

DOCKET NO. 37382-3-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

ROBERT M. HOUGH,

Appellant,

vs.

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

Respondents.

AMENDED BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A) *Assignments of Error*

1. The court erred in submitting the case to the jury based upon erroneous jury instructions.
2. The jury verdict is not supported by substantial evidence.
3. The court erred in ignoring PLCR 5 and the court's scheduling order in allowing witnesses that were not disclosed as experts to extensively testify to their expert opinions.
4. The court erred in denying Mr. Hough's CR 12 (e) motion for a more definite and certain statement in the pleadings.
5. The trial court erred when it refused to dismiss an unfit juror.
6. The court erred in assessing sanctions against Mr. Hough pursuant to CR 11 and RCW 4.84.
7. The court erred in awarding the Stockbridges attorney fees and costs pursuant to MAR 7.3.
8. The court erred in ordering post judgment interest on a tort case to be calculated at 12% per annum when the statutory rate was 5.296% at the time of the entry of the judgment.

B) **Issues Pertaining to Assignments of Error**

1. Did the court err in failing to instruct the jury that to sustain an "abuse of process" claim the Stockbridges were required to

- prove that Mr. Hough used formal process as a form of extortion to improperly gain a collateral advantage not within the purview of the case?..... 15
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after January 2003 the case was devoted to Mr. Hough defending against the Stockbridges' counterclaim of malicious prosecution for which there were never any facts to support and on an abuse of process claim that was very poorly pled and further where all of the Stockbridges' grievances, if any, could have and should have then been addressed via timely request for sanctions based upon a CR 11 motion?..... 29

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II. STATEMENT OF FACTS

This case went to jury trial on the Stockbridges' counterclaim of abuse of process. That was the only issue.

The Stockbridges' pleadings started with their Answer and Affirmative Defenses dated August 27, 2001. No counterclaims were

asserted therein. CP 71-6. The prayer for relief section of that pleading contained the prayer:

3. That Plaintiff's claim against Defendants be dismissed immediately based upon the fact Plaintiff's claim is not within the limits prescribed by civil rules, this matter has already been before the Pierce County Small Claims Court and been dismissed and that Plaintiff is abusing the superior court, and wasting the superior court's time.

CP 75-6.

On January 31, 2001, Stockbridges filed an Answer to the Amended Complaint. CP 80-3. This pleading designated a counterclaim based on the theory of "malicious prosecution" as follows:

1. That Plaintiff instituted this action without probable cause and with malice, and the Defendants have incurred costs and legal fees in defending against the malicious prosecution.

Under the title "Request for Judgment" the Answer to the Amended Complaint states as follows:

Defendants request that judgment be entered as follows:

2. Awarding Defendants damages on their counterclaim for malicious prosecution.

On May 9, 2002, the Stockbridges filed an Answer to the Second Amended Complaint. CP 84-9. There, for the first time, they asserted the affirmative defense of "absolute privilege" for any of Mr. Hough's slander claims against them that were based upon statements they had

made in any prior court proceedings. CP 87. The Stockbridges again counterclaimed under a malicious prosecution theory and requested pecuniary relief as follows:

III. COUNTERCLAIM

7.3 That judgment should be rendered in favor of Defendants and against the Plaintiffs for the emotional distress involved in being involved in a claim which clearly attempts to punish the Defendants for exercising their legal right to seek redress in the courts.

7.4 That damages should be awarded to Defendants for malicious prosecution as well as for defending under circumstances which demonstrate that this action is not warranted by existing law and as such violative of CR 11.

7.5 That Plaintiff's actions have been conducted for purposes of harassment, to cause unnecessary delay, or needlessly increasing the costs of litigation.

The Request for Judgment in this pleading asked for Mr. Hough's case to be dismissed "with prejudice and without an award of costs." And, "[A]warding Defendants damages on their counterclaim for malicious prosecution in an amount to be established at trial." CP 88.

For the remainder of the case, no further formal pleadings (opposed to motions) were filed by either party.

On May 9, 2002, Stockbridges filed CR 12(b)(6) motions to dismiss, which resulted in the Honorable Judge Van Deren dismissing all of Mr. Hough's claims except those that pertained to the assertions that the

Stockbridges had defamed Mr. Hough to friends, neighbors, etc. RP (June 7, 2002). In that June 7, 2002, hearing Judge Van Deren denied Stockbridges' motion for sanctions noting that it took a very long time for the Stockbridges to assert the "absolute privilege" affirmative defense. Judge Van Deren stated that she did not "... find any fault on his (Hough's) part for asserting this case." RP (June 7, 2002), p. 18.

On January 31, 2003, the Honorable Judge Feltnagle imposed sanctions against Mr. Hough in the amount of \$987.00 and dismissed Hough's remaining claim, with prejudice, pursuant to CR 37. CP 387.

Consequently, after January 31, 2003, the only clear claim that remained was the malicious prosecution claim raised by the Stockbridges in their counterclaims. From that date forward, the Stockbridges were the Plaintiffs in fact and Mr. Hough became the de facto Defendant.

The case went through arbitration pursuant to the MARs. The arbitrator awarded the Stockbridges \$5,000 in damages and \$20,315.00 for attorney fees. On July 21, 2003, Hough filed a request for trial de novo. CP 394.

On February 20, 2004, Mr. Hough moved for a summary judgment and noted the matter for hearing on March 19, 2004. On March 2, 2004,

the Stockbridges filed a cross motion for summary judgment. On March 19, 2004, both summary judgment motions were heard. There the Honorable Judge Nelson granted Hough's motion for summary judgment on Stockbridges' claims of "malicious prosecution" and those claims were dismissed. Stockbridges' motion for summary judgment was denied CP 345-9.

On March 19, 2004, over Mr. Hough's objections, the court sua sponte improperly canceled the jury trial and decided that the case would be tried to the bench. The resulting bench trial began on March 22, 2004. Despite the fact that the Stockbridges were the de facto Plaintiffs, the court required that Mr. Hough present his defense evidence prior to the Stockbridges presenting any evidence or even an opening statement. Mr. Hough subsequently appealed the trial court's adverse judgment. *Hough v. Stockbridge*, (unpublished) 129 Wn. App. 1037, 2005 WL 2363795, 8 (Div. 2, 2005). This Court of Appeals reluctantly (given the taxing nature of this case on all involved) reversed the trial court's judgments against Mr. Hough because of the trial court's basic and egregious errors.

The Stockbridges' final counterclaim pleadings were filed in May of 2002. Ex 6. Thereafter, it became apparent that the Stockbridges were seeking relief based upon facts and events that occurred after that date. Therefore, it was equally apparent that the Stockbridges' counterclaim did

not put Mr. Hough on fair notice of the basic facts upon which they based their claim for relief. To rectify this lack of sufficient notice pleading, on September 5, 2007 Mr. Hough filed a motion for a more definite statement pursuant to CR 12(e). CP 55-7. That motion was denied. CP 142-3.

Other than Mr. Hough's summons and complaint (as later amended), Mr. Hough did not initiate any formal "process" as that term is technically defined (a pleading such as a summons, mandate or writ to exercise its authority over a person or property). All of the motions he filed and responded to were within the purview of the case. Some of his motions were granted, some were denied. Likewise, some of the Stockbridges' motions were granted and some were denied.

The case went to jury trial. Prior to trial, pursuant to PCLR 5 and the trial court's scheduling order, the Stockbridges disclosed attorneys Scott Candoo and Lafcadio Darling as lay witnesses only. CP 388-91. During trial, over Mr. Hough's objections and contrary to the mandates of PCLR 5 applicable to expert witnesses, Mr. Candoo and Mr. Darling testified extensively regarding their respective expert opinions. (For citation to the TRP, please see page 22 below).

Further, over Mr. Hough's objection, the jury instructions did not include any instruction that to prevail on the abuse of process claim the Stockbridges had the burden of proving that Mr. Hough used formal

process as a form of extortion to achieve some collateral advantage outside the purview of the case. CP 299 - 320.

Despite the lack of any evidence that Mr. Hough initiated any process as a form of extortion to achieve a collateral advantage outside the purview of the case, the jury found Mr. Hough liable of abuse of process and awarded the Stockbridges damages in the amount of \$200,500.00. CP 323.

After trial, the Stockbridges moved for sanctions under CR 11 and RCW 4.84.185 and an award of attorney fees pursuant to MAR 7.3. CP 324-38. In an order separate from the trial judgment, the court ordered sanctions against Hough in the sum of \$40,844.50. CP 371. The court further awarded post judgment interest to be calculated at the rate of 12% per annum irrespective of the RCW 4.56.110(3) statutory limitations on tort post judgment interest rates.

For the reasons set forth below, Mr. Hough asks this court to vacate a jury verdict and reverse the Trial Court's judgment.

III. ARGUMENT

Abuse of process defined.

Abuse of process is the misuse or misapplication of the process, after the initiation of the legal proceeding, for an end other than that which the process was designed to accomplish. To prove the tort of abuse of process, the party must show both "(1) the existence of an ulterior

purpose to accomplish an object not within the proper scope of the process, and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings.” But the “mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process.”

Saldivar v. Momah, 145 Wn. App. 365 186 P.3d 1117, 1130 (2008) (citations omitted).

Abuse of process is further defined as:

One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wn.2d 800, 806, 699 P.2d 217, 220 (1985) quoting Restatement (Second) of Torts § 682, at 474 (1977).

The Restatement of Torts addresses the significance of the “primary purpose” requirement:

The significance of th[e] word [“primarily”] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant.

Restatement (Second) of Torts § 682 cmt. b (1977).

Thus, claimants must not only present evidence that the defendant used court process for a primarily improper purpose, they must also show that, in using the court process, the defendant took an action that could not

logically be explained without reference to the defendant's improper motives.

“Abuse of process” is not just the misuse of process - no matter how vexatious, reprehensible, extensive or severe that misuse might be. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 699-700, 82 P.3d 1199, 1217 (2004); *Fite v. Lee*, 11 Wn. App. 21, 32, 521 P.2d 964, 970 (1974). And, it is clear that the requisite improper acts for abuse of process cannot even be inferred from motive. *Batten v. Abrams*, 28 Wn. App. 737, 744-747, 626 P.2d 984, 988 - 9 (1981).

A claim of abuse of process must be based upon the use of “process” as that word and concept is technically defined. “An element which is implicit in both of these definitions is that the defendant must have employed some “process,” in the *technical sense of the term.*” *Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union*, 44 103 Wn.2d 800, 806, 699 P.2d 217, 220 (1985) (*italic added*). The technical term of “process” must then be distinguished from a more general use of the term meaning to refer to the whole course of proceedings in a legal action.

The technical definition of “process” is the methods used by a court, such as a summons, mandate or writ to exercise its authority over a person or property. “Process” is the pleadings used to “acquire or exercise

its jurisdiction over a person or specific property” *Black's Law Dictionary* 1084 (5th ed.1979).

Therefore, a party’s use of the general discovery or the motion practice rules, however motivated and no matter how offensive, cannot be the basis of an abuse of process tort claim because the related documents used in those proceedings are not “process”.

A claimant must also present evidence that the defendant committed a specific willful use of process that it is “...not proper in the regular conduct of the proceedings.” *Mark v. Williams*, 45 Wn. App. 182, 191, 724 P.2d 428, review denied, 107 Wn.2d 1015 (1986).

Accordingly, a generalized allegation that a defendant has misused the process as a whole cannot support a claim of abuse of process. The claim must be based upon a specific use of “process” act. Therefore, the claim must be based on something more than an opposing party’s mere stubborn, vigorous persistence in the litigation even where the conduct is combined hostile ill will, the intent to harass and increase litigation expenses and where the defending party has made groundless and false allegations. *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008).

Consequently, to prove abuse of process, the Stockbridges were required to prove that Mr. Hough used legal process to compel them to do

some collateral thing outside the purview² of the case which they could not legally be compelled to do. They were required to prove that Mr. Hough used process as a “threat or a club” in a coercive effort to obtain a collateral advantage, such as the surrender of property or the payment of money, not properly involved in the proceeding itself.

There is (required), in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort. The cases have involved such extortion by means of attachment, execution, garnishment, or sequestration proceedings, or arrest of the person, or criminal prosecution, or even such infrequent cases as the use of a subpoena for the collection of a debt. The ulterior motive or purpose may be inferred from what is said or done about the process, but the improper act may not be inferred from the motive.

Batten v. Abrams, at 745-6 (quoting B. W. Prosser, Law of Torts, 121 at 856 et seq. (4th ed. 1971)).

In sum, the Stockbridges had the burden to prove that Mr. Hough used process as a “form of extortion” in the course of negotiations to accomplish an improper act outside the purview of the case. *Loeffelholz*, 119 Wn. App. at 699-700.

Therefore, the Stockbridges are required to prove far more than just a vexatious confusing use of the motion practice and discovery

² Purview is defined as: “The extent or range of function, power, or competence; scope. Law the body, scope or limit of a statute.” *The American Heritage Dictionary of the English Language*, 1472 (3 ed. 1992).

governed by the civil rules. Neither discovery nor the motion practice directly engages the use of specific compulsory “process.” And neither discovery nor the general motion practice is outside the purview of the case.

Our courts have clearly stated the reasons for limiting abuse of process as set forth above. An amorphous cloud that would hang over all litigants if the standards for “abuse of process were any less stringent”. And, there is the additional risk that the courts would be overwhelmed by follow up law suits.

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

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

Thus, it is not sufficient for the Stockbridges to prove that Mr. Hough was a stubborn, extraordinarily litigious party, who filed extensive difficult to understand pleadings, motions and memorandums – even if he had the subjective motives to harass and increase the Stockbridges’

litigation expenses. *Saldivar v. Momah*, 186 P.3d at 1130.

1. ***Did the court err in failing to instruct the jury that to sustain an “abuse of process” claim the Stockbridges were required to prove that Mr. Hough used formal process as a form of extortion to improperly gain a collateral advantage not within the purview of the case?***

Jury instructions are reviewed de novo. An instruction is erroneous if it contains a misstatement of the applicable law. The giving of an erroneous instruction is a reversible error where it prejudices a party. *Thompson v. King Feed & Nutrition Serv*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). A clear misstatement of the law is presumed prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). However, “Jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

The court’s instructions defining abuse of process were as follows:

Instruction No. 7 (CP 310):

“Abuse of process” is the misuse of the power of the court. It is an act done in the name of the court and under its authority by means of use of a legal process not proper in the conduct of a proceeding for an ulterior purpose(s) or motive(s)

Instruction No. 8 (CP 311):

The essential elements of a claim for abuse of process are:

- (1) The existence of an ulterior purpose to accomplish an object not within the proper scope of the process, and
- (2) An act in the use of legal process not proper in the regular prosecution of the proceedings.

The test as to whether there is abuse of process is whether the process has been used to accomplish some end which is without the regular purview of the process; or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be compelled to do.

Instruction No 9 (CP 312):

The ulterior motive or purpose may be inferred from what is said or done about the process, but the improper act may not be inferred from the motive. The purpose for which the process is used, once it is issued, is the only thing of importance.

Instruction No 10 (CP 313):

One who uses a legal process against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by his abuse of process.

Mr. Hough objected to these instructions as being incomplete. He offered far more complete instructions with definitions of abuse of process consistent with the holdings of *Batten v. Abrams*, 28 Wn. App. 737, 626 P.2d 984, (1981); *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, , 82 P.3d 1199 (2004), and; *Fite v. Lee*, 11 Wn. App. 21, 521 P.2d 964, (1974). CP 256-61.

The court's given instructions are improper and thus prejudicial to Mr. Hough. The fundamental misstatement of law is that the court's

instructions failed to inform the jury that abuse of process "...requires a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now (C.L.E.A.N.)* 119 Wn. App. at 700.

Without a complete and accurate definition of applicable law the jury was misled to the conclusion that if they found that Mr. Hough was stubbornly litigious, motivated by revenge and seeking to increase the other party's legal expenses, then he could be liable for abuse of process. In fact, with the instructions given, Mr. Hough could be held liable even if he prevailed on his motions, was correct in his discovery responses and questions and even if he prevailed on the merits after trial.

In fact, the Stockbridges made that very argument to the jury in closing. In closing argument Mr. Easley erroneously stated:

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

TRP 911

Thus, from the incomplete instructions the jury was invited to

conclude, and appears to have concluded, that Mr. Hough's extensive use of the motion and discovery practice (even if he followed the civil rules correctly and prevailed on his motions) combined with a subjective vexatious motive was sufficient to hold him liable for abuse of process.

However, as detailed above, abuse of process cannot be found on those facts alone. There must be a showing that Mr. Hough used "process", as that word is defined in the technical sense, as a "threat or a club" in a coercive effort to obtain a collateral advantage, such as the surrender of property or the payment of money, not properly involved in the proceeding itself. But the jury was not asked to consider these requirements.

Thus the incomplete instructions left the door open for precisely what the *Batten* court decision sought to guard against – the risk that abuse of process may be based upon "subjective intent only", be included as a counterclaim in nearly every answer, and used to dissuade and intimidate litigants from having "his day in court." *Batten v. Abrams*, 28 Wn. App. at 750.

2. *Must the jury verdict based upon abuse of process be vacated when there is no evidence that Mr. Hough improperly used process to extort a collateral advantage not within the purview of the case?*

Normally a jury verdict will not be disturbed by the courts.

... This court will not willingly assume that the jury did not

fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. *Phelps v. Wescott*, 68 Wn.2d 11, 410 P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for this court. *The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.* *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

Burnside v. Simpson Paper Co. 123 Wn.2d 93, 107-8, 864 P.2d 937, 945 (1994).

Still, a verdict must be supported by sufficient evidence. “Sufficient evidence exists if the record contains enough evidence to persuade a rational, fair-minded person that it is true.” *RWR Management, Inc. v. Citizens Realty Co.* 133 Wn. App. 265, 275, 135 P.3d 955, 960 - 961 (2006) quoting *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001).

In this case there is no evidence that Mr. Hough initiated any “process” after the case was filed or that he used the initial summons and complaint as a form of extortion primarily to achieve the “...surrender of property or the payment of money, not properly involved in the proceeding itself.” *Batten v. Abrams*, 28 Wn. App. at 745-6. There was a great deal of discussion about Mr. Hough’s motives, extensive motions, his inarticulate writing style and his use of, and responses to discovery

requests. TRP 200 ln. 6 – TRP 220 ln. 21; TRP 344 ln 24. But, none of those actions include the initiation of process by Mr. Hough and they are all within the scope of the case.

After Mr. Hough's affirmative case was dismissed in January of 2003, thereafter, he was only defending against counterclaims asserted by the Stockbridges. The jury verdict included and awarded all of the attorney fees incurred by the Stockbridges (compare Ex 178 & 179 with verdict form CP 323). Thus, the jury found Mr. Hough liable for defending himself against the Stockbridges' groundless malicious prosecution and poorly pled abuse of process claims. They also found him liable for the expenses the Stockbridges incurred in pursuing their own failed motions and for the fees the Stockbridges incurred responding to Mr. Hough's successful motions. See for example Ex 82 (RP of May 3, 2002 p 32 ln 5 (Hough motion granted; p 46 ln 10-17 (Stockbridge motion denied)).

Therefore, it is respectfully submitted that the jury's decision is not supported by substantial evidence and must be reversed.

3. Did the court err in ignoring Pierce County Local Rules, where there was a great prejudice to Mr. Hough, in allowing witnesses that were only disclosed as lay witnesses testify as to their expert opinions?

Local Pierce County Superior Court Rule PCLR 5(b) & (e) and the trial court's Order Amending Case Schedule (dated May 18, 2007)

required that the Stockbridges disclose their primary witnesses, including expert witnesses, by May 21, 2007. Discovery cutoff was October 1, 2007. CP 1

The Stockbridges filed their Disclosure of Primary Witnesses on May 21, 2007. CP 388-91. They did not file any other witness list – rebuttal or otherwise. Their Disclosure of Primary Witnesses listed attorneys Scott Candoo and Mr. Lafcadio Darling as lay witnesses.

Following those listings, the Stockbridges provided the following brief description of these witnesses’ “relevant knowledge” as follows: “... can provide testimony regarding his dealings with Mr. Hough in this case and Mr. Hough’s use and abuse of legal process.” The required disclosure did not reveal that Mr. Candoo or Mr. Darling were going to be offered as expert witnesses at trial, nor were the expert witness disclosures required by PCLR 5(e) provided³.

Nevertheless, at trial the court, over several objections from Mr.

³ PCLR 5 in relevant part provides:

(b) **Disclosure of Primary Witnesses.** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons with relevant factual or expert knowledge whom the party reserves the option to call as witnesses at trial.

(c) **Disclosure of Rebuttal Witnesses.** Each party shall, no later than the date for disclosure designated in the Case Schedule, disclose all persons whose knowledge did not appear relevant until the primary witnesses were disclosed and whom the party reserves the option to call as witnesses at trial.

(d) **Scope of Disclosure.** Disclosure of witnesses under this rule shall include the following information:

(1) **All Witnesses.** Name, address and phone number.

(2) **Lay Witnesses.** A brief description of the witness's relevant knowledge.

(3) **Experts.** A summary of the expert's anticipated opinions and the basis therefore and a brief description of the expert's qualifications or a copy of curriculum vitae if

Hough, allowed both Mr. Candoo and Mr. Darling to extensively testify as to their expertise and background in law and as well as their expert legal opinions.⁴ TRP 193 ln 11 – TRP 195 ln 23; TRP 199 ln 17 – TRP 200 ln 17; TRP 202 ln 8 – TRP 219 ln 11; TRP 285 ln 7 – TRP 286 ln 21 (Mr. Candoo’s testimony). Indeed, nearly all of Mr. Darlings’ testimony was based upon his expert opinion as an attorney. TRP 341 ln 18 – TRP 342 ln 20; TRP 346 ln 4 – TRP 355 ln 18; TRP 355 ln 20 – TRP 362 ln 1; TRP 362 ln 16 – TRP 369 ln 11; TRP 369 ln 5 – TRP 386 ln 12.

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

PCLR 5 (e) provides: “Any person not disclosed in compliance with this rule may not be called to testify at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires.” “Any” as used above means “every” and “all.” *Allied Financial Services, Inc. v. Magnum*, 72 Wn. App. 164, 167-9, 864 P.2d 1, 2 - 3 (1993). Consequently, the PCLRs bar a party from calling any witness at trial that was not properly disclosed unless the court orders

⁴ ER 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

otherwise for good cause.

There was not any “good cause” ever offered for the Stockbridges’ failure to comply with PCLR 5 (d)(3) and the court’s scheduling order. A violation of the rule and court order without reasonable excuse is deemed willful. *Allied Financial Services, Inc. v. Magnum*, 72 Wn. App. at 168. Where the only excuse given for failure to disclose is an attorney’s inadvertent error and failure to comply to disclose the witnesses, it will be treated as a willful act. *In re Estate of Foster*, 55 Wn. App. 545, 548-9, 779 P.2d 272, 274 (1989); *Falk v. Keene Corp.*, 53 Wn. App. 238, 250-1, 767 P.2d 576, 583-4 (1989).

The proper sanction for a party's failure to disclose witnesses without a reasonable excuse is an order excluding the undisclosed witnesses from testifying. *Allied Financial Services, Inc. v. Magnum*, 72 Wn. App. at 168-9; *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (1994) PCLR 5(e).

Where there is a “willful” failure to properly disclose witnesses, exclusion of the witness testimony is proper even in the absence of prejudice to the other side. *Allied Financial Services, Inc. v. Magnum*, 72 Wn. App. at 168-9. Further, it is reversible error for the trial court not to exclude testimony when the other party would be prejudiced by a willful violation of the court ordered witness disclosure. *Id.*, at 169 n 4.

In this case, there is no showing of any “good cause” for the Stockbridges’ failure to comply with PCLR 5(e) and the courts’ scheduling order. Based upon the Stockbridges’ Disclosure of Primary Witnesses, Mr. Hough rightfully concluded that the Stockbridges did not intend to introduce any expert opinion evidence. Thus, it was not necessary for Mr. Hough to call his own expert in rebuttal. As such, he was not prepared to rebut the expert opinions as to whether or not the documents he filed in this case were within the purview of the case. Therefore, it is respectfully submitted that the court’s failure to exclude the expert witnesses’ opinions is an error that requires that this case be reversed.

4. Did the trial court deny Mr. Hough his right to due process when it denied his motion for a more definite statement?

In order to determine the basic factual grounds for the Stockbridges’ abuse of process counterclaim, Mr. Hough filed a CR 12(e) motion for a more definite statement on September 5, 2007. CP 55-57.

Although inexpert pleading is permitted, insufficient pleading is not. *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) (citing *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 245 (1986)). “A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests.”

Dewey, 95 Wn. App. at 23 (quoting *Lewis*, 45 Wn. App. at 197); *Molloy v. Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993) (complaint must apprise defendant of the nature of plaintiff's claims and legal grounds upon which claim rests). And insufficient pleadings are prejudicial. *Camp Finance, LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (2006) (citing *Northwest Line Constructors Chapter of Nat. Elec. Contractors Ass'n v. Snohomish County Public Utility Dist. No. 1*, 104 Wn. App. 842, 848-49, 17 P.3d 1251 (2001); *Dewey*, 95 Wn. App. at 23, 25.

In fact, a complaint must be sufficiently specific to satisfy a defendant's due process right to notice—notice of both the fact of the claim *and the nature* of the claim. Tegland, 14 Wa.Prac. §12.3.

Here, the vast majority of the documents which the Stockbridges offered at trial as the basis for their vaguely pled “abuse of process” claim were neither created nor filed until long after their counterclaim (Ex. 6) was filed on May 9, 2002. See Ex. 129, Ex. 130, Ex. 132, Ex. 134, Ex. 135, Ex. 136, Ex. 137, Ex. 138, Ex. 139, Ex. 140, Ex. 141, Ex. 142, Ex. 144, Ex. 145, Ex. 146, Ex. 148, Ex. 149, Ex. 150, Ex. 151, Ex. 152, Ex. 153, Ex. 154, Ex. 155, Ex. 156, Ex. 157, Ex. 158, Ex. 159, Ex. 160, Ex. 161, Ex. 162, Ex. 163, Ex. 164, Ex. 165, Ex. 166, and Ex. 167.

As such, their May 9, 2002 counterclaim simply could not have

included the factual basis or grounds for their vaguely pled abuse of process claim. The factual basis or grounds for it had not yet occurred. And where a complaint does not give notice of the factual allegations later made, it is correct to conclude that the party failed to plead these allegations. *See Northwest Line Constructors Chapter of Nat. Elec. Contractors*, 104 Wn. App. at 849.

Indeed, any claim that Mr. Hough was provided subsequent notice of the factual basis or grounds for the abuse of process claim through discovery, motions, or otherwise, is not germane to the sufficiency of the pleading of the counterclaim.

Mr. Hough was entitled to fair notice, when the Stockbridges filed their counterclaim, as to the grounds for their vaguely pled abuse of process claim. Mr. Hough was denied that notice, where those grounds had not even occurred yet and were of course not included in the counterclaim as is required.

Accordingly, to the basic factual grounds for the Stockbridges abuse of process counterclaim, Mr. Hough filed a CR 12(e) motion for a more definite statement on September 5, 2007. CP 55-7. The trial court denied his motion on October 4, 2007, CP 142-43, leaving Mr. Hough to defend an “abuse of process” counterclaim based on documents and events that did not even exist at the time the counterclaim was filed.

5. ***Did the trial court err when it refused to dismiss an unfit juror?***

After the jury was selected and before Mr. Hough gave his opening statement, a juror submitted a note to the judge stating:

Your Honor, has Mr. Hough been evaluated by a mental health professional? There is little doubt that this man is delusional and would be diagnosed with obsessive compulsive disorder, OCD. Does the Court have the authority to order such evaluation? No need to respond to this.

TRP 628-29.

After Mr. Hough gave his opening statement, the judge notified the parties of the juror's note and Mr. Hough immediately moved to have the juror dismissed for prejudice, which the court denied. TRP 629-31.

The right of trial by jury is unequivocally guaranteed by the Washington State Constitution and is inviolate. *Wash. Const. art. I, § 21. Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 656, 771 P.2d 711, 721-2 (1989). CR 38(a). This is a precious right that is aggressively protected by our courts. *Watkins v. Siler Logging Co.*, 9 Wn. 2d 703, 710-11, 116 P.2d 315, 321-2 (1941). In fact, our courts recognize this right to be so fundamental that it "...must not diminish over time and must be protected from all assaults to its essential guaranties." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656 (1989).

The right to trial by jury is a right to an unbiased and unprejudiced

jury. *Federated Publications, Inc. v. Swedberg*, 96 Wn.2d 13, 17, 633 P.2d 74 (1981) (citing *State v. Stiltner*, 80 Wn.2d 47, 491 P.2d 1043 (1971)).

Under RCW 2.36.110, the court may dismiss a juror who has manifested unfitness due to bias, prejudice, indifference, inattention or due to conduct or actions that are inconsistent with proper and efficient jury service.

“Prejudice” means “[a] forejudgment; bias; partiality; preconceived opinion. A leaning towards one side of a cause for some reason other than conviction of its justice.” Black’s Law Dictionary, 816 (6th ed. 1991).

A trial court’s determination of whether to dismiss a juror is reviewed for abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 768-9, 123 P.3d 72 (2005). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Proctor v. Huntington*, 2008 WL 4330319, 7 (Wn. App., Div. 2, 2008) (citing *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)).

Discussing the juror who wrote the note, Mr. Hough correctly

stated to the court, “[t]here’s certainly some prejudice indicated there. Well, I don’t know how you can say there’s no prejudice in that statement.” To which the court responded, without further comment or discussion, “[w]ell, it is what it is.” TRP 630-31. Despite a clear statement that a juror held a strong prejudice against Mr. Hough, even before he had presented any of his defenses, the court made no further investigation or attempt to discern the depth of the prejudice. Further, there is no indication that the court even considered the applicable legal standards.

Thus, there are no tenable grounds and the court’s refusal to dismiss the juror on Mr. Hough’s motion was manifestly unreasonable. TRP 629-31. In allowing the juror to remain, the trial court abused its discretion and denied Mr. Hough the right to trial by an unbiased and unprejudiced jury.

6. Did the court misapply CR11 in finding: 1) all of Mr. Hough’s motions frivolous, even motions on which he prevailed, and; 2) holding Mr. Hough liable for all of the Stockbridges’ attorney fees incurred in the entire case, including fees they incurred in the prior appeal that was based upon grievous trial court errors and in which appeal Mr. Hough prevailed and, further, where after January 2003 the case was devoted to Mr. Hough defending against the Stockbridges’ counterclaim of malicious prosecution for which there were never any facts to support and on an abuse of process claim that was very poorly pled and further where all of the Stockbridges’ grievances, if any, could have and should have then been addressed via timely request for sanctions based upon a CR 11 motion?

At the request of the Stockbridges, the jury awarded the Stockbridges \$30, 467.08 for “Attorney fees and lawsuit costs.” CP 323. After verdict was entered, the Stockbridges filed “Defendants’ Motion for Costs and Attorney’s Fees and For CR 11 Sanctions Against Plaintiff.” CP 324-38. The motion requested the court to enter a judgment for \$109,458.32 for attorney’s fees and costs in addition to the jury awarded attorney’s fees and costs award. The Stockbridges based the motion upon RCW 4.84.185, MAR 7.3, and CR 11. CP 328 – 35. The court granted the motion but awarded \$40,488.50, rather than the full amount requested. CP 371.

Attorney fees and costs may be awarded only pursuant to contract, statute, or a recognized ground of equity. *Gray v. Pierce County Housing Authority*, 123 Wn. App. 744, 759, 97 P.3d 26, 33 (2004).

1. Jury question.

Mr. Hough’s right to a jury trial is guaranteed by Article I, Section 21 of the Washington State Constitution. See also CR 38(a). As such, he has the constitutional right to have a jury determine the amount of damages, if any, to which the Stockbridges are entitled. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-6, 771 P.2d 711, 780 P.2d 260 (1989); *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971) (“To the jury is consigned under the constitution the ultimate power to weigh

the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact.”). Therefore, here it is up to a jury to determine the amount of attorney fees, if any, to be awarded.

Consistent with these principles, courts in other jurisdictions have held that, when attorney fees are recoverable as an element of damages, the measure of such attorney fees must be determined by the jury.

Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn. App. 743, 761, 162 P.3d 1153, 1163 (2007).

Therefore, in this case, it was strictly for the jury to decide the amount of reasonable attorney fees to award, if any, as damages for abuse of process. However the court's Findings and Conclusions of Law predominately focus on Mr. Hough's motives, purposes and the damages sustained by the Stockbridges. CP 369-70. Motive and damages were submitted to the jury to decide. Thus, the court's attorney fees and cost award is an unconstitutional infringement upon the province of the jury.

2. *RCW 4.84.180 and CR 11.*

Additionally, the Stockbridges are not entitled to an award of fees and costs pursuant to either RCW 4.84.180 or CR 11.

Generally it is correct that such an award is within the sound discretion of the trial court. Indeed, a trial court's imposition of sanctions is reviewed for abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876

P.2d 448 (1994) (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993)). A court abuses its discretion when its order is manifestly unreasonable or based upon untenable grounds. *Washington State Physicians Ins. Exch. & Ass'n*, 122 Wn.2d at 339.

CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 111, 780 P.2d 853 (1989).

Sanctions should be utilized as minimally as possible and cannot be used as a fee-shifting mechanism. Sanctions must not be imposed where the effect is to chill a party's enthusiasm or creativity in pursuing legal or factual theories and must be reserved for the most egregious conduct only. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099, (1992); *Biggs*, 124 Wn.2d at 198 n. 2. The burden of justifying sanctions is on the movant. *Biggs*, 124 Wn.2d at 201-2.

"The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 214-15.

The trial court is required to create an adequate record for appellate review of fee award decisions. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App.

at 690. The trial court must specify, in the record, each specific pleading that violates CR 11. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 912 P.2d 1052 (1996). Here, the court did not identify any specific offensive pleading. Indeed, the trial court found that “Mr. Hough perverted the entire legal process” including his prior appeal to this court – which was successful⁵. CP 369, para 3.

Before imposing CR 11 sanctions, the trial court must find both that a pleading lacks a factual or legal basis and that the party who signed and filed the pleading failed to conduct a reasonable inquiry into its factual and legal basis. The reasonableness of an inquiry is evaluated by an objective standard. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220, citing *Miller v. Badgley*, 51 Wn. App. 285, 299-300, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1998). It is incumbent upon the court to inquire whether there was need for discovery to develop factual circumstances underlying a claim. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220-21. The court is further required to avoid using the wisdom of hindsight and impose sanctions only when it is “patently clear that a claim has absolutely

⁵ This court held:

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

no chance of success.” *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir.1986) (quoting *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir.1985), cert. denied, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d at 220. In deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule. *Id.*, at 225.

In applying RCW 4.84.185, the case must be viewed in its entirety. If any part of a party’s case is not frivolous then the court may not award fees to the prevailing party. The trial court is not authorized to shift through a lawsuit searching for frivolous claims and then award fees based solely on those matters. *Biggs v. Vail*, 119 Wn. 2d at 136-7.

The Stockbridges’ motion asked the trial court to award all the attorney fees they incurred in this case, including the amounts they incurred in their failed response in the prior appeal, the amounts they incurred as plaintiffs in pursuing their malicious prosecution claim that was dismissed at summary judgment⁶, and the fees they incurred pursuing

⁶ “After hearing argument, the trial court ruled and in colloquy said:

THE COURT: ... I'm going to dismiss the § Stockbridges' } malicious prosecution case. There are no facts that support that, and that will not go forward. I'm not saying that there wasn't a good-faith basis to bring it up, but at this juncture, with the challenge made, no malicious prosecution claim is going forward.” *Hough v. Stockbridge* (unpublished) 2005 WL 2363795, Div. 2,2005)

their counterclaims for malicious prosecution and abuse of process. This includes the time spent in trial and the prior appeal). Further, Judge Van Deren, when she was a Superior Court Judge, spent many hours studying the law and the pleadings. Responding to Stockbridges' argument that Mr. Hough's claims were frivolous, Judge Van Deren stated: "I do not find any fault on his part [Mr. Hough] for asserting this case." RP (June 7, 2002), p. 18.

The Stockbridges, as the party requesting CR 11 sanctions, have the duty to mitigate and may not recover excessive expenditures. *Miller v. Badgley*, 51 Wn. App. at 303, 753 P.2d 530. Accordingly, the moving party (as well as the court) must notify the offending party as soon as it becomes aware of sanctionable activities, thereby providing the offending party with an opportunity to mitigate the sanction.

If any sanction is imposed it should be assessed at the time of a transgression. *Biggs v. Vail*, 124 Wn.2d at 198. Here the court sanctioned Mr. Hough for pleadings dating back to the time this case was filed over seven years ago. Ex 119.

Any sanction imposed ought not to exceed the reasonable attorney fees that would have been incurred had notice of violation of CR 11 been brought promptly. *Biggs v. Vail*, 124 Wn.2d at 201. CR 8(c) requires a party to affirmatively plead any matter constituting an affirmative defense.

Failure to so plead generally results in the waiver of that defense and its exclusion from the case. *Winans v. W.A.S., Inc.*, 52 Wn. App. 89, 108, 758 P.2d 503, 514 (1988).

Here, the absolute privilege defense to Mr. Hough's defamation and slander claims were first pleaded in the Stockbridges' third answer and counter claim filed on May 9, 2002 (Ex 6) more than nine months after the case began and less than thirty days before Judge Van Deren dismissed Mr. Hough's related claims.

The only matters that clearly remained before the court after January 31, 2003, were the Stockbridges' baseless counter claim for malicious prosecution and poorly pled abuse of process claim. If the Stockbridges had a valid claim for sanctions, it was incumbent upon them to bring any claim of violation of CR 11 to the court's attention at that time, rather than continuing to pursue a baseless claim of malicious prosecution and a vague assertion that Mr. Hough is "abusing the Superior Court" and then insist that Mr. Hough must pay their additional costs when all Mr. Hough was doing after that date was defending himself against their claims.

Fees granted as sanctions must be limited to those amounts reasonably expended in responding to the sanctionable filing. *MacDonald v. Korum Ford*, 80 Wn. App. at 892). Where attorney fees are

recoverable for some claims but not others, the award must segregate out the time spent on issues for which fees are authorized from other issues. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. at 690-1. Here the Stockbridges seek an award of all of the fees that they incurred in this case. Consequently, they are asking the court to ignore the Stockbridges' duty to mitigate and award them fees for time spent on matters other than responding to sanctionable conduct. See *Biggs v. Vail*, 124 Wn.2d at 201.

The Stockbridges' motion did not identify which filings, if any, were frivolous and thereby subject to sanction. They simply asserted all of Mr. Hough's documents and actions were based upon improper motives and thereby frivolous – even when he was only defending against their claims and appearing at trial. Notably, before the prior appeal, the trial court granted many motions Mr. Hough brought and denied several motions brought by the Stockbridges. The court cannot award attorney fees based upon motions that were granted to the alleged offending party or denied to the party requesting sanctions. *Biggs v. Vail*, 124 Wn.2d at 201.

The Stockbridges have the burden to show that the amount of sanctions they seek is limited to reimbursement for responding to sanctionable pleadings. However, neither Mr. Easley nor Mr. Darling, two of three of the Stockbridges' attorneys, provided any accounting of

how their hours were spent on this case⁷. Further, there is no attempt by any of the Stockbridges' attorneys to segregate out the time spent on issues for which fees may be authorized from other issues in this case. Therefore, it was not possible for the court to properly limit any such award.

CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. at 111. Yet, here inexplicably the court's sanctions are the same amount as all of the attorney fees the Stockbridges claim they incurred in these proceedings.

7. Did the court err in awarding Stockbridges attorney fees under MAR 7.3 when the case tried to the jury was based upon facts, events and documents that were either not in existence or had not even occurred at the time of arbitration?

The Stockbridges' motion also sought fees based upon MAR 7.3. The purpose of MAR 7.3 is to expedite resolution of cases, discourage meritless appeals from MAR awards, and to relieve court congestion. *Tribble v. Allstate Property and Cas. Ins. Co.*, 134 Wn. App. 163, 174, 139 P.3d 373, 379 (2006). *Christie-Lambert Van & Storage Co. v.*

⁷ Ex 178 is the only document pertaining to an accounting of Mr. Darlings' fees. Stockbridges motion references at n. 10 "see attached Exhibit 3 – Billing statement from Chris Easley". However, no exhibits were attached to that motion or any pleadings filed contemporaneously therewith. CP 324 -38.

McLeod, 39 Wn. App. 298, 302-03, 693 P.2d 161 (1984).

Therefore, implicit in the application of MAR 7.3 is that the case heard by the MAR arbitrator must be the same matter later tried de novo. That did not happen in this case.

The arbitrator's award was entered on July 7, 2003. That award could only be based upon the facts and events that had occurred before the arbitration hearing. However, the majority of Mr. Hough's motions that the Stockbridges relied upon at trial for their abuse of process claim were neither created, filed, nor served until after arbitration. Ex 158, 159, 160, 162, 163, 164, 165, 166, 178, 190.

Furthermore, the Stockbridges' only clearly pled claim before the arbitrator was malicious prosecution. That claim was subsequently dismissed by the trial on Mr. Hough's summary judgment motion. The jury verdict is based upon abuse of process. Thus, the case the jury heard was based upon different and new facts, as well as a different theory of law than what was presented to the arbitrator. Because the jury heard a different case than was heard by the arbitrator, MAR 7.3 should not apply.

Further, MAR 7.3 fee awards are limited to fees incurred after the filing of the request for trial de novo.

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may

assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. *Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.*

MAR 7.3 (Italic added).The Stockbridges made no attempt to limit their fee award request accordingly.

8. *Must the court award only those attorney fees, if any, that is reasonable?*

In all motions for attorney fees, the award must only be for fees that are reasonable. The Washington Supreme Court has "set forth standards to be followed in determining reasonable attorney's fees and trial courts are obligated to heed those standards in arriving at an award of reasonable attorney's fees." *Singleton v. Frost*, 108 Wn.2d 723, 733, 742 P.2d 1224 (1987). The court held that the trial court should consider the total hours necessarily expended in the litigation by each attorney, as documented by counsel, and that the total hours expended should then be multiplied by each lawyer's reasonable hourly rate of compensation considering *inter alia* the difficulty of the problem, each lawyer's skill and experience and the amount involved. *Id at 733*, (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983)). The court in *Singleton* went on to list the factors to be considered as guides in determining the reasonableness of the fee:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.
6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.
8. Whether the fee is fixed or contingent.

Singleton v. Frost, 108 Wn.2d at 731.

Here the Stockbridges were awarded the attorney fees they incurred pursuing a baseless malicious prosecution claim long after arbitration. And, the Stockbridges were awarded their attorney fees they incurred during the first trial that was conducted over Mr. Hough's objections as to both the lack of a jury and improper order of trial. They were also awarded the fees incurred at the Court of Appeals. It is respectfully submitted that it is not reasonable to require Mr. Hough to pay for the attorney fees that the Stockbridges incurred pursuing a baseless claim, an unconstitutional bench

trial with improper procedures, or in responding to Mr. Hough's successful appeal based upon those issues.

9. *Did the court err in awarding post judgment interest at the rate of 12% per annum when the correct rate at the time of entry of the judgment was 5.296%?*

The Judgment for Defendants includes post judgment interest at 12% per annum. CP 261. This interest amount is not correct. RCW 4.56.110(3) provides that:

Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at two percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

According to the Access Washington website for the Washington State Treasurer, the correct judgment rate for tort judgments entered for the month of January 2008 was 5.296%. CP 349.

IV. CONCLUSION

For the reasons stated above, Mr. Hough respectfully requests that this court order that the jury verdict and resulting judgment, as well as the

trial court's post verdict award of attorney fees and costs be vacated.

Dated this _____ day of October 2008.

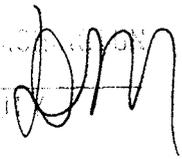
MANN, JOHNSON, WOOSTER
& McLAUGHLIN, P.S.



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Attorneys for Appellant

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____ DEPT. 

WASHINGTON STATE COURT OF APPEALS
DIVISION II

9	ROBERT M. HOUGH,)	
)	Court of Appeals No. 37382-3-II
10	Appellant,)	
)	
11	vs.)	CERTIFICATE OF SERVICE
)	
12	FRANK W. STOCKBRIDGE and SUSAN D.)	
	STOCKBRIDGE, Husband and Wife, and the)	
13	marital community comprised thereof,)	
)	
14	Respondents.)	
)	

I, Dawne M. Rowley, hereby certify that I am over the age of 18 years and not a party to the within action; my business address is and I am employed by Mann, Johnson, Wooster & McLaughlin, P.S., 1901 South "I" Street, Tacoma, Washington.. On the 16th day of October, 2008, a true and correct copy of the following documents:

(1) Motion to Supplement the Record; (2) Motion to Transfer Record; (3) Motion to Amend Brief of Appellant; and (4) Amended Brief of Appellant were delivered to:

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

ORIGINAL

