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No. 51782-5-II

**COURT OF APPEALS, DIVISION I
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**

**APPELLANT'S
REPLY BRIEF**

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A. REPLY TO INTRODUCTION

Mrs. Hicklin argues in her introduction that CR 12(e) should be interpreted so as to enable a court to eventually dismiss a complaint based on a failure to obey an order to make a more definite statement. However, a Trial Court's authority in granting a CR 12(e) Motion to Strike is simply to order the party to make a more definite statement or (i) "strike the pleading to which the motion was directed;" or (ii) make such order as it deems just. So much is clear, but CR 12(e) doesn't expressly provide for a case to be dismissed for non-compliance with the order. As argued in Appellant's opening brief, a trial court's authority to dismiss a claim in a CR 12 motion is quite restricted. In Trujillo vs. Northwest Trustee Services, 181 Wn.App. 484, 489, 326 P.3d 708 (2014), in reviewing a CR 12(b)(6) dismissal of Mr. Trujillo's claim, ". . . Motions to dismiss should be granted 'sparingly and with care.' " Cutler v. Phillips Petroleum Co., 124 Wn.2nd 749, 755, 881 P.2d 216 (1994).

Mrs. Hicklin's assertion that once a court issues an Order for a more definite statement, under CR 12(e) it then has authority to dismiss a cross-claimant's case is not expressly a part of the court rule. Such an assertion fails to address the requirement that a trial court dismiss cases only sparingly. Cutler, supra.

Mrs. Hicklin's introduction next asserts that "Hunt created needless litigation" "alleging vague allegations" but "really wanted to litigate about 2010-2011 logging." Mrs. Hicklin's Brief never again mentions any basis for the assertion that her cross-claims created needless litigation, because there is no basis for such a claim unless one could conclude (as Mrs. Hicklin seems to do) that the cross-claim against her had nothing to do about her duties as a Co-Trustee but everything to do about the logging of a forest belonging to the Tuttle Family Limited Partnership (FLP).

Mrs. Hicklin's introduction, as well as various later arguments in her reply brief, contain unsupported speculation about the reasons Mrs. Hunt filed her cross-claims. Several examples of such speculation, without any reference to the record on appeal include:

"but really Hunt wanted to litigate about (was the) 2010-2011 logging..." (Pg. 8)

(Hunt was) "...demanding to know what happened to the logging proceeds," (Pg. 8)

"Hunt was trying to avoid dismissal, knowing she could not litigate about the logging." (Pg. 9)

"Hicklin got wise to Hunt's games . . . obtained an Order under CR 12(e) compelling Hunt to state what her claim was really about. Did it involve the 2010-2011 logging proceeds and the 2009 Power of Attorney (YES) or was it about some other actionable claim . . ." (Pg. 9)

"All Hunt had to do was . . . show the Trial Court her actual claim." (Pg. 9)

At no place in the introduction to Mrs. Hicklin's Reply Brief or in the body of her Brief does she specifically discuss the allegations contained in Mrs. Hunt's initial (four count) cross-claim; namely that Mrs. Hicklin's conduct as a Co-Trustee violated various statutes relating to Trustees and failed to abide by her duties in her administration of the Trust.

A significant part of Mrs. Hicklin's Reply Brief involves the creation of various "red herrings" such as the claim that Mrs. Hunt's cross-claims were "all about logging" rather than about Co-Trustee's Hicklin's misconduct while acting as the Trustee of her father's Trust.

That red herring also permits Mrs. Hicklin to argue that all of the issues raised in Hunt's cross-claim had been resolved in earlier litigation between members of the extended Tuttle family and the three entities Robert and Anita Tuttle created as a part of their estate plan.

Then, Mrs. Hicklin goes one step further and urges this Court (just as she urged the Trial Court) to believe that the "real basis" or "what is really about" or "what really Hunt wanted to litigate" and "all Hunt had to do was (to) amend her complaint and show the Trial Court her *actual* claim.

That type of argument piled a whale on top of the red herring Mrs. Hicklin posited. In ruling that Mrs. Hunt had to amend her pleadings in order to make a more definite statement, the trial judge apparently bought

into Mrs. Hicklin's argument that Mrs. Hunt's claim had to do more than the pleading requirement of CR 8(a).

B. NO REPLY TO STATEMENT OF ISSUES

C. REPLY TO PROCEDURAL BACKGROUND

The procedural background contained in Mrs. Hicklin's brief is twelve pages in length (Pgs. 10-22) and contains 216 lines.

In preparing this Reply Brief, Hunt's counsel counted the number of lines of the Brief where Mrs. Hicklin discusses issues raised in the various other "Tuttle Family/Tuttle Entity/Tuttle Estate" cases *other than* issues in the case now before this Court.

Not less than 115 lines of Respondent's Brief discuss the Tuttle Estate litigation, Robert Tuttle, Jr.'s litigation and the Tuttle FLP case. Included in that "line count" are all forty lines between pages 10-12 of the brief and most of the fifty-five lines between pages 15-17.

It is difficult to understand why Mrs. Hicklin devoted such an extensive amount of space in her Reply Brief to explain in chronological order what had occurred in litigation between members of the Tuttle Family and entities Mr. and Mrs. Tuttle established, when the issues in this appeal involve whether or not Mrs. Hunt's cross-claim complied with the provisions of CR 8(1):

“A pleading . . . shall 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 for which the pleader deems the pleader is entitled.” (Emphasis Added)

Nowhere did Mrs. Hicklin argue to the Trial Court that Appellant’s cross-claim didn’t meet the “notice pleading” standard of CR 8(a). Nor does the Respondent bother to mention CR 8(a) in her Reply Brief other than in passing.

Mrs. Hicklin does begin to discuss issues relevant to this appeal on page 13, asserting:

“3. Hunt agrees that “income” belonged to Anita Tuttle upon Anita Tuttle’s death.”

However, in an effort to obscure what the Appellant said in her pleading, Mrs. Hicklin quotes *only part* of Doreen Hunt’s declaration, the entirety of which is quoted below and quotes *none* of the pertinent provisions in the Testamentary Trust pertaining to what is “income” and what is “property” held in the Trust.

Mrs. Hunt’s declaration, in relevant part, is as follows:

“Second, Patti’s answer (to an interrogatory) shows that she has apparently taken the position that she is the only one who can decide what is ‘Income’ and what is an ‘Asset’ in the Trust. Patti is correct that the trust provides that upon our mother’s death, all ‘Income’ in the Trust is to be distributed to her Estate and all ‘Assets’ are to be distributed to our parent’s seven children. (CP 357, Lines 13-19)¹

¹ Mrs. Hunt’s declaration goes on to point out that Mrs. Hicklin has a Conflict of Interest in deciding, without consulting with her Co-Trustee, what income was in the Trust at Anita Tuttle’s death and what were considered to be Assets in the Trust.

Patti is both the P.R. and the primary beneficiary (90%) of our mother's estate. Roberta, myself, Patti, Sharon, Daisy, Raymond and Robert, Jr. are the seven beneficiaries of the assets of the Trust after our mother's death." (CP 357, Lines 19-23)

Mrs. Hicklin's Brief doesn't mention that the Trust distinguishes what is "income" verses what is "property." As is shown below, this difference puts Mrs. Hicklin in direct conflict with her Trust Co-Beneficiaries.

The full Trust is set out in the Clerk's Papers at CP 538-549. The relevant provisions are at pages 541 and 542. They provide:

4.3 Distribution of Income. Trustee shall distribute the entire net income from the trust in monthly or quarterly installments to, or for the benefit of Trustor's spouse (Anita), while she is living. Any undistributed **income** on hand at the time of the death of Trustor's spouse shall be distributed to the *personal representative of her estate.*" (Emphasis Added)²

4.5 Termination. Upon the death of the Trustor's spouse (Anita), the Trust for Surviving Spouse shall terminate and all remaining **property** shall be distributed by the Co-Trustees for administration as a part of the *Trust for Children and Grandchildren.*³ (Emphasis Added)

Despite having a conflict between her interest in what could possibly be considered income as opposed to be what could be considered property,

2 Mrs. Hicklin is Executrix/P.R. of the Estate and inherits 90% of the Estate.

3 All seven children survived their mother. All seven children would share equally in the distribution of Trust "property." Article 3.5 appoints Anita Tuttle as Trustee. Doreen Hicklin and Patricia Hicklin are the successor Co-Trustees and are directed to "use(ing) their best efforts to consult with Sharon Horan in matters involving the trust or estate.

at page 13 of her brief, Mrs. Hicklin makes the following unusual statement (which obviously shows her unwillingness to recognize she has a conflict of interest):

“Robert Tuttle, Daisy Anderson, Doreen Hunt and Sharon Horan have no claim to the Trust logging proceeds paid to Anita Tuttle. Yet, now the disinherited heirs are demanding Hicklin to go back and account to them what Anita may or may not have done with the logging proceeds which she had the authority to take.” (Emphasis Added)

That statement, clearly, reveals that Mrs. Hicklin made an executive decision, without consulting with Hunt that Anita Tuttle “took” as “income” all of the proceeds of the logging operations and she implies that at the time of Mrs. Tuttle’s death, there remained no property to distribute in equal shares to Anita’s seven surviving children.

Mrs. Hicklin’s remarks also reveal an attitude of resentment that the Co-Trustee’s and the Trust Beneficiaries demand (that she) go back to account to them. Note that Count II of Mrs. Hunt’s cross-claim (CP 495-496) alleged that Co-Trustee Hicklin had failed in her duties under RCW 11.98.072 to furnish the trust beneficiaries with an accounting of Trust assets.

Count IV of Hunt's cross-claim (CP 498) alleged that Mrs. Hicklin failed to avoid conflicts of interest and had violated the duty of loyalty imposed as a Trustee under RCW 11.98.078.

At Page 22 of Mrs. Hicklin's Brief, she continues to argue, without explaining why, that Mrs. Hunt's cross-claim contains "vague" allegations. Between the pages 10 and 22 of her Brief, Mrs. Hicklin uses the term "vague" not less than eight times without discussing what, in Mrs. Hicklin's opinion, caused them to be vague.

At Page 22, near the end of the "Procedural Background" of her Brief, Mrs. Hicklin suggests, without citing any authority:

This Court "should disregard (Hunt's) amended Complaint filed as March 15, 2018 because it was untimely and filed after (Hicklin filed) the motion to dismiss."

Mrs. Hicklin then argues that because Mrs. Hunt filed and served a trial brief on March 31, 2018 in response to her Motion to Strike Pleadings and Dismiss the Cross-claims:

"Hunt failed to timely obey the Court."⁴

⁴ Mrs. Hicklin fails to cite any Order which Mrs. Hunt failed to obey. Further, (i) the hearing at which Mrs. Hunt's brief was considered took place on April 24, 2018, 24 days after Hunt's brief was filed. The record below doesn't contain any discussion *or* document which would support Hicklin's request for *this* Court to disregard Mrs. Hicklin's Amended Cross-Claim. Finally, the Trial Court's Order of April 24, 2018 at CP 116, Line 3 states: "Hicklin's Motion here was timely filed and then re-set to one week later, giving time to reply."

D. REPLY TO ARGUMENT

Respondent argues that it's frivolous for Mrs. Hunt to appeal the two interlocutory orders issued on May 22, 2017, the first of which granted Mrs. Hicklin's CR 12(e) motion for a more definite statement, and the second of which then denied Mrs. Hunt's CR 37(a) motion to compel discovery.

Next, Mrs. Hicklin cites several cases in which appellate courts permit a trial court to "control litigation before it" prior to the entry of a "Final Judgment" or a "Decision Determining Action" (RAP 2.2(a) (1) & (3)). What Respondent *never cites* is *any authority* to the proposition that once a decision concluding an action, an aggrieved Appellant can't appeal the various trial court orders which precede the (determining) order.

Mrs. Hunt addressed this issue at page 7 of her opening brief:

"Hunt did not seek discretionary review of the trial court's May 22, 2017 orders because she determined that the order was a "final order" of the trial court from which discretionary review could be obtained."

Worse yet, Respondent implies (without citing any authority) that Mrs. Hunt's appeal of those interlocutory orders was frivolous. This argument suggests that an aggrieved litigant *should file* a RAP 2.3(a) motion for appeal of an interlocutory order. However, doing so would burden Appellate Courts with a massive number of appeals of interlocutory orders. Further, a party appealing such an order could be subject to sanctions if,

under RAP 2.3(c), the Appellate Court Commission declines to accept discretionary review, because (in a Respondent's mind) it was "frivolous" for an Appellant to appeal interlocutory orders.⁵

Tossing about the term "frivolous" without citing any authority for the proposition is tiresome and troublesome. Mrs. Hicklin's use of catch phrases such as "vague," "frivolous," "intentionally vague," "needless litigation," "what they really wanted," and "infer they are very bitter," does almost nothing by way of legitimate argument. However, it forces Mrs. Hunt to address that type of speculation multiple times in this reply. For example, Mrs. Hicklin argues at the top of page 24 of her brief:

"It was not an abuse of discretion (for the trial court) to be persuaded by competent argument that Hunt's claims needed to be more specific under CR 12(e), due to the history of the case."

This sentence sets out Mrs. Hicklin's trial court-strategy and as her argument now on appeal. What she proposes, without citation to authority, is that a trial court should have the discretion to enter a CR 12(e) order which has the effect of "trumping" the notice pleading standard of CR 8(a). Further, Hicklin argues a defendant's arguments and the history of the cases before it (as well as history of several other cases between related litigants),

⁵ RAP 2.3(c) points to the absurdity of Respondent's unfounded argument: "... the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court's decision." (In other words, even if the appeal court declines to review an interlocutory decision, that decision can be reviewed later.

could enable a court to question what the case is “really about” and order pleadings, paraphrasing CR 12(e) to be:

“less vague or less ambiguous” so that the “responding party can reasonably be able/required to frame a responsive pleading.”

Respondent wants this court to accept their proposition that a defendant should be allowed to argue that certain parts of a complaint are somehow vague and then, before an answer is given, seek an order obligating the plaintiff to allege a sufficient number of “specific facts” to justify filing of the claim.

Plaintiff’s interpretation of when CR 12(e) motions can be made or granted flies in the face of the nature of CR 8(a) notice pleading.

Hunt wants once again to point out that the Respondent has never argued that her cross-claim was vague or ambiguous. Her only real argument is that Mrs. Hicklin, wants to know, in her own words:

“What this claim is really about.”

(Or in other words – without so stating):

“Sister . . . tell me what facts do you know which could tend to make me liable for some wrong doing. I won’t answer until you do.” (Emphasis Added)

Mrs. Hicklin’s arguments between the middle of page 24 through 25 reveal that she could have made an answer under CR 19(a) because, as she states “these acts occurred prior to Anita Tuttle’s death,” implying that the

affirmative defense of a failure to join a necessary party was a possibility. Of course, we know that the party to be joined would have been Patricia Hicklin, the executrix of Mrs. Tuttle's estate.

Mrs. Hicklin argues at page 26 of her Brief that a portion of Mrs. Hunt's complaint could be "time barred." If there existed facts to support a statute of limitations defense, the Respondent could have asserted that as an affirmative defense.

At page 25 of her Brief, Mrs. Hicklin argues that she "reminded the trial court that Count I as originally pled couldn't be correct." If that assertion was true, a motion to dismiss the offending Count could have been made under CR 12(b)(6).

In short, Mrs. Hicklin's Reply Brief reveals that there were a number of defenses and affirmative defense which she could have made in answer to Hunt's cross-claims. She indicates there could be additional parties who should have been added in order for a just resolution or that there existed the fault of a "non-party" as be an affirmative defense. (Page 28)

At page 28 of her Brief, Mrs. Hicklin poses an argument which is breathtaking in its misunderstanding of CR 12(b). She states:

"Further, if Hicklin had not demanded a more definite statement and let these vague pleadings go, then courts have held that any affirmative defenses Hicklin might have raised are waived . . ."
(Emphasis Added)

She goes on to say:

“under CR 8(c) and CR 12(1) a defendant *must* plead non-party fault as an affirmative defense.” (Emphasis Added)

This is almost true enough except that only a misreading of CR 12(b) and Bernsen vs. Big Bend Elec. Co-op, Inc., 68 Wn.App. 427, 842 P.2d 1047 (1993) would have enabled Mrs. Hicklin to assert that “*any* affirmative defenses . . . *are waived* unless . . . pleaded.”

Under CR 12(b), the only affirmative defenses that are waived unless included in an answer or made by motion before answer is made are:

- (1) Lack of subject matter jurisdiction;
- (2) Lack of in personam jurisdiction;
- (3) Improper venue;
- (4) Insufficiency of process;
- (5) Insufficiency of service of process;
- (6) Failure to state a claim;
- (7) Failure to join a party (if the provisions of CR 19(a) apply).

Mrs. Hicklin doesn't mention or address the possibility that CR 12(b) sub-parts (1)-(5) do not apply to this case. If Respondent believed that Hunt's cross-claims didn't state claim for which relief could be granted, an appropriate CR 12(b)(6) motion could have been made. However, a brief review of Mrs. Hunt's initial cross-claim shows that she alleged that Mrs. Hicklin had violated various statutes and that she was requesting several types of relief under those statutes. Mrs. Hicklin could not have alleged sub parts (1)-(5), so there was never a chance of “waiver.”

As discussed above, the Respondent did identify the possibility that her mother, or her mother's estate, could be a party who "should have been joined if in the estate's absence complete relief could not be accorded . . .," but no party other than Mrs. Tuttle or her Estate were mentioned by Mrs. Hicklin in her Brief. Therefore Hicklin, as Executrix, would have been the party not joined.

Asserting that "any affirmative defenses Hicklin might have raised could have been waived . . ." is another red herring which Mrs. Hunt has been forced to address.

Starting at page 29 and continuing through page 35, the Respondent argues that the trial judge didn't abuse his discretion in dismissing Mrs. Hunt's cross-claims. Mrs. Hunt first argues that because the judge "clearly recognized that (the Tuttle) family had been fighting since Anita Tuttle's death and that Hunt's lawsuit accomplished nothing.

Judge Melly did state in his oral ruling it was his:

" . . . the family members at the end of all this will be able to heal and . . . get over it and rebuild those bridges . . .

That sentiment, while compassionately expressed, has never been cited by appellate courts (or found) to be a justification to dismiss a cause of action. Mrs. Hicklin's assertion that Mrs. Hunt's lawsuit accomplished nothing cannot be found in the record.

Mrs. Hicklin next cites a case where a dismissal was upheld where a discovery order was not obeyed – “which refusal substantially prejudiced the opponent’s ability to prepare for trial.” That is not the case here. There exists no finding of prejudice to Mrs. Hicklin in support of the dismissal of Co-Trustee Hunt’s claims.

Mrs. Hicklin next argues that the Appellant had “no excuse or justification for not obeying the May 22, 2017 CR 12(e) Order.” Mrs. Hunt pointed out in her opening brief that her initial four count cross-claims did comply with the notice pleading requirements of CR 8(c). She elected not to file a Request for Discretionary Review. All that Mrs. Hunt could have done other than to appeal was to file an amended cross-claim (which she eventually did) once again asserting the statutes and authorities relating to Trustee misconduct and adding a fifth count.

As Mrs. Hunt has already argued, the effect of the Order denying her motion to compel that the Respondent furnish full discovery “tied her hands” as regards to alleging the sort of “specific facts” which Mrs. Hicklin’s CR 12(e) insisted she needed to plead. This set up a second trap because, if the Order was intended to require her to make specific factual allegations about what Mrs. Hicklin insisted, Hunt’s claims were “all about,” to-wit: “where, what, when and how” of the alleged misconduct. However, if without full discovery, Mrs. Hunt was mistaken about

specifics (because of lack of knowledge), she could have faced CR 11 sanctions for having alleged specific facts without having made “inquiry reasonable under the circumstances” and that pursuant to CR 11(1) the claim is “well grounded in fact.”

At page 31 of her Brief, Mrs. Hicklin argues that the trial court’s dismissal of the Appellant’s action was done pursuant to CR 12(e). As argued above, that rule doesn’t provide a trial court express authority to dismiss an action because a complaint is “so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.”

No case law authority exists for the proposition that a case may be dismissed with prejudice on account of a CR 12(e) violation. Mrs. Hicklin concedes as much on page 32 of her Brief. Even the trial judge conceded that he could find:

“precious few cases under CR 12(e) and what the remedy is.”
(R.P., Page 76) (Emphasis Added)

Nevertheless, the trial court imposed the most extreme remedy, that of dismissal. Doing so was an abuse of his discretion insofar as the dismissal could have been without prejudice.

This is not to concede that Mrs. Hunt concedes any dismissal (“with” *or* “without”) prejudice was warranted. She simply confirms her

position that the Trial Court's remarks reveal the Judge's inability to exercise discretion in this case.

To rebut Mrs. Hicklin's argument that the trial court's Order of Dismissal of April 24, 2018 was made pursuant to CR 12(e) and not pursuant to CR 12(b)(6) as Mrs. Hunt argues in pages 18-21 of her Opening Brief, Finding No. 5 of that order states:

"5. The pleadings that were the subject of the May 22, 2017 order are hereby struck (sic), as such Co-Trustee Doreen Hunt has failed to state a claim." (CP 110, Lines 5-6) (Emphasis Added)

Basing the Order of Dismissal on a phrase (and a finding) relevant only to a CR 12(b)(6) motion, not one based on CR 12(e) it's clear that "failing to state a claim" was the basis of the Order of Dismissal.

Accordingly, Mrs. Hicklin's arguments between pages 30 and 31 of her Brief are not pertinent to the order from which Mrs. Hunt has appealed. Therefore, Mrs. Hunt's argument, between pages 18 and 19 of her brief urging this Court to review the basis for dismissal, de novo, pursuant to the CR 12(b)(6) discussion in Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994) is proper. Cutler requires that the trial court presume that the allegations made in Mrs. Hunt's cross-claim are true. Judge Melly did not do so.

It is appropriate for Mrs. Hunt to formally challenge Finding No. 5, because Washington authorities are consistent in holding that unchallenged findings become verities on appeal. Nearing v. Golden State Food Corp., 114 Wn.2d 817, 818, 792 P.2d 500 (1990), Fisher v. Parkwood Properties, Inc., et al., 71 Wn.App. 468, 859 P.2d 77 (1993) Div. 2.

Mrs. Hicklin argues in her Brief (Page 32, Lines 1-2) that this court's review of the order of dismissal should be for abuse of discretion. Mrs. Hicklin then represents: "*Hunt agrees that granting a CR 12(e) motion is reviewed for an abuse of discretion,*" Appellant *never* agreed to what Respondent asserts here. In fact in Mrs. Hunt's brief, between pages 18 and 24, she makes multiple references to a number of cases decided under the CR 12 (b)(6) 'de novo' standard of review *because* the order being appealed was based upon a finding that she had "failed to state a claim," and nothing exists in the record to support Respondent's assertion (or the trial court's Finding No. 5) that Mrs. Hunt's cross-claims failed to state claims upon which relief could be granted.

Respondent next argues at Page 38 of her Brief that Mrs. Hunt's cross-claims included "conclusory allegations." She then asserts in the next paragraph that the Appellant shouldn't or couldn't have alleged that:

"Hicklin is the only party that has access to the Trust's Record, but the Trial Court *clearly held* that was not true." (Emphasis Added)

Had such a holding been made by the trial court, it would have been appropriate [and required of the writers of briefs pursuant to RAP 10.4(f)] to designate the page and part of the record which supports a citation to a trial court's holding. Respondent's failure to reveal where in the record below there exists a "clear holding" (particularly of such an essential assertion), not only violates RAP 10.4(f), but is troubling in that it has caused Mrs. Hunt to search the entire record below in order to state that no such holding exists.

Mrs. Hicklin then continues the argument that Appellant's pleadings "vaguely alleged breaches of fiduciary duty" or that they "appeared" to ask the trial court for relief under RCW 11.98.075 to void the action. These contentions are not accurate or supported by the record. Paragraphs 32. – 3.4 (CP 497) are anything but vague.

Further, Hunt's cross-claim requested that the trial court "void" any "action" despite what Respondent asserted in her pleadings "appeared to ask" for. This is just another example of Respondent's tendency to propose (or invent) an argument out of whole cloth to enable her to suggest that the Appellant claimed that:

"Hicklin's 2009 POA was used in some infamous manner, but she didn't come out and just say so." (Brief Page 38, Lines 8-9)

It may eventually become possible for the Appellant to argue there had been misuse of the Power of Attorney Mrs. Tuttle gave her daughter other than having used the power of attorney to sign the Trust's income tax returns (as Attorney-in-Fact for the trustee) (CP 366, 368 and 370) or having signed a check of FLP distributions (CP 349) when Anita Tuttle was the Limited Partner and Eric Anderson was her alternate. If the Appellant is given the opportunity to conduct discovery appropriate to her allegations, she may well find additional evidence Mrs. Hicklin committed multiple acts of the misuse of a personal power of attorney to engage in actions on behalf of various Tuttle Family entities before she had the authority to do so.

In the last sentence at page 38 of her Brief, Mrs. Hicklin states in her reply the sort of conclusory remark which may have convinced the Trial Court to disallow any discovery, and Order that the Appellant allege the sort of specific facts (which Hicklin of course denies exist) when she concludes her argument stating:

“Hunt’s ruse was identified and (the) Trial Court was correct in ending the litigation as it did.”

If there was a “ruse” and if it had been “identified,” the Respondent should have pointed to the record so her argument could be verified, but once again, she failed to do so.

In her arguments on page 39, Section 15 of her Brief, Mrs. Hicklin once again reveals the sort of conflict of interest Hunt alleged existed in Count IV of her cross claim against Mrs. Hicklin.

Respondent argues that Mrs. Hunt questioned whether all of the funds Mrs. Tuttle received while she administered the Trust constituted "income" rather than accumulation of "property." As noted below, Hicklin, as an Estate Beneficiary, stands to receive 90% of the income held in the Trust at the time of her mother's death but only 1/7th of any "property" held in the trust when her mother died. Acting as though she had the only voice on the matter, the Respondent states:

“. . . but Hunt erroneously claims there were assets, not income to the Trust.”

Taking that type of executive position concerning not an insignificant amount of money constitutes Hicklin's decision to "solely administer" the Trust following her mother's death. It also shows her refusal to recognize she has a conflict of interest in making important decisions about the trust without consulting the Co-Trustee or her alternate, that sort of action is a part of Hunt's cross-claim.

In the final paragraph of page 40 of her Brief, Respondent once again makes reference to this court's decision in the unreported decision in Cause No. 49669-1-II. Of course, both Respondent and her Counsel in this

appeal participated in Robert Tuttle, Jr.'s appeal of an order entered in Robert's case against Mrs. Hicklin.

Hicklin and her Attorney would have done well to read pages 10-14, Sections 2-5 of that Court's opinion in this case before arguing that "Hunt's true claims will be time barred." That statement reveals that Mrs. Hicklin refuses to recognize that in Case No. 49669-1-II this Court ruled that there can be no "link" between the various cases which have been brought in the Clallam County Superior Court between members of the Tuttle family. Given this Court's previous Opinion, Hicklin's argument in this section of her Brief is superfluous and irrelevant in the issues Mrs. Hunt raised below and in this Appeal.

In section 17 of the Respondent's Brief, she once again throws out the term "frivolous" in arguing that because the Trial Court's refusal to compel her to furnish discovery was done "without prejudice" her appeal of the May 24, 2017 order is somehow improper. This argument implies that an Appellant's ability to seek review of certain interlocutory orders of the trial court following an order of dismissal is limited for some stated reason. Mrs. Hicklin offers no authority for her proposition.

Incredibly, Respondent then reasons that "the Trial Court did not foreclose Hunt's ability to conduct discovery." These two arguments seem to be at the base of Mrs. Hicklin's claim that "Appellant's Brief is

frivolous.” Mrs. Hunt shouldn’t need to point out the obvious . . . The trial court’s Order of Dismissal absolutely foreclosed her ability to conduct discovery. The dismissal order is under appeal as is the trial court’s 2017 order denying Appellant’s ability to conduct discovery.

How or why the Respondent claims pages 26-39 of Appellant’s Brief are frivolous is never revealed, nor does Mrs. Hicklin cite any authority to the propositions she argues.

In what can only be termed wholesale speculation at page 41, Mrs. Hicklin’s Brief boldly asserts:

“Hunt’s tactic (was) to avoid stating what her claims were really about was to confuse the issues by arguing the CR 37 motion.”

Mrs. Hicklin’s Brief then veers off once again in page 41 where she claims that Mrs. Hunt’s discovery requests were “abusive.” No explanation or argument is given for that claim.

Mrs. Hunt’s Brief, at page 26, cites Matter of Firestorm 1991, 129 Wn.2d 130, 916 P.2d 711 (1996) for the proposition that under certain circumstances an Appellate Court can review discovery requests and CR 27(a) motions and orders denying or limiting discovery de novo. Mrs. Hicklin’s urges this court to review Mrs. Hicklin’s responses to Hunt’s Interrogatories and Requests for Production (CP 398-418), under an Abuse of Discretion Standard noting the nature of Mrs. Hicklin’s responses

(including the fifteen times Mrs. Hicklin based her refusals to answer or produce Trust documents barred on attorney-client privilege).

Mrs. Hunt asks this Court to fully review the discovery Mrs. Hunt sought below. Once such a review has been conducted, Mrs. Hunt asks this court to conduct a de novo review and either enter an Order directing Mrs. Hicklin to fully respond to the Discovery Mrs. Hunt propounded or include in its opinion to instruct the trial court to issue appropriate orders pursuant to its ruling on this appeal and consider the imposition of sanctions under CR 37(4).

E. WAIVER OF ATTORNEY-CLIENT PRIVILEGE

Mrs. Hunt devoted seven pages (Pages 33-39) of her Brief to the issue of whether, and under what circumstances, Mrs. Hicklin could decline to answer an interrogatory question or honor a request for production based on an assertion of attorney-client privilege. As discussed below, the Appellant arguments on the issue of attorney-client privilege in connection with discovery were extensive and wide-ranging.

Mrs. Hicklin's Brief devoted one paragraph to the issue Mrs. Hunt raised in her appeal. Respondent cited Court's Opinion in Dana v. Piper, 173 Wn.App. 761, 770, 295 P.3d (2013) for the proposition that Mrs. Hicklin did *not* waive attorney-client privilege. The Dana case did involve a discovery setting; however, there are significant distinctions between the

facts and issues this court addressed in that decision and the facts and issues presented in Mrs. Hunt's appeal.

Mrs. Hunt asks this court to rule only on the attorney-client privilege between the entity of the Robert E. Tuttle Jr. Trust and its counsel, but not the privilege between Patrician and Sydney Hicklin and their attorney.

In Dana case, this court approvingly cited Brundage v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 101 P.3d 879 (2008) quoting Advantor Capital Corp. v. Yeary, 136 F.3d 1259, 1267 (10th Cir. 1998) for the proposition that:

“whether facts on which a claim of waiver is based have been proved, is a question for the trier of the facts, but if those facts, if proved, amount to a waiver is a question of law.”

The watershed Washington case on the issue of waivers of privilege in the area of discovery is Pappas v. Holloway, 114 Wn.2d 198, 787 P.2d 30 (1990). Pappas also involved a de novo review of a claim of privilege in the setting of discovery. This Court, in conducting a de novo review of Hunt's assertions that Mrs. Hicklin's discovery responses and assertions of privilege violated the principle set out in Cedell v. Farmers Ins. Co. of Wash., 176 Wn.2d 686, 695, 295 P.3d (2013) that the scope of discovery is very broad. Hicklin violated that rule because her responses to Hunt's discovery request were constrained by multiple spurious objections and assertions of “privilege.”

The question here is whether Mrs. Hicklin has met the burden of persuasion in seeking to withhold documents or answer interrogatories, (Cedell at 696). Mrs. Hunt argues that she has not.

The facts Mrs. Hunt asks this court to consider in its de novo review of the issue of the waiver of privilege here include this following:

1. Co-Trustee Hicklin retained counsel *for the* Trust after first retaining the same counsel for herself and her spouse, all without any consultation with Co-Trustee. Doing so deprived Mrs. Hunt from objecting to the inherent conflict of interest. (CP 423, 11/26/2013; 12/12/2013; 1/5/2014)
2. Mrs. Hicklin elected to have one attorney defend the Trust in all the litigation it faced without consulting her Co-Trustee about the nature of the claims or the strategy the Trust could adopt. (CP 424, 3/4/2014, 3/25/2014, 4/7/2014, 4/30/2015)
3. Mrs. Hunt made multiple attempts to convince the Respondent to make joint decisions for matters concerning the trust. All were rebuked.
4. Unlike in Dana supra, Trust Counsel Seaman did not seek a protective order (see Dana at 760) to prevent disclosure of allegedly privileged information.⁶
5. Counsel for Mrs. Hicklin has filed thirty-two pages of Declarations and other pleadings in where he-alone-alleged the existence of *facts* which deny the validity of Mrs. Hunt's claims. No Declaration signed by Mrs. Hicklin were in the record before the trial.⁷

⁶ See: Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 718, 281 P.3d 119 (2011) and Richmark TFC, 959 F.2d 1468 (9th Cir. 1992). Those cases stand for proposition that objections *are* waived unless timely objection is made or a protective order is requested and Mrs. Hicklin did neither.

⁷ One declaration allegedly signed by Mrs. Hicklin was included in the Clerk's papers. It was dated several years before it was filed and it was filed after the dismissal. No explanation as to why it was not filed for several years has been given.

F. CONCLUSION

This Court should reverse the trial court's interlocutory order of May 22, 2017 as well as the Order for Dismissal of April 24, 2018 as well as the Order for Attorney Fees of July 21, 2018.

This Court, after reviewing de novo the issues raised by Mrs. Hunt on the issue of Mrs. Hicklin's refusal to furnish meaningful discovery, should include in its opinion what the trial court should require of her to furnish discovery, including the proposition of sanctions under CR 37(4).

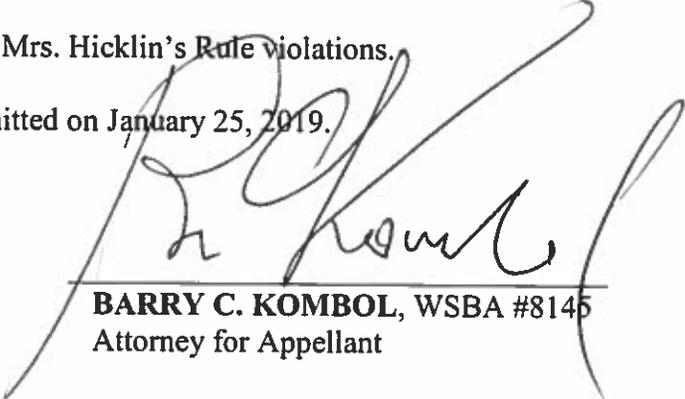
In addition, Mrs. Hunt requests this Court to include in its opinion that after its de novo review of the facts and circumstances of the Trust's assertion that it can assert attorney-client privilege as a basis not to answer Hunt's discovery requests *as to issues concerning the trust* that the Trust and Co-Trustee Hicklin failed to meet the burden of persuasion in asserting there existed attorney-client privilege in this case. In addition or alternatively, this Court should rule that the ability to assert the privileged was waived pursuant to the facts, authorities and arguments in this Brief.

Finally, Appellant asks this Court to review the issues she has raised in her reply concerning the multiple instances where Mrs. Hunt and her Counsel violated the requirement of RAP 10.4(f). Those failures as well as Respondent's continual references to facts and issues in dispute in cases and

causes of action which have almost nothing to do with the issues in Mrs. Hunt's appeal has required her to expend a considerable amount of time and effort in locating those parts of the record which Mrs. Hicklin did not identify by "page and part of the record." (RAP 10.4(f))

Appellant urges this Court, pursuant to RAP 18.9(a) to propose sanctions on the Respondent and/or her Counsel for the failure "to comply with these rules" which caused damages to Mrs. Hunt in the nature of fees incurred in dealing with Mrs. Hicklin's Rule violations.

Respectfully Submitted on January 25, 2019.



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 25th day of January, 2019, the Appellant's Reply Brief was placed in the **U.S. Mail, First Class, Postage Prepaid** to:

To: **Mr. Shane Seaman**
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Poulsbo, WA. 98370

To: **Mr. Patrick Irwin**
106 North Laurel Street
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To: **Mr. David Johnson**
804 South Oak Street
Port Angeles, WA. 98362

To: **Mr. Craig Miller**
711 East Front Street
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DATED this 25th day of January, 2019 in Black Diamond, Washington.


Susan Burnett

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