FILED
Court of Appeals
Division II
State of Washington
10/12/2018 4:21 PM

No. 51782-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re:

DOREEN HUNT

vs.

**PATRICIA HICKLIN, Co-Trustee of the
ROBERT E. TUTTLE, Sr. TESTAMENTARY
TRUST,
u.w.d. 11/17/1993**

BRIEF OF APPELLANT DOREEN HUNT

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I. INTRODUCTION

Doreen Hunt (hereinafter sometimes referred to as "Hunt") and Patricia Hicklin (hereinafter referred to as "Hicklin")[1] were named as alternate Co-Trustees of the Robert E. Tuttle Sr. Testamentary Trust; referred to as "the Trust." Mr. Tuttle died in 1999. The initial Trustee was his surviving spouse, Anita Tuttle. Anita died in April of 2013.

Robert and Anita Tuttle also formed a Limited Liability Partnership ("LLP") in August of 2000 ("Tuttle Family Limited Partnership") into which they transferred a number of properties, including the ranch Anita's ancestors homesteaded in the 1890's north of the Sol duc River near Forks, Washington. Anita became the general partner of the LLP after her husband's death. The partnership agreement named Mr. And Mrs. Tuttle's grandson, Eric Anderson, to become the successor (general) partner after Mrs. Tuttle's death.

During the last several years of Mrs. Tuttle's life, she was assisted by her daughter Patricia Hicklin with her financial, medical and personal

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1 No disrespect is intended by referring to each by their last names.

affairs. Patricia was nominated to serve as her executrix under a will Anita Tuttle executed on December 28, 2009.

Following Anita's death, relations among Robert and Anita Tuttle's children soured. In 2013, several of her children filed an action contesting Mrs. Tuttle's Will. The Estate and Mrs. Hicklin were represented by attorney Patrick Irwin of Port Angeles.

In 2014, an action was filed in the Clallam County Superior Court (Cause No. 14-2-00463-2) by Eric Anderson, the general partner of the Tuttle Family Limited Partnership against the Estate of Anita Tuttle, its Executrix Patricia Hicklin; the Robert E. Tuttle, Sr. Testamentary Trust; and Patricia Hicklin as Co-Trustee. In that action, the successor general partner, Eric Anderson, alleged that Anita Tuttle, while serving as the general partner of the LLP and as Trustee of the Trust (as well as possible other persons) had mismanaged or converted partnership property.

Again, Mr. Irwin represented the Estate and Mrs. Hicklin. Shane Seaman, an attorney in Poulsbo represented Mrs. Hicklin.

A third action (from which Mrs. Hunt makes this appeal) was filed by Robert Tuttle, Jr. (Superior Court Cause No. 13-2-01120-7) against:

(1) The Estate of Anita Tuttle and its P.R., Patricia Hicklin;

(2) The Tuttle Family Limited Partnership;

(3) Robert Tuttle, Sr.'s Testamentary Trust (Patricia Hicklin and Doreen Hunt, Co-Trustees); and

(4) Patricia and Sidney Hicklin, Sr., husband and wife.

Billing records obtained from Mrs. Hicklin's attorney show that on November 22, 2013, Mr. and Mrs. Hicklin retained Mr. Seaman to represent them to defend against Robert, Jr.'s allegations against both of them and their marital community (CP 422, Item 11/22/2013).

". . . Prepared Notice of Appearance"

Mr. Seaman's billings on November 26, 2013 show that he was:

> "Holding on representation as Trustee until
> (I) review documents more carefully."
> [CP 422, entry of 11/26/2013]

In December of 2013, Mr. Seaman and Mrs. Hicklin exchanged correspondence regarding issues of "waiver" [CP 422, Item 11/15/2014]. Mrs. Hunt surmises (but has never been informed) that the "Waiver" discussed between the Hicklins and Mr. Seaman related to "Waivers of Conflict of Interest" on his part.

On December 8, 2015, Mrs. Hunt filed a Cross-claim containing four counts against her fellow Co-Trustee, Mrs. Hicklin. [CP 494-499]

On December 23, 2016, Hunt submitted 34 Interrogatories and 29 Requests for Production to Hicklin [CP 398-418]. Hicklin furnished responses to those discovery requests on February 21, 2017. Following a

March 17, 2017 CR 26(i) discovery conference (*See* Hunt's Summary of Discovery Issues) [CP-426-434], on March 23, 2017, Hunt filed a Motion to Compel Mrs. Hicklin to furnish additional and more responsive interrogatory answers and document production. [CP 372-384]

Mrs. Hicklin filed a motion for a more definite statement on February 23, 2017 [CP 438-447] arguing that because Hunt's Cross-claim were "so vague or ambiguous" she could not reasonably be required to frame responsive pleadings.

Mrs. Hunt's "Motion to Compel" and Mrs. Hicklin's Motion for a More Definite Statement were both heard by the trial court on May 22. 2017 [CP 4-52].

In its order of May 22, 2017, the trial court granted Hicklin's CR 12(e) motion. [CP 264, Lines 2-6] Hunt's motion to compel was denied "without prejudice to renew". [CP 264, Lines 7-10]

Mrs. Hunt appealed both of the May 22, 2017 rulings after her cross-claims were dismissed in April of 2018 when the trial court entered an Order Striking Hunt's Pleadings and ordered per claims dismissed [CP 109-110]. A fee award was reserved. Hunt has also appealed these rulings. On July 31, 2018, the trial court awarded Mr. and Mrs. Hicklin $11,640.00 in attorney fees to be "paid by Robert E. Tuttle Testamentary Trust." [CP 511, Line 10]. Hunt has filed a Supplemental Appeal of that Order as well.

II. STATEMENT OF THE CASE

Doreen Hunt appeals four rulings issued by Clallam County Superior Court Trial Judge Christopher Melly, two of which were entered on May 22, 2017 ("order granting motion for more definite statement" and "order denying motion to compel.") [CP 263-265]); as well as the trial court's order of April 24, 2018 which granted Hicklin's motion to strike pleadings, dismiss claims and award sanctions [CP 109-111]. In her amended appeal, Hunt has also appealed the trial court's July 31, 2018 "order granting attorney fees". [SCP 510-512][2]

A.

The matters under appeal are essentially a sub-part of the claims by Robert E. Tuttle, Jr. against, among other defendants: (1) the Robert E. Tuttle, Sr. Testamentary Trust u/w/d 11/17/1993 (sometimes hereafter referred to as "the Trust"); (2) The Tuttle Family LLP ("LLP"); (3) Patricia

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2 Because an amended request for Clerk's Papers was made after Hunt's Amended Notice of Appeal was filed, the Clallam County Superior Court Clerk supplemented the record with Supplemental Clerk's Papers. They will be referred to as "SCP."

Hicklin and Doreen Hunt, its Co-Trustees; as well as (4) Patricia and Sidney Hicklin, individually, and as husband and wife.[3]

Hunt's and Hicklin's (adversarial) part of the case began on December 8, 2015, when Mrs. Hunt filed cross-claims against her fellow Co-Trustee, Patricia Hicklin. None of the other parties were named or included in Hunts' cross-claims.

B.

Mrs. Hunt's Cross-Claim [CP 494-497] included Four Counts which can be summarized as alleging:

I. Violation of RCW 11.98.070 (Violation of Co-Trustee Hicklin's duty to keep her fellow Trustee informed);

II. Violation of RCW 11.98.072 (Violations of Mrs. Hicklin's duty to keep all Trust Beneficiaries (including Hunt) reasonably informed about Trust administration, as well as her failure to furnish the Co-Trustee any Trust accountings or any inventory of Trust assets).

III. Violation of RCW 11.106.020 (Co-Trustee Hicklin assuming sole administration of the trust without Co-Trustee Hunt's consent); and

IV. Co-Trustee Hicklin's various conflicts of interest to wit, electing to retain the same counsel to represent herself and

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3 That litigation (Tuttle v. Hicklin, et al.) involves allegations by Robert Tuttle, Jr. that there had been misconduct by the P.R. of Anita Tuttle's Estate, ultra vires actions by Hicklin regarding the Robert Tuttle, Sr. Testamentary Trust, and the Tuttle Family LLP and the conversion of LLP assets by both of the Hicklins. This Court has previously heard an appeal made by Robert Tuttle, Jr. For this court's rulings in that Case, *See* No. 49661-1-II and the Opinion filed May 30, 2018.

> her spouse Sidney in defense of Robert Tuttle, Jr.'s claims against them, as well as having the same attorney represent Hicklin in her capacity as co-trustee of the trust.

In it's May 22, 2017 ruling *granting* Co-Trustee Hicklin's CR 12(e) "Motion for More Definite Statement" [CP 263-64], the trial court, without issuing findings, impliedly decided that under CR 12(e) Mrs. Hunt's Cross-Claims were *"so vague or ambiguous that (Mrs. Hicklin) cannot reasonably be required to frame a responsive pleading, ..."*

The second part of Judge Melly's Order of May 22, 2017 *denied* Hunt's motion to compel Hicklin to furnish fully responsive replies to her interrogatories and requests for production, indicating that the denial was "without prejudice to renew" [CP 263-64].

Mrs. Hunt did not seek discretionary review of the trial court's May 22, 2017 orders because she determined neither Order was a "final order" of the trial court from which discretionary review could be obtained. *See* Fox v. Sunmaster Products, Inc., 115 Wash. 2d 498 (1980).

On February 28, 2018, Mrs. Hicklin filed a Motion to Dismiss Mrs. Hunt's cross-claim [CP 256-261] relying upon the last sentence of CR 12(e):

> *If the Motion (for a more Definite Statement) is granted and the Order of the Court is not obeyed within 10 days after the Notice of the Order or within such other time as the Court may fix, the Court may strike the pleading to which the Motion was directed or make such other Order as it deems just."* (Emphasis Added.)

Hicklin's 2018 motion to dismiss also sought to "Strike" all of Hunt's pleadings. [CP 259, Lines 1-3].

On March 15, 2018, Mrs. Hunt filed an Amended Cross-Claim against Mrs. Hicklin containing Five Counts, summarized as:

1. Violation(s) of RCW 11.98.072;

2. Violation(s) of RCW 11.106.020;

3. Violation of Duty of Loyalty RCW 11.98.078 and Conflict of Interest between Mrs. Hicklin and the Trust Beneficiaries;

4. Conflicts of Interest by Mrs. Hicklin allowing Counsel representing her (as Co-Trustee) in the underlying litigation filed by Robert Tuttle, Jr, as well as representing both Sidney and Patricia Hicklin individually, and as husband and wife, to defend against allegations of misconduct on their part against the Trust;

5. Requesting removal of Hicklin as Co-Trustee of the Trust and the substitution of the alternate Co-Trustee (Sharon Horan).

On April 24, 2018, Judge Melly granted Mrs. Hicklin's "motion to strike" Hunt's initial cross-claims which *"were the subject of the May 22, 2017 Order as such Co-Trustee has failed to state a claim"* [4] [CP 111,

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4 Hicklin never requested that Hunt's claims be dismissed under CR 12(b)(6).

Lines 5-6]. Judge Melly then dismissed with prejudice *"the claims brought by . . . Hunt"* [CP 111, Line 12]. An award of attorney fees was reserved.

After considering Mrs. Hicklin's motion for attorney fees [CP 091-108], on July 31, 2018, the trial court issued Findings of Fact and Conclusions of Law [SCP 513-517] and awarded "attorney fees in the amount of $11,640." [SCP 516, Line 3]

Finding of Fact 21 failed to indicate to whom the fact award was given. In "Conclusion No. 2," [SCP 516, Line 10-12], the Court concluded:

> *" [5]The language of CR 12(3) is plain and not ambiguous. If the Motion is granted and the Order of the Court is not obeyed within 10 days after the Notice of the Order or within such other time as the court may fix, the Court may strike the pleading to which the Motion was directed or make such other order as it deems just."*

The Order Granting Fees [SCP 511, Line 11] granted the following:

> *"Amount: $11,640.00, (to be)* ***paid by*** *Robert E. Tuttle, et al. Testamentary Trust."* (Emphasis Added.)

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5 Finding of Fact No. 9 cites a Court Rule (CR 12(3) [*See* SCP 514 which does not exist and which was never argued to the Court. That Finding indicates that "it appeared to Hicklin that Hunt was pursuing substantially the same allegations that were dismissed in the FLP case and (which were) also dismissed as a part of Robert Tuttle's claims."

Mrs. Hicklin's May 18, 2018 motion for attorney's fees was directed ***solely*** against Mrs. Hunt [CP 92-94].[6] Nothing in the record supported an award of fees to Mr. and Mrs. Hicklin against the Robert E. Tuttle Testamentary Trust, of which Hicklin is a Co-Trustee.

III. ASSIGNMENTS OF ERROR:

1. **Assignment of Error No. One**
   The trial court erred in its May 22, 2017 "Order Granting Motion for More Definite Statement."

2. **Assignment of Error No. Two**
   The trial court erred in its May 22, 2017 "Order Denying [Mrs. Hunt's] Motion to Compel."

3. **Assignment of Error No. Three**
   The trial court erred in entering the Orders of April 24, 2018, to wit:

   "... Cross Claim Defendant Robert E. Tuttle Testamentary Trust, Patricia Hicklin, Trustee (sic) motion is Granted and Co-Trustee Doreen Hunt's pleadings are struck (sic)." [CP 89, line 10-11]

   and

   "The claims brought by Co-Trustee Hunt are dismissed with prejudice."

4. **Assignment of Error No. Four**
   The trial court erred in its Order awarding Hicklin $11,640.00 "to be paid by the Robert Tuttle Testamentary Trust."

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6 "In her Motion for Fees [CP 93, Lines 12-13], Mrs. Hicklin requested attorneys' fees in the amount of $27,737.50 plus an additional $1,000.00 for a total of $28,737.50 . . . "requested *against Hunt*." (Emphasis Added.)

IV. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Whether the trial court committed reversible error in ruling that Mrs. Hunt's Cross-Claims against Co-Trustee Hicklin were *"so vague and ambiguous"* that Mrs. Hicklin could not *"reasonably be required to frame a responsive pleading."*

2. Whether the trial court committed reversible error in denying Mrs. Hunt's Motion for Order compelling Hicklin to fully answer Interrogatories and produce the documents Hunt had requested.

3. Whether the trial court committed reversible error in granting Hicklin's Motion to Strike Mrs. Hunt's cross claims and dismissing Hunt's first and amended cross-claims.

4. Whether the trial court erred in granting the Hicklin's $11,640 in attorneys' fees *against the Trust.*

5. Whether the court's Findings & Conclusions fail to abide by the law of the case; and are not supported by authorities or the facts before the trial court.

V. ARGUMENT

1. MOTION FOR A MORE DEFINITE STATEMENT.

A. Standard of Review/CR (e) Motions

Civil Rule 12(e) authorizes a litigant to argue that: *"if a pleading is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading* ... the party may move for a more definite statement before framing a responsive pleading."

A trial court's ruling on a CR 12(e) motion for a more definite statement is reviewed under an abuse of discretion standard. Berg v.

Humptulips Boom and River Improvement Co., 38 Wash. 342, 344, 80 Pac. 528 (1905).

> "A trial court abuses its discretion if its decision is not based on tenable grounds or tenable reasons." Scott's Excavating v. Winlock Properties, 176 Wn. App. 335, 348, 308 P.3d 791 (2013) *citing* Eagle Point Condo Owner's Association v. Coy, 102 Wn. App. 697, 702, 9 P.3d 898 (2000).

B. Pleading Requirements of Claims for Relief

Washington Courts have consistently ruled that under CR 8(a):

A pleading setting forth a claim for relief must contain:

> "(1) A short and plain statement of the claim showing that the pleader is entitled to relief, *and*
>
> (2) A demand for judgment for the relief to which the pleader deems the pleader is entitled."

Here Hunt filed a cross-claim against Co-Trustee Hicklin, six pages in length, containing Four Counts, all based on allegations that Hicklin had violated her duties as a Co-Trustee of the Robert E. Hicklin Sr. Trust. The cross-claim requested release on each of the claims against Mrs. Hicklin [CP 494-497]. The relief she sought included:

> (A) That Hicklin account for the actions she had taken as Trustee as well as furnish Hunt with a financial accounting;
>
> (B) That Hicklin furnish the Co-Trustee with all correspondence relating to the affairs of the Trust;
>
> (C) That sanctions be imposed if Hicklin failed to account or furnish her with a verified inventory;

(D) That Hicklin furnish the Co-Trustee with copies of "all documents, writings, banking records, check registers, income tax returns, and income tax related materials ...";

(E) That Hicklin be ordered to "desist from acting as though she were the Sole Trustee" administrating the Trust without Hunt;

(F) That Hicklin furnish Hunt an accounting of all fees Mr. and Mrs. Hicklin personally incurred with their attorney as well as the fees the Trust incurred with the same counsel, *and* that she reveals the sources of payment therefore; and

(G) That if any misconduct on the part of Mrs. Hicklin be established that she be replaced by Sharon Horan. the person nominated as Alternate Co-Trustee

C. CR 12(e) Argument

Mrs. Hicklin has never argued to the trial court that any of Mrs. Hunt's Cross-claims were vague or ambiguous. Nor could she. Each Count alleged that her fellow Co-Trustee had violated her statutory duties, to wit:

I. RCW 11.98.070: Failure to consult with or obtain prior written notice before hiring counsel and defending Ms. Tuttle's claims *against the Trust.*

II. RCW 11.98.072: Failure to permit her Co-Trustee (a Trust Beneficiary) access to Trust records; preventing Mrs. Hunt to "knowingly engage in her fiduciary capacity. Failure by Hicklin to furnish adequate accountings.

III.	**RCW 11.106.020:**	Wrongfully assuming sole administration of the Trust Administration and failing to furnish accountings or an Inventory of Trust properties;
IV.	**RCW 11.98.078:**	Conflicts of Interest; violation(s) of duty of loyalty; commingling Trust assets/ expenses with Hicklin's own assets and expenses.

What Mrs. Hicklin did in support of her February 23, 2017 CR 12(e) motions was to file a lengthy declaration by her Counsel [CP 438-448] and then submitting additional pleadings in support of her second CR 12(e) motion in 2018 [CP 120-129]. Hicklin's pleadings in both motions essentially argued that Hunt's cross-claims addressed issues which had already been decided in the FLP case or which had been decided in the trial court's rulings in Robert, Jr.'s case. In her CR 12(e) motion of February 21, 2017, Hicklin repeatedly referred to matters concerning proceeds Anita Tuttle received from logging done by the FLP between 2009 and 2012. Hicklin's 2017 CR 12(e) pleadings mentioned the Anita Tuttle Estate and "logging proceeds" five times. There were at least three assertions that Mrs. Hunt lacked "standing," [CP 439, Lines 14; CP 440 Lines 20, CP 441, Line 12]. Hicklin's motion also contained "questions" as to what Hunt's cross-claims were "all about." Those "rhetorical questions" (which Hicklin posed in support of her CR 12(e) motion) were asserted by way of the use of phrases throughout Counsel's Declaration. These included the following

[CP 439-447]: "appears that," "appears to be," "surmised by," "it seems from," "it appears to be," "seems to imply," and "again appears to be". What never appeared in Hicklin's motion were recitations of the Court Rule upon which the CR 12(e) motions were based.

Hicklin's Motion also contained not less than 18 references to Robert Tuttle's case against her (nine on Page 3) [CP 440, Lines 2, 3, 5, 6, 9, 10, 20 and 27] and 15 references to Eric Anderson's FLP case against her (four on Page 3) [CP 440, Lines 10, 15, 22 and 27].

These references to Tuttle, Jr.'s and the LLP's claims against Hicklin and the Trust were obviously made in an attempt to argue that Hunt's claims against her were barred by res judicata. That doctrine was cited once [CP 439, Lines 18-19]. This court, in its unpublished opinion of May 30, 2018 in Tuttle v. Hicklin, et al., Case No. 49669-1-II rejected Hicklin's res judicata arguments. Hunt believes that this Court's 2018 opinion has become "the law of the case." State v. Kilgore, 167 Wn.2d 28, 42; 316 P.3rd 393 (2009).

In Hicklin's 2017 motion for a more definite statement, she asserted not less than fifteen times that there were undisputed "facts" or "circumstances" which she suggested that the trial court should consider. Some of the assertions included the following:

> "The purpose of this motion is to require that Hunt, actually state her claim, and not just allege *the same vague non-specific allegations alleged by Robert Tuttle and by the FLP.*" [CP 441, Lines 15 and 16][7]
>
> "There are absolutely no facts pled or relief requested that show that Co-Trustee Hunt is requesting that the Court void the action of defending the trust.[8] What exactly is the cause of action here?" [CP 447, Lines 1-3]
>
> "Co-Trustee denies that there has been a violation of RCW 11.98.070 contending that . . ." (Hicklin then gave her interpretation of what Hunt had alleged). [CP 445, Lines 9-11]
>
> ". . . Hunt's cross-claims vaguely allege that Co-Trustee Hicklin is the only person who has had access to the Trust records <u>but</u> <u>fails</u> <u>to</u> <u>say</u> where this allegedly occurred . . . previous declarations by Hicklin have demonstrated" . . . [CP 443, Line 11-14]

Hicklin's first CR 12(e) motion wasn't supported by her declaration. Rather it was based on a declaration signed by her counsel on March 22, 2017 which contained over thirty additional assertions of the existence of "Facts" which simply contradicted the allegations in Hunt's cross claims. The "Facts" Counsel asserted in support of Hicklin's 2017 motion included:

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7 Mrs. Hunt's cross-claim contained none of the issues raised by Tuttle, Jr. on the FLP.

8 Mrs. Hunt never argued that Hicklin's action defending against Robert Tuttle, Jr.'s claims should have been 'voided.'

> ". . . Co-Trustee Hunt is vaguely stating a cause of action in her cross-claim by alleging violations by Patti Hicklin. Yet in this case she apparently intends to prosecute, she is pursuing substantially the same allegations were dismissed in the FLP case and also dismissed in as a part of Robert Tuttle's claims" [CP 325, Lines 16-19] [9]
>
> *and:* "This is basically the same claim the FLP in Robert Tuttle raised" [CP 326, Line 11];
>
> *and:* "If Doreen Hunt's case is about what is stated in Mr. Kombol's letter, this will be the third time that Patricia Hicklin has been forced to defend these exact claims surrounding an alleged use of a power of attorney related to the logging proceeds" [CP 327, Lines 17-19]; [10]
>
> *and:* "Hicklin respectfully requests the court to order Doreen Hunt to be more specific in her pleadings concerning what her claim is really about" [CP 328, Lines 4-5].

The Memorandum Hicklin filed in support of her 2018 motions to strike and dismiss included Hicklin's counsel's "Rebuttal Declaration" [CP 120-129] by which Hicklin argued that her motions should be granted, even more purported "facts" and "speculations" were asserted Samplings included:

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9 In its Opinion in Tuttle v. Hicklin, et al (No. 4969-1-II), Mrs. Hicklin made similar arguments, relating to the doctrine of res judicata. This Court rejected these arguments in Part B of its Opinion at pages 9-11.

10 Mr. Seaman's opinion about what Hunt's cross-claim against his client "is really all about" ignores the specific allegations in that cross-claim.

". . . Hunt has not filed a substantive response . . . Hunt filed her scandalous amended complaint . . . failed to bring any substantive *facts* (only arguments) to the court, or even if the court converts it to a CR 56 motion, the court may, in exercising its equitable power and doing justice, order the pleadings struck (sic)" [11] [CP 115, Line 27 continuing to CP 16, Lines 1-3].

"Hunt still has not *brought anything substantive* to the court concerning who, what, when, why or how that Hicklin allegedly breached her duty as a Co-Trustee after Anita's death" [CP 117, Lines 12-14].

"Hunt argues that this is now a motion under CR 56, and thus the court must presume her unsubstantiated allegations[12] . . . as sufficient to defeat Hicklin's motion. However, Hunt ignores the *fact* that Hicklin has *answered* each one of the allegations . . . in previously filed declarations."[CP 118, Lines 2-5]. (Emphasis Added)

Hunt pointed out to the trial court in her 2018 memorandum [CP 156-182] that under the ruling in Suleiman v. Lasher, 48 Wash. App 373, 739 P.2d 712 (1987):

". . . actions are not subject to dismissal under CR 12 if any state of facts could be proven under the complaint which

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11 Not surprisingly no citation to authority is given in Counsel's arguments about a court "exercising equitable power and doing justice" in the circumstance of a CR 12(e) motion.

12

12 Here Hicklin is suggesting that the Court Rules require a claimant to "substantiate" allegations even before any discovery has been conducted." Hicklin cites no law supporting her assertion.

> would entitle the plaintiff to relief." (Suleiman, *supra,* at 376). *See also:* Halvorson v. Dahl, 89 Wn.2d 673, 574 P.2d 1190 (1978); Madison v. General Acceptance Corp., 26 Wn. App. 387, 612 P.2d 826 (1980).

In CR 12 motions, the trial court must consider the evidence in the light most favorable to the non-moving party. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wn.2d 528, 503 P.2d 108 (1972). The trial court committed reversible error when it failed to consider that the allegations contained in Hunt's cross-claims are presumed to be true, Cutler v. Phillips Petroleum, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

Mrs. Hunt submits to this court that if CR 12(e) motions could be won by virtue of aggressive and insistent declarations and assertions in Motions and Memoranda submitted by the moving party about "facts" that a litigant asserts to be true or "speculations" about what claims are "really about," then most all civil cases could be resolved under Court Rule CR 12(e) by way of declarations which refute the allegations contained in a claim or complaint. Fortunately, utterly no authority exists for the proposition which is the foundation of Hicklin's motions.

The trial court erred in relying upon assertions made by counsel of "facts" or "assumptions" (about what Hunt's case *"is really about"*) when it issued its 2017 and 2018 rulings granting Hicklin's CR 12(e) motions.

Mrs. Hunt will later argue that, in asserting, without authority, that a court could order that pleadings be made "more definite" by way of filing motions and memoranda supported only by declarations which essentially challenge the allegations in an adversary's claim or which seek to tie a claim into claims made by other litigants in the same case, Hicklin and her counsel violated CR 11, because no set of actual and undisputed facts exist to support the motions, and Hicklin has never cited any authority for the propositions she makes about what CR 12(e) motions can accomplish. The motions Hicklin filed have increased the cost of litigation and the factual contentions asserted by Hicklin were not warranted by the evidence.

If, in her Answering Brief, Mrs. Hicklin is not able to support the incredible interpretation she has made concerning the circumstances under which a CR 12(e) motion may be made, Hunt intends in her Reply Brief to make, an argument that CR 11 sanctions will be appropriate for this Court to impose against both Hicklin and her Counsel.

A simple reading of the allegations in the Four Counts of Mrs. Hunt's initial cross-claim and the five counts of her amended cross-claim (if true) would have prevented the trial court from ordering that she make a more definite statement of her claims, either in 2017 or in 2018 unless there were *no* facts which she could prove, consistent with her cross-claim which would entitle her to relief. Brown v. MacPherson's, 86 Wn.2d 293, 545 P.2d

13 (1975), Grimsby v. Sampson, 85 Wn.2d 52, 530 P.2d 291 (1975), Hafto v. Blumer, 74 Wn.2d 321, 444 P.2d 657 (1968), Barnum v. State, 72 Wn.2d 928, 435 P.2d 678 (1967). And of course, Mrs. Hunt's allegations are presumed to be true, Cutler, *supra*, at 755.

Any hypothetical situation which could conceivably be raised by a claim defeats a CR 12 motion if the hypothetical is legally sufficient to support a claim. Halvorson, *supra*, at 675. The trial court committed reversible error when it considered "facts" which were asserted in Hicklin's motions, memoranda and declarations which simply discounted or dismissed as untrue the allegations contained in Hunt's initial cross-claims, which were re-asserted in her amended cross-claim in 2018 (which also added a fifth count directed toward Hicklin and her counsel).

A simple hypothetical could easily establish that Hunt's claims were viable. Hunt alleged in Count II of her cross-claims [CP 495, Lines 17-28] that Co-Trustee Hicklin had failed to furnish her with notice of various decisions she had unilaterally made as "a" Co-Trustee. If that was true, RCW 11.98 had been violated and Hunt could have sought various kinds of relief, including sanctions against Hicklin.

In Count IV [CP 498] Mrs. Hunt alleged that by retaining the same attorney to represent herself and Sidney to defend claims of misconduct on their part (and not as representatives of the Trust) as well as later retaining

the same attorney to represent Mrs. Hicklin in her capacity as a Co-Trustee of the Trust, Hicklin violated her duty of loyalty to the Trust and its beneficiaries and had created conflicts between her interest and the interest of the Trust. If those assertions were established by facts and the relief Hunt had requested was supported by authorities, Hicklin could have been removed as Co-Trustee and replaced by the Alternate Co-Trustee.

In Count IV of her Amended Cross-claim [CP 242], Mrs. Hunt alleged that because, after having retained her counsel to represent herself and Sidney, she retained the same attorney to represent Hicklin and the Trust without her Co-Trustee's prior knowledge or consent; Hicklin had created such significant conflicts of interest to exist and her adversarial conduct had caused such contentions litigation between the Co-Trustees, to the Trust's detriment that Hicklin's removal and replacement by her alternate was warranted.

In addition, Hunt requested, in her amended cross-claim, that the attorney Hicklin retained to help her defend the Trust as well as herself and her husband could be a basis for Hunt to request that the attorney be ordered to withdraw as Counsel for the Co-Trustee and cease assisting her with defending the Trust's interests and also be compelled to forward his files relating to the lawsuit against the Trust to the Successor Co-Trustee for her to take to counsel of her choice.

If those allegations were true, as the Cutler ruling, *supra,* presumes them to be, Mrs. Hunt and Co-Trustee Horan would have been able to seek the relief Mrs. Hunt requested, to wit: Hicklin's removal and her attorney's forced withdrawal from representing Hicklin, as a Co-Trustee.

Assuming, for argument sake, that the trial court ***had*** treated Mrs. Hicklin's motions though they were brought under CR 56, the same principal set forth in Yakima v. Central Heating, *supra*, would apply, to wit: the trial court should have considered the evidence in a light most favorable to Mrs. Hunt and that the allegations Hunt made in her cross-claims, which, under Cutler, *supra,* would be presumed to have been established.

No court rule exists upon which Hicklin could have relied would enable the trial court to issue its 2017 Order for a more definite statement and then issue the Order dismissing Hunt's claims in 2018. Hunt's analysis of the court rules and the references made to disputed facts and to authorities which Hunt pointed out to the trial court in her pleadings in opposition to Hicklin's motions should have prevented the court from:

(a) Entered its May 22, 2017 CR 12 (e) Order obligating Mrs. Hunt to file an amended cross-claim so as to make a "more definite statement" of her case;

(b) Confirmed that Order by striking both Mrs. Hunt's initial and also her amended cross-claim in its Order of April 24, 2018; and

(c) Dismissing Mrs. Hunt's claims in that same order.

The trial court's ruling of May 22, 2017 ordered Co-Trustee Hunt to make a more definite statement of her claims was an abuse of discretion because it was clearly based upon untenable grounds and untenable reasons. Hunt urges this court, in its Opinion to decide that: because:

a. Mrs. Hunt's four cross-claims were clearly stated and unambiguous; and

b. The reasons Mrs. Hicklin gave in support of her motion failed to establish that any reason existed for her purported inability to state any reason she couldn't reasonably be able to frame a responsive pleading. At pages 39 to 40 of this Brief, Hunt includes the verbatim report of the April 24, 2018 proceedings. Reviewing the Judge's comments and oral ruling that day will clearly reveal that the trial court failed to properly apply CR 12(e) in its rulings. Rather the trial court's comments from the bench suggests that the court was swayed by the factual assertions and speculations of Mrs. Hicklin's counsel (most of which simply sought to deny, obfuscate and dispute the merits of Mrs. Hunt's claims *or* to "tie-in" Hunt's cross-claims with claims others had made against Mrs. Hicklin in separate causes of action.

The trial court's bench ruling contained no analysis of the matters alleged in Mrs. Hunt's cross claims or the legal basis (either in Court Rule or citation(s) to cases as bases in support of the Orders it issued.

This Court should reverse the trial court's May 22, 2017 Order Granting Hicklin's CR 12(e) Motion and also reverse the 2018 Orders striking Hunt's pleadings *and* dismissing her claims.

D. Epilogue

Before continuing to Mrs. Hunt's Second Assignment of Error, Hunt asks that this Court consider the logical and logistical effect the trial court's orders had in this litigation, to-wit: The Court's denial of Hunt's Motion to Compel discovery effectively *prevented* her from investigating the facts which Hicklin, alone, had at her disposal (and which, in Hicklin's responses to Hunt's discovery requests, Hicklin stubbornly refused to reveal).

This reveals the essential problems inherent in the trial court's errors . . . in its two Orders of May 22, 2017, the Court, in simple vernacular told the litigants:

> *"No, Mrs. Hunt, you cannot compel discovery,"* and
>
> *"Yes, Mrs. Hicklin, more facts need to be pled by Mrs. Hunt to enable you to defend against her claims."*
> (Emphasis Added)

The trial court's rulings of May 22, 2017 had the obvious effect of preventing Mrs. Hunt from litigating the claims she brought before the Court. In permitting such an obvious outcome, the trial court abused its discretion in granting Hicklin her initial motion for a more definite statement. The Court's CR 12(e) Orders of May 22, 2017 and April 24, 2018 should be reversed.

2. ORDERS DENYING MOTION TO COMPEL.

A. Standard of Review/CR 37(a) Motions

The Standard of Review of orders granting or denying discovery is a question of law if the case involves the application of a court rule to a set of particular facts and will be reviewed de novo on appeal. Matter of Firestorm 1991, 129 Wn.2d 130, 916 P.2d 711 (1996), State v. Tortum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994), review denied. Otherwise, a trial court's discovery orders are reviewed for abuse of discretion. T.S. v. Boy Scouts of America, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (*citing* John Doe v. Puget Sd. Blood Ctr, 117 Wn.2d 772, 778, 819 P.2d 370 (1991).

If a trial court fails to make any factual finding in denying a motion to compel discovery, an appellate court may, if necessary, independently review the same evidence and make the required findings, In Re Firestorm 1991, *supra,* at 135, Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 222, 829 P.2d 1099 (1992).

B. Argument

On December 23, 2016, Mrs. Hunt propounded 34 interrogatories and 29 requests for production to Mrs. Hicklin [CP 372-418]. Interrogatory responses and production of a limited number of documents were returned by Hicklin on February 17, 2017. Those responses (such as

they were) were attached to Mrs. Hunt's Motion to Compel Discovery [CP 398-418].

On February 23, 2017, Mrs. Hicklin filed her first CR 12(e) motion for a more definite statement.

Believing Hicklin's interrogatory answers to be evasive, incomplete and argumentative *and* that the document production inadequate (given the length of time Hicklin had been solely administering the Trust) Mrs. Hunt requested that her counsel and Mrs. Hicklin's attorney conduct a CR 26(i) discovery conference. The conference was not successful in convincing Hicklin to supplement her answers or produce any additional documents.

A letter dated March 17, 2017 [CP 426-434] was sent by Hunt's counsel immediately after the CR 26(i) conference concluded. That letter was also attached to the Motion to Compel Discovery which Hunt filed on March 23, 2017 [CP 372-384].

A review of Hunt's 13-page motion to compel and the letter from Hunt's attorney to Hicklin's will reveal why Hunt believed Hicklin's objections and responses were inadequate and evasive. To summarize just a few of Hicklin's refusals to furnish discovery, Hunt pointed out to the trial court that Hicklin had asserted:

> "Forty-eight objections-based upon "attorney-client privilege between Mr. and Mrs. Hicklin and Mr. Seaman" or attorney-client privilege between Mrs. Hicklin in her capacity as Co-Trustee of the Trust and Mr. Seaman as Co-Trustee's Counsel." [Hunt pleadings at CP 380, Lines 7-11]."
>
> "Hicklin made Twenty-eight objections to the interrogatories as overly-broad," burdensome," "facts not relevant" or "vague." [CP 380, Lines 11-13]

A frequent response to Hunt's requests for production was:

> "Tax returns (which were requested) are already in Doreen Hunt's possession from Jennifer Zaccardo" [CP 407, Line 6].
>
> "Declarations part of the FLP case (in which Hunt was not a party) . . . are available to Doreen Hunt" [CP 408, Line 21]
>
> "Tax returns (which were requested) have been made available to Doreen Hunt through CPA Jennifer Zaccardo" [CP 409, Line 12]
>
> "Those documents are a part . . . of the FLP case and . . . available to Doreen Hunt as a matter of public record." [CP 410, Line 9]
>
> "I turned over documents to (the FLP's counsel) Craig Miller. I don't have anything else in my possession." [CP 413, Line 26]
>
> No Response Given. [CP 414, Line 12]
>
> "I don't have any records responsive to this request except for Robert E. Tuttle Trust Documents. Doreen should have a copy." [CP 416, Lines 25-26]
>
> "Doreen Hunt has already obtained the tax return from Jennifer Zaccardo" [CP 418, Line 17]

Nowhere in the requests for production did Hicklin reveal why she believed Mrs. Hunt had the documents she was asked to produce. The requests were for *any* documents in *Hicklin's possession.* Hicklin's assertions that Mrs. Hunt "had" received, "should have" or "could have" received the requested documents were not-responsive to Hunt's requests for production. Claiming in response to Request for Production No. 26 that Hicklin had "turned over documents to Craig Miller"[13] is ludicrous and clearly reveals Mrs. Hicklin's attitude towards her duties of disclosure.

The best example of an argumentative interrogatory response from Mrs. Hicklin [at CP 400, Lines 22-23] was her reply to Interrogatory No. 4 concerning the "financial records" of the Trust, Hicklin's response was:

> ". . . Patricia Hicklin Co-Trustee answers as follows: I have no records, because to my knowledge there has been no income to the trust, the trust was not charged any attorney fee in the two frivolous actions (and now this one) and there have been no distributions."

Hunt's motion questioned the credibility of Mrs. Hicklin's assertions of "lack of knowledge." At page 10 of the Motion [CP 381, Lines 10-18], Hunt pointed out:

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13 Mr. Miller is counsel for Eric Anderson, Gen. Partner of the LLP.

> ". . . . In the few responses Mrs. Hicklin provided regarding the Assets of the Trust, business bank accounts maintained by the Trust, Mrs. Hicklin answers - to summarize them - were that she had almost no knowledge of such issues . . . that only her mother knew what was going on, . . . that only her mother administered the Trust during her life and her mother must have done something which no one can find out (certainly not her) when over $300,000 (all unaccounted) was distributed to the Trust between 2010 and 2012"

However, Alternate Co-Trustee Sharon Horan filed a lengthy declaration in support of Hunt's Motion to compel that Hicklin to furnish her with Discovery [CP 341-348]. Exhibit A to Mrs. Horan's declaration [CP 348] is a copy of a check showing that on March 25, 2012, Mrs. Hicklin signed a check drawn on an account in the names of Anita Tuttle (who was then the Sole Trustee) *and* Patricia A. Hicklin.

Yet in Mrs. Hicklin's answer to Interrogatory No. 16 [CP 143], which asked her to reveal if she had ever signed banking documents:

> "Did you execute any document on behalf of (*or as* agent or by identifying yourself as attorney-in-fact for Anita Tuttle, either with respect to Anita Tuttle's personal or business-related matters or for her medical records, income tax returns, or for purposes of Anita Tuttle's banking or financial matters (between) January 1, 2009 and April 22, 2013,"

Mrs. Hicklin's reply was to:

> *"object to this discovery request as overly broad, vague, unduly burdensome and that it calls for facts that are not relevant to this case and further these exact issues were raised in the FLP case and raised by Robert Tuttle both having been dismissed. This also asks about a claim that*

could only have been made between the heirs of Anita Tuttle and the Estate of Anita Tuttle, which is not before the court."

It could possibly be argued that the "$131.00" check Hicklin wrote in March of 2012 [CP 349] was a *de minimis* matter, not worthy of question. However, what is revealed in Exhibit A to a declaration Hunt signed in support of her motion to compel [CP 366-371], (which are copies of Fiduciary Tax Returns signed by Hicklin) is that Mrs. Hicklin was much more involved in the business of the Trust than she wanted to reveal, having: signed three of the Trust's 8879-F Tax Returns for income tax years 2010, 2011 and 2012.

Mrs. Horan submitted a declaration to the court in support of Doreen Hunt's motion to compel Patricia Hicklin to more fully answer the interrogatories and produce all of the documents which had been requested in discovery.

At CP 342 (Lines 18-27) continuing to Line 20 on the next page, Mrs. Horan stated:

> "I didn't recall having been named in dad's Trust as one of the Alternate Trustees until Mr. Kombol gave me a copy of the trust document. At all times in my involvement in matters dealing with the Trust, Doreen has included me in the discussions with Mr. Kombol as well as discussed trust matters with me and with two of our sisters.

> Patti has never contacted me to discuss any of the matters involving the Trust. It came as a shock to me when Doreen told me a year or so ago that Patti had hired an attorney to represent the Trust and herself as a Co-Trustee as well as herself and her husband in a lawsuit our brother Robert, Jr. filed in 2013 against Patti and Sid Hicklin, the Testamentary Trust and against both of the Co-Trustees of the Trust (Patti and Doreen).
>
> I have carefully read Doreen's Declaration in her motion to require Patti to become totally open and transparent about all of the actions she took from the time of mom's death in April of 2013 through today. I agree with Doreen's request that Patti share with Doreen every bit of information she obtained on her own - and with the help of her attorneys - as well as all of the strategy Patti and her attorneys developed in defending against my brother's lawsuit.
>
> I have read Mr. Seaman's billing statements to Patti and the Trust as well as a second set of billing statements which are labeled **"HICKLIN ATTORNEY FEES"** and it seems clear to me as if Mr. Seaman was keeping separate records about the work he was doing for Patti and Sid as opposed to the billing records he was keeping for the Trust and Patti as a Co-Trustee."

The trial court was apprised of Hicklin's inconsistent, evasive and hostile discovery responses in Mrs. Hunt's motion to compel. Without explanation, the trial court simply denied Mrs. Hunt's motion, apparently in the belief that it wasn't reasonably necessary for Mrs. Hicklin to furnish clear responsive non-hostile answers to interrogatories or copies of documents Hunt asked Hicklin to produce.

In this failure, the court erred, because "The scope of discovery is very broad." Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 695, 295 P.3d 239 (2013) (*citing* Coburn v. Seda, 101 Wn.2d 270, 276, 677 P.2d 173 (1984)). "The right to discovery is an integral part of the right to access the courts embedded in our constitution." *Id.* (*citing* Lowy v. PeaceHealth, 174 Wn.2d 769, 776-77, 280 P.3d 1078 (2012)). As explained by the Washington Supreme Court in *Lowy*:

> "Besides its constitutional cornerstone, there are practical reasons for discovery. Earlier experience with a "blindman's bluff" approach to litigation, where each side was required "literally to guess what their opponent would offer as evidence," were unsatisfactory Michael E. Wolfson, *Addressing the Adversarial Dilemma Civil Discovery,* 36 CLEV. ST. L.REV 17, 22 (1988). As modern pretrial discovery has evolved, it has contributed enormously to more fair, just, and efficient process." *Id.* at 20. Effective pretrial disclosure, so that each side knows what the other side knows has narrowed and clarified the disputed issues and made early resolution possible. As importantly, early open discovery exposes meritless and unsupported claims so they could be dismissed. It is uncontroverted that early and broad disclosure promotes the efficient and prompt resolution of meritorious claims and the efficient elimination of meritless claims."

The Washington Supreme Court has affirmed the broad scope of discovery under CR 26(b)(1):

> "The only limitation [under the rule] is relevancy to the subject matter involved in the action, not to the precise issues framed in the pleadings and inquiry as to any matter which is or may become relevant to the subject matter of the action should be allowed subject only to the objection of privilege."

Bushman v. New Holland Div. of Sperry Rand Corp., 83 Wn.2d 429, 434, 518 P.2d 1078 (1974); *see also* Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 38, 111 P.3d 1192 (2005), *review denied,* 156 Wn.2d 103 (2006) (Washington recognizes a "broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c).").

> "A trial court has broad discretion under CR 26 to manage the discovery process and, if necessary, to limit the scope of discovery under CR 26(b) and (c) through issuance of protective orders under CR 26(c), Nakata v. Blue Bird, Inc., 146 Wn. App. 267, 277, 191 P.3d 900 (2008), *review denied*, 165 Wn.2d 1033 (2009)."

Here the trial court abused its discretion by failing to engage in any effort to manage the discovery process. It simply denied Mrs. Hunt's motion to compel without making any finding for the denial *or* to make any comment in the Verbatim Report of the Proceedings of May 20, 2017.

Mrs. Hicklin's decision not to furnish complete and responsive answers to Hunt's discovery requests, but rather electing to make blanket assertions that the interrogatories were "vague," "broad," "burdensome" and asserting attorney-client privilege does not suffice under the civil discovery rules or Washington case authority to refuse to produce documents or furnish answers to interrogatories.

If a responding party believes that discovery requests are objectionable or that responsive information should be withheld for some reason, the responding party has two options;

(1) Make an appropriate written objection before the discovery response is due, or

(2) Timely file a motion for a protective order before a response is due, Cedell, *supra* at 695.

The burden of persuasion is upon the party seeking to withhold documents or decline to answer interrogatories. (Cedell, *supra* at 696); *see also* Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975).

Here Mrs. Hicklin did neither. Hunt's Interrogatories and Requests for Production were issued on December 23, 2016. Hicklin's responses were due by the end of January, 2017. Hicklin delayed until February 17, 2017 to furnish her responses, which, of course, included Forty-eight assertions of attorney-client privilege regarding not only communication between the Hicklins and their attorney but also communications and documents which related to what Mrs. Hicklin was doing in administering the trust on her own as well as to the steps Hicklin had taken (without Hunt's prior consent or knowledge) to retain counsel as a Co-Trustee and plan litigation strategy.

Hicklin's failure to object within thirty days after service of interrogatories (CR 33) or requests for production (CR 34) are grounds for

the waiver of a claim of privilege, Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 718, 261 P.3d 119 (2011).

Mrs. Hunt pointed out to the trial court that she was not included in Hicklin's decision to seek counsel to represent the Trust, she has never reviewed a copy of the Fee and Retainer Agreement Hicklin entered into with Mr. Seaman; has never been informed about the legal service(s) the Trustee needed; the terms of the agreement Hicklin entered into, on behalf the Trust, with the counsel she selected. Nor, has Hunt been kept apprised of the legal fees and costs the Trust was incurring; or had any opportunity to join Hicklin in the Trust's strategy to defend against Robert Jr.'s claims.

C. Argument – Hicklin's Assertions of Attorney/Client Privilege

Federal Courts have held that objections to interrogatories or requests for production (including objections grounded on a claim of privilege) served by the responding party after expiration of the 30-day response period, are waived. Fed R. Civ. P. 33(b)(4) specifically states that any ground not stated in a timely objection is waived unless the responding party's failure to timely object is excused by the court for good cause shown, Richmark v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992).

The trial court erred in simply denying Hunt's discovery requests out of hand. Hunt requests that this court engage in a de novo review of

Hunt's CR 37(a) motion and then rule that Mrs. Hicklin waived her claim of attorney-client privilege not only because her responses were given after the expiration of the 30-day response period, but also because of her use of blanket objections (without specificity), her argumentative and sometimes incoherent answers and the failure to be truthful (the 2013 check and the 2010, 2011 and 2012 tax returns which she failed to disclose she had signed) point to matters which Hicklin and her counsel (as her attorney in Mrs. Hicklin's capacity as a Co-Trustee) may have information and documents which are "at issue" in Hunt's Cross-Claims.

Mrs. Hunt also argues that by agreeing to represent Patricia and Sidney Hicklin *as well as* Co-Trustee Hicklin and the Trust in the face of Mrs. Hunt's cross-claim and amended cross-claim, both of which pleadings asserted that Hicklin's elections to do so created significant conflicts of interest, Mrs. Hicklin can't (under the doctrine of "at issue" waiver) assert the attorney-client privilege to avoid full discovery disclosure, because the potential conflicts of interest the attorney she and Sidney retained had in representing Hicklin in her capacity as a Co-Trustee had placed communication with her legal counsel "*at issue*".

Washington Courts have adopted a three-part test to determine whether such a waiver has occurred. The test was first described in Hearn

v. Rhay, 68 F.R.D. 575 (E.D. Wash. 1975). That test, as applied to the facts in this case is:

> (1) Assertion of a privilege is the result of an *affirmative act* [Hicklin retaining Counsel as Co-Trustee's (and the Trust's Counsel *and the* same *attorney accepting* that retention) *after* Hicklin had retained same attorney to defend her and her spouse in the same case];
>
> (2) The asserting party put the protected information at issue by allowing it to become relevant to this case, to wit: the separate billing, separate strategies, Hicklin's refusal to share any real information or produce any documents relating the agreements entered into with the attorney who represented her as Co-Trustee as well as representing Patricia and Sidney Hicklin at the same time, in the same litigation;
>
> (3) The application of the privilege would deny Co-Trustee Hunt access to information vital to her claims against her fellow Trustee.

The Hearn was adopted by the Washington Supreme Court in Pappas v. Hollowag, 114 Wn.2d 198, 207-208, 787 P.2d 30 (1990).

Because of the trial court's failure to apply the rules and court cases mandating liberal discovery, not to mention the two bases discussed above for deciding that Mrs. Hicklin had waived the attorney-client privilege she repeatedly asserted as a basis to refuse to fully respond to Hunt's discovery requests, Appellant asks this court to:

> (a) Rule that the trial court erred in denying Hunt's motion to compel discovery;

(b) Furnish the trial court with clear instructions as to the nature and extent of the discovery information Hicklin should be ordered to furnish Mrs. Hunt;

(c) Include in its decision a ruling on whether or not Mrs. Hicklin may be able to (and under what circumstances) assert the attorney-client privilege; and

(d) Award sanctions, including attorney fees and costs against Hicklin and her Counsel pursuant to CR 37(4).

3. ORDER DISMISSING.

Judge Melly's failure to "keep his eye on the ball" is perhaps best revealed between pages 76, Line 12 through Page 78, Line 7 in the Report of Proceedings on May 20, 2017.

THE COURT: "Court Rule 12(e) does allow the court to impose a sanction, for lack of a better phrase, although that word isn't used, if a more definite statement is not filed within 10 days after the order directing it to be entered. Again, that order was entered on May 20th of 2017. Under the rule the amended complaint should have been filed by the end of May of 2017, some eight or nine months ago. Here we are on a motion to dismiss, because that wasn't timely done. I looked at the cases. Interestingly, there are precious few cases under CR 12(e) and what the remedy is. Part of the dilemma that the court, I think has is this isn't your typical litigation where it's, you know, citizen A suing corporation B. These are all family members. With the exception of the trust, these are all family members. Regardless of what the court does, you know, hopefully the family members at the end of all this will be able to heal and you know, get over it and rebuild those bridges that have been burned, but do we start the healing process now

> or do we postpone it until, you know, down the pike when the Court of Appeals issues its ruling or the court denies the motion today and we proceed on the amended complaint? I'm gonna take maybe the coward's way out. I think that the nine months that has intervened between the courts order and the present is too much. I'm gonna grant the motion to dismiss. I think it's appropriate. I think it's, A) gives the family members an opportunity maybe to start that healing process. Is that a legitimate concern for the court? I don't know, but it certainly is in the courts thoughts and I might as well articulate that, that by bringing this to a conclusion now, maybe things can start to get a little bit better with regard to the way the family's gotten along over the last couple of years. While this may come back from the Court of Appeals, basically reverses my decisions, we'll be back and be dealing with it again, but if not, then of course Mr. Kombol will have the opportunity to take any appeals that he thinks might be appropriate, but at this point in the interest of, primarily in the interest of being a litigant and enforcing the person that sues me to do their job is the most compelling reason for granting the decision that the court's granting today, dismissing it, but as a subtext to that is the familial discord that is involved. So, I will sign an order dismissing."

The trial court's wandering comments from the bench on April 24, 2018 and its failure, in any of the trial court's Orders, to address what CR 8(a) and CR 12(e) require of a litigant, such as Mrs. Hunt, to accomplish under our rules of 'notice pleadings' to file a legally sufficient claim or complaint and the failure of the court below is indicative of the trial court's failure to properly consider and apply the court rules and case authority in its rulings. All of the trial court rulings should be reversed and remanded.

4. ORDER FOR ATTORNEY'S FEES

A. Standard of Review

Under Washington law, a trial court may only grant attorney fees if the request is based on a statute, a contract, or a recognized ground in equity, (Cmty. Ass'n Underwriters of America, Inc. v. Kalles, 164 Wn. App. 30, 38, 259 P.3d 1154 (2011). Washington courts universally agree that the standard of review of an award for attorney fees is for abuse of discretion. *See* Morgan v. Kingen, 166 Wn.2d 526, 539, 210 P.3d 995 (2009), Rettkowski v. Dep't Ecology, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

B. Argument

Mrs. Hunt filed several declarations in reply to Hicklin's motion for attorney fees. They include declarations by Trust beneficiaries:

Sharon Horan	[CP 12-18]
Doreen Hunt	[CP 16-23]
Barry Kombol	[CP 24-30]
Reply of Hunt	[CP 56-66]
Roberta Gonzalez	[CP 67-69]

Those declarations reveal the sort of rancor Mrs. Hicklin's actions while acting as Trustee of the trust caused. Each was before the trial court when it considered Mrs. Hicklin's motion for legal fees.

Hunt pointed out to the trial court that the nineteen hours and twenty minutes (19.4 hrs.) of billings relating to legal work Hicklin's counsel

requested (and included in his fee application) included file review legal research and other tasks purportedly done between February and June of 2016 relating to an intention, at some time, to seek "CR 11" fees and sanctions against Hunt. [CP 60, Lines 2-9]

However, Hicklin based her motion for fees upon RCW 11.96A.150 (3) ***not*** CR 11.

As Hunt pointed out in her pleading to the trial court filed in opposition to Hicklin's motion for fees, Hicklin never furnished the trial court with any explanation as to why she had included her attorney fee billings from 2016 into a fee request she made in June of 2018 based on statutory authority [CP 60, Lines 10-15].

In point of fact, Hicklin never sought fees or sanctions against Hunt in the trial court based on CR 11.

A court should "discount" hours spent on unsuccessful claims or wasted effort, Bowers v. Transamerica, 100 Wn.2d 581, 597, 675 P.2d 86 (1996). Nearly nineteen and a half hours of research and the performance of other tasks by an attorney is certainly nothing to sneeze at. But if that massive effort didn't result in success in a motion that was the object of all that effort, it only stands to reason that the effort – researching the law and

reviewing the pleadings to see if a motion under CR 11 was feasible – did involve wasted time and effort.

Nevertheless, the trial court based part of its award on those nineteen wasted hours and failed to make any logical inquiry into the credibility of Hicklin's assertion that nearly half of a work-week by an attorney time had actually been furnished to the Co-Trustee (and billed to the Trust) by an attorney as experienced as the one who was assisting Hicklin and the Trust.

Further, and even more mysteriously, the trial court's order for fees reveals on its face that the trial court failed to pay adequate attention to who (or what entity) was being asked to bear Hicklin's attorney fee.

The order awarding attorney fees to Patricia and Sidney Hicklin [CP 511, Lines 10-11] in the amount of $11,640.00 was, pursuant to the Order, to be paid "by (sic) Robert E. Tuttle Testamentary Trust" when at no place in Hicklin's pleadings for a fee award is there any mention that fees were being sought from the Trust. The trial court never indicated in its findings or the Order it entered why the Trust was ordered to pay fees to the Hicklins. In their pleadings, the Hicklins, incredibly, asserted that the Trust had never been billed for work Mr. Seaman did for it [CP 140, Lines 21-22].

Worse yet, and further indicative of the conflicts of interest Co-Trustee has created, in obtaining a fee award against the Trust she is administering, Hicklin has compounded those conflicts of interest, to-wit:

Is this Co-Trustee intending on billing the Trust she has been administering without giving her Co-Trustee any opportunity to assist in selecting counsel or having access to retainer agreements or work-product done for the Trust's Co-Trustee?

As outlined above, the trial court's Order awarding attorney fees to Patricia and Sidney Hicklin to be paid by the Trust was an abuse of discretion in a number of ways. That Order should be reversed.

VI. CONCLUSION

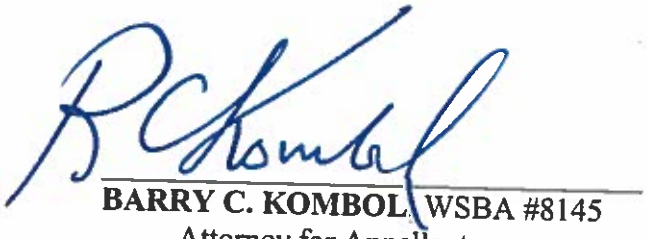
For the reasons contained in Mrs. Hunt's arguments, the facts which were before the trial court and the Court Rules, Statutes and Authorities cited in this brief, this court should reverse all of the Orders issued on May 22, 2017, April 24, 2018 and July 31, 2018,

Mrs. Hunt should be awarded attorney fees and costs and sanctions should be imposed against Mrs. Hicklin and her counsel based upon the provisions of CR 11, a Court Rule intended to prevent a litigant or the litigant's counsel to sign and file pleadings and advance arguments which are not well grounded in fact, warranted by existing law or a good faith argument if the pleading is filed for purposes such as the needless increase of the cost of litigation. Hicklin's pleadings violate CR 11 on four squares.

Hicklin's actions in obscuring her answers, refusing to answer other interrogatory questions, use of improper (and evasive) reasons to deny the discovery Mrs. Hunt sought should result in additional attorney fees being awarded pursuant to CR 37(4).

Doreen Hunt's request for fees and the imposition of sanctions should be granted in this Court and the Court's Remand to the Superior Court should likewise instruct the trial court to consider imposing fees and sanctions if the trial court, in its discretion and after a review of the pleadings filed below warrant such an action.

Respectfully Submitted on October 10, 2018.



BARRY C. KOMBOL, WSBA #8145
Attorney for Appellant

CERTIFICATE OF MAILING

Susan Burnett, certifies under penalty of perjury of the laws of the State of Washington as follows:

1. That she is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over the age

of twenty-one years, not a party to the above-entitled action and competent to be a witness therein:

That on the 12th day of October, 2018, the Appellant's Brief was placed in the **U.S. Mail, First Class, Postage Prepaid** to:

To: **Mr. Shane Seaman**
Attorney for Patricia *and* **Sydney Hicklin**
and **The Robert E. Tuttle, Sr. Trust**
18887 Hwy. 305 NE, **Suite 1000**
Poulsbo, WA. **98370**

To: **Mr. Patrick Irwin**
Attorney for Patricia Hicklin and
The Estate of Anita Tuttle
106 North Laurel Street
Port Angeles, WA. **98362**

To: **Mr. David Johnson**
Attorney for Robert Tuttle, Jr.
804 South Oak Street
Port Angeles, WA. **98362**

To: **Mr. Craig Miller**
Attorney for The Tuttle Family LLP
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DATED this 12th day of October, 2018 in Black Diamond, Washington.

Susan Burnett, Paralegal
Rainier Legal Center

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October 12, 2018 - 4:21 PM

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Appellate Court Case Number:	51782-5
Appellate Court Case Title:	Robert Tuttle Jr, Appellant v Estate of Anita D Tuttle, et al, Respondents
Superior Court Case Number:	13-2-01120-7

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