

NO. 62557-8-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

RANDY HALL,

Plaintiff/Respondent

v.

TRACEY NORTON and

DARREN KOSSEN,

Defendants/Appellants

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 AUG 18 PM 4:44

---

BRIEF OF RESPONDENT

---

James J. Jameson  
WSBA # 11490  
Attorney for Respondent  
3409 McDougall Avenue  
Suite 201  
Everett, WA 98201  
(425) 258-8444

ORIGINAL

## TABLE OF CONTENTS

	<u>PAGE</u>
I. ASSIGNMENT OF ERROR.....	1
II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR	1
III. STATEMENT OF CASE.....	2
IV. ARGUMENT.....	3
V. CONCLUSION.....	6

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Caouette v. Martinez,</u> 71 Wn. App. 69, 856 P.2d 725 (1993).	3,4
<u>Friebe v. Supancheck,</u> 98 Wn. App. 260, 992 P.2d 1014 (1999).	4,5
<u>Rodriguez v. James-Jackson,</u> 127 Wn. App. 139, 111 P.3d 271 (2005).	5,6
<u>STATUTES</u>	<u>PAGE</u>
RCW 4.28.100 (2)	5
<u>RULES</u>	<u>PAGE</u>
RAP 9.1(a)	3

### ASSIGNMENTS OF ERROR

1. The trial court did not err when it granted Plaintiff default judgment, as Plaintiff's Declaration accompanying his Motion for Default adequately sets forth each element of his claim against Defendants.
2. The trial court did not err when it found proper service was made upon Defendants by publication.

### ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the four declarations appended to the Brief of Appellants be stricken, as well as any reference to facts or allegations contained therein in the body of Appellant's Brief, as they are not part of the record on review?
2. Is Plaintiff's Declaration in support of his Motion for Default factually sufficient to support the judgment entered by the trial court? (Assignment of Error 1)
3. Did service by publication on Defendants constitute valid service of process so as to support the default judgment entered by the trial court herein? (Assignment of Error 2)

## STATEMENT OF THE CASE

The Summons and Complaint, upon which judgment was entered in this cause, were filed in Snohomish County Superior Court on July 14, 2008 (CP 47-58). Plaintiff's counsel mailed Defendants correspondence on July 16, 2008 at their last known address, but Plaintiff left no forwarding address and the correspondence was returned (Declaration of Edward A. Ritter, II., CP 39). Furthermore, Plaintiff's counsel conducted research on the internet to attempt to locate Defendants, but could not locate them (Id.). Plaintiff's attorney had previously attempted personal service on Defendants of a prior Summons and Complaint, also to no avail (Declaration of Non-Service, CP 36-38). Only after exhausting all of the above attempts to contact Defendants did Plaintiff's counsel resort to service by publication.

When no response was received from the Defendants to the Summons, Plaintiff moved for a default judgment, which judgment was entered on October 9, 2008 (CP 5-6). In support of his motion for default judgment, Plaintiff set forth in his declaration the elements of his damages (CP 8). This declaration is what the court based its judgment upon. Plaintiff's declaration clearly set forth an itemized list of his damages

which totaled \$9,900.00 plus costs and attorney's fees. There was substantial evidence upon which to base the default judgment.

### ARGUMENT

1. The four declarations appended to the Brief of Appellant should be stricken, as well as any reference in the body of the Brief of the Appellant to the facts contained therein, as these declarations are not part of the record on review.

“The ‘record on review’ may consist of (1) a ‘report of proceedings’, (2) ‘clerk’s papers’, (3) exhibits, and (4) a certified record of administrative adjudicative proceedings.” RAP 9.1(a)

The declarations appended to the Brief of Appellant do not qualify as any of the above components to the record on review and therefore must be stricken. Any reference to the facts contained in these declarations in the body of the Brief of Appellant must also be stricken as these portions of the brief are not supported by the record on review.

2. Plaintiff’s declaration in support of his motion for default was factually sufficient to support the judgment entered by the trial court.

In support of their Assignment of Error on this issue, Appellants cite the case of Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993). The Brief of Appellant at page 10 states as follows:

In Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993), the court stated, a default order as well as a judgment may be vacated if "...based upon incomplete, incorrect or conclusory factual information." This permits the court, if meritorious defenses are alleged, to vacate the default order establishing liability.

In the Caouette case, Plaintiff alleged liability on the theory of negligent entrustment, yet produced no evidence on this theory in the motion for default judgment. On this basis, the court found that there was insufficient evidence to support the judgment.

When Defendants argued for a broad reading of the Caouette decision, the court in Friebe v. Supancheck, 98 Wn. App. 260, 992 P.2d 1014 (1999) (a Division I decision; Caouette was decided by Division II) refused to read Caouette broadly, stating: "We interpret Caouette as requiring only that the party seeking a default judgment set forth facts supporting, at a minimum, each element of the claim." Friebe at 268.

In the instant case, Plaintiff's declaration set forth the monthly rental amount, the months for which rent was not paid, the amount of damages Defendants caused to the property and the amount of propane necessary to fill the tank for propane which was used by Defendants, as well as an itemization of the costs and the amount of attorney's fees Plaintiff incurred. Plaintiff clearly set forth facts supporting each element

of his claim against Defendants as required by Friebe, supra. As such, Appellant's contention of error on this issue must fail.

3. Plaintiff's counsel conducted a diligent inquiry into the whereabouts of Defendants sufficient to allow service by publication.

Service by publication is allowed by RCW 4.28.100(2) "when the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a Summons, or keeps himself concealed therein with like intent." In the instant case, Defendants avoided service of a prior Summons and Complaint when Plaintiff knew where they resided (See Declaration of Non-Service, CP 36-38), moved and left no forwarding address and could not be found via internet research (See Declaration of Edward A. Ritter, II., CP 39-45). Plaintiff's counsel made diligent efforts to locate Defendants, who, it is fairly obvious, did not wish to be found. As such, service by publication was proper.

Appellants cite the case of Rodriguez v. James-Jackson, 127 Wn. App. 139, 111 P.3d 271 (2005), to support their position that Plaintiff's counsel, in this case, did not conduct a diligent search. What the Rodriguez case truly indicates is that whether a diligent search was performed is a factual inquiry peculiar to each case. There are several distinguishing facts in the Rodriguez case which are not present here.

First, in Rodriguez the Plaintiff's counsel did not send any correspondence to the Defendant until nearly three years after the occurrence. As a result, the forward which the Defendant had on her mail had expired. In the instant case, correspondence was sent to the Defendants a matter of weeks after they had moved from their previous residence, for which they left no forwarding address.

Furthermore, in Rodriguez Plaintiff's counsel had information as to the insurer of the Defendant, yet failed to make any inquiries of the insurer to attempt to locate her. That fact is not present in the instant case.

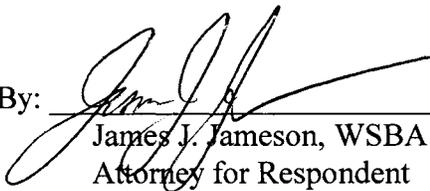
Given that Defendants, herein, avoided service of process of a prior Summons and Complaint, moved without leaving a forwarding address and that diligent efforts were taken by Plaintiff's counsel to contact the Defendants, the facts in this case are clearly distinguishable from the facts in the Rodriguez case and service of the Summons by publication herein was proper.

#### CONCLUSION

For the reasons set forth, above, Respondent respectfully requests that the trial court's judgment be affirmed.

DATED: August 13, 2009

RESPECTFULLY SUBMITTED:

By:   
James J. Jameson, WSBA # 11490  
Attorney for Respondent

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

2009 AUG 18 PM 4:44

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

In re:

RANDY HALL,

Plaintiff/Respondent,

and

TRACEY NORTON and DARREN  
KOSSEN,

Defendants/Appellants.

NO. 62557-8-I

CERTIFICATE OF SERVICE

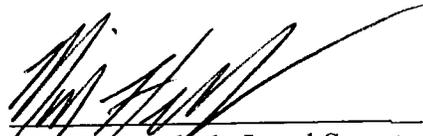
I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: I, Marjory Herdeck, deposited in the United States mail, postage pre-paid, an envelope directed to William C. Budigan, Attorney for Appellants at the address set forth below, on August 14, 2009, a copy of Brief of Respondent.

The address to which said document was mailed is:

Mr. William C. Budigan  
Attorney for Appellants  
2601 42<sup>nd</sup> Avenue West  
Seattle, WA 98199

DATED: August 13, 2009

PLACE: Everett, WA

  
\_\_\_\_\_  
Marjory Herdeck, Legal Secretary

Certificate of Service - 1

**JAMES J. JAMESON, P.S.**  
ATTORNEY AT LAW

3409 McDOUGALL AVE., SUITE 201  
EVERETT, WA 98201  
(425) 258-8444  
FAX (425) 258-9412

ORIGINAL