. He is 15 years old. They have since left my home and moved back to Hawaii.” CP at 49.

“Ms. Campbell is a widow and she had a family living in the basement.”¹⁰ RP at 5.

“I’m not sure, I’m not sure how the family, the Hawaiian family was living in the home, but it was pretty apparent that that’s who got served was the son of a Hawaiian – of a family who was living in her basement.”¹¹ RP at 16.

It is one thing to argue how the law may be applied to facts. It is quite another thing to present to this Court “facts” without citing to them in the record, citing “facts” that do not exist anywhere in the record, and

⁹ This statement was made by Ms. Campbell’s counsel in her Motion to vacate the default judgment.

¹⁰ Statements made by Ms. Campbell’s counsel at the hearing.

¹¹ Comments by Judge Verser.

alleging “facts” that are contrary to the established facts that are actually *in* the record. It is entirely inappropriate of Ms. Campbell to attempt to insert new “facts” to support her appeal when she failed to present any of those “facts” to the trial court.

While technical errors of briefing can be ignored, the type of factual misrepresentations presented to this court should not be. The court should strike Respondents’ brief in its entirety.

B. Ms. Campbell’s Brief Does Not Properly Cite to the Record.

The second problem with Ms. Campbell’s Brief is that the citations in her Brief do not cite to the page number of the Clerk’s Papers as required by RAP 10.4(f). “The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court.” *Lawson v Boeing Co.*, 58 Wn. App. 261, 271 (Wash. Ct. App. 1990).

Ms. Campbell apparently cites generally to the *Docket Number* of the document as listed in the Designation of Clerk’s Papers. Accordingly, it is impossible to identify Ms. Campbell’s specific citation to the record. For example, on Page 2 of Ms. Campbell’s Brief, Ms. Campbell cites to “CP 5” as a reference for her statements of fact. CP 5 is supposed to refer to page 5 of the Clerk’s Papers; however, Page 5 of the Clerk’s Papers is page 3 of the Complaint. It appears that Ms. Campbell is actually

referring to the *Trial Court Docket Number 5*, as designated in the Designation of Clerk's Papers, which is Plaintiff's Affidavit in Support of Default Judgment. That document actually starts as page 12 of the Clerk's papers (CP 12).

Further problematic is that Ms. Campbell does not even cite to the particular page of Docket Number 5 which contains 28 pages (CP 12-40). This citation defect appears throughout Ms. Campbell's Brief. It is impossible for anyone to tell what part of the record Ms. Campbell is actually referring to.

The Court should strike Ms. Campbell's Brief in its entirety because it fails to comply with RAP 10.3(a)(5).

C. Ms. Campbell's Defective Brief is Prejudicial to Mr. Cleverley

Mr. Cleverley is not generally concerned with technical flaws in the briefing. Had Ms. Campbell actually cited to a specific page within the docket entry, one could at least find the reference. And the Court could likewise ignore the flaws if they were not prejudicial. "[A]n appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion,

moreover, should normally be exercised unless there are compelling reasons not to do so.” *State v. Olson*, 126 Wn.2d 315, 323 (Wash. 1995). Compelling reasons involve prejudice to the opposing party. *Id.*

In this case, those flaws should not be ignored. Mr. Cleverley is prejudiced because it is impossible for the Court to refer to the record and examine the facts or purported facts alleged by Ms. Campbell. In addition, Ms. Campbell is alleging facts that have no supporting citations, and alleging “facts” that do not exist in the record.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT REQUIRING MS. CAMPBELL TO MEET HER BURDEN OF PROOF ALLEGING IMPROPER SERVICE

A. An Affidavit of Service is Presumed Correct. A person Challenging the Service must do so by clear and convincing evidence.

A Trial Court’s order vacating a judgment under CR 60(b) is reviewed for an abuse of discretion. *Caouette v. Martinez*, 71 Wn. App. 69 (Wash. Ct. App. 1993). When challenging service after a Default Judgment has been entered, it was Ms. Campbell’s burden to submit clear and convincing evidence that there was improper service. “When a default judgment has been entered based upon an affidavit of service, the judgment should be set aside only upon convincing evidence that the return of service was incorrect. *Allen v. Starr*, 104 Wash. 246, 247, 176 P.

2 (1918). An affidavit of service that is regular in form and substance is presumptively correct. *Lee v. Western Processing Co.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983). The burden is upon the person attacking the service to show by clear and convincing proof that the service was improper. *Allen*, at 247; *McHugh v. Conner*, 68 Wash. 229, 231, 122 P. 1018 (1912).” *Leen v. Demopolis*, 62 Wn. App. 473, 478 (Wash. Ct. App. 1991).

B. Ms. Campbell submitted no evidence of improper service.

There is no evidence in the record that supports Ms. Campbell’s contention that service was improper. On the contrary, she admits in her Brief that she submitted no such evidence: “However, even if it is accepted that service was made on this 15 year old boy, we do not have any additional evidence regarding his suitability for service.” Respondent’s Brief at 14. “[W]e have no findings in the record to show that he was talented, familiar with the court system or held an appreciation of the law. We don’t know if he was concerned about his future; we don’t even know if he could read.” Respondent’s Brief at 14.

Ms. Campbell’s arguments actually support Mr. Cleverley’s position. It was *Ms. Campbell’s* burden to present clear and convincing evidence to rebut the declarations of service. The declarations of service

by the licensed process server are presumed to be valid. Ms. Campbell offered no evidence at all to suggest that the 15 year old boy living in her basement wasn't suitable for service. If there was some reason why service on the 15 year old who lived in her basement was improper, it was Ms. Campbell's obligation to present that evidence. She failed to do so.

C. The trial court abused its discretion by finding improper service without any evidence

The Trial Court had no evidence to support Ms. Campbell's allegations of improper service. In fact, the Trial Court found that service was actually made on the 15 year old resident. "[I]t was pretty apparent that that's who got served was the son of Hawaiian – of a family who was living in her basement." RP at 16. However, the trial court then inexplicably ruled that substitute service was improper: "I think that is inadvertence, surprise or excusable neglect when it wasn't served on her, and I accept the explanation." RP at 17.

The Trial Court clearly erred. In holding that personal service was required, the Trial Court ignored the statutory authority for substitute service: "(15) In all other cases, to the defendant personally, *or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.*" *R.C.W.*

4.28.080(15) (emphasis added). The licensed process server submitted two unchallenged declarations regarding substitute service on a suitable resident of Ms. Campbell's home. The Trial Court's holding that Ms. Campbell must be personally served was contrary to the law and was a clear abuse of discretion. Further, it was an abuse of discretion for the trial court to find that substitute service on Ms. Campbell was inadvertence, surprise or excusable neglect.

**IV. THE TRIAL COURT ERRED WHEN IT VACATED THE
DEFAULT JUDGMENT BECAUSE MS. CAMPBELL PRESENTED
NO EVIDENCE OF A DEFENSE TO ANY OF THE CLAIMS**

***A. The Trial Court Abused its Discretion when it Vacated the
Default Judgment Without Evidence of a Prima Facie Defense.***

A Trial Court's order vacating a judgment under CR 60(b) is reviewed for an abuse of discretion. *Caouette v. Martinez*, 71 Wn. App. 69 (Wash. Ct. App. 1993). "Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment. It is thus an abuse of discretion." *Little v. King*, 160 Wn.2d 696, 706 (Wash. 2007).

Ms. Campbell relies on *Griggs v. Averbek Realty, Inc.*, 92 Wn. 2d 576, 599 P.2d 1289 (1979) to support her contention that the trial court has

the discretion to vacate a default judgment even if the defaulted defendant does not submit any evidence to support a defense to the claims. *Griggs* does not support Ms. Campbell's position. The Court in *Griggs* vacated a default judgment because the court in that case had already been involved with extensive pretrial proceedings over a period of four years, had summary motion documents on file, and had issued previous findings of fact.¹²

Griggs actually supports Mr. Cleverley's position that Ms. Campbell was required to produce adequate evidence of defenses to the claims. Ms. Campbell was required to present enough evidence to prove that she has at least a prima facie defense to the claims. If she did not do so, then it was a waste of judicial resources to set aside the default. "The

¹² "The trial court did not operate in a vacuum without knowledge of the alleged defense. The case had been pending for more than 4 years. Trial had been preassigned to the trial court judge who granted the vacation some 31 months earlier than the act of vacation. The pleadings and memorandum plainly revealed the facts and theory of the defense upon which the petitioner ultimately prevailed. A motion for summary judgment for petitioner had been heard, orally granted and then denied on reconsideration.

"Importantly, the trial court was aware of the deficiency in petitioner's affidavits and set out in its findings that no facts were set forth within the affidavits but found that the petitioner had the basis of a legal defense. The court then referred to the affidavit in support of the earlier summary judgment. That finding was prepared by respondent-plaintiff's counsel. In fact, there was no affidavit in the summary judgment proceeding but there was an extensive memorandum of facts and law on the very defense upon which petitioner prevailed."

Griggs v. Averbek Realty, 92 Wn.2d 576, 583-584 (Wash. 1979).

prime purpose of the rule is to prove to the court that there exists, at least prima facie, a defense to the claim. *White v. Holm*, supra at 352. This avoids a useless subsequent trial if the defaulted defendant cannot bring forth facts to make such a showing when seeking to vacate the default.” *Griggs v. Averbek Realty*, 92 Wn.2d 576, 583 (Wash. 1979).

It is an abuse of discretion for a trial court to set aside a default when it is not presented with any evidence of a defense. “Bearing in mind the fundamental purpose of doing justice, the question becomes whether the trial court had before it sufficient evidence of the meritorious defense to justify vacating the judgment. Clearly the better practice, and one which is seldom excused, is to set out the facts in affidavit form.” *Griggs v. Averbek Realty*, 92 Wn.2d 576, 583 (Wash. 1979). “Affidavits supporting motions to vacate judgments must set out the facts constituting a defense. It is insufficient to merely state allegations and conclusions.” *Commercial Courier Serv. v. Miller*, 13 Wn. App. 98, 104 (Wash. Ct. App. 1975).

Ms. Campbell presented the trial court with a three-page declaration in support of her motion to vacate the default judgment. CP at 48-50. The declaration is entirely devoid of any defense to any of the claims made in the lawsuit. Ms. Campbell does not even offer a basic

denial of having made the defamatory statements. (Nor could she, considering that she had already admitted to them in her deposition.) She simply reiterates and confirms that she repeated to other people the statements that were made to her by her son. No reasonable person could read the declaration and find any prima facie defense to the claims made in the lawsuit. The trial court then, did not have sufficient evidence before it find that Ms. Campbell had any prima facie defenses.

The trial court abused its discretion in vacating the judgment because Ms. Campbell did not offer any evidence to support a defense to any of the claims.

B. The Trial Court Abused Its Discretion in Failing to Properly Apply the Four-Part Test

The court considers four factors when determining whether to set aside a default judgment under CR 60(b). These factors are: (1) That there is substantial evidence to support a least prima facie defense to the claim; (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 v. Holm*, 73

Wn.2d 348, 352, 438 P.2d 581 (1968). Factors (1) and (2) are primary; factors (3) and (4) are secondary. Id. at 352-53.

In this case, Ms. Campbell presented no evidence of any defense to the trial court. The Declaration submitted by Ms. Campbell did not offer any defenses at all to the three claims. The Trial Court, therefore abused its discretion in finding that the first part of the test had been met.

C. The Trial Court Abused Its Discretion Because Ms. Campbell Did Not Offer Any Substantial Evidence to Support a Defense to the Defamation Claim

Ms. Campbell cites *Kimble v. Kimble*, 14 Wash 369, 44 P. 866 (1896) for the proposition that the statements made by Ms. Campbell to all of her other family members fall under a qualified privilege. *Kimble* does not support Ms. Campbell's contention. *Kimble* does recognize an extremely narrow situation where communications between two family members might be conditionally privileged. However, that conditional privilege is extremely limited, and is lost if the purpose of the communication is malicious. "Such a communication, even though containing matter which was libelous, was conditionally privileged and would not render the one who wrote and sent it liable in damages unless it appeared that his acts in so doing were inspired by malice and a desire to injure the person of whom the libelous matter was written, and not simply

to give to the person to whom the letter was sent information for the purpose of enabling her to act intelligently, and to furnish reasons to induce her to act upon such information.” *Kimble v. Kimble*, 14 Wash. 369, 370 (Wash. 1896)¹³

Nonetheless, Ms. Campbell’s problem is that she did not present any evidence to the Trial Court as to a legitimate purpose of her defamatory statements. The record is devoid of any such evidence or defense. She presented no evidence that her statements were for the purpose of another to act intelligently and to act upon such information, as opposed to acting maliciously. She presented no evidence as to the circumstances to warrant disclosure of the false information. Thus, Ms. Campbell failed to present a prima facie defense of a qualified privilege,

¹³ *Kimble* does not apply in cases where there is reckless disregard of the truth:

This case does not fall within the rule announced by this court in the case of *Kimble v. Kimble*, 14 Wash. 369 (44 P. 866 v. *Kimble*, 14 Wash. 369 (44 P. 866). So far as the question of malice is concerned, and the burden of proof, the rule is stated as follows by Newell on Defamation, Slander and Libel, p. 322:

"If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

Stewart v. Major, 17 Wash. 238, 241-242 (Wash. 1897).

and the Trial Court abused its discretion in finding that she had met her burden of a prima facie defense.

Finally, Ms. Campbell relies on *Caouette v. Martinez*, 71 Wn. App. 69, 79 (Wash. Ct. App. 1993) for the proposition that there was insufficient evidence submitted by Mr. Cleverley to support the defamation claim, and that the pleadings were not detailed enough. Ms. Campbell's first problem, again, is that she did not raise either of these defenses in the trial court and therefore cannot raise them for the first time on appeal. Her second problem is that Mr. Cleverley submitted a detailed declaration with his motion for default judgment that set forth the history and factual basis for the claims. CP at 12-40. That declaration contains sufficient detail of the nature of the statements and their falsity.

D. Ms. Campbell Did Not Offer Any Substantial Evidence to Support a Defense to the Tortious Interference Claim or the Outrage Claim.

Ms. Campbell's primary defense to the Tortious Interference and Outrage claims is that the Complaint did not plead the necessary elements of the causes of action. She then claims that she did nothing to discredit Mr. Cleverley, or interfere with his relationship with his client, and claims that her actions were not outrageous. No evidence of these defenses were

submitted to the trial court, none are in the record, and they cannot be raised for the first time on appeal.

The Complaint sets forth the basis for relief and is adequate under Washington's notice pleading laws.

The basic rules of law governing this action are clear. A complaint need only set forth a short and plain statement of a claim showing that the pleader is entitled to relief. CR 8(a)(1). No dismissal for failure to state a claim should be granted unless it appears, beyond doubt, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Sherwood v. Moxee School Dist.* 90, 58 Wn.2d 351, 363 P.2d 138 (1961); *Higgins v. State*, 70 Wn.2d 323, 422 P.2d 836 (1967). Factual allegations of the complaint must be accepted as true for purposes of the motion. *Hofto v. Blumer*, 74 Wn.2d 321, 444 P.2d 657 (1968).
Berge v. Gorton, 88 Wn.2d 756, 759 (Wash. 1977).

Mr. Cleverley's Declaration in support of the default judgment set forth the factual basis for the claims. CP at 12-40.

Finally, it is Ms. Campbell's burden to set forth substantial evidence supporting her defenses. The record is silent on any defenses to the tortious interference or outrage claims. They were not mentioned at all in her Declaration (CP at 48-50). Therefore, she did not present any evidence whatsoever to the Trial Court of a defense to the claims.

The Trial Court abused its discretion when it vacated the default judgment as to the tortious interference and outrage claims. Ms. Campbell

submitted no evidence whatsoever of a defense to those claims. Therefore, the trial court failed to properly apply the first test of the 4-part test and abused its discretion when it vacated the default judgment.

V. ANY ERRORS IN VENUE WERE WAIVED

A. *Ms. Campbell Waived Improper Venue as a Defense by Filing an Answer without Raising it as a Defense*

Ms. Campbell has waived any defense by filing an Answer that does not raise venue as a defense.¹⁴ Subsequent to entry of the Order vacating the default judgment, Ms. Campbell filed an Answer in Kitsap County that did not raise improper venue as a defense. “When, however, a rule 12(b) defense or objection is raised by motion prior to pleading or in conjunction with the responsive pleading, as here, a failure to join all other 12(b) defenses or objections which were then available to the defendant results in a waiver of the omitted defenses or objections. CR 12(g) and (h).” *Kahclamat v. Yakima County*, 31 Wn. App. 464, 466 (Wash. Ct. App. 1982). Ms. Campbell therefore waived the defense as to improper venue.

¹⁴ The Answer was not designated in the Clek’s record, but it does not raise venue as a defense.

B. A Default Judgment Filed in the Wrong County Is Still Valid.

A default judgment entered in an improper venue is still valid. “A default judgment entered in a county of improper venue is valid but will on motion be vacated for irregularity pursuant to rule 60(b)(1).” CR 55(c)(2). So, initially, the default judgment is valid, even if it was obtained in the wrong county.

To set the judgment aside for improper venue, Ms. Campbell must still meet the requirements of CR 60(b)(1): “(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 his 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.” This does not give Ms. Campbell any support. It puts Ms. Campbell right back into the same situation that she is in now. She still has to show that the judgment was obtained in violation of one of the reasons listed in the rule. As noted throughout this Brief, Ms. Campbell has not met any of the standards that would otherwise justify vacating the judgment. Accordingly, the county where the judgment was entered is irrelevant.

**VI. THERE ARE NO IRREGULARITIES THAT SUPPORT
VACATING THE DEFAULT JUDGMENT**

A. Filing a Complaint and Default Judgment at the Same Time is a Common Procedure Under Washington's Rules.

Ms. Campbell seems to make an argument that the filing of the Complaint, Summons and Default Judgment all at the same time somehow prejudiced her and was improper. Mr. Cleverley is unable to make any sense of this argument as CR 3 and CR 4 provide for the service of a Summons and Complaint in advance of commencing the action. Default judgments are routinely entered when more than 20 days has elapsed from the date of service.

B. Ms. Campbell Lost the Opportunity to Present Her Defenses By Failing to Present them to the Trial Court.

Ms. Campbell argues that it is equitable for her to have a trial on the merits. Ms. Campbell's problem is that she failed to present any prima facie defenses to the trial court that would merit vacating the default judgment. If she could not present any prima facie defenses to the claims, or the amount of damages, in order to support her motion to vacate the default judgment, then there is little benefit of going to trial on a case where she failed to present any meritorious defense in her motion. She did not present any substantive evidence of any defenses to the claims to the

trial court, and cannot raise those defenses for the first time on appeal.

These issues are addressed elsewhere in this Brief.

VII. NO ATTORNEY FEES MAY BE AWARDED

A. There is no Contract, Statute or Equity

Ms. Campbell cites no contract, statute or recognized ground of equity for awarding attorney fees, and there are none. No attorney fees may be awarded.

B. There is No Basis for Fees Under CR 11 or RAP 18.1

Ms. Campbell makes a plea for sanctions under CR 11 and RAP 18.1. She again cites no cases that support her position. She makes various vague allegations of misconduct and sprinkles in various ad hominem attacks on Mr. Cleverley. However, she does not provide any authority for her position. Sanctions are not appropriate except in extreme cases. “An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980). We construe any doubt about whether an appeal is frivolous in favor of the appellant. *Id.* at 434-35.”

Christ v. Hamilton, 2008 Wash. App. LEXIS 2844 (Wash. Ct. App. Dec. 2, 2008).

Certainly, in this case, there is adequate evidence of a meritorious claim, and any doubt is construed in favor of Mr. Cleverley.

VIII. CONCLUSION

Ms. Campbell failed to substantively support her Motion to Vacate the Default Judgment at the trial court level. She failed to offer any substantive evidence to support her defenses. She failed to offer any evidence that damages were excessive. She failed to meet the minimum standards to have a default judgment vacated, and the trial court abused its discretion when it did so. The order vacating the default judgment should be vacated for abuse of discretion, and the default judgment reinstated.

Dated: November 22, 2010



Matthew Cleverley, WSBA #32055
POB 987
Suquamish WA 98392
360-598-4952
Pro Se

COURT OF APPEALS NO. 40788-4-II
KITSAP COUNTY CASE NO. 09-2-003021-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

MATTHEW CLEVERLEY,

Appellant,

v.

CAROL CAMPBELL,

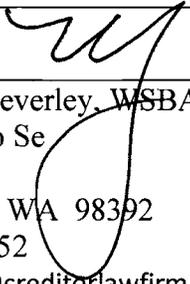
Respondent.

FILED
COURT OF APPEALS
DIVISION II
10 NOV 26 AM 11:15
STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

I certify that on November 22, 2010, I served a copy of Appellant's Reply Brief on the following persons by first class mail:

Lin O'Dell, WSBA #19582 Attorney at Law 505 W Riverside Ave, Suite 630 Spokane WA 99201	John R. Zeimantz, WSBA #9502 JP Diener, WSBA #36630 Feltman, Gebhardt, et al. 421 W Riverside Ave, Suite 1400 Spokane WA 99201
--	--


Matthew Cleverley, WSBA #32055
Plaintiff Pro Se
POB 987
Suquamish WA 98392
360-598-4952
mcleverley@creditorlawfirm.com