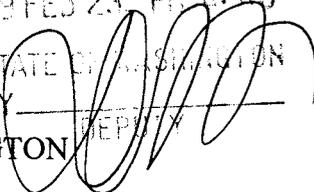


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DIVISION II

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COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II BY   
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ROBERT M. HOUGH,

Appellant,

vs.

FRANK W. STOCKBRIDGE and SUSAN D. STOCKBRIDGE,  
Husband and Wife, and the marital community comprised thereof,

Respondents.

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REPLY BRIEF OF APPELLANT

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ORIGINAL

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## I. STATEMENT OF FACTS

Several pages of the Stockbridges' factual assertions are devoted to drawing attention to Mr. Hough's inarticulate drafting style, his alleged lack of apparent understanding of the civil rules, their belief as to the degree of Mr. Hough's anger and frustration with the Stockbridges and to providing a list of the motions that Mr. Hough filed in this case since it began in 2001. They do not deny that Mr. Hough prevailed on several of his motions and that the Stockbridges did not prevail on many of theirs. Brief of App pg 8.

The Stockbridges' statement of facts does not identify any "process" Mr. Hough used as a club for collateral advantage. In fact, they fail to identify even a single pleading or document Mr. Hough filed in this matter that is outside the scope of this case. In short, the Stockbridges here, as at trial, have not asserted sufficient facts upon which the tort of "abuse of process" is actionable.

## II. ARGUMENT

### A. Elements of Abuse of Process

1. *The Stockbridges' claim is fatally flawed because they base their claim on a perilously overly broad and incorrect definition of "abuse of process."*

The Stockbridges argue that the tort of "abuse of process" requires

only two elements. First, that a party must have availed him/herself of the Court systems, either as a plaintiff or a defendant. And, second, that in using the Court systems, a party has a motivation to achieve a goal that is outside the parameters of the authority that is bestowed upon the Courts. Under the Stockbridges' theory, it is of no significance whether or not the subject party prevails in the litigation. They maintain that the only thing of concern is a party's motivation. As the Stockbridges sum up their argument, "The purpose for which the process is used, once it is issued, is the only thing of importance." Brief of Res at pg 21. Based upon this erroneous understanding of the law, in closing argument to the jury Mr.

Easley stated:

Again, the purpose for which it's used is the only thing of importance. So even if Mr. Hough had some technically proper reasons to use the legal process in this case, if he had a technically proper reason to bring a motion or to submit an interrogatory or anything else he did, and even if he prevailed on some of those motions, if he had an ulterior purpose, then it's abuse of process and he's liable to the Stockbridges for damages.

TRP 911.

Our courts have long recognized and warned that the extraordinarily broad definition mistakenly relied upon by the Stockbridges would be fraught with peril and directly conflict with the most basic principles, purposes and goals of the court system. As far back

as 1904, while addressing the parameters of the parallel tort theory, civil malicious prosecution, the Supreme Court wrote:

The right of free allegations in a pleading has always been considered privileged. Courts are instituted to grant relief to litigants, and are open to all who seek remedies for injuries sustained; and unnecessary restraint and fear of disastrous results in some succeeding litigation ought not to hamper the litigant, or intimidate him from fully and fearlessly presenting his case. If the charges prove to be unfounded, costs have been prescribed by the Legislature as the measure of damages. Prior to the time when costs were allowed to the prevailing party, there was more reason for sustaining actions on the case; and, as a rule, the costs and expenses incident to an unsuccessful lawsuit will be sufficient to restrain actions which are founded purely on malice. While it is, no doubt, true that in some instances the peril of costs is not a sufficient restraint, and the recovery of costs is not an adequate compensation for the expenses and annoyances incident for the defense of a suit, yet all who indulge in litigation are necessarily subject to burdens, the exact weight of which cannot be calculated in advance, and a rule must be established which, as a whole, is the most wholesome in its effects, and accords in the greatest degree with public policy.

*Abbott v. Thorne*, 34 Wash. 692, 694-5, 76 P. 302 (1904).

Thus, even where a party is shown to be pursuing a frivolous case with malicious intent the overriding concern for the courts is the unfettered access to the courts for all.<sup>1</sup>

The overriding public policy of unfettered access to the courts is

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<sup>1</sup> In 1904 baseless, frivolous, malicious actions could be, in balance, adequately curbed by an award of costs and fees pursuant to statute. Now our courts have added the sanctioning authority of CR 11 to thwart such conduct.

ignored in the Stockbridges' argument.

2. *Accepting the Stockbridges' definition of abuse of process would clog the courts with endless "finger pointing" rounds of abuse of process litigation.*

Further, accepting the Stockbridges' definition of abuse of process would lead to endless rounds of litigation. As an example, it is respectively submitted that in virtually every contentious divorce proceeding, one or both parties believe that the other is motivated out of malice, with the purposes of running up the other party's costs, continuing the arguments entrenched in their marital discord, venting and "teaching the other a lesson", as opposed to the legitimate objectives of the best interests of the children involved and an equitable property division. Adopting the Stockbridges' abuse of process definition would open the door for continuous subsequent litigation as parties to an initial divorce proceeding thereafter assert that the other was motivated by seething anger and to use the court system to vent their frustrations and exact revenge. Even further rounds of litigation would be based upon the theory that a prior abuse of process case arising out of a prior divorce litigation was itself abuse of process. The result could be endless circles of litigation.

The *Abbott v. Thorne* court specifically decided to curtail such a never-ending litigious result.

"Otherwise parties would be constantly involved in

litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution.”

In *Mayer v. Walter*, 64 Pa. 283, it is said:

“But for this [limiting] rule, the termination of one suit would be, in a multitude of instances, the signal for the institution of another, in which the parties would be reversed; and the process might be renewed indefinitely, in contravention of the maxim, ‘Interest reipublicae ut sit finis litium.’”

*Abbott v. Thorne* at 696, quoting *McNamee v. Minke*, 49 Md. 122, 1878 WL 6546, 6 (1878).

The overriding public policy concerns of unfettered access to courts and preventing never-ending rounds of litigation articulated in *Abbott v. Thorne* are as vibrant and controlling today as they were in 1904.

Clearly, the cases bespeak a policy which favors allowing the plaintiff his day in court. The assumption is that any wrong will be resolved by carrying the suit to its conclusion and that a different principle would be fraught with grave danger. There is the risk that if abuse of process is not limited to an act subsequent to filing suit, to irregular steps taken under cover of process after its issuance, that it may be based on subjective intent only and that as a result be included as a counterclaim in nearly every answer. So far as the record goes in this case, all plaintiffs did or sought was to press their claims to conclusion by trial, which claims the trial court denied.

*Batten v. Abrams*, 28 Wn. App. 737, 750, 626 P.2d 984, 991 (1981).

The *Abbott v. Thorne* court fully considered that obnoxious abuse

and misuse of the legal system would, in some instances, cause great hardships. However, it recognized that the greater peril would be to allow a cause of action to be based solely upon a party's use of the court system for "ulterior purposes" as advocated by the Stockbridges here.

'We think it requires no argument to demonstrate that the words complained of were pertinent and material to the cause, and the question to be determined is, Were they absolutely privileged, regardless of whether they were true or false, used maliciously or in good faith? The doctrine of privileged communications rests upon public policy, 'which looks to the free and unfettered administration of justice, though, as an incidental result, it may in some instances afford an immunity to the evil-disposed and malignant slanderer.'

*Abbott v. Thorne* at 698, quoting *Abbott v. National Bank of Commerce*, 20 Wash. 552, 554, 56 P. 376 (1899).

The matter before this court is an abuse of process case, rather than a slander case. However, regardless of the title attributed to a cause of action, the underlying core principles are the same. As the *Abbott v. Thorne* court wrote: "It is true that this [Abbott v. National Bank of Commerce] was an action for libel, but the principle involved is exactly the same as is involved in this case [civil malicious prosecution], although the form of the action was slightly different."

3. *Abuse of process claims must not be allowed to become a sword used to intimidate a party from unfettered access to the courts.*

To apply the Stockbridges' abuse of process definition in context

of this case would be particularly egregious. The principle case Mr. Hough instituted here was based upon a theory of libel and slander. He believed and plead that the Stockbridges had falsely and maliciously made statements that caused Mr. Hough great personal harm. However, he was never allowed to present his theory or evidence to a finder of fact.

Irrespective of the truth of Mr. Hough's allegations, the malicious intent of the Stockbridges, or the resulting damages that the Stockbridges may have caused, Mr. Hough's slander case was dismissed on the basis of judicial proceeding "absolute privilege." RP (June 7, 2002). It would be entirely inconsistent and unjust to allow the Stockbridges to pursue a cause of action of "abuse of process" that is in any way rooted in dismissal of Mr. Hough's complaint. The same overriding access to the court's public policy that rendered the truth of Stockbridges' malicious and slanderous actions irrelevant and led to dismissal of Mr. Hough's slander case must be applied to the Stockbridges' abuse of process cause of action. To hold otherwise would lead to the unjust result of Mr. Hough not being afforded the same unfettered right of access to the courts granted to the Stockbridges.

4. *The Stockbridges failed to prove that Mr. Hough sought or received a collateral advantage outside the scope of the case.*

To prove abuse of process requires a showing that the defendant

used process as a form of coercion to obtain a collateral advantage outside the purview of the case. *Batten*, 28 Wn. App. at 746.

Abuse of process is not actionable even when an action is filed to intimidate and embarrass the other party and even when the “abuser” knows that he/she is not entitled to recover the full amount of damages sought. Likewise, complicating the course of litigation and increasing the costs of defense do not qualify as a collateral advantage or ulterior purpose for the claim of abuse of process. See W. Keeton, *Prosser and Keeton on Torts* § 121 at 897 (5th ed. 1984) (explaining that “even a pure spite motive is not sufficient [to state a claim for abuse of process] where process is used only to accomplish the result for which it was created”).

This Court of Appeals recently again addressed this issue in *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008), a case ignored in the Stockbridges’ Brief of Respondent. In that case this court overturned the trial court’s award of damages based on abuse of process. In so holding the *Saldivar* court reasoned:

But even if the Saldivars had fabricated Perla's claims of sexual abuse, the initiation of vexatious civil proceeding, although baseless, is not an abuse of process. There must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit.

*Id.* at 389.

Neither here, nor at trial have the Stockbridges identified even a single document or act that was outside the purview of the case. Indeed, all of Mr. Hough's actions, discovery efforts and filings that the Stockbridges claim are the basis for their abuse of process claim were actions, discovery efforts and filings, within the scope of the case.

Therefore, the Stockbridges failed to prove that Mr. Hough used process for collateral advantage outside the purview of the case.

5. *“Process” in an “abuse of process” case has a technical and thereby narrow definition.*

A claim of abuse of process must be supported by proof of the misuse of “process” as that word and concept is technically defined. “An element which is implicit in both of these definitions is that the defendant must have employed some “process,” in the *technical sense of the term.*”

***Sea-Pac Co., Inc. v. United Food and Commercial Workers Local***

***Union***, 44 103 Wn.2d 800, 806, 699 P.2d 217, 220 (1985) (*italic added*).

The technical definition of “process” is the methods used by a court, such as a summons, mandate or writ to exercise its authority over a person or property. “Process” is the pleadings used to “acquire or exercise its jurisdiction over a person or specific property” *Black's Law Dictionary* 1084 (5th ed. 1979).

Limiting abuse of process claims to the misuse of “process” in the

technical sense of the term has been the law in Washington for many years. “In abuse of process cases, the crucial inquiry is whether the judicial system's process, made available to insure the presence of the defendant or his property in court, has been misused to achieve another, inappropriate end.” *Gem Trading Co., Inc. v. Cudahy Corp.* 92 Wn. 2d 956, 963, n.2, 603 P.2d 828, 833 (1979) citing *Gilmore v. Thwing*, 167 Wash. 457, 459, 9 P.2d 775 (1932) and *Rock v. Abrashin*, 154 Wash. 51, 54, 280 P. 740 (1929).

The Washington courts are not alone in limiting abuse of process claims to the abuse of “process” as that word is technically defined.

“Process” for abuse of process purposes “refers to the papers issued by a court to bring a party or property within its jurisdiction,” such as “writs of attachment, the process used to institute a civil action, and, the process related to the bringing of criminal charges.”

*Andrews v. South Coast Legal Services, Inc.* 582 F.Supp.2d 82, 91 (D.Mass., 2008) quoting *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 389-90, 340 N.E.2d 484, 485-6 (1975) (declining to broaden the definition of “process” to include injunctions).

The Stockbridges recite the very language quoted herein above from *Sea-Pac Co., Inc.* However, inexplicably and without citation to any authority, they come to a conclusion that is opposite the holding in *Sea-Pac Co., Inc.* Stockbridges conclude: “That the case here is obviously

different and thus the acts of legal process that a claim for abuse of process is based upon must be broad in scope.” Brief of Res at 19-20.

Arguments unsupported by any authority will generally not be considered on appeal. *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358, 62 (1998), *McKee v. American Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045, 1047 (1989). *In re Marriage of Wallace*, 111 Wn. App. 697, 705, 45 P.3d 1131, (2002).

For that reason, in addition to the holdings in *Gem Trading Co., Inc.* and *Sea-Pac Co., Inc.*, it is respectfully submitted that this court should not accept the Stockbridges’ apparent contention that “process” in “abuse of process” claims includes the more general use of the word to refer to the whole course of proceedings in a legal action.

**B. Improper, prejudicial jury instructions require reversal**

Contrary to the Stockbridges’ assertion that Mr. Hough admitted that the instructions given by the trial court were an accurate statement (Brief Of Res at 23), during trial Mr. Hough argued that the instructions given were incorrect ( TR 899 & 903) and he makes the same argument to this court. Brief of App at 15-18.

The trial court’s instructions failed to inform the jury that abuse of process “...requires a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the

process itself, which constitutes the tort.” *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)* 119 Wn. App. 665, 700, 82 P.3d 1199 (2004). Consequently, the trial courts instructions were inaccurate and highly prejudicial to Mr. Hough. See Brief of App at 15-18.

The Stockbridges assert that Mr. Hough’s alternative jury instruction was “...confusing, inappropriate, and did not accurately or correctly state the law on abuse of process in Washington.” Thus, the Stockbridges argue Mr. Hough did not preserve this issue for appeal. Brief of Res pg 25.

However, Mr. Hough orally offered to amend his written proposed instruction with a very clean, concise and accurate statement of the law quoting the above words set forth in *Loeffelholz*. TR 899 & 903. The trial court rejected that offer. TR 903.

The Stockbridges argue that because the trial court included “some portions” of the definition of abuse of process the instructions were sufficient. Brief of Res at 24. However, the incomplete instructions left out the critical “extortion” and “what is done in negotiation” requirements of an abuse of process claim. Abuse of process requires evidence that “process” is used as a threat or a club in a coercive effort to obtain a collateral advantage, such as the surrender of property or the payment of

money, not properly involved in the proceeding itself. See Brief of App pg 1-13. But the jury was not asked to consider these requirements.

The failure to properly instruct allowed the jury to be misled into improperly concluding, as Mr. Easley argued, that the claim of abuse of process is proved if Mr. Hough had any “ulterior purpose” in pursuing his claims (and after January 2003 exclusively defending against the Stockbridges’ claims).

Again, the purpose for which it’s used is the only thing of importance. So even if Mr. Hough had some technically proper reasons to use the legal process in this case, if he had a technically proper reason to bring a motion or to submit an interrogatory or anything else he did, and even if he prevailed on some of those motions, if he had an ulterior purpose, then it’s abuse of process and he’s liable to the Stockbridges for damages.

TRP 911.

Thus, the instructions given were a clear misstatement of the law and highly prejudicial to Mr. Hough. It is respectfully submitted that on the basis of improper jury instructions alone the jury verdict must be reversed. *Thompson v. King Feed & Nutrition Serv*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

**C. The jury verdict is not supported by substantial evidence**

The parties agree that credibility and weighing the evidence is up to the jury. Compare Brief of Res 25-26 with Brief of App at 18-19. The parties' disagreement is whether there is sufficient evidence to support the jury verdict. Brief of App at 19.

Mr. Hough argues that no evidence was presented to the jury that he initiated any "process" after the case was filed, or that he used the initial summons and complaint as a form of extortion primarily to achieve the "...surrender of property or the payment of money, not properly involved in the proceeding itself" as required in an abuse of process case. *Batten v. Abrams*, 28 Wn. App. at 745-6. Mr. Hough further argues that there is no factual basis to award the Stockbridges as damages all of the attorney fees they incurred throughout this entire case when, for several years, (since January 2003) the Stockbridges were the only party pursuing claims. Brief of App at 18-20.

The Stockbridges summarily respond that "...there was substantial evidence of the elements of tort of abuse of process to support the jury's verdict that Mr. Hough was liable to the Stockbridges for economic and non-economic damages." Brief of Res at 26. Thus the Stockbridges have not, and clearly cannot, identify any "process" used or even pleading created in this matter that was not within the scope of the case. And, the Stockbridges simply ignore the fact that the jury clearly

erred in awarding the Stockbridges all of the attorney fees they incurred in pursuing their own abuse of process and dismissed malicious prosecution claims.

Therefore, for the unrefuted reasons set forth in the Brief of Appellant, it is respectfully submitted that the jury's decision is not supported by substantial evidence and must be reversed.

**D. The Stockbridges' failure to properly disclose expert witnesses and related deception requires reversal**

The Stockbridges do not deny that Local Pierce County Superior Court Rule PCLR 5(b) & (e) and the trial court's Order Amending Case Schedule (dated May 18, 2007) required that the Stockbridges disclose their primary witnesses, including expert witnesses, by May 21, 2007. The Stockbridges do not deny they only disclosed attorneys Mr. Scott Candoo and Mr. Lafcadio Darling as lay witnesses and that the expert witness disclosures set forth in PCLR 5(e) were not provided to Mr. Hough. Brief of App at 20-23.

Compliance with PCLR 5 is a simple matter. Yet, the Stockbridges have not ever provided any reason or excuse for their failure to comply with the rule or the court's order. It is thus fair to conclude that no such excuse exists.

Instead of providing any pertinent excuse, the Stockbridges argue

that "...these witnesses did not give expert testimony." This is a false assertion.

For example, in response to Mr. Easley's direct examination, Mr. Candoo testified to the purposes and compliance requirements of CR 26(i) (TRP 204-5); the proper basis for a motion for reconsideration (TRP 206); the legal perils of failing to respond to the other parties motions (TRP 208); his opinion regarding whether there was anything "improper or irregular" in Mr. Hough's motion to amend his Complaint (TRP 209-11); and, Mr. Candoo's opinion as to whether or not Mr. Hough's pleadings were "just within normal legal practice" (TRP 212 ln. 3-13).

Mr. Easley's direct examination of Mr. Darling elicited testimony regarding Mr. Darling's opinion of the legal sufficiency of the basis of Mr. Hough's claims (TRP 346 ln. 4-14); his understanding of what a "motion" is in the context of civil litigation (TRP 347ln. 4-25); his opinion of what an "interrogatory" is in the context of the civil rules (TRP 348 ln.10-12); whether or not interrogatories submitted by Mr. Hough were in the proper form and otherwise complied with the civil rules pertaining to discovery (TRP 349 ln.8 - 352 ln. 8); his opinion regarding the legal adequacy of Mr. Hough's responses to the Stockbridges discovery demands; (TRP 353-4); the proper requirements of dismissal of claims under CR 41 (TRP 355 ln. 6 - 356 ln.18); and Mr. Darling's opinion of the proper basis for a motion

to reconsider under the civil rules (TRP 363 ln. 13 - 364 ln. 3).

In fact, on direct examination, nearly all of both witnesses' direct testimony was either setting forth the witnesses' qualification as experts in the law or their respective opinions regarding Mr. Hough's compliance with the parameters of the civil rules. Therefore, the extensive pertinent testimony that Mr. Easley elicited from these witnesses was not that of lay persons setting forth facts. It was, instead, opinions based upon the witnesses' qualifications as experts with specialized knowledge, skill, experience, training and education. See ER 702.

In the pretrial hearing on the issue of barring Mr. Candoo and Mr. Darling testifying as expert witnesses, the Stockbridges describe these witnesses' planned testimony as merely "factual." Because of the Stockbridges' representation, the trial court deemed that Mr. Darling and Mr. Candoo were only being offered as lay witness. For that reason, Mr. Hough's motion was denied. CP 8-9.

However, the trial court's trial transcript shows that from the moment these two witnesses took the stand, the Stockbridges set about qualifying the witnesses as experts in order to elicit their expert opinions. TPR 193; TPR 341. Thus, the Stockbridges' pretrial representation that the witnesses were being called to provide merely factual evidence was deceptive and thereby misleading and prejudicial.

Local rules have the force and effect of statutory law and consequently, may not be overlooked. *Batten v. Abrams*, 28 Wn. App. 737, 742, 626 P.2d 984, 987 (1981).

The Stockbridges' failure to comply with PCLR 5 and the court's scheduling order was done without reasonable excuse and is therefore deemed willful. *Allied Financial Services, Inc. v. Magnum*, 72 Wn. App. 164, 168, 864 P.2d 1 (1993). Where there is a "willful" failure to properly disclose witnesses, exclusion of the witness testimony is proper even in the absence of prejudice to the other side. *Allied Financial Services, Inc. v. Magnum*, 72 Wn. App. at 168-9; *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994); PCLR 5(e). It is reversible error for the trial court not to exclude testimony when the other party would be prejudiced by a willful violation of the court ordered witness disclosure. *Allied Financial Services, Inc. v. Magnum*, 72 Wn. App. at 169 n 4.

In this case, there is more inadvertence or neglect in failing to follow the disclosure rule. If at one time this was an oversight, that was no longer the situation after Mr. Hough brought his motion to exclude the expert testimony based upon the Stockbridges' failure to disclose. After that point in time, when the issue was squarely before the court, the Stockbridges assured the court and Mr. Hough that Mr. Candoo and Mr. Darling were merely fact witnesses.

In reliance upon the Stockbridges' Disclosure of Primary Witnesses and their misrepresentations to the trial court, Mr. Hough rightfully concluded that the Stockbridges did not intend to introduce any expert opinion evidence. Thus, it was not necessary for Mr. Hough to call his own expert in rebuttal. As such, he was not prepared to rebut the expert opinions as to whether or not the documents he filed in this case were within compliance with the civil rules. The assertion that Mr. Hough did not comply with the civil rules is a major component of the Stockbridges' abuse of process claim. Therefore, it is respectfully submitted that the court's failure to exclude the expert witnesses' opinions is an error that requires that this case be reversed.

**E. CR 12 (e)**

When the Stockbridges filed their counterclaim, they arguably put Mr. Hough on notice that their abuse of process claim was based upon the pleadings that Mr. Hough had filed to the date of their counterclaim. To that extent, the Stockbridges did comply with the basic notice pleadings requirement of CR 8.

However, the documents that Mr. Hough filed prior to the date that the Stockbridges filed their counterclaim had very little, if anything, to do with the Stockbridges factual assertions at trial. The Stockbridges do not deny that vast majority of the basis for their "abuse of process" claim at

trial were documents which were not even created until long after their counterclaim (Ex. 6) was filed on May 9, 2002. Brief of App 25-26. The Stockbridges do not contend that they ever, at any time, amended their complaint to include these new documents as additional factual basis for their abuse of process claim. There is no showing that Mr. Hough consented, pursuant to CR15 (b), to trying this case without a properly pleaded counterclaim.

On September 5, 2007, Mr. Hough filed a CR 12(e) motion for a more definite statement. CP 55-57. This presented the Stockbridges the ideal opportunity to properly plead the additional basic factual grounds not set forth in their counterclaim. The Court denied the motion (CP 142-43) which left Mr. Hough to defend an “abuse of process” counterclaim that was not ever properly pleaded.

There is no dispute that to be sufficient, a complaint must be sufficiently specific to satisfy a defendant’s due process right to notice—notice of both the basic facts of the claim and the nature of the claim.

*Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) (citing *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 245 (1986)); Tegland, 14 Wa.Prac. §12.3. Brief of App at 24. There can be no legitimate dispute that the Stockbridges’ counterclaim did not, and could not provide Mr. Hough sufficient notice that the counterclaim to be tried

was going to be based almost entirely upon facts and events that had not happened at the time the counterclaim was filed. Thus, while at the time of the pleading of counterclaim is may have been sufficient, at the time of trial the allegations in the counterclaim were not sufficient. Insufficient pleadings are prejudicial. *Camp Finance, LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (2006). The trial improperly denied Mr. Hough's CR 12(e) motion designed to provide sufficient clarity to the Stockbridges' counterclaim to comply with the basic due process requirements.

**F. The court erred when it refused to dismiss an unfit juror.**

The jury in this case was made of twelve jurors and two alternates. TRP 108-9. Before Mr. Hough had presented his opening statement or any direct examination of witnesses, a juror reached the conclusion that Mr. Hough was in need of a mental health evaluation and treatment. "There is little doubt that this man [Mr. Hough] is delusional and would be diagnosed with obsessive compulsive disorder, OCD." TRP 628-29. Certainly this is an expression of extreme prejudice. Without hearing Mr. Hough's position or his evidence, this juror had already determined who was at fault and why.

The right to trial by jury is a right to an unbiased and unprejudiced jury. *Federated Publications, Inc. v. Swedberg*, 96 Wn.2d 13, 17, 633

P.2d 74 (1981) (citing *State v. Stiltner*, 80 Wn.2d 47, 491 P.2d 1043 (1971)). Mr. Hough was denied that basic, inviolate right. The court's ruling is particularly disturbing when there were two alternate jurors fully able to immediately step in without any disruption of the trial.

**G. The trial court improperly awarded attorney fees as sanctions.**

The trial court did not create an adequate record for appellate review of fee award decisions. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. at 690. The trial court must specify, in the record, each specific pleading that violates CR 11. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996). Here, the court did not identify any specific offensive pleading. The trial court just summarily concluded that “Mr. Hough perverted the entire legal process.” That “process” includes several motions upon which Mr. Hough prevailed in his prior appeal to this court – which was successful<sup>2</sup>. CP 369, para 3.

The Stockbridges, as the party requesting CR 11 sanctions, had the duty to mitigate and may not recover excessive expenditures. *Miller v. Badgley*, 51 Wn. App. 285, 303, 753 P.2d 530, review denied, 111 Wn.2d

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<sup>2</sup> In the prior appeal this court held:

The Stockbridges seek attorney fees on appeal under RAP 18.9(a). They argue that the appeal is completely frivolous. Obviously, because we reverse in part, we disagree that Hough's appeal is frivolous. We decline to award fees on appeal on this basis. *Hough v. Stockbridge* (unpublished) 129 Wn. App. 1037, 2005 WL 2363795, 8 (Div. 2, 2005)

1007 (1998).

In applying RCW 4.84.185, the case must be viewed in its entirety. If any part of a party's case is not frivolous then the court may not award fees to the prevailing party. The trial court is not authorized to shift through a lawsuit searching for frivolous claims and then award fees based solely on those matters. Fees granted as sanctions must be limited to those amounts reasonably expended in responding to the sanctionable filing. *MacDonald v. Korum Ford*, 80 Wn. App. at 892.

After January 2003, Mr. Hough was in this case only to defend himself against the Stockbridges' counterclaim. All of Stockbridges' claims in this case could have been and should have been expeditiously resolved by a timely motion pursuant to CR 11 filed at the end of Mr. Hough's case. See Brief of Res at 41. Instead, for the last six years the Stockbridges have intractably continued litigation on a theory that for them is "difficult to explain or articulate." Brief of Res at 15-16. A theory of liability they clearly do not understand.

Instead of utilizing sanctions as minimally as necessary to carry out its purpose, the trial court improperly used CR 11 and RCW 4.84 as a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099, (1992); *John Doe v. Spokane & Inland*

*Empire Blood Bank*, 55 Wn. App. 106, 111, 780 P.2d 853 (1989).

Further, the court ignored the standards for determining reasonableness of the fees requested that it is obligated to follow. *Singleton v. Frost*, 108 Wn.2d 723, 733, 742 P.2d 1224 (1987).

Attorney fees may be awarded only pursuant to contract, statute, or a *recognized ground* of equity. *Gray v. Pierce County Housing Authority*, 123 Wn. App. 744, 759, 97 P.3d 26, 33 (2004). Here the Court did not articulate any recognized ground of equity for the award of attorney fees and the Stockbridges did not advocate one. Consequently, it is logical to deduce that the Court was only applying its equitable power as embodied in CR11.

**H. Mar 7.3 does not apply to the unique facts of this case**

The Stockbridges argue the application of MAR 7.3 as if this were a standard MAR case. But it is not. The Stockbridges do not deny that “implicit in the application of MAR 7.3 is that the case heard by the MAR arbitrator must be the same matter later tried de novo.” Nor do they deny that “the case the jury heard was based upon different and new facts, as well as a different theory of law than what was presented to the arbitrator.” Brief of App at 39. In ignoring these truths, the Stockbridges errantly conclude that, presuming that they prevail on appeal, they are entitled to an award of fees pursuant to MAR 7.3.

**H. Any judgment entered herein, if any, must include the correct post judgment interest percentage.**

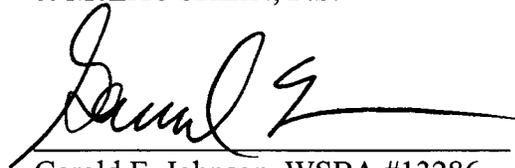
The Stockbridges, by silence, seemingly agree that under RCW 4.56.110(3), the correct post judgment interest rate in this case is 5.296%. Brief of App at 42. However, they argue that the trial court did not error in awarding a judgment of “12% or the maximum allowed by law.” Apparently, they believe that it is correct to leave the determination of “maximum allowed by law” to either the clerk of the court or future litigation. It is respectfully submitted that the correct rate of interest is a part of the judgment that must be determined by the court at the time the judgment is entered.

**III. CONCLUSION**

For the reasons stated above, Mr. Hough respectfully requests that this court order that the jury verdict and resulting judgment, as well as the trial court’s post verdict award of attorney fees and costs be vacated.

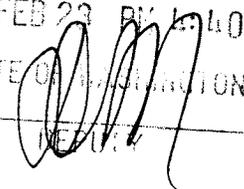
Dated this 23<sup>rd</sup> day of February 2009.

MANN, JOHNSON, WOOSTER  
& McLAUGHLIN, P.S.



Garold E. Johnson, WSBA #13286  
Attorneys for Appellant

COURT OF APPEALS  
DIVISION II

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BY 

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

ROBERT M. HOUGH,	)	
	)	Court of Appeals No. 37382-3-II
Appellant,	)	
	)	
vs.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
FRANK W. STOCKBRIDGE and SUSAN D.	)	
STOCKBRIDGE, Husband and Wife, and the	)	
marital community comprised thereof,	)	
	)	
Respondents.	)	

I, Dawne M. Rowley, hereby certify that I am over the age of 18 years and not a party to the within action; my business address is and I am employed by Mann, Johnson, Wooster & McLaughlin, P.S., 1901 South "I" Street, Tacoma, Washington.. On the 23<sup>rd</sup> day of February 2009, a true and correct copy of the following documents:

(1) Reply Brief of Appellant was delivered to:

S. Christopher Easley  
Easley Law Group, P.S.  
724 Yakima Avenue, Suite 200  
Tacoma, WA 98405-4845

by the following method:

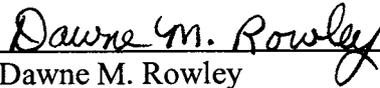
Personally delivering copies to the person(s) identified above.

ORIGINAL

1 I herby certify under the penalty of perjury under the laws of the State of Washington  
2 that the foregoing is true and correct.

3 DATED this 23<sup>rd</sup> day of February 2009.

4 MANN, JOHNSON, WOOSTER  
5 & MCLAUGHLIN, P.S.

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7 Dawne M. Rowley

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