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State of Washington  
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No. 51953-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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JOHN CARVILLE, et al  
Appellant,

v.

JOHN RODIUS,  
Respondent.

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BRIEF OF RESPONDENT JOHN RODIUS

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## **I. INTRODUCTION**

Respondent, John Rodius (hereinafter “Rodius”) is a lifelong Forrester with over thirty five years of experience in the timber business. After a bench trial, Mr. Rodius was made whole after Appellant, Jon Carville (hereinafter “Carville”) was determined to have unlawfully interfered with Rodius’s right to access his timber excavator. Rodius spent over a year fighting to have his machine returned to him after losing significant sums of money due to the unlawful actions of Defendant Carville. At trial, the judge made specific findings and determined that Rodius was credible and Carville was not. No reconsideration is appropriate in this matter because the Court evaluated all relevant evidence and made its decision accordingly. This is a frivolous appeal because Rodius was simply made whole, and has not received a windfall in this matter. The trial court exercised appropriate discretion in determining Rodius’s losses, therefore this appeal should be dismissed as lacking merit.

## **II. ASSIGNMENTS OF ERROR**

### **Assignment of Error 1**

1. The trial court utilized the appropriate calculations to make Rodius whole as plaintiff and did not err in so doing. The judgment should be upheld.

### **Assignment of Error 2**

2. The trial court evaluated all relevant information at trial and determined a continuance was not necessary. The trial court did not abuse its discretion in this instance, therefore the judgment should stand and no new trial should be ordered.

## **III. STATEMENT OF THE CASE**

Rodius incorporates through reference the general outline of Carville's statement of the case. However, Rodius specifically objects to the argumentative recitation of facts in violation of RAP 10.3(a)(5) and requests those averions be stricken.

## **IV. ARGUMENT**

### **A. Standards of Review**

#### **1. Damages generally**

"Generally the appropriate measure of damages for a given cause of action is a question of law, reviewed de novo." *Womack v. Von Rardon*,

133 Wn. App. 254, 263, 135 P.3d 542 (2006) (citing *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843, 726 P.2d 8 (1986)); *Shoemake v. Ferrer*, 168 Wn. 2d 193, 198 (Wash. 2010). When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law. *Keever Assocs., Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). On appeal, the Court must review the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Dep't*, 123 Wn. App. 59, 65, 96 P.3d 460 (2004); *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555-56 (Wash. Ct. App. 2006).

After a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *City of Tacoma v. State*, 111 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Fred Hutchinson*

*Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). If that standard is satisfied, the appeals court will not substitute their judgment for that of the trial court even though they might have resolved disputed facts differently. *Sunny Side Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003) A respondent in a bench trial is "entitled to the benefit of all evidence and reasonable inference therefrom in support of the findings of fact entered by the trial court." *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 853, 792 P.2d 142 (1990) (internal citations omitted).

**2. Motion for Reconsideration.**

A ruling on a motion for reconsideration is within the discretion of the trial court and is reversible only for a manifest abuse of discretion. *Coggle v. Snow*, 56 Wn. App. 499, 504, 784 P.2d 554 (1990). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Owners v. Plateau*, 139 Wn. App. 743, 752 n.1 (Wash. Ct. App. 2007)

When reviewing a trial court's decision for abuse of discretion, the Court upholds the decision unless it is, " 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' " *In re Guardianship of Hays*, 176 Wash. App. 1009 (2013). A court makes a

manifestly unreasonable decision if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; a court bases its decision on untenable grounds if the record does not support the court's factual findings; a court bases its decision on untenable reasons if it uses an incorrect standard or the facts do not meet the correct standard's requirements. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995)).

In the case at bar, there is no indication the Court abused its discretion. Contrary to their unsupported assertions, Carville had adequate notice that Rodius was seeking to be made whole. Further, Rodius provided competent and clear evidence of his losses. Granting or refusing a new trial is entirely discretionary with the trial court, except where pure questions of law are involved, and action of lower court will not be interfered with unless abuse of discretion appears. *Danielson v. Carstens Packing Co.* (1921) 115 Wash. 516, 197 P. 617; *Potts v. Laos* (1948) 31 Wash. 2d 889, 200 P.2d 505; *Rettinger v. Bresnahan* (1953) 42 Wash.2d 631, 257 P.2d 633. Here, there is no question the trial court acted appropriately and within its discretion.

When raised on appeal, the court will not consider issues unsupported by citation to authority. *Valente v. Bailey*, 74 Wash.2d 857,

858, 447 P.2d 589 (1968); *Avellaneda v. State*, 167 Wash.App. 474, 485 n. 5, 273 P.3d 477 (2012). The courts do not consider conclusory arguments. *Joy v. Dep't of Labor & Indus.*, 170 Wash.App. 614, 629, 285 P.3d 187 (2012), *review denied*, 176 Wash.2d 1021, 297 P.3d 708 (2013). Passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review. *West v. Thurston County*, 168 Wash.App. 162, 187, 275 P.3d 1200 (2012); *Holland v. City of Tacoma*, 90 Wash.App. 533, 538, 954 P.2d 290 (1998).

**B. Washington is a notice pleading state. Carville was provided sufficient notice under all of the circumstances of this case. Rodius was merely made whole by the trial court after a sufficient finding of facts occurred.**

Washington is a notice pleading state. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-70, 98 P.3d 827 (2004) (quoting *Mollov v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) ("A civil complaint must 'apprise the defendant of the nature of the plaintiffs' claims and the legal grounds upon which the claims rest.' "). "While inexpert pleadings may survive a summary judgment motion, insufficient pleadings cannot." *Pac. Nw. Shooting Park Ass'n v. City of Seavim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). A simple concise statement of the claim and the relief sought is sufficient. *Id.* at 352; CR 8(a). Pleadings are liberally construed; their purpose is to facilitate a proper decision on the merits, "not to erect

formal and burdensome impediments to the litigation process." *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

In his *Complaint*, Rodius pled in the demand for relief for a judgment "awarding Plaintiff compensatory and general damages as may be proven at trial." CP at 3. Rodius also made a demand for "such other and further relief the Court deems proper and equitable". *Id.* Rodius pled multiple tort theories for the interference of his property and respectfully asked the court to put him in the same position had such actions not occurred. *Id.* at pg. 2-3. In Rodius's trial brief he made a request for the damages related to "loss of use" in the alternative to loss of business claims. CP at 29. The brief also stated Rodius would "provide compelling and conclusive evidence supporting the economic harm he suffered". *Id.* Even more compelling, Rodius claimed in his trial brief that he was entitled to "loss of use and/or unrealized profit". Almost conclusively, Rodius cited the following portion from *Potter*<sup>a</sup>:

"Generally, the measure of damages for conversion is the fair market value of the property converted. *Merchant*, 38 Wash.App. at 858, 690 P.2d 1192. An owner is also entitled to loss of use damages for the period of time during which the owner was wrongfully deprived of the converted property. *Dunn v. Guar. Inv. Co.*, 181 Wash. 245, 248, 42 P.2d 434 (1935). Finally, consequential damages may be available in some circumstances. *Dennis v. Southworth*, 2 Wash.App. 115, 124, 467 P.2d 330 (1970)

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<sup>a</sup> *Potter v. Washington State Patrol*, 165 Wn. 2d 67, 78 (2008).

(allowing damages for the loss of profits *or reasonable rental value of converted property*).” (Emphasis added).

*Id.* at pg. 30.

In Washington, " 'The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation.' . . . Simply stated, a plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act." *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 183, 828 P.2d 610 (1992). The plaintiff should be made whole without conferring a windfall. *Id.* at 180. When a plaintiff seeks prejudgment interest, the award should compensate "the plaintiff for the 'use value' of his damage amount from the time of loss to the date of judgment." *Matson v. Weidenkopf*, 101 Wn. App. 472, 485, 3 P.3d 805 (2000) (citing *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)) *Shoemake v. Ferrer*, 168 Wn. 2d 193, 198 (Wash. 2010).

In the case at bar, Rodius was made whole without conferring a windfall. Rodius properly obtained judgment for the lost rental value of his excavator. The basis of lost rental value as the calculation of damages was specifically testified to by Rodius and taken as a reasonable assessment in this case by the trial judge. Carville has purposefully mischaracterized the court's determination of damages. Rodius was made whole for the year

and a half he was deprived of access to his property. The trial court found rental value was the appropriate metric to quantify these damages. Further, the court made Rodius whole by ordering the return of his unlawfully detained property. Carville is clearly in error in asserting that Rodius received any kind of windfall.

Further, Rodius' attorney affirmatively identified the calculations for damages and the alternative metrics presented to evaluate the damages claimed. CP Exhibit 1 pg. 2-4. Mr. Rodius' attorney affirmatively articulated at least \$50,000 expended renting similar machines in mitigation of damages. *Id.* at pg. 3. Summarily, the court had sufficient evidence from Mr. Rodius' testimony to award damages. The record does not support the assertion that Mr. Carville was in any way prejudiced by an assessment of rental value for an award of damages.

**C. The Trial Court's Decision is supported by the testimony of Mr. Rodius who was deemed credible and has over thirty five years of experience in the applicable field of forestry.**

Carville erroneously claims Rodius cannot recover because of the election of remedies doctrine. However, this is inapplicable in the case at bar, because Rodius has only been made whole; he has not received a double recovery. *See Lange v. Town of Woodway*, 79 Wash.2d 45, 49, 483 P.2d 116 (1971) (adopting the election of remedies doctrine for "the sole purpose of preventing double redress for a single wrong"); *Rice v.*

*Janovich*, 109 Wash.2d 48, 61–62, 742 P.2d 1230 (1987) (holding that the trial court erred by giving jury instructions for both assault and outrage for the same conduct because it allowed for the possibility of double recovery); *Sherry v. Fin. Indem. Co.*, 160 Wash.2d 611, 621–22, 160 P.3d 31 (2007) (discussing rules designed to prevent double recovery in the context of an underinsured motorist). *Rekhter v. State*, 323 P.3d 1036, 1045 (Wash. 2014).

The concept of election of remedies is a rule of narrow scope, having the sole purpose of preventing double redress for a single wrong. *Barber v. Rochester*, 52 Wn.2d 691, 328 P.2d 711 (1958). Washington cases make it clear that three elements must be present before a party will be held bound by an election of remedies. Two or more remedies must exist at the time of the election; the remedies must be repugnant and inconsistent with each other; and the party to be bound must have chosen one of them. *McKown v. Driver*, 54 Wn.2d 46, 337 P.2d 1068 (1959); *In re Estate of Wilson*, 50 Wn.2d 840, 315 P.2d 287 (1957); *Barber v. Rochester, supra*; *Willis T. Batcheller, Inc. v. Welden Constr. Co.*, 9 Wn.2d 392, 115 P.2d 696 (1941); *Lord v. Wapato Irr. Co.*, 81 Wn. 561, 583, 142 P. 1172 (1914). *Lange v. Woodway*, 79 Wn. 2d 45, 49 (Wash. 1971).

At trial, Rodius testified that he has been working in the Timber industry for over 35 years. RP at 2. Rodius testified that eight percent of

his revenue a year was derived from the excavator at issue. *Id.* at pg. 6.

Rodius testified that due to the actions of Carville, he had to rent a similar excavator on no less than twelve occasions. *Id.* at pg. 30. Rodius testified that he lost at least five jobs which were lined up. *Id.* at pg. 27. Further, he testified that one job could run anywhere from forty to eighty thousand dollars per month. *Id.* at pg. 28. In the course of a year, Rodius competently judged he lost between two-hundred and fifty to three hundred thousand dollars in net revenue. *Id.* at pg. 33.

Upon rendering judgment, the trial court explicitly found that “Mr. Rodius was being truthful when he testified today, in all respects.” CP Exhibit 2 Pg. 2. “I did not have similar feeling after I watched and listened to Mr. Carville testify.” *Id.* The judge also explicitly found, “[T]hat part of the case is easy for me, and – because I made credibility determinations, and so it falls on the side of Mr. Rodius.” *Id.* at pg. 5.

For ease of assessment, the court stated,

“The law is pretty clear that there is more than one way of calculating damages for loss of use of a chattel, and one of those is the rental value of a similar chattel, in this case a similar piece of equipment. Mr. Rodius testified that he determined what it would cost to rent a 200 size machine, that was his testimony .200 size machine, that was unlawfully withheld from him, was a John Deere 200 size machine, and the number Mr. Rodius gave was \$12,000 a month. I accept that. I believe him, that that [sic] what would be what the rental cost would be.”

*Id.* at pg. 6.

As a general rule, damages for conversion of personal property are measured by the fair market value at the time of the conversion. *Anstine v. McWilliams*, 24 Wn.2d 230, 163 P.2d 816 (1945); *Hofreiter v. Schwabland*, 72 Wn. 314, 130 P. 364 (1913). However, under some circumstances, a party will be allowed consequential damages for a wrongful conversion in addition to the fair market value of the property. One case allowing the reasonable rental value was *Colorado Kenworth Corp v. Whitworth*, 144 Colo. 541, 357 P.2d 626 (1960). In that case, a truck was sold to plaintiff under a chattel mortgage and later wrongfully repossessed because of an alleged default in payment. When the court found that there had been no default, plaintiff was allowed both the value of the truck and its reasonable rental value. The Colorado court considered the known use of the vehicle for hauling freight and the fact that both parties were aware of the consequences of the taking at the time of the wrong.

In *Southworth*, as here, the plaintiff was unable to obtain a replacement tractor, because of his financial circumstances, and where defendant is made aware that consequential damages would commence at the time of the conversion, the trial court was justified in allowing consequential damages represented by the loss of profits or the reasonable

rental value of the equipment for a reasonable time. *See, Dennis v. Southworth*, 2 Wn. App. 115, 124-25 (Wash. Ct. App. 1970).

After determining that the fair market value of the tractor at the time of the conversion was \$6,950 in *Southworth*, the trial court determined that its fair rental value was \$1,200 per month. *Id.* at 125. This finding was based not only upon plaintiffs' testimony, but also upon that of the defendant, Mr. Southworth, who testified in support of his cross complaint. *Id.* The court allowed 5 months rental at \$1,200 per month.

The *Southworth* court found, since there was testimony that work was available for this type of tractor through the winter of 1966-1967, it could not be said as a matter of law that the court was in error in allowing the damages for 5 months. *Id.* at 125. Nor was the defendant's objection to the allowance of this item of damage sustained on the grounds that it was not pleaded. *Id.* Plaintiff had pleaded consequential damages because of loss of profits. There was found to be no abuse under those circumstances. *Id.* In fact the appeals court explicitly found, "The trial court must be commended for cutting through the morass of conflicting testimony and conflicting theories and reaching the merits of this controversy. Judgment affirmed." *Id.* In short, *Southworth* is inapposite to Carville's position.

Here, Mr. Rodius provided nearly identical testimony, and the court explicitly found his testimony credible. *Supra.* Based on Mr. Rodius'

decades of expertise, the court determined there was sufficient evidence to support a claim for lost rental value.

**D. The Trial Court did not err when it denied the request to continue the trial.**

A trial court's decision to grant or deny a continuance is reviewed for a manifest abuse of discretion. *State v. Adamski*, 111 Wash.2d 574, 761 P.2d 621 (1988). The Supreme Court has held that “[t]he unexcused absence of a subpoenaed witness at the time of trial is not good cause for a continuance ...” *Lewis*, 93 Wash.2d at 84, 605 P.2d 1265. Under a manifest abuse of discretion standard, “[t]he trial court's decision will be affirmed unless no reasonable judge would have reached the same conclusion.” *In re Marriage of Landry*, 103 Wash.2d 807, 809–10, 699 P.2d 214 (1985).

When Carville requested a continuance, the Court heard the offer of proof, considered the circumstances, and found there was insufficient cause to continue the trial. Such a decision is well within the purview of the trial court.

Further, it is not error to deny a new trial asked on grounds of absence of a witness, where his testimony would have been contradicted. *Lindblom v. Johnston* (1916) 92 Wash. 171, 158 P. 972. Here, the second witness would only have provided additional testimony which the court was not inclined to believe. It was not error to refuse new trial on account

of absence of witness where same facts could have been shown by other witnesses. *Mortimer v. Dirks* 57 Wash. 402, 107 P. 184 (1910). Under Washington Court rule, the trial court has broad authority to deny needlessly cumulative evidence. *See*, ER 403. Here, the court clearly found Mr. Carville's story was simply without merit. Mr. Carville's missing witness would simply had presented information already articulated by Mr. Carville himself. No abuse of discretion can be found by excluding this cumulative evidence. Thus, no abuse of discretion can be found in denying a request for new trial.

#### V. ATTORNEY FEES AND COSTS

Rodius affirmatively pleads attorney fees and costs on appeal. A prevailing party on appeal is entitled to costs and disbursements. RCW 4.84.030; *Cooper v. State Dep't of Labor & Indus.*, 188 Wash. App. 641, 651, 352 P.3d 189, 194 (2015). Further, Respondent is entitled to attorney's fees when opposing a frivolous action or defense. RCW 4.84.185. "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." *Skimming v. Boxer*, 119 Wash.App. 748, 756-57, 82 P.3d 707, review denied, 152 Wash.2d 1016, 101 P.3d 108 (2004). (*quoting Tiger Oil Corp. v. Dep't of Licensing*, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997)).

In the case at bar, Appellant Carville has failed to adequately brief issues on appeal. Carville has failed to support any rational argument based on the facts of this case or the governing law therein. Frivolous appeals on a summary judgment motion entitle respondent to attorney's fees. RCW 4.84.185. Award of attorney's fees is support by court rules and case law in this instance. RAP 18.1; *Stiles v. Kearney*, 168 Wash. App. 250, 267, 277 P.3d (2012).

## VI. CONCLUSION

In conclusion, Mr. Carville has failed to demonstrate a lack of substantial evidence at trial. Mr. Rodius proved his damages at trial, and the trial court explicitly found his claims credible. The Court did not abuse its discretion in denying the request for continuance made by Mr. Carville. Nor did the Court abuse its discretion in denying both the motion for reconsideration and a request for new trial. The issues raised by Mr. Carville lack merit, and the appeal should be summarily dismissed with an award of attorney fees and costs to Rodius.

Respectfully submitted this 16<sup>th</sup> day of November, 2018.



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C. Scott Kee, WSB#28173  
Attorney for Respondent John Rodius

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

James Parker  
Attorney at Law  
P.O. Box 700  
Hoquiam, WA 98550  
*Attorney for Appellant*  
*jim@hoquiamlaw.com*

*via email and U.S. Mail*

DATED at Olympia, Washington, this 16<sup>th</sup> day of November, 2018.

*Catherine Hitchman*  
Catherine Hitchman, paralegal  
Rodgers Kee Card & Strophy, P.S.

**RODGERS KEE & CARD, P.S.**

**November 16, 2018 - 1:17 PM**

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