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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 10-2-11622-8

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TED SPICE,

Appellant,

vs.

DONNA E. DUBOIS, as Personal Representative of the Estate of DORIS  
E. MATHEWS, deceased

Respondents.

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

Appellant, Mr. Ted Spice (“Mr. Spice”), respectfully submits this brief to appeal the ruling in Pierce County Superior Court, Cause Number 10-2-11622-8, regarding claims to the ownership of several parcels of real property and various counterclaims and defenses to the claims.

Mr. Spice requests that the Court reverse the trial court’s decision finding Donna E. Dubois, as Personal Representative of the Estate of Doris E. Matthews (the “Estate”), the prevailing party, finding no contractual basis for attorney fees, denying attorney fees and costs to Mr. Spice, and denying his request for JNOV or a new trial.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred when it found the Estate as the prevailing party.
2. The trial court erred when it found no contractual basis to award fees to Mr. Spice.
3. The trial court erred when it denied attorney fees and costs to Mr. Spice.
4. The trial court erred when it denied Mr. Spice’s request for JNOV or a new trial.

B. Issues Pertaining to Assignments of Error

1. Whether Mr. Spice was the prevailing party when he obtained an award of a portion of the properties in dispute, and he prevailed on 24 counterclaims and overcame 16 affirmative defenses.
2. Whether there was a contractual basis for attorney fees when Mr. Spice and Ms. Doris Mathews created the Plexus Operating Agreement and signed a Promissory Note.
3. Whether the Estate was entitled to attorney fees when excessive motions practice and delays in court caused Mr. Spice attorney fees in excess of \$600,000.00.
4. Whether the trial court erred in not granting Mr. Spice's request for JNOV or a new trial when there was no substantial evidence or reasonable inferences to sustain the verdict that awarded the property to the Estate in the percentage interests that were awarded, and the Estate's counsel engaged in misconduct during the trial.

**III. STATEMENT OF THE CASE**

A. Mr. Spice and Ms. Doris Mathews Enjoyed a Productive Business Relationship.

In August of 2003, Mr. Spice moved into a property managed by Ms. Doris Mathews ("Ms. Mathews"). (CP 2). Mr.

Spice worked with Ms. Mathews by cleaning up several of her properties and assisting her with the eviction of tenants. (CP 1360).

Although a number of people rented mobile homes, Ms. Mathews neglected the majority of the properties. (CP 1436). Only two tenants regularly paid their rent. (CP 1436). For a period of approximately 14 years after her husband's death, Ms. Mathews stopped maintaining the grounds and rentals. (CP 1436). Her family failed to assist in maintaining the properties. (CP 1436).

The lot with the four duplexes had a lot of debris that had to be removed. (CP 1437). The debris included abandoned cars, metal, a dilapidated horse barn, overgrown trees and shrubs, and a large amount of trash. (CP 1437). Within a few weeks of arriving, Mr. Spice began taking on a managerial role over the properties. (CP 1437). In doing so, he cleaned up the properties, which were in a poor state and helped evict the tenants that failed to pay. (CP 1437). Tenants threatened Mr. Spice, wrote derogatory words on the walls, and trashed units. (CP 1436- 1437). One tenant engaged in the illicit drug trade. (CP 1436- 1437). Mr. Spice created a schedule to clean the area. (CP 1437). He hired workers and found more reliable tenants. (CP 1437). This process took over ten months. (CP 1437).

In early 2004, Mr. Spice qualified for a special home

buyer's housing program and intended to leave the property. (CP 1360). However, Ms. Mathews requested that he stay and signed the Promissory Note that provided compensation for Mr. Spice on January 8, 2004. (CP 1361). The Promissory Note employed Mr. Spice to become the manager of the properties instead of taking advantage of the home buyer's program. (CP 49-50). Ms. Mathews signed the Promissory Note entitling Mr. Spice to between \$5,000.00 and \$8,000,000.00, for services rendered. (CP 5). The Promissory Note included the following language:

For Services rendered, the undersigned Doris E. Mathews & Mathews Investments, LLC (borrower) hereby jointly and severally promises to pay Ted Spice (grantor) half (1/2) of all equity or monies realized in any amounts ranging from \$5,000 up to \$8,000,000 from property sales, investments, developments, refinancing proceeds or any type of business projects what so ever relating to any properties purchased, bonds relating to parcel number 770500000191, P413169199 & R224500-040-0, 22450000410, including all property or investments, property purchased or any other business project coordinated by the grantor now or transacted in the future. Together with interest thereof at the rate of 7% per annum on the unpaid balance.

(CP 5).

The Promissory Note contained the following language regarding attorney's fees:

In the event this note shall be in default, and placed with an attorney for collection, then the undersigned agree to pay all reasonable attorney fees and cost of collection.

(CP 5).

Ms. Mathews appreciated Mr. Spice's assistance and wanted to continue working with him. (CP 50). Ms. Mathews trusted Mr. Spice and signed a Durable Power of Attorney appointing him as her Attorney-in-Fact on February 4, 2004, in front of a public notary. (CP 50, 86).

In April of 2004, Mr. Spice and Ms. Mathews, as a joint venture, formed Plexus Investments, LLC ("Plexus"). (CP 1361). Mr. Spice and Ms. Mathews signed the Operating Agreement on April 22, 2004. (CP 50). She also consulted with the Plexus attorney regarding the venture. (CP 299). Mr. Spice held a 51 percent interest in Plexus. (CP 75). And, Ms. Mathews remained actively involved in the business through regular consultation with Mr. Spice. (CP 21-22). Ms. Mathews routinely called the bank and customer services to track Plexus business accounts. (CP 50). Several business contacts confirmed her involvement such as bank manager Ryan Hays and attorney Adam Brinbaum. (CP 222-225).

In regards to attorney fees, the Plexus Operating Agreement provided:

12.13: In the event that either legal proceedings or arbitration is instituted to enforce or determine the Members' rights in connection with the Company or duties arising out of the terms of this Agreement or the Members' relationship or a suit or action permitted herein is brought, **the substantially prevailing party shall recover from the party or parties who do not substantially prevail,**

**reasonable attorney fees incurred in such proceeding.** The determination of who is the substantially prevailing shall be decided by the arbitrators (with respect to attorney fees incurred prior to and during arbitration proceedings) and by the court and courts, including any appellate court, in which such matter is tried, heard, or decided, including the court which hears any exceptions made to an arbitration award submitted to it for confirmation as a judgment (with respect to attorney fees incurred in such confirmation proceedings).

(CP 74) (Emphasis Added).

Mr. Spice contributed 20 acres of land to the partnership as well as acquiring five other properties during the partnership. (CP 1912). He contributed Tacoma Boat stock, \$20,000.00 to renovations of the duplex, and approximately \$800,000.00 worth of debt. (CP 1911-1912). Mr. Spice attended auctions in Kitsap and Lewis counties to acquire property for the business. (CP 1912). In total, Mr. Spice contributed approximately \$100,000.00 in cash to Plexus. (CP 112). The court can also take judicial notice that the parties entered into these agreements when the real estate market was strong, many individuals were investing in the real estate market, and expectations were high that you could do very well in the market.

Ms. Mathews was a very giving person and mismanaged her money by overspending. (CP 16-17). Mr. Spice attempted to assist by ordering checks from the bank and analyzing spending habits. (CP 17). Mr. Spice also obtained cash in varying amounts for Ms. Mathews' personal use by accessing ATMs in various

casinos. (CP 95).

Both Mr. Spice and Ms. Mathews agreed to various business transactions, litigation, and property transfers made by quitclaim deed. (CP 50). Ms. Mathews obtained and subsequently deeded over the following properties to Mr. Spice: 5818 Milwaukee Avenue East, 11305 58<sup>th</sup> Street Court East, 11003 58<sup>th</sup> Street Court East, and the duplex at 10915 and 10917 59<sup>th</sup> Street Court East. (CP 1324). Mr. Spice owned 11319 58<sup>th</sup> Street Court East in his individual capacity. (CP 1324).

Mr. Spice and Ms. Mathews worked with one another productively until her death in December of 2009. (CP 1361).

B. Mr. Spice Properly files his Creditor's Claim in the Probate of the Estate of Doris Mathews.

Ms. Christina Olsen, granddaughter of Ms. Mathews and a medical assistant lived with Ms. Mathews at the time of her death. (CP 44). Ms. Olsen called 911 and called Mr. Spice immediately afterwards. (CP 45). Mr. Spice arrived at the house before even the paramedics. (CP 45). Upon receiving notice of the probate, Mr. Spice properly filed a creditor's claim based upon the Promissory Note on April 26, 2010. (CP 1361). The Estate of Doris Mathews (the "Estate") rejected Mr. Spice's claim in its entirety upon filing a rejection of Creditor's Claim on July 7, 2010. (CP 11).

The Estate recorded a notice of interest in property and anticipated *lis pendens* on June 1, 2010, for all five properties. (CP

1324). The anticipated *lis pendens* action clouded title over the properties and caused problems in obtaining loan financing for a proposed construction project. (CP 1324). As a result, the lenders decided not to fund the project. (CP 1324). Mr. Spice filed suit on August 2, 2010. (CP 1).

C. The Estate Answers Complaint with 25 Counterclaims and 16 Affirmative Defenses.

Mr. Spice alleged Breach of Contract based upon the Promissory Note. (CP 3). In the amended complaint, filed on July 28, 2011, Mr. Spice included the additional causes of action of conversion, tortious interference, and breach of fiduciary duty. (CP 1580). The Estate filed 25 counterclaims and 16 affirmative defenses. (CP 1499-1544). By filing the counterclaims, the Estate added the following parcels: 11010 58<sup>th</sup> Street Court East, 11319 58<sup>th</sup> Street Court East, 117.8 acres in Kitsap County, and 0.2 acres in Napavine, Washington. (CP 1541-1544). On June 5, 2012, the trial court summarily dismissed the counterclaim for wrongful death, but allowed the other remaining 24 counterclaims. (CP 480-482).

D. The Estate Engaged in Excessive Motions Practice, Wasted Court Time, and Lacked the Experience Required for this Type of Litigation.

The trial court found the Estate's counsel deficient because of numerous baseless counterclaims and affirmative defenses; inexperience; excessive motions practice; failure to

obtain more experienced co-counsel; and numerous extensions of court time. (CP 1228-1229). In addition, the trial court found a violation of a discovery order by the Estate's counsel for the sole purpose of embarrassing Mr. Spice and attempting to sway the jurors. (CP 1304-1307). This then required the trial court and counsel to go through the trouble of interviewing the jurors to determine whether they had been prejudiced by the improper questioning. (RP, 09/05/12, at 3-23).

The record contains over 200 declarations, 60 motions, and 50 responses or opposition to motions. Ms. Sharon Carter, the Estate's paralegal, alone filed over 20 declarations to the court. (CP 2083). The trial court ordered a Temporary Restraining Order on both parties because of the contentiousness of the litigation. (CP 104-106). The trial court found the primary reason for high attorney fees resulted from excessive motion practice and ineffective use of court time. (CP 1227). Opposition to the Estate's motions caused large legal fees for Mr. Spice. (CP 995, 1122, 1052, 1042). Mr. Spice's attorneys divided their efforts due to the voluminous filings by the Estate. (CP 1052-1053).

The Estate requested three motions of continuance. Mr. Spice attempted to obtain financial information at least five times from the Estate. (CP 387). The Estate failed to cooperate with discovery requests despite a court order. (CP 1879). The Estate's counsel admitted to never litigating this type of case, and

it was his first jury trial in his recent practice. (CP 1227). The Estate failed to engage experienced co-counsel. (CP 1227).

The Estate required a court order in order to let Mr. Spice negotiate loan modifications. (CP 187). The Estate required an Order of Contempt and Motion to Compel in order to produce documents. (CP 677). Mr. Spice's attorneys spent the majority of their time defending counterclaims. (CP 995). The counterclaims substantially escalated the time spent and corresponding costs of litigation. (CP 995). Attorney Brian Krikorian estimates the trial took an additional two weeks due to the counterclaims. (CP 1122).

E. Mr. Spice Prevailed on 24 of the Counterclaims and Obtained Property on the Quiet Title Action.

The trial took three weeks. (CP 1122). The verdict in the case was provided in the form of distributing property. (CP 939-940). The jury awarded the parties an interest in the properties as follows: "Rental Properties (11003, 11004, 11007, and 11011 58<sup>th</sup> St. Ct. E):" 25% to Mr. Spice and 75% to the Estate; "Duplex Property (10915-10917 58<sup>th</sup> St. Ct. E):" 100% to the Estate; "Rental"/Ted (5818 #A and #B Milwaukee Ave E):" 100% to the Estate; 11319 58<sup>th</sup> St. Ct. E.: 100% to Mr. Spice; 117.8 Acres Kitsap County: 50% to Mr. Spice and 50% to the Estate; .02 Acres Napavine, WA: 100% to Mr. Spice; and 11305 House 58<sup>th</sup> St. Ct. E.: 100% to the Estate. (CP 939-940). No money was awarded

to the Estate as damages based upon its claims. (CP 937-940). The Estate only partially prevailed on its quiet title counterclaim. (CP 939-940).

F. The Trial Court Found No Contract Entitling Either Party to Attorney Fees Based Upon an Inference.

Mr. Spice sought 11 properties in connection with this lawsuit. (CP 1224). The jury awarded Mr. Spice an interest in 5 properties and 2 of the properties outright. (CP 1224). The trial court found the Estate prevailed because of the larger interest in the property. (CP 1225). However, it declined to award attorney fees to the Estate because of excessive motion practice, ineffective use of court time, requirement of special master for discovery, failure to hire more experienced co-counsel, and baseless counterclaims. (CP 1227). The Estate's counsel admitted this was his first jury trial in his recent practice and never experienced this type of litigation. (CP 1227). The Estate alleging Mr. Spice caused the death of Ms. Mathews was an example of his inexperience. (CP 1227).

The trial court rejected the Promissory Note and Plexus Operating Agreement as having a legal contractual basis. (CP 1225). The trial court inferred the jury found the documents not credible. (CP 1227-1228).

G. The Trial Court Found all the Elements Necessary for Contempt by Clear, Cogent, and Convincing Evidence Against the Estate's Attorney.

Mr. Spice filed a Motion for Contempt and CR 11 Sanctions on October 2, 2012. (CP 2339). The Estate's counsel intentionally asked a question during the trial to portray Mr. Spice as a sexual deviant despite a trial court order barring such questions. (CP 1305-1306). Of course, this was done to prejudice Mr. Spice before the jury, and Mr. Spice did not have an adequate remedy because he could not afford to start the trial over. (RP, 09/05/12, at 16-17). The Estate also disclosed confidential tax and financial information to third parties in an attempt to embarrass Mr. Spice. (CP 1304-1305). The trial court granted the Order on November 30, 2012. (CP 1304). The trial court allowed the Estate's findings of contempt to be expunged contingent on payment of \$6,500.00 to Mr. Spice. (CP 1306).

H. The Trial Court Denied Mr. Spice's Reasonable Attorney Fees.

Mr. Spice properly filed a Motion for Attorney Fees on October 4, 2012. (CP 1043). Mr. Spice's attorney costs are as follows: Rebecca Weiss \$6,147.50, Brian Krikorian \$150,270.75, Stephen Hansen \$91,536.87, and Thomas Dickson \$387,425.49 for a total of \$635,380.61. (CP 1044). Thomas Dickson billed at \$295.00 an hour and was Mr. Spice's primary attorney from July 2010 through October 2011. (CP 995, 997). Rebecca Weiss represented Mr. Spice from December 2009 until November 2011. (CP 1113). She has practiced law since 1982 and billed at

\$250.00 an hour. (CP 1113). Stephen Hansen was admitted into practice in 1986, and billed at \$165.00 (CP 1877-1878). Brian Krikorian worked exclusively on the counterclaims and billed at a rate of \$165.00 an hour. (CP 1118). The trial court denied the request for attorney fees and costs. (CP 1225).

I. The Trial Court Denied Mr. Spice's Motion for JNOV or New Trial.

Mr. Spice also properly filed and the trial court heard his motion for JNOV or new trial. (CP 989). Mr. Spice requested that the Court enter a JNOV or a new trial with respect to the jury's decision not to award Mr. Spice, at least, a certain percentage interest in some of the properties as a result of those properties being deeded to him and to Plexus. On October 5, 2012, the trial court denied the motion for JNOV or new trial. (RP, 10/05/12, at 12).

#### IV. ARGUMENT

1. **The Trial Court Improperly Denied an Award of Attorney Fees to Mr. Spice.**

A. Standard of Review on a Trial Court's Decision to Award Attorney fees.

"When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party was entitled to attorney fees, and second, whether the award of fees is reasonable." *Ethridge v. Hwang*, 105 Wn.App 447, 460, 20 P.3d 958 (2001). Review of the trial court's decision to grant or deny attorney's fees are reviewed de novo. *Id.*, citing, *Tradewell*

*Group, Inc. v. Mavis*, 71 Wn.App 120, 126, 857 P.2d 1053 (1993). The amount of a fee award is reviewed for abuse of discretion. *Id*; see also *American Nat'l Fire Ins. Co. v. B& L Trucking & Const. Co*, 82 Wn.App. 646, 669, 920 P.2d 192 (1996). "A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion." *Id.* (citations omitted). While the determination of the prevailing party has been described as a mixed question of law and fact, the issue is reviewed under the error of law standard. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash.App. 697, 706, 9 P.3d 898 (2000), citing, *Sardam v. Morford*, 51 Wash.App. 908, 911, 756 P.2d 174 (1988).

Here, Mr. Spice was the substantially prevailing party because he defended against 24 of the 25 counterclaims, overcame 16 affirmative defenses, and was awarded a portion of the real property. The Promissory Note and Plexus Operating Agreement entitled him to reasonable attorney fees and costs. The Estate caused the excessive attorney's fees and costs through excessive motions practice, inexperience, baseless counterclaims, and dilatory practices.

B. The Promissory Note and Plexus Operating Agreement Authorized Attorney Fees.

Attorney's fees should have been awarded to Mr. Spice

under the Promissory Note and Plexus Operating Agreement, both private agreements. RCW 4.84.330 provides, "[i]n any action on a contract or lease entered into after September 21, 1988, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or not shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements." "In Washington, attorney fees may be awarded only when authorized by private agreement, a statute or recognized ground of equity." *Labriola v. Pollard Group, Inc.* 152 Wn.2d 828, 100 P.3 791 (2004) (citations omitted).

The Promissory Note and Plexus Operating Agreement, both private agreements, authorize attorney fees and costs. Mr. Spice properly filed suit to enforce the Promissory Note once the Estate of Doris Mathews wholly rejected his creditor's claim. (CP 11). The promissory note provided that if it had to be enforced then Ms. Mathews would pay all reasonable attorney fees and costs. (CP 5). If it had to be enforced, the Plexus Operating Agreement also provided for an award of reasonable attorney fees incurred in enforcing the agreement. (CP 74). The Promissory Note and Plexus Operating Agreement qualify as private agreements. These agreements satisfy the requirements of RCW 4.84.330. Therefore, Mr. Spice as the

prevailing party was entitled to an award of reasonable attorney fees and costs.

C. The Trial Court Erred in Determining that the Attorney's Fees Provisions were Void, when it Determined the Promissory Note and Operating Agreement Invalid.

Attorney fee provisions in contracts remain intact even if the remaining portions of the contracts are determined invalid. *See, Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121-122, 63 P.3d 779 (2003); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn.App. 188, 196-97, 692 P.2d 867 (1984); *Yuan v. Chow*, 96 Wn.App. 909, 915-18, 982 P.2d 647 (1999); and *Stryken v. Panell*, 66 Wn.App. 566, 572-73, 832 P.2d 890 (1992). An intent to contract validates attorney fee provisions even if the Court invalidates other parts of the contract. *See, Wallace v. Kuehner*, 111 Wn.App. 809, 46 P.3d 823 (2002). "There is no authority to support an interpretation of RCW 4.84.330 other than as mandating an award of reasonable attorney's fees to the prevailing party where a contract so provides." *See Singleton v. Frost*, 100 Wn.2d 723, 729, 742 P.2d 1224 (1987). The denial of attorney's fees in this case is not "within the ambit of broad trial court discretion." *Id.* at 730.

The trial court invalidated the documents stating in its findings:

This Court also repeats its finding that it has serious questions regarding the legality upon which both parties are relying on with regard to their

contractual source of the reasonable attorney's fees request; specifically, a promissory note and the Plexus, operating agreement. Although no specific jury instruction was requested to make a finding as to whether or not those documents were in fact credible, the Court can only infer, from the decision of the jury which weighed heavily in the ultimate result in favor of the Estate of Doris E. Mathews, that they also shared those questions regarding the legality of said documents.

(CP 1225).

The trial court went outside its authority with inferences of jury motivations and disregarded the mandatory language of RCW 4.84.330. RCW 4.84.330 requires the trial court to award attorney fees pursuant to a contract. *Mt. Hood Beverage Co.* dictates to trial courts that attorney fee provisions remain intact even if the underlying contract is invalidated. As *Singleton* instructs the trial court must award attorney fees pursuant to contract as it is not within discretion of the trial court.

Here, Mr. Spice and Ms. Mathews contracted in the form of the Promissory Note and Plexus Operating Agreement. Under Washington State law, the trial court must award attorney fees to the prevailing party. An attorney fee provision in an invalidated contract still remains in force. As discussed below, since Mr. Spice substantially prevailed in the matter due to the largely unwarranted counterclaims and obtaining a portion of the properties, he should have been awarded his attorney fees and costs.

D. Mr. Spice Defended Against 24 Counterclaims, 16 Affirmative Defenses, and Received Property.

Mr. Spice defended against the counterclaims, which took up the majority of the trial. Determining a prevailing party "is a mixed question of law and fact that is reviewed pursuant to an error of law standard." *Newport Yacht Bain Ass'n of Condominium Owners v. Northwest Inc.*, 168 Wn. App 86, 98, 285 P.3d 70 (2012), citing *Cornish College of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn.App 203, 231, 242 P.3d 1 (2010), review denied, 171 Wn.2d 1014, 249 (2011).

The prevailing party need not prevail on the entire "claim to qualify for attorney's fees, but it must substantially prevail in order to be entitled to such an award." *Newport Yacht Bain Ass'n of Condominium Owners v. Northwest Inc.*, 168 Wn.App 86, 98, 285 P.3d 70 (2012), citing, *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn.App 762, 773-74, 677 P.2d 773 (1984). "Moreover, a successful defendant can also recover as a prevailing party." *Id.* at 98, citing *Marassi v. Lau*, 71 Wn.App. 912, 916, 859 P.2d 605 (1993), abrogated on other grounds by *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009). If neither party wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends on the relief afforded the parties. *Marassi* at 916. A party may prevail for defending claims and without an affirmative judgment. See, *Richter v. Trimmerger*,

50 Wn. App 780, 784, 750 P.2d 1279 (1988).

Here, the trial court incorrectly determined that the Estate was the prevailing party. "Based on the values of the properties and the amount of interest in the real property which was awarded to the [Respondent], which was the overwhelming interest, this Court does not declare [Appellant], for purposes of awarding attorney's fees, as the prevailing party." (CP 1225). However, Mr. Spice prevailed on more causes of action than the Estate.

Mr. Spice also received a portion of the property that the Estate refused to acknowledge that he had an interest in. In fact, the Estate rejected his creditor's claim outright. (CP 1568). However, pursuant to RCW 11.40.100(1) and (2), Mrs. Donna Dubois, as personal representative of the Estate, could have rejected the claim in part or compromised the claim, but she chose to do neither.

E. Mr. Spice Substantially Prevailed Because the Majority of Litigation Focused on the Failed Counterclaims, and He Received a Portion of the Properties.

As such, Mr. Spice was required to file the lawsuit to enforce his interest in the properties that he had an interest in. The jury agreed that Mr. Spice had an interest in the properties, albeit, not all of them. He had to defend against the multiple counterclaims, defenses, and unnecessary motion practice conducted by the Estate.

Under the totality of the circumstances, Mr. Spice was the substantially prevailing party. If the jury had accepted the Estate's claims, Mr. Spice would not have been awarded any interest in the properties. Instead, the jury did award Mr. Spice an interest in a portion of the properties thereby signifying its agreement with Mr. Spice's claims.

In the alternative, when the substantially prevailing party cannot be determined as a result of distinct and severable claims being involved, an order that leaves both parties to bear their own costs is not adequately supported by a bare conclusion that each party recovered on a substantial theory. *See, Transpac Development, Inc., v. Oh*, 132 Wn.App. 212, 130 P.3d 892 (2006) (holding court should assess reasonable attorney fees for each claim); *see, also, Marassi v. Lau*, 71 Wn.App. 912, 915, 859 P.2d 605 (1993) (holding plaintiff and defendant are awarded attorney fees for the claims that they prevail upon and offset one another). The Court calculates the fees for each issue based on the reasonable time spent and under the lodestar method. *See, Crest Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 113 P.3d 349 (2005).

Each counterclaim required substantial work to defend against. The Estate forced Mr. Spice to respond to each claim and defense. The Estate wasted the court's time and Mr. Spice's time and financial resources by requesting numerous

continuances and engaging in excessive motions practice. The trial court reprimanded the Estate in his Findings of Fact by listing excessive motion practice, ineffective use of court time, requirement of special master for discovery, and lack of co-counsel as reasons for high attorney fees. (CP 1227). It also sanctioned the Estate's counsel for his conduct during the trial, which was intended to prejudice the jury against Mr. Spice and did prejudice Mr. Spice.

a. *The Estate Presented Insufficient Evidence Supporting Claims for Conversion (Counterclaim I & II).*

Under Washington common law, "A conversion is a willful interference with a chattel without lawful justification, whereby a person entitled thereto is deprived of the possession of it." *Olin v. Goehler*, 39 Wn.App. 688, 693, 694 P.2d 1129, review denied, 103 Wn.2d 1036 (1985); *see, Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn.App. 80, 84, 18 P.3d 1144 (2001). Money may become the subject of conversion, but only if the party charged with conversion wrongfully received the money, or if that party had an obligation to return the money to the party claiming it. *Id* at 83.

The jury did not award any money damages to the Estate because Mr. Spice did not convert any of the monies from Ms. Mathews or Plexus.

b. *The Estate Failed to Produce Sufficient Evidence for Its Fraud Claims (Counterclaims V, VI, VII).*

A claimant must plead and prove both the elements and circumstances of fraudulent conduct and allege specific fraudulent acts. *Haberman v. Wash. Public Power Supply Sys.*, 109 Wn.2d 107, 165, 744 P.2d 1032 (1987). A claim of fraud requires proof of nine essential elements. *See e.g. Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Only a complaint that alleges each element of fraud, including the allegedly fraudulent statements and how they were false, is sufficient. *Haberman*, 109 Wn.2d at 165-66.

“Generally fraud cannot be predicated upon a representation as to a future event, or a promise to do something in the future.” *Baertschi v. Jordan*, 68 Wn.2d 478, 483, 413 P.2d 657 (1966). The Estate asserted various nefarious schemes and plots based upon “information and belief,” but the Estate could not prove the existence of those schemes. Mr. Spice never intentionally concealed anything from Ms. Mathews and engaged in a mutually beneficial business relationship with her.

c. *The Estate Failed to Prove Negligent Misrepresentation (Counterclaim XVI).*

To prevail on a negligent misrepresentation claim, there must be clear, cogent, and convincing evidence that: (1) the defendant supplied false information for the guidance of others in a business transaction; (2) the defendant knew or should have known that the information was supplied to guide plaintiff in the business

transaction; (3) the defendant was negligent in obtaining or communicating false information; (4) the plaintiff relied on false information supplied by defendant; (5) the plaintiff's reliance on the false information supplied by defendant was reasonable under the circumstances; and (6) that the false information was the proximate cause of damages to plaintiff. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002).

The Estate relied upon inferences and conjecture and could not prove the elements of the negligent misrepresentation.

d. *Breach and Rescission of Contract Counterclaims Failed (Counterclaims VIII, IX, X)*

A contract requires the parties manifest to each other their mutual assent to the same bargain at the same time, generally in the form of an offer and an acceptance." *See, e.g. Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 555-56, 608 P.2d 266, review denied, 93 Wn.2d 1030 (1980). A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Larson v. Union Inv. & Loan Co.*, 168 Wn. 5, 10 P.2d 557 (1932); *Alpine Indus., Inc. v. Gohl*, 30 Wn. App. 750, 637 P.2d 998 (1981), review denied, 97 Wn.2d 1013 (1982).

The Estate failed to present sufficient evidence to warrant a breach of contract or rescission of contract action. No evidence proved a failure of assent.

e. *The Promissory Note and Plexus Operating Agreement Contained no Unconscionable Provisions (Counterclaims XI, XII)*

A claim that a contract is unconscionable, whether procedurally or substantively, may be a defense to enforcement of a contract. *See e.g. Zuver v. Airtouch Comm's, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004). In *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d. 510, 210 P.3d 318 (2009), the Washington Supreme Court observed that the difference between the two theories is that “procedural” unconscionability, involves blatant unfairness in the bargaining process and a lack of meaningful choice, and “substantive” unconscionability, involves an unfairness of the terms or results. *See also Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d. 371, 391, 858 P.2d 245 (1993). The key inquiry for finding procedural unconscionability is whether Ms. Mathews lacked a meaningful choice. *See Zuver v. Airtouch Communications*, 153 Wn.2d 293, 305, 103 P.3d 753 (2004).

Mr. Spice and Ms. Mathews worked together for over five years. Ms. Mathews oversaw the business operations and approved Mr. Spice’s transactions. Ms. Mathews never lacked meaningful choice in working with Mr. Spice. Two competent adults entered into a contract. Ms. Mathews even received counsel on the appearance of inequality in the contracts. (CP 299).

f. *The Jury Found No Negligence in Mr. Spice’s Business*

*Dealings and (Counterclaims XIV, XVII, XVIII, XIX)*

“Under the business judgment rule, corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.” *Scott v. Trans-Sys, Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003). The intent of the rule is to prevent the fact finder from substituting their judgment for that of a corporation’s directors when they act in good faith. *See Durand v. HIMC Corp.*, 151 Wn. App. 818, 214 P.3d 189 (2009), *citing*, *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). With regard to LLCs in particular, the law further limits a manager’s responsibility as follows:

A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law.

RCW 25.15.155:

The evidence showed that Mr. Spice acted in good faith in his efforts to maximize profits in the long term. The Estate failed to prove any exercise of unsound business judgment or breach of a fiduciary duty owed to Ms. Mathews.

g. *The Estate Failed to Produce Sufficient Evidence of Disregard and Dissolution of Corporation (Counterclaim XXIII, XXIV).*

The corporate entity is disregarded and liability assessed against shareholders in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another. *See Morgan v. Burks*, 93 Wn.2d 580, 611 P.2d 751 (1980), *citing Culinary Workers v. Gateway Cafe, Inc.*, 91 Wn.2d 353, 366, 588 P.2d 1334 (1979). This may occur either because the liability causing activity did not occur only for the benefit of the corporation, and the corporation and its controllers are thus “alter egos,” *See e. g., J. I. Case Credit Corp. v. Stark*, 64 Wn.2d 470, 392 P.2d 215 (1964); *W. G. Platts, Inc. v. Platts*, 49 Wn.2d 203, 298 P.2d 1107 (1956). The doctrine of disregard of the corporate entity will not apply, even though the intent necessary to disregard the corporate entity may exist, unless it is necessary and required to prevent unjustified loss to the injured party or to prevent violation of a duty. *See Morgan, supra*, at 587.

The Estate sought both the “corporate disregard” and the “dissolution” of Plexus. There was no reason to dissolve the corporation, and Plexus remained an active corporation.

h. *Mr. Spice Properly Managed Plexus Funds After Ms. Mathews’ Death (Counterclaim III, XV).*

Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a majority of the disinterested managers or members. *See RCW 25.15.155(2)*. But a

member's obligation to contribute to an LLC cannot be expanded beyond the members' agreements by reference to a general fiduciary duty of loyalty. *See Bishop of Victoria, Corp. v. Corporate Bus. Park*, 138 Wn.App. 443, 158 P.3d 1183 (2007).

Mr. Spice and Ms. Mathews signed the Plexus Operating Agreement. Ms. Mathews passed away and Mr. Spice was the majority member. The Estate failed to show any impropriety in Mr. Spice's administration of the business.

i. *The Estate Could Not Prove Unjust Enrichment (Counterclaim IV)*.

Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it. *See Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 160, 810 P.2d 12 (1991) (holding unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another).

Mr. Spice and Ms. Mathews formed a business relationship. Mr. Spice worked in the best interest of the business. The Estate offered no credible evidence of unjust enrichment.

j. *Mr. Spice Exerted No Undue Influence Over Ms. Mathews (Counterclaim XIII)*

Restatement of Contracts § 497 (1932) defines undue influence as follows: “[w]here one party is under the domination of another, or by virtue of the relation between them is justified in

assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable.” *Pleuss v. City of Seattle, et al.*, 8 Wn.App. 133, 137, 504 P.2d 1191 (1972). The evidence to establish undue influence must be clear, cogent, and convincing. *See In re Estate of Mitchell*, 41 Wn.2d 326, 249 P.2d 385 (1952).

Mr. Spice worked with Ms. Mathews for years. She trusted him enough to give him a Durable Power of Attorney. Mr. Spice assisted her with her properties at a time when they were in disrepair. Everyone knew of their business relationship.

k. *The Trial Court Summarily Dismissed the Counterclaim for Wrongful Death (Counterclaim XX)*

Absent affirmative conduct or a special relationship where one party is entrusted with the well-being of another party, there is no legal duty to come to the aid of another. *See Folsom v. Burger King*, 135 Wn.2d 658, 674, 958 P.2d 301 (1998). Generally, “every actor whose conduct involves an unreasonable risk of harm to another is under a duty to exercise reasonable care to prevent the risk from taking effect.” *Parrilla v. King County*, 138 Wn. App. 427, 436, 157 P.3d 879 (2007) (quotation omitted).

The Estate filed this counterclaim, and the Court summarily dismissed it on June 5, 2012. (CP 481). Ms. Christina Olsen, Ms. Mathews’ granddaughter, and a trained medical

assistant, lived with Ms. Mathews. (CP 1650). Mr. Spice has no specialized medical training and arrived shortly after being contacted about Ms. Mathews' passing. (CP 1650). The trial court found no merit to this claim.

1. *The Affirmative Defenses Lacked Merit.*

Mr. Spice attempted to mitigate damages, but the cloud over the title prevented him from doing so and completing the construction deals. His damages arose from the cloud over title that the Estate put on the property. The relief sought considered those damages. Mr. Spice never received sufficient payment.

As mentioned above, Mr. Spice committed no fraud or negligent misrepresentation. The Promissory Note and Plexus Operating Agreement contained no unconscionable terms and Mr. Spice gave sufficient consideration.

Although Ms. Mathews and Mr. Spice were business partners, he exerted no undue influence over Ms. Mathews, and Ms. Mathews made her own informed decisions. Mr. Spice did not conceal business information from Ms. Mathews. Mr. Spice successfully defended against 24 counterclaims and 16 affirmative defenses. The Estate only partially succeeded on the quiet title counterclaim, and Mr. Spice received ownership in a portion of the properties that were in dispute.

The counterclaims, defenses, along with the extensive motion practice, resulted in attorney's fees to Mr. Spice

exceeding \$600,000.00. Therefore, Mr. Spice substantially prevailed in this case, and, pursuant to the Operating Agreement and Promissory Note, he should have been awarded attorney's fees and costs. Mr. Spice could not successfully collect property awarded to him if he had not successfully navigated the 25 counterclaims and affirmative defenses filed in this case.

The majority of these counterclaims lacked merit. The trial court found that the Estate should not receive attorney fees because of the substantial number of the baseless counterclaims, inexperience of counsel, excessive motion practice, failure to obtain more experienced co-counsel, and extension of court time. (CP 1229). However, the Estate forced Mr. Spice to respond to the counterclaims and excessive motion practice. As a result, Mr. Spice incurred an unnecessarily large amount in attorney fees.

The trial court dismissed the large amount of attorney fees by stating that it believed that the money to pay for the fees came from the properties. While this was not supported by the record, especially given that the jury did not award any money damages to the Estate, Mr. Spice still had to pay an exorbitant amount of money on attorneys to defend the Estate's claims.

His attorneys estimate the trial lasted three times as long because of the additional counterclaims. Discovery entailed thousands upon thousands of pages of documents. The Estate, in

large part, caused the extensive amount of work that had to be performed through unnecessary discovery and excessive motion practice. As the prevailing party, this Court should award attorney fees to Mr. Spice. He claimed an interest in the properties, and he received an interest in the properties. While he did not receive an interest in all of the properties, he prevailed on his claim and defeated the Estate's counterclaims and defenses.

F. Mr. Spice Incurred Reasonable Attorney Fees Under the Lodestar Method.

Washington courts have adopted the "Lodestar" approach in the calculation of attorney fees. This method requires that the "trial court must determine the number of hours reasonably expended in the litigation." See *Bowers v. Transamerica Title Insurance*, 100 Wn.3d 581, 597, 675 P.2d 193 (1983); see also *Lindy Bros Builders, Inc. v. American Radiator & Standard Sanitary Corp.* 487 F.2d161 (3rd Cir. 1973). The total number of hours reasonably expended is then multiplied by the reasonable hourly rate of compensation. See *Bowers* 100 Wn.3d at 597.

Nonetheless, the trial court does have the discretion in determining what is reasonable. *Singleton v. Frost*, 108 Wn2d 723, 730-31, 742 P.2d 1224 (1987). 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 rate of compensation considering *inter alia* the difficulty of the problem, each lawyer's skill and experience and the amount involved." *Id.* at 733. Appellate courts exercise a supervisory role to ensure discretion is exercised on articulable grounds. *See Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998).

This case involved a high level of complexity, a large number of motions, a three week trial, and a very contentious discovery period. Mr. Spice required multiple attorneys to defend against the counterclaims of the Estate. Each one of the attorneys charged a reasonable hourly rate commensurate with their years in practice, expertise, and the complexity of the case. The attorneys worked a reasonable amount of hours based upon the excessive motions practice and counterclaims of the Estate. The trial court incorrectly determined that the Estate was the prevailing party and never reviewed whether Mr. Spice incurred reasonable fees as part of the action.

The Estate rejected Mr. Spice's creditor's claim in its entirety thereby forcing Mr. Spice to file the lawsuit to pursue his claims to the real property. While the jury did not award all the property to Mr. Spice, it awarded a significant interest in the properties to him thereby rejecting the Estate's claim that he had no interest in the properties. Under these circumstances, Mr. Spice should have been entitled to an award of attorney fees and costs as

the substantially prevailing party, not the Estate.

**2. The Trial Court Improperly Denied Mr. Spice's Motion for JNOV or New Trial.**

A. The Standard of Review on a Trial Court's Decision to Deny a Motion for JNOV or New Trial.

In reviewing a trial court's decision to deny a directed verdict or JNOV, this Court applies the same standard as the trial court. *Wright v. Engum*, 124 Wn.2d 343, 356, 878 P.2d 1198 (1994). The *Wright* court stated that:

A directed verdict or judgment n.o.v. is appropriate if, when viewing the material evidence most favorable to the non-moving party, the court can say, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party .

...  
The inquiry on appeal is limited to whether the evidence presented was sufficient to sustain the jury's verdict. Denial of a motion for directed verdict or judgment n.o.v. is inappropriate only when it is clear that the evidence and reasonable inferences are insufficient to support the jury's verdict.

*Id.*, quoting, *Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

Abuse of discretion is the standard of review for an order denying a motion for a new trial: "An order denying a new trial will not be reversed except for abuse of discretion. The criterion for testing abuse of discretion is: '[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?'" *Sommer v. Dept. of Social and Health Services*, 104 Wash. App. 160, 170, 15 P.3d 664 (2001).

B. The Trial Court should have Granted Mr. Spice's Motion for JNOV.

In this case, following the jury's verdict, Mr. Spice timely filed a motion for JNOV. (CP 989). The trial court denied the motion reasoning that there was sufficient evidence for the jury to distribute the property in the manner in which it did. (RP, 10/5/12, at 11-12). However, this court ignored the evidence that had been presented that showed that Ms. Mathews had properly transferred the properties to Mr. Spice and Plexus. (Ex. 9-17). It ignored the fact that there was no finding by the jury that the transfers were a result of fraud, misrepresentation or any other claim asserted by the Estate.

For example, in *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 32 P.3d 250 (2001), after a jury found for the defendant on common-law tort claims and for the plaintiffs on the Consumer Protection Act ("CPA") claim, the trial court granted the defendant's motion for judgment as a matter of law. The *Guijosa* court affirmed the decision of the trial court and the court of appeals. In doing so, it determined that the plaintiff had not provided any evidence that a CPA violation had occurred. *Guijosa* at 921. The *Guijosa* court found that the jury's determination of no discrimination eliminated the only basis presented by plaintiffs at trial for finding such a violation, and "a verdict cannot be founded on mere theory, speculation or conjecture." *Id.*, quoting, *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 356, 493 P.2d 1018 (1972).

Of course, the facts and claims in the *Guijosa* case are not similar to the facts, claims, counterclaims, and defenses asserted in this case, but the reasoning for entering the JNOV is the same. That is, there was no basis

for the jury to award the percentages in the properties as they did based on the evidence and testimony provided during the trial. Put another way, there was no substantial evidence or reasonable inferences that could lead the jury to render its verdict awarding property in the percentages it did to Mr. Spice and the Estate.

Verdict Form “B” provided, in pertinent part, that:

WE, THE JURY, find for the Defendant, Estate of Doris Matthews, and that the Estate is entitled to \$ \_\_\_\_\_ as damages against Ted Spice based upon the claims of the Defendant’s Estate. (If no money damages are awarded please leave blank. If neither party is to be awarded 100% of the real properties used Verdict Form “C”)

(CP 938). The jury did not award any money to the Estate as damages against Mr. Spice based on the Estate’s counterclaims against him. Instead, pursuant to Verdict Form “C”, the jury awarded the parties an interest in the properties as follows: “Rental Properties (11003, 11004, 11007, and 11011 58<sup>th</sup> St. Ct. E):” 25% to Mr. Spice and 75% to the Estate; “Duplex Property (10915-10917 58<sup>th</sup> St. Ct. E):” 100% to the Estate; “Rental”/Ted (5818 #A and #B Milwaukee Ave E):” 100% to the Estate; 11319 58<sup>th</sup> St. Ct. E.: 100% to Mr. Spice; 117.8 Acres Kitsap County: 50% to Mr. Spice and 50% to the Estate; .02 Acres Napavine, WA: 100% to Mr. Spice; and 11305 House 58<sup>th</sup> St. Ct. E.: 100% to the Estate. (CP 939-940).

In Mr. Spice’s motion for JNOV, he argued that the jury improperly awarded a 100% interest in the 11305 property to the Estate, given that Doris Matthews had deeded a 1/3 interest in the 11305 property to Mr. Spice. (RP, date 10/5/12, at 3-12) (Ex. 13). In regards to the 11003

property, Mr. Spice was deeded a 100% in this property. (Ex 18). And, Mr. Spice had a 51% interest in Plexus, so he should have, at the least, received a 51% interest in the properties that were owned by the company. (CP 1424). The properties that were owned by the company were the 10915 property and the Kitsap County property. (Ex 19 and 17). There simply was not substantial evidence or any reasonable inferences to lead the jury to ignore the deeds and award lesser percentages to Mr. Spice.

RCW 64.04.050 provides that, “Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his or heirs and assigns in fee of all then existing legal and equitable rights of the grantor in the premises . . .” While an older case, in *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 P. 984 (1909), the plaintiff conveyed property to the defendant by quitclaim deed and sued to set aside the transfer on the ground that the former was obtained through fraud and misrepresentation. *Id.* at 438. The plaintiff could read and speak the English language, but he claimed that he did not read the deed and signed it believing that he was guaranteeing the payment of a note. The trial court ruled in favor of the plaintiff.

In reversing the trial court’s decision, the *Golle* court stated that, “If this judgment is permitted to stand, deeds and other written instruments have lost their chief value. In actions of this kind the authorities all agree that the proof on the part of the party seeking to defeat the operation of his deed must be clear, unequivocal, and convincing.” *Id.* at 439. *See also*,

*McInerney v. Beck*, 10 Wash. 515, 517-18, 39 P. 130 (1895) (reversing a jury's verdict in favor of defendants when the evidence showed that the property had been properly conveyed by deed and that a quitclaim deed was as good as any other deed if the grantor had the title to convey it).

In fact, on cross examination of Mrs. Donna Dubois, she admitted that her mother, Ms. Mathews, would make her own decisions regarding how to handle her affairs, including her property. (RP, 09/11/12, at 18-19). She took her mother to meet with attorneys for estate planning purposes and received advice from the attorneys. *Id.* Ms. Mathews then made a decision on how to proceed with her estate planning. Mrs. Dubois acknowledged that it was her mother's decision because it was her money and her property, and her mother ultimately made the decision to do what she wanted to do. *Id.*

Likewise, Ms. Mathews made the decision to transfer the property to Mr. Spice and Plexus through properly executed deeds. It was her decision to do this, and, again, there was no finding by the jury that the transfers were a result of fraud, negligent misrepresentation, duress or any other counterclaim or affirmative defense the Estate pursued against Mr. Spice. The evidence was not sufficiently clear, unequivocal, and convincing to support an award of an interest in the properties to the Estate that was in direct conflict with the deeds and the operating agreement of Plexus, and there was no finding by the jury that Mr. Spice wrongfully obtained an interest in the properties.

Therefore, Mr. Spice respectfully requests that this Court reverse the

trial court's decision denying his motion for JNOV. Mr. Spice should be entitled to a 1/3 interest in the 11305 58<sup>th</sup> St. E. property, a 100% interest in the 11003 58<sup>th</sup> St. E. property, and a 51% percent interest in the Plexus properties.

C. The Trial Court should have Granted Mr. Spice's Motion for New Trial.

In Mr. Spice's motion for JNOV or new trial, he argued to the trial court that, pursuant to CR 59, the trial court had the authority to vacate the jury's verdict and enter judgment or order a new trial if there was an error in the assessment of recovery or there was an error of law at trial. (CP 989). A new trial should have also been granted as a result of the misconduct of the Estate's counsel during the trial when he intentionally elicited testimony from a witness that depicted Mr. Spice as a sexual deviant. (CP 1305-1306) Counsel's misconduct resulted in sanctions being assessed against him following the trial, (CP 1304), but sanctions were insufficient to correct the harm to Mr. Spice as a result of his actions during the trial.

CR 59(a)(7) permits a new trial when "there is no evidence or reasonable inference from the evidence to justify the verdict." It is an abuse of discretion to deny a motion for a new trial where the verdict is contrary to the evidence. *Sommer v. Dept. of Social and Health Services*, 104 Wash. App. 160, 172, 15 P.3d 664 (2001), quoting, *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1997). When the proponent of a new trial argues that the verdict was not based on the evidence, the appellate court reviews the record to determine whether there was sufficient evidence to support the

verdict. *Sommer at 172.*

All evidence must be viewed in the light most favorable to the party against whom the motion is made. *Id., citing, Hojem v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980). There must be “substantial evidence” as distinguished from a “mere scintilla” of evidence, to support the verdict-i.e., evidence of a character “which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *Id.* A verdict cannot be founded on mere theory or speculation. *Id.*

For the same reasons set forth above as to why the trial court should have granted Mr. Spice’s motion for JNOV, the trial court should have ordered a new trial. There was not substantial evidence to support the jury’s verdict awarding property to the Estate and to Mr. Spice in the percentages that were awarded. The Estate did not provide evidence that was clear and unequivocal that would convince an unprejudiced, thinking mind of the truth of the fact that the properly executed deeds should be ignored in determining the percentage interests of the parties in the real property.

This fact combined with the fact that the Estate’s counsel engaged in misconduct during the trial should have resulted in the granting of a new trial for Mr. Spice. CR 59 permits a new trial because of misconduct of the prevailing party or damages are so excessive or inadequate as to unmistakably indicate that the verdict was a result of passion or prejudice. *See*, CR 59(a)(1) and (5). In this case, the trial court considered the Estate the prevailing party, which was a mistake. In addition, the Estate, through

its counsel, engaged in misconduct by intentionally eliciting testimony from a witness during the trial that cast Mr. Spice as a sexual deviant.

Absent an objection to counsel's remarks, the issue of misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect. *Sommer v. Dept. of Social and Health Services*, 104 Wash. App. 160, 171-172, 15 P.3d 664 (2001), *citing*, *Warren v. Hart*, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967). When the misconduct occurred, Mr. Spice's counsel did raise the issue to the trial court. (RP, 09/05/12, at 16-17). The trial court and Mr. Spice's counsel discussed the possibility of a mistrial. *Id.* At the time, Mr. Spice's counsel believed that it would be cost prohibitive to start the trial over unless the trial court ordered the Estate to pay for Mr. Spice's attorney fees in having to do so. *Id.*

This did not happen and, instead, the trial court proceeded with interviewing each juror regarding the impact of the testimony on them. (RP 18-19). While it was determined to proceed forward with the trial, the misconduct was so flagrant that no instruction to the jury or the individual jurors could have cured the prejudicial effect, and the trial court should have ordered a mistrial. (RP 24-26) The jury's decision to award Mr. Spice a percentage interest in the property that was directly in conflict with the deeds is indicative of the prejudice Mr. Spice suffered as a result of the misconduct of the Estate's counsel.

The proverbial bell had been rung by the Estate's counsel's improper questioning, and there was no way to un-ring the bell. Mr. Spice should be

entitled to a new trial or, at least, a revision of the verdict to properly reflect the correct interests in the properties that the parties were entitled to.

### **3. Attorney Fees on Appeal.**

RCW 4.84.330 allows for attorney fees under a contractual agreement. “If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.” RAP 18.1. The Promissory Note and the Plexus Operating Agreement provided for attorney fees to be awarded to the prevailing party.

Mr. Spice has incurred attorney fees in the preparation of this appeal, and he would respectfully request an award of reasonable attorney fees for having had to file and pursue this appeal.

## **V. CONCLUSION**

The trial court erred by not awarding attorney fees and costs to Mr. Spice as the prevailing party. RCW 4.84.330 uses mandatory language, and the trial court enjoys no discretion. Mr. Spice prevailed on 24 counterclaims and 16 affirmative defenses. The Estate forced Mr. Spice to respond to these claims in order to obtain his interest in the property. Mr. Spice incurred an exorbitant amount of attorney fees and costs litigating the counterclaims and defenses. As a result, Mr. Spice prevailed on

more issues as well as the issues that were more heavily litigated, and he should have been considered the prevailing party.

Mr. Spice and Ms. Mathews enter into two separate private agreements, the Promissory Note and Plexus Operating Agreement. The trial court merely inferred the jury found the agreements legally deficient. Moreover, as explained previously, attorney provisions remain intact even when the trial court finds other parts of the contract invalid. Attorney fees should be awarded to Mr. Spice as the prevailing party and under the private agreement between the parties.

The trial court's decision denying Mr. Spice's motion for JNOV or a new trial should also be reversed. There was no substantial evidence or reasonable inferences that could lead the jury to render its verdict awarding the property in the percentages it did to Mr. Spice and the Estate. Moreover, the evidence was not clear, unequivocal, and convincing enough to defeat the operation of the deeds that transferred the property to Mr. Spice and Plexus. Mr. Spice should be entitled to a 1/3 interest in the 11305 58<sup>th</sup> St. E. property, a 100% interest in the 11003 58<sup>th</sup> St. E. property, and a 51% percent interest in the Plexus properties.

Alternatively, Mr. Spice should be entitled to a new trial due to the conduct of the Estate's counsel, and the prejudice that resulted from such conduct and the resulting jury verdict that did not award property to Mr. Spice pursuant to the deeds and the

Plexus Operating Agreement.

Under RAP 18.1, the prevailing party may request attorney fees on appeal when a contract has an attorney fee provision. Mr. Spice respectfully requests reasonable fees and costs on this appeal under the contract he had with Ms. Mathews and pursuant to RCW 4.84.330.

Dated this 6<sup>th</sup> day of April, 2015.

A handwritten signature in black ink, appearing to read 'Chris Marston', written over a horizontal line.

Christopher J. Marston, WSB #30571  
Attorneys for Ted Spice, Appellant

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DIVISION II  
2015 APR -6 PM 3:15  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
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NO. 44101-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 10-2-11622-8

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TED SPICE,

Appellant,

vs.

DONNA E. DUBOIS, as Personal Representative of the Estate of DORIS  
E. MATHEWS, deceased

Respondents.

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**AFFIDAVIT OF SERVICE OF APPELLANT'S OPENING  
BRIEF**

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