71905-0

71905-0

NO. 71905-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SANDRA J. ARCHDALE,

Appellant/Cross-Respondent

vs.

SHARYL L. O'DANNE,

Respondent/Cross-Appellant

REPLY/RESPONSE BRIEF OF APPELLANT/COUNTERRESPONDENT

DENO MILLIKAN LAW FIRM, PLLC
By: JOEL P. NICHOLS
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ORIGINAL

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A. REPLY TO RESPONSE TO APPELLANT'S BRIEF

1. Archdale Clearly Identified Assignments Of Error

O'Danne's charge that Archdale failed to assign error to any Findings of Fact is specious. Archdale fully set forth in her brief, by paragraph and line, each factual finding to which she assigned error, and fully discussed the nature of her challenges in her brief.[1] Where the trial court made findings not specifically enumerated, Archdale also fully set forth her challenges to those findings.[2]

Not all of the trial court's findings are cleanly enumerated or separated from its conclusions of law. See CP 151-154. Regardless, failure to cite paragraph numbers of enumerated findings to which the appellant assigns error is not fatal to the appeal. Minor technical violations of RAP 10.3(g) do not bar review where the nature of the challenges is perfectly clear and the challenged rulings are set forth and fully discussed in the appellate brief. Polygon Nw. Co. v. Am. Nat. Fire Ins. Co., 143 Wn.App. 753, 774, 189 P.3d 777, 788 (2008) (fn.6), citing Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn.App. 609, 614, 1 P.3d 579 (2000). Further, where the nature of challenged findings is clear, the appellate court may consider the merits of the challenges

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[1] See Brief of Appellant at pp. 3-4.

[2] *Id.*

regardless of whether whether the findings are separately identified or referenced by number in the appellant's brief. State v. Estrella, 115 Wn.2d 350, 355, 798 P.2d 289, 291 (1990).

2. Because O'Danne Admitted the Parties Had No Agreement as to When Archdale Would Pay Off the Underlying Mortgage, the Trial Court Abused its Discretion in Failing to Quiet Title to Archdale.

Contrary to Respondent's argument,[3] the trial court's finding that Archdale promised to pay off the underlying mortgage as soon "as she received her inheritance" is not supported by substantial evidence. To the contrary, O'Danne admitted the parties had no agreement as to when Archdale would pay off the underlying mortgage.[4] O'Danne's "understanding" or belief that Archdale would "quickly" pay off the debt with her inheritance[5] is not the same as a promise from Archdale to do so. O'Danne's concession on direct testimony that the parties had no agreement as to when Archdale would pay off the debt is substantial evidence that Archdale did not make a promise to pay it off as soon as she received her inheritance. O'Danne's testimony is also consistent with her November 20, 2008 representation to Archdale's then counsel that the

[3] See Respondent's Brief at 6.

[4] See November 13, 2013 VR 17:9-19.

[5] See Respondent's Brief at 7.

parties agreed Archdale would obtain financing to pay off the mortgage, not pay it off with her inheritance:

> The main deal was struck and she was to make sure to pay all mortgages, and etc [sic] to the condo. She was also to finance it in her own name as soon as she could[.] [...]She was also told at the time of the signing that if she missed one payment she would be asked to leave the condo. [sic] That I could not afford to make her payments for her. To her credit she has kept up with this part. That is not the issue.[6]

In light of the substantial evidence presented at trial, the trial court erred in finding that Archdale promised to pay off the underlying mortgage "as soon as she received her inheritance" and abused its discretion in refusing to quiet title in Archdale based on that erroneous finding.

3. The Trial Court's Finding that Archdale "Refused" to Use Funds from Her Inheritance to Pay Off the Mortgage, and Did so in Bad Faith, is Not Supported by Substantial Evidence.

The trial court's finding that Archdale "refused" to pay off the mortgage when she received the inheritance funds assumes Archdale agreed to do so. In addition to O'Danne's testimony outlined above that there was no agreement as to when Archdale would pay off the mortgage, Archdale testified she needed the inheritance funds to live on, and she

[6] Exhibit 21, ¶4.

decided to go ahead and make the monthly mortgage payments.[7] Further, Archdale had not received all the inheritance funds from her mother's estate.[8] Finally, Archdale's statement to O'Danne in a March 2004 email that she would use her inheritance to pay off a loan was in reference to a potential promissory note on a different property she did not purchase. VRP 159:6 - 160:20, and at 162:10-17. Substantial evidence in the record shows the parties did not have an agreement as to when Archdale would pay off the mortgage on the Condo that is the subject matter of this litigation, and Archdale had good faith reasons for not using her inheritance funds to do so when she received those funds.

4. Respondent Erroneously Characterizes the Trial Court's "Simultaneous Payoff" Finding as a Failure to Find O'Danne Refused to Convey Title Absent a Simultaneous Payoff.

O'Danne cites REI v. World Wrapps Northwest, Inc., 165 Wn.App. 353, 266 P.3d 924 (2011) in claiming Archdale's "failure" to obtain a finding that O'Danne refused to convey title in the Condo to Archdale in exchange for a payoff of the mortgage precludes her from arguing against the court's finding that O'Danne was willing to do so.[9] O'Danne's argument confuses the issue. Archdale argues the trial court erred in

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[7] November 13, 2013 VRP 122:1-13.

[8] *Id.* at 122:13-14.

[9] See Respondent's Brief at pp. 8-9.

finding O'Danne was willing to convey upon a simultaneous payoff,[10] not that the court erred in failing to make a finding that O'Danne refused to do so. Archdale clearly challenged the court's finding on the "simultaneous payoff" issue and is entitled to argue why she believes the court's finding is not supported by substantial evidence. *See* Polygon Nw. Co, *supra*, 143 Wn.App. at 774.

5. O'Danne's Pro Se Status Does Not Excuse Her Intransigence.

O'Danne implies her *pro se* status should militate against any argument that she was ever unwilling to convey title to the Condo to Archdale.[11] That O'Danne was unrepresented when she took the erroneous position that a court order prohibited transfer of the Condo's title[12] is no excuse for her obstinacy. Indeed, O'Danne's intransigence continued when she was represented by counsel who suggested to Ms. Archdale at the end of the Franzen Estate trial that she file a legal action to quiet title to the Condo. VR at 126:6-17.

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[10] See Appellant's Brief at p. 3 (Assignment of Error 5 - April 4, 2014 Finding of Fact ¶2), and at pp. 12 - 18, 23 - 24.

[11] See Respondent's Brief at 9, and see Rebuttal Declaration of Sharyl L O'Danne in Reply to Response to Motion for Attorney's Fees, attached hereto as Appendix A and filed contemporaneously with this brief as as a supplement to Petitioner's Designation of Clerk's Papers, pursuant to RAP 9.6(a).

[12] See Exhibit 21, p.2.

6. The Finding of a Constructive Trust Does Not Require an Immediate Conveyance, and Archdale Did Not Seek Such Relief.

Contrary to O'Danne's argument,[13] Archdale did not seek an immediate conveyance without obligation to pay the underlying mortgage. Rather, she sought relief in the form of a constructive trust requiring O'Danne to convey title *subject to encumbrances.*[14] The court abused its discretion in refusing to quiet title in the condo to Archdale, subject to Archdale paying the underlying mortgage.[15]

7. The Terms of the Constructive Trust Imposed by the Court Did Not Do Substantial Justice to Archdale.

Contrary to O'Danne's argument,[16] the terms of the constructive trust imposed by the trial court are unjust to Archdale. The court's action circumvents O'Danne's equitable duty to convey title to Archdale upon Archdale paying the underlying mortgage and instead forces Archdale to sell the Condo within six months, and provides unjust enrichment to O'Danne in granting her 25% of the net proceeds of any sale. CP 153.

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[13] See Respondent's Brief at 11.

[14] CP at 300:6-8, 301:19-23, at 302:15-18.

[15] See Brief of Appellant at 7-10.

[16] See Respondent's Brief at 15 - 18.

8. The Court Abused its Discretion in Finding Archdale's Suit Frivolous and in Awarding Fees and Costs on That Basis.

Contrary to O'Danne's argument,[17] Archdale's argument against the trial court's finding of a "frivolous action" is not merely based on the fact that the court found clear, cogent, and convincing evidence of a constructive trust. It is also based on the fact that she had a statutory right to file the action based on her superior title under RCW 7.28.120 (CP 302:1-3), and on the fact that O'Danne's intransigence made it necessary.[18]

Regardless, the trial court based its "frivolous action" finding on the wrong legal standard - its belief that the relief Archdale sought "was largely not granted to her and that she could have obtained relief without coming to court."[19] *See* Wright v. Dave Johnson Ins. Inc., 167 Wn.App. 758, 787, 275 P.3d 339, 355-56 review denied, 175 Wn.2d 1008, 285 P.3d 885 (2012). Because Archdale's claim for a constructive trust advanced to trial and evidence supported her claims, it cannot be said her action was entirely frivolous. *Id.* Therefore, the trial court abused its discretion in awarding O'Danne's attorney's fees and costs under RCW 4.84.185.

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[17] See Respondent's Brief at 20.

[18] See Appellant's Brief at 15-18.

[19] March 10, 2014 VRP 19:6-23.

Likewise, O'Danne is not entitled to attorney's fees and costs on appeal under RCW 4.84.185.

B. RESPONSE TO RESPONDENT/CROSS APPELLANT'S BRIEF

1. O'Danne Opened the Door for Evidence of Her Refusal to Convey Title Absent a Payoff of a Separate Judgment.

O'Danne reserved her right to argue, and did argue, that Archdale's action was frivolous based, in part, on O'Danne's claim that she was always willing, before and throughout this litigation, to convey title to the Condo upon a simultaneous payoff by Archdale of the underlying mortgage. Further, O'Danne opened the door for Archdale to present evidence to rebut O'Danne's post-trial claim that O'Danne had "always been willing to convey [title to the Condo] upon a release from the mortgage."[20]

The trial court granted O'Danne's motion for reconsideration of the trial court's original determination that Archdale's action was not frivolous. CP 129-130. The trial court did so, in part, based on O'Danne's argument that such a determination required a post-trial evidentiary hearing. CP 140-143. At that evidentiary hearing, O'Danne presented evidence and argument that she was always willing to convey title. CP

[20] See CP at 126:9-14.

123-128. When Archdale presented evidence to the contrary, O'Danne cried foul, claiming Archdale's evidence violated ER 408's prohibition against offering evidence of settlement negotiations to prove liability for or invalidity of a claim. Defendant's CP at 314.

ER 408 provides as follows:

> In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ER 408.

Archdale did not offer the evidence to prove liability for or invalidity of a claim. Rather, she offered it to negate O'Danne's contention that she remained willing throughout this litigation to convey title upon a simultaneous payoff of the underlying mortgage. Even if the evidence were being offered by Archdale to prove liability for or invalidity of a claim, O'Danne opened the door by offering evidence of her "willingness" to convey title upon a payoff by Archdale. It is disingenuous for O'Danne

to repeatedly assert she offered to convey title upon a simultaneous payoff then argue Archdale is prohibited by ER 408 to present evidence to rebut her assertion.

Interestingly, when Archdale objected at trial under ER 408 to the admissibility of a letter drafted by O'Danne that contained reference to settlement discussions between the parties, O'Danne argued the letter's contents 1) were simply a "physical manifestation that she made an offer" 2) having "independent evidentiary value" and 3) contained a "statement" in defense of Archdale's Complaint. In arguing for the document's admission, O'Danne articulated the limited purpose behind ER 408, and that the document was not being offered to show liability.[21] It is disingenuous for O'Danne to argue ER 408 precludes Archdale from presenting evidence in a post-trial evidentiary hearing to rebut O'Danne's professed willingness to transfer title when she argued at trial that her "offer" to do so was nothing more than putting Archdale on notice of her intent.

2. The Trial Court Did Not Abuse its Discretion in Denying O'Danne's Motions for Order Shortening Time and to Strike.

In her Reply to Archdale's Response to O'Danne's Motion for Award of Attorney's Fees, O'Danne included a Motion to Strike portions

[21] October 10, 2013 VRP at 19:20 - 22:7.

of Archdale's Response. CP 316-323. Her Motion to Strike was based on CR 12(f). The court properly denied O'Danne's Motion to Strike because O'Danne failed to comply with the requirements of SCLCR 7 and CR 6. Even if the court erred in denying O'Danne's motion, such error was harmless, as O'Danne's motion was without merit.[22]

SCLCR 7(b)(2)(D)(10)(D) provides as follows:

> (D) Shortening time. Before taking any action on less notice than that required by this or any other rule, a party must present a motion and affidavit, and must obtain an order to shorten time. The documents may be presented ex parte if the motion contains a written certification that the other parties pro se or attorneys were notified of the time and place of the hearing requesting the order shortening time.

CR 6 provides, in pertinent part,

> **(d) For Motions--Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

CR 6(d).

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[22] See §B.1., *infra.*

O'Danne served her Motion to Strike on Archdale one court day before the date she wished the court to consider it. CP 316. Under CR 6(d), the only way O'Danne's motion could be heard on less than 5 days' notice would be for her to have obtained an order shortening time, which she did not do. O'Danne also could have moved to continue the hearing on the merits, but chose not to do so. Therefore, the trial court properly denied the Motion to Strike and proceeded to rule on O'Danne's Motion for Attorney's Fees based on the pleadings timely filed, and on the argument of counsel.

O'Danne's counsel faults Archdale's counsel for "failing" to use his time on one court day's notice to respond to O'Danne's untimely motion to strike. CP at 307. Putting aside O'Danne's counsel's inadmissible and inappropriate hearsay testimony regarding her communication with Archdale's counsel on the issue,[23] O'Danne attempts to shift the blame to Archdale's counsel for her failure to obtain an order shortening time or to continue the hearing on the merits. Even if Archdale's counsel had spent the intervening weekend between receipt of O'Danne's Motion to Strike, and the hearing on the merits of her Motion for Attorney's Fees, the court would not have had time to review the materials and would have been well within its discretion not to consider them. SCLCR 7(b)(2)(C).

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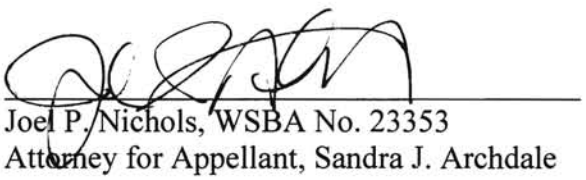
[23] CP at 307:11-23.

Even if O'Danne properly followed the court rules on shortening time, there was no basis for her motion under CR 12(f). Although CR 12(f) provides that a motion to strike may be made within 20 days after the service of a pleading, that rule does not provide an exception to CR 6(d)'s 5-day service and notice requirement. Additionally, CR 12(f) relates to defenses and objections in initial pleadings, and only applies to motions to strike "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." CR 12(f). CR 12(f) is inapplicable to Archdale's response to O'Danne's post-trial motion for attorney's fees. Therefore, even if it were error for the court to deny O'Danne's Motion to Strike as untimely, such error would be harmless.

RESPECTFULLY SUBMITTED this 25 day of November, 2014.

DENO MILLIKAN LAW FIRM, PLLC



Joel P. Nichols, WSBA No. 23353
Attorney for Appellant, Sandra J. Archdale

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF SNOHOMISH)

Leigh Snyder, being first duly sworn on oath, deposes and states: On the 25th day of November, 2014, I caused to be served by legal messenger, the following: **Appellant's Reply/Response Brief**

to the following:

Office of the Clerk
Court of Appeals, Division I
600 University Street
One Union Square
Seattle, WA 98101-4170

And to:

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SIGNED AND SWORN to before me this 25th day of November, 2014.

DENECIA R. EVANS NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 5-27-17

NOTARY PUBLIC
Printed Name: Denecia R. Evans
In and For the State of Washington
Residing at: Olympia
My Commission Expires: 5/27/17

APPENDIX A

RAP 10.3

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

SANDRA J. ARCHDALE, as her separate estate, Plaintiff, vs. SHARYL L. O'DANNE, a single individual, Defendant.	NO. 10-2-05325-3 REBUTTAL DECLARATION OF SHARYL L. O'DANNE IN REPLY TO RESPONSE TO MOTION FOR ATTORNEYS' FEES SENT ON MARCH 7, 2014, TO LORNA S. CORRIGAN *VIA* FAX FOR FILING IN COURT AFFIDAVIT MADE PURSUANT TO GR 17

I, SHARYL L. O'DANNE, declare under the penalty of perjury of the laws of the State of Washington that the following statements are true and correct according to my best knowledge and information:

1. ARCHDALE now asserts in a last-ditch effort to explain why she sued me and obtained only the relief she could have had all along and that the suit was necessary because I refused to convey. She cites my letters to Larry Trivett of November 20, 2008, *see* Exhibit 3 to NICHOLS Declaration, and to attorney Ryan Sternoff of June 14, 2010. *Id.* at Exhibit 4. I had been represented in the Estate litigation in which I obtained my sister's removal as Personal Representative due to her financial misconduct, but that matter was no longer active for my purposes. I was not represented at the time of those letters with respect to the conflict over the condominium. I therefore interpreted the court's order of March, 2007, in the Estate litigation, which barred a transfer of the condo without the consent of all counsel as best I could. What is most important, however, is that I steadfastly

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OPPOSING COUNSEL

communicated to my sister, personally or through her three ensuing attorneys, that I just wanted out. I would convey to her as soon as she could pay off the mortgage, by whatever means. She never at any time attempted to do so before filing suit. For example, she never tendered a purchase and sale agreement to me.

2. Although in the course of the Estate litigation where the issue of equitable versus legal title to the condominium first arose, we sought an opportunity to negotiate a means of placing title in Sandra's name so that she could seek financing, *see* Order of May 11, 2002, in Franzen Estate, attached as Exhibit 1 to NICHOLS Declaration, at ¶ 4, we were never able to come up with an acceptable plan. My concern was that I would lose all control of the deed if it were placed in escrow, because it would be in Sandra's name. If she were not able to obtain a refinance, I would have no means of returning title to my name, and hence no means of protecting against liability on the underlying mortgage should Sandra default. What seemed like a good at the time of the Order simply could not be worked out.

Executed at Winlock, Washington, this 7TH day of March, 2014.

Sharyl L O'Danne

SHARYL L. O'DANNE

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SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

SANDRA J. ARCHDALE, as her separate estate,

Plaintiff,

vs.

SHARYL L. O'DANNE, a single individual,

Defendant.

NO. 10-2-05325-3

AFFIDAVIT MADE PURSUANT TO GR 17

STATE OF WASHINGTON)
) SS.
COUNTY OF SNOHOMISH)

LORNA S. CORRIGAN, being first duly sworn on oath, deposes and states:

That I am the individual signing this Affidavit and filing the Declaration of Sharyl O'Danne In Reply to Response to Motion for Attorneys' Fees, dated March 7, 2014, and have examined the document and concluded that it consists of 2 pages, including exhibits thereto????? and this Affidavit, and that it is complete and legible.

LORNA S. CORRIGAN

SUBSCRIBED AND SWORN TO before me this 7th day of March, 2014.

VALETA G. KING, NOTARY PUBLIC in and for the State of Washington.
My commission expires: 5/4/16

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Received Time Mar. 7. 2014 11:19AM No. 1086

APPENDIX C

West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.28. Ejectment, Quieting Title (Refs & Annos)

West's RCWA 7.28.120

7.28.120. Pleadings--Superior title prevails

Effective: July 22, 2011
Currentness

The plaintiff in such action shall set forth in his or her complaint the nature of his or her estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had.

Credits
[2011 c 336 § 172, eff. July 22, 2011; Code 1881 § 538; 1879 p 134 § 2; 1877 p 113 § 542; 1869 p 128 § 490; RRS § 793.]

Notes of Decisions (120)

West's RCWA 7.28.120, WA ST 7.28.120
Current with all 2014 Legislation

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APPENDIX D

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.84. Costs (Refs & Annos)

West's RCWA 4.84.185

4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

Currentness

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

Credits
[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

Notes of Decisions (167)

West's RCWA 4.84.185, WA ST 4.84.185
Current with all 2014 Legislation

End of Document

APPENDIX E

ER 408

COMPROMISE AND OFFERS TO COMPROMISE

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

APPENDIX F

CR 12

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the courts own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

APPENDIX G

SCLCR 7(b)(2)

(C) Late Filing; Term. Any material offered at a time later than required by this rule may be stricken by the court and not considered. If the court decides to allow the late filing and consider the materials, the court may continue the matter or impose other appropriate remedies including terms, or both.