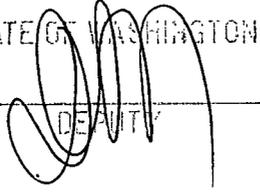


FILED
COURT OF APPEALS
DIVISION II

2013 NOV -5 PM 1:19

No. 44829-7-II

STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

HAFID TAHRAOUI,

Appellant

v.

FRANKLIN BROWN, ET AL.,

Respondents.

APPELLANT'S OPENING BRIEF

Hafid Tahraoui
Appearing Pro Se
P. O. Box 45365
Seattle, WA 98145
206-612-7070

P.M. 11-4-2013

A. INTRODUCTION

This case involves a lawsuit for civil rights and other state law violations against a sheriff's department and its deputies during the course of investigating a minor theft claim.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by not striking Respondents' statement of factual background in their CR 12(c) motion.

2. The trial court erred in dismissing Tahraoui's claim for malicious prosecution.

3. The trial court erred in dismissing Tahraoui's claim for Abuse of Process.

4. The trial court erred in dismissing Tahraoui's claim for Intentional Inflection of Emotional Distress/Outrage.

5. The trial court erred in dismissing the Pierce County Sheriff and Pierce County from Tahraoui's complaint.

C. ISSUES PERTINING TO ASSIGNMENTS OF ERROR

1. Whether Respondents' statement of factual background, in their CR 12(c) motion, should be stricken by the court when said statement is contrary to the facts presented in the amended complaint.

2. Whether the trial court erred in dismissing the claim for malicious prosecution when Tahraoui had alleged sufficient facts to support that Respondents lacked probable cause to arrest, institute or continue criminal proceedings against him.

3. Whether the trial court erred in dismissing the claim for abuse of process when Tahraoui had alleged sufficient facts to support said claim.

4. Whether the trial court erred in dismissing the claim for Intentional Inflection of Emotional Distress/Outrage when Tahraoui's amended complaint contain sufficient facts to support said claim.

5. Whether the trial court erred in dismissing the Pierce County Sheriff and Pierce County from Tahraoui's complaint

D. STATEMENT OF THE CASE¹

1. On or around May 9, 2008, Appellant Hafid Tahraoui ("Tahraoui") went to the Spanaway area in Pierce County, Washington, to buy a small generator that was listed for sale on Craigslist by an individual named Eric Pate ("Pate"). Shortly after meeting with Pate, Tahraoui agreed to buy the generator and paid Pate \$250 cash. Also, Pate informed Tahraoui that he was moving

¹ The statement of the case is based on Tahraoui's First Amended complaint. See Clerks' papers (CP) pages 16-21

out of state and has a lot of tools for sale. Then, Tahraoui agreed to meet Pate at his house, later that day, to see if there are some tools he wanted to buy. CP 16-21

2. Around 6 p.m., that same day, Tahraoui arrived at Pate's house and inspected the tools that are for sale. Few hours later, Tahraoui bought a dozen of tools from Pate and paid him \$450 cash. Before leaving, Tahraoui informed Pate that he was also interested in buying his forklift. Tahraoui and Pate, again, agreed to meet next day, at his house, to discuss the sale of the forklift.

3. The next day, May 10, 2008, around 10 a.m., Tahraoui arrived at Pate's house where a garage sale was under way. Pate's step father, Shelly, was conducting the sale and collecting the payment. Pate, however, was not seen around and was not involve in the sale. Tahraoui asked Shelly to see Pate, and Shelly told him that Pate will be available in about half hour. Tahraoui start going through the garage sale while waiting for Pate to came out. Some time after, Tahraoui saw Pate from distance, in tear, getting to his car and leaving the house with his wife. Tahraoui asked Shelly about Pate and why he was in tear. Shelly told him that Pate's father has passed away and Pate was going to his father's house.

4. During the garage sale on that day, Tahraoui bought few more items from Shelly and paid him \$200 cash, including a trailer hitch ("hitch") priced at \$50. And at around 12 p.m., Tahraoui left Pate's house driving home without talking to Pate.

5. On May, 11, 2008, Pate telephoned Tahraoui and informed him that his step father shelly made a mistake by selling him the hitch because it was not for sale. In rude manner, Pate asked Tahraoui to bring him back the hitch immediately. Tahraoui explained to Pate that he bought the hitch from Shelly and he is not obligated to give it back to him. However, he may consider give him back the hitch if can be respectful and willing to come his home and get it. During that conversation, a dispute arouses between Tahraoui and Pate as to whether the hitch was properly sold to the Tahraoui. CP 18-19

6. On that same day, Pate contacted the Pierce County Sheriff to report that Tahraoui had stolen the hitch from him. Respondent Deputy Sheriff Franklin Brown ("Brown") was dispatched to Pate's house to investigate the theft claim.

7. At 12:01 p.m., Brown, arrived at Pate's house.

8. At 12:07 p.m., less than 6 minute after arriving at Pate's house and without conducting an investigation in good faith

or a meaningful one, Brown called and left a message for the Tahraoui threatening to arrest him in very quick manner if he did not return the hitch to Pate immediately. Brown said in his message:

“Hafid, this is Depute Brown with the Pierce County Sheriff’s Department. You took the trailer hitch from Eric (Pate) from his house. I’ll bet that you will return the hitch before I get my hand on you and put you in the Pierce County Jail. If you want to contact me call 911 and ask for Deputy Brown”.

9. After hearing Brown’s message, Tahraoui was shocked and frighten. He called Brown immediately and tried to explain to him that he bought the hitch and he (Brown) should hear his side of the story before deciding to arrest him for something he did not do. Brown told him that he must return the hitch before he catches him. Also, Tahraoui tried to remind Brown that a warrant or probable cause is needed for the arrest. Brown responded that he does not need anything to arrest him. To prove his point, Brown asked Tahraoui for his address so he can come to his home and arrest him. However, Tahraoui refused to answer his request.

10. Brown made some contact with other police agencies in an effort to locate Tahraoui and arrest him. Brown was able to gather private and personnel information about Tahraoui such us

his home and work address, what car or truck he owns and other things. Subsequently, that information was given to Pate so he can help locate Tahraoui.

11. Later that day, Pate telephoned Tahraoui and told him that he was given a lot of information about him and he will be waiting for him at his work place until he gets back the hitch. As a result of this revelation, Tahraoui become more afraid and was worried that Pate may attack him if he goes to work.

12. On May 12, 2008, Tahraoui contacted the Pierce County Sheriff several times to complaint about Brown's misconduct with him. However, Tahraoui could not get anyone to help him with his complaint.

13. Hours later, Respondent Lieutenant Rustin Wilder ("Wilder") telephoned Tahraoui to investigate his Complaint. Tahraoui complained to Wilder about Brown bias and mishandling of the theft claim. He told Wilder that Brown wants to arrest him without investigation or a good faith belief that he stole the hitch from Pate. Wilder assured Tahraoui that he will investigate his complaint and get back to him with an answer.

14. Afterward, and according to the police report, wilder setup a ruse to arrest Tahraoui. He telephoned Tahraoui and asked

him to come down to the South Hill precinct and fill out a statement about his complaint. Tahraoui become suspicious and asked Wilder if he is going to be arrested. At first, Wilder try to hide his intention, but few minutes after, he informed Tahraoui that his is facing arrest for multiple crimes including theft and extortion. Wilder told Tahraoui that he was lying in his complaint and Brown had every right to arrest him.

15. Without any further investigation, and less than 30 hours after the theft claim, Wilder recommended to the Pierce County Prosecutor's office to charge Tahraoui with felony in Superior Court, even though the hitch is not worth more than \$100. However the prosecutor's office declined to do so.

16. On May 13, 2008, Tahraoui contacted the Pierce County Executive office to complaint about his growing problem with the Pierce county Sheriff. However, Tahraoui was advised by the executive assistant that the executive office has no control over the Sheriff and can not review its decision. The assistant explained that the Sheriff is an elected position and the Department is an independent agency from Pierce county Executive.

17. On May 22, 2008, Defendants Deputies Montgomery Minion ("Minion") and Foster travel to Tahraoui's work Place in

Kent, King County, to arrest him on theft charge. However, Tahraoui was not found and kept him self out of reach.

18. Defendant Minion telephoned Tahraoui and told him that he was charged with theft and he will be arrested and better for him to return the hitch to Pate.

18. For the following weeks and months, Tahraoui was fearful from the imminent arrest he was facing and did not know to whom else to complain. He limited his movement and driving activities to the minimum and did not travel to Pierce County to avoid arrest.

19. For financial reason, Tahraoui was unable to hire an attorney to resolve the theft claim. He hoped that his problem with the Sheriff will go away over time if he is not arrested.

20. On March 4, 2009, Tahraoui received a criminal complaint charging him with theft in Pierce County District Court. He contacted the prosecutor office and asked them to drop the charge against him based on the lack of probable cause in the case and Brown's misconduct. But they refused to do so.

21. On March 13, 2009, Tahraoui was arraigned on the theft charge and pleaded not guilty. And in subsequent hearings,

the Court dismissed with prejudice the charges against Tahraoui on May 5, 2009.

22. On July 11, 2011, Tahraoui filed a lawsuit against Respondent in Pierce County Superior Court for various federal and state claims.

23. In November 2011, Respondents removed Tahraoui's action to Federal Court.

24. On February 13, 2012, U.S. District judge dismissed all Tahraoui's federal claims and reminded the balance of the case on state claims to Pierce County Superior Court.

25. On March 29, 2013, the trial court granted Respondents' CR 12(c) motion and dismissed Tahraoui's action in its entirety.

26. On April 29, 2013, Tahraoui filed a timely notice of appeal to this court.

E. ARGUMENT

1. Standard of review

A motion to dismiss for failure to state a claim (CR 12(b)(6)) and a motion for judgment on the pleadings (CR 12(c)) raise identical issues and are subject to the same standard of review. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128

P.3d 627 (2006). The court of appeals reviews a trial court's dismissal of a claim under either CR 12(b)(6) or CR 12(c) de novo. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). In making this determination, the court must presume that the plaintiff's allegations are true and may consider hypothetical facts that are not included in the record. *Burton*, 153 Wn.2d at 422. A CR 12 motion should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). It is under this standard that the court of appeals must decide the issues raised on appeal.

2. Respondents' Statement of Factual background of their CR 12(c) Motion is False and Misleading Therefore; it should be stricken by the court

As preliminary matter, the trial court erred by not striking or at least disregarded Respondents' statement of factual background in their CR 12 (c) motion.

Because Respondents' motion was brought under CR 12(c), the only facts allowed before the court are the one alleged by the

plaintiff's (Appellant) complaint which must be presumed to be true by the court. Respondents' motion, however, came up with new facts and they attribute them to Plaintiff's complaint, namely:

Respondents state that "instead of leaving, Tahraoui remained on the property". See Defendants' Motion p. 2. Nowhere in plaintiff's complaint such allegation can be found. This allegation by the Respondents which is false is very important because, it gives the impression that Plaintiff did not have permission to be at Pate's house. The plaintiff, however, did have permission and did not leave Pat's house because of the garage sale which was open to the general public conducted by Shelly, Pate's step father, on behalf of Pate's.

Defendants state that "plaintiff was told by third party that Pate's father had passed away and Pate was going to his father's house". Here Defendants deliberately concealed the identity of this so called third party to show that Pate and this third party are not related and therefore this third party could not act on behalf of Pate and had no permission to sell Pate's stuff. Where in fact, this third party is Shelly, Pate's step father, who was authorized by Pate to conduct the garage sale.

Defendants state that "Tahraoui left Pate's house with the trailer hitch and without first talking to Pate concerning this action". This is also another material false allegation made by the Defendants and it is unfounded in plaintiff's complaint. This false allegation by the defendants gives the impression that plaintiff knew that the hitch was a private property of Pate and the third party had no permission to sell it. The true fact, however, is that the hitch was for sale at the garage sale like any other items. Plaintiff and Shelly did not know that the hitch was not for sale at the garage sale. Plaintiff could not be held responsible for the sale of hitch by Shelly.

Defendants state that "On May 11, 2008, Pate telephoned Tahraoui and told him the hitch was not for sale". Here Defendants deliberately omitted that Pate told Plaintiff his step father made a mistake by selling him the hitch.

Defendants hide the fact that Deputy Brown spent less than 5 minutes to investigate the theft claim before he decided to arrest Tahraoui.

The above are some of the false statements by the Respondents in their motion. These facts are contrary to the allegation in Plaintiff's complaint and they can easily prejudice the

Plaintiff if considered by the court. Therefore, the court should strike part of Defendant's motion named "Factual background".

3. Tahraoui alleged sufficient facts to support that Respondents lacked probable cause to arrest, institute or continue criminal proceedings against him, and as such, Tahraoui's claim for malicious prosecution should not be dismissed

The trial court erred in dismissing Tahraoui's claim for malicious prosecution.

In order to maintain an action for malicious prosecution in this state, a plaintiff must plead and prove the following elements: (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 852 P.2d 295 (1993). Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action. *Hanson* 121 Wn.2d 552 at 554.

Respondents argued below that Tahraoui's claim for malicious prosecution should be dismissed because Tahraoui failed to show that "officers lacked probable cause". See Defendants' motion at p. 5. (CP 5)

Probable cause for a warrantless arrest exists when the facts and circumstances within the arresting officer's knowledge at the time of the arrest are sufficient to lead a reasonably prudent officer to believe in good faith that the person was violating the law. *Sennett v. Zimmerman*, 50 Wn.2d 649, 651, 314 P.2d 414 (1957). However, "unless the evidence conclusively and without contradiction establishes the lawfulness of the arrest, it is a question of fact for the jury to determine whether an arresting officer acted with probable cause." *Gurno v. Town of LaConner*, 65 Wn. App. 218, 226, 828 P.2d 49 (1992)

Here, Tahraoui's amended complaint alleged sufficient facts to support that defendants did not have probable cause to arrest, institute or continue criminal proceedings against plaintiff. He alleged the followings: See complaint at p. 4

a. Defendants were not reasonably prudent and were careless and disregarded Plaintiff's right in investigating the theft claim. Defendant Brown arrived at Pate's house, after 911 call, at

12:01 pm and at 12:07 pm he decided that Plaintiff should be arrested for the theft of the trailer hitch. Brown spent less than 5 minutes investigating Pate's claim and examining the victim/witness "Pate", who did not witness the theft claim and was not at the house. In these circumstances, Brown did not, and could not have conducted a meaningful investigation in less than 5 minutes, that can lead a reasonably prudent officer to believe in good faith that a crime has been committed, especially when there is no emergency and Brown did not have to rush to make judgment.

b. Defendants did not act in good faith to gather sufficient evidence to evaluate Pate's claim. Brown did not want to hear Plaintiff's explanation to how he obtained the hitch.

c. Defendant Brown did not act in good faith when he deliberately failed to ask or examine Shelly, Pate's step father, who was the only witness for the theft claim. In addition, Shelly was authorized by Pate to conduct the garage sale on his behalf.

Tahraoui alleged that Defendants instituted or continued their criminal proceedings through malice based on Brown and wilder actions. Only 5 minutes after he arrived at Pate's house, Brown called Plaintiff and left a voice mail stating the following:

““Hafid, this is Depute Brown with the Pierce County Sheriff’s Department. You took the trailer hitch from Eric (Pate) from his house. I’ll bet that you will return the hitch before I get my hand on you and put you in the Pierce County Jail. If you want to contact me call 911 and ask for Deputy Brown”. See complaint at p. 4.

Wilder was mad at the Plaintiff because he complained about Brown’s actions, later wilder setup a ruse to arrest Plaintiff. Complaint at p. 5.

Furthermore, Tahraoui alleged that defendants did not act in good faith, and did not make a full and fair disclosure of all material facts known to them such as that Plaintiff did purchase the hitch and other item, and deliberately forward a false report to the prosecuting attorney to file charges.

It is the Defendants who recommended to the prosecuting attorney to charge Plaintiff with theft based on their investigation.

Defendants argue that Plaintiff committed theft under RCW 9A.56.020 (a) because he took Pate’s hitch without first telling Pate. This assertion is false and not supported by Plaintiff’s complaint. The hitch, like all other items, was available for sale at Pate’s garage sale under the supervision of Shelly. There is no reason for the Plaintiff to tell Pate that he bought the hitch or any other item

because Shelly, who was in charge of the sale and acting on behalf of Pate, knew about all item sold that day. In addition, Pate was not at the house when the Plaintiff bought the hitch. Tahraoui clearly alleged in his complaint that "On May 11, 2008, Pate telephoned Tahraoui and informed him that his step father, Shelly, made mistake by selling him hitch because it was not for sale."

In this situation, Pate tried to cover up Shelly's mistake in selling the hitch, by claiming that Tahraoui stole the hitch. The most what can be said about this controversy it is a civil dispute between two people but there was no theft.

Respondents also argue that Tahraoui's claims that he bought the hitch is only an affirmative defense to the theft and can not negate the existence of probable cause. This argument has no merit and Defendant reliance on *McBride v. Walla County*, 95 Wn. App. 33, 975 P.2d 1029, 990 P.2d 967 (1999) and *State v. Fry*, 168 Wn.2d 1, 18, 228 P.3d 1 (2010) is misplaced. Because, as our supreme court explain in *State v. Fry*, hitting someone and smoking marijuana are still crimes unless there is affirmative defense of "self defense" or "compassionate use defense". Where as, buying or taking possession of something are not crimes unless proven otherwise. Therefore, the requirement to establish probable cause

when there is an act of hitting someone or an act of smoking marijuana is much lower than in a theft act. In theft claim, an officer is required to conduct a meaningful investigation, in good faith and ask all parties involved before finding probable cause and making arrest. This proposition is also supported by *Bender v. Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492 (1983).

Defendants did not act in good faith, were not reasonably prudent and were careless and disregarded Plaintiff's right. They did not have probable cause and did not make a full and fair disclosure of all material facts known to them to the prosecuting attorney. The court thus should not dismiss plaintiff malicious prosecution claim.

4. Tahraoui Alleged Sufficient Facts to Support a Claim for Abuse of Process Therefore Dismissal of Said Claim is not Appropriate

The trial court erroneously concludes that Tahraoui's claim for abuse of process should be dismissed.

According to the *Washington Practice*, Vol. 16A, p. 65, "Washington courts apply the Restatement definition of abuse of process: "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

abusive process." For the tort of abuse of process, "the crucial inquiry is whether the judicial system's process, made available to insure the presence of the defendant or his property in court, has been misused to achieve another, inappropriate end." *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d 956, 965, 603 P.2d 828 (1979).

The court characterized the "essential elements" as "(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." *Fite v. Lee*, 11 Wn. App. 21, 27-28, 521 P.2d 964 (1974)

In this case, Tahraoui alleges that he rightfully acquired the trailer hitch at a garage sale and was not obligated to give it back to Pate. Respondents Brown and Wilder had an ulterior motive of coercing the Tahraoui to give back the trailer hitch to Pate. Respondents improperly used the legal process by instituting a criminal proceeding against the Tahraoui to accomplish that motive. In addition, Respondents misuse the criminal legal process to cover up their illegal conduct toward Tahraoui.

In *Gibson v. City of Kirkland*, Dist. Court, WD Washington 2009. See US District Court, No. C08-0937-JCC. , a case similar to

the one at bar, the court denied Defendants' summary judgment on abuse of process claim and ruled that:

If a reasonable jury believed Plaintiffs' allegations that the officers (1) used excessive force against Edward and Elliot, and (2) arrested the brothers without probable cause to suggest that they had committed any crime, it would not be unreasonable to infer that the arrest was intended to cover up the use of excessive force. *Batten v. Abrams*, 626 P.2d 984 (Wash. Ct. App. 1981) ("the ulterior motive or purpose may be inferred from what is said or done about the process . . .") (Quoting *W. Prosser, Law of Torts* § 121 at 856 (4th ed. 1971)). Because a reasonable jury could conclude that the officers initiated the arrest for an ulterior purpose, the Court DENIES Defendants summary judgment as to Plaintiffs' abuse of process claims.

Respondents argue that the claim for abuse of process should be dismissed because Tahraoui cannot show that Respondents Brown and Wilder were involved in any form in the criminal legal process once has been issued on March 2008.

Respondents' argument is disingenuous. It is Brown and Wilder, with their deliberate faulty investigation and disregard to Tahraoui's right, who instituted or continued the criminal legal process against Tahraoui. Brown and Wilder knew that Tahraoui did not steal the hitch from Pate but they chose to provide the prosecuting attorney with false report and recommend that Tahraoui

be charged with crime in order to extract from him the hitch and cover up their wrongful conduct. In these circumstances, the criminal legal process was misused by Respondents for extortion and cover-up purposes.

Furthermore Respondents rely on *Loeffelholz v. Citizens* 119 Wn. App. 665, 690-91, 82 P.3d 1199 and *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008) to support their position, However those cases are not on point and distinguishable from the instant case because in those cases, the abuse of process was sought as counterclaim and the court could not find extortion and misuse of the process.

Tahraoui alleged that Respondents Brown and Wilder had an ulterior purpose of coercing Tahraoui to give back the hitch to Pate. In addition, he alleged that Respondents improperly used the legal process by initiating a criminal proceeding against the Tahraoui for extortion and cover up purpose. The Court thus should not dismiss his claim for abuse of process.

5. Tahraoui Alleged Sufficient Facts to Support a Claim for Intentional Inflection of Emotional Distress/Outrage therefore it should not be dismissed

To state a claim for the tort of outrage a plaintiff must show “(1) extreme and outrageous conduct; (2) intentional or reckless

infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” *Birklid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995)

In this case, the trial committed error by dismissing Tahraoui’s claim for outrage because his complaint alleged plenty of facts to support a claim for outrage. Tahraoui claimed that he was deprived of his freedom of movement and was in hiding from Brown, wilder and other deputies because of fear from arrest he was facing. Tahraoui was unable to go to work. He claims that he was subjected to malicious prosecution and was facing prison time for a crime he did not commit. Tahraoui alleged that as direct result of Respondents’ actions, he suffered severe emotional distress over long period of time (over 1 year) and sustained substantial damages. Also, Tahraoui alleged that Respondents were aware that there was a high probability that their conduct would cause severe emotional distress upon him, and contrary to Respondents assertion, Tahraoui was facing a lot more than “mere threat of arrest”. Because those threat were eminent and caused Tahraoui to go in hiding.

6. The Pierce County Sheriff and Pierce County Should not be Dismissed From Tahraoui's Complaint

The trial court erred in dismissing the Pierce County Sheriff and Pierce County from Tahraoui's lawsuit.

a. Tahraoui has already served the Pierce County Sheriff Pastor with summons and complaint and would substitute the Defendant Pierce county sheriff's department for defendant Pierce county sheriff.

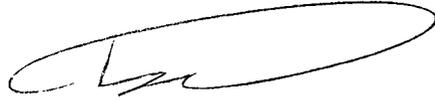
b. Because Tahraoui's complaint supports claims of liability against Respondents Brown, wilder and other who are employees of Pierce County, Pierce County is liable for its employees' actions or inactions, therefore it should not be dismissed.

F. CONCLUSION

For the foregoing reasons, Tahraoui respectfully requests that the Court reverse the trial court grant of Respondents' CR 12(c) motion for judgment on the pleadings.

Dated this 4th day of November, 2013.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, sweeping oval shape with a smaller, more defined signature inside it.

Hafid Tahraoui
Appearing Pro-Se
P. O. Box 45365
Seattle, WA 98145
206-6127070

DECLARATION OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on November 4, 2013, I caused to be served true and correct copy of the following document:

- Appellant's opening brief

to the counsel of the record listed below via first class mail.

Donna Y. Masumoto
Deputy Prosecuting Attorney
Attorneys for Defendants
955 Tacoma Avenue South, Suite 301
Tacoma, WA 98042
253-798-4289

Dated this 4th day of November, 2013.



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A. INTRODUCTION

This case involves a lawsuit for civil rights and other state law violations against a sheriff's department and its deputies during the course of investigating a minor theft claim.

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5. Whether the trial court erred in dismissing the Pierce County Sheriff and Pierce County from Tahraoui's complaint

D. STATEMENT OF THE CASE¹

1. On or around May 9, 2008, Appellant Hafid Tahraoui ("Tahraoui") went to the Spanaway area in Pierce County, Washington, to buy a small generator that was listed for sale on Craigslist by an individual named Eric Pate ("Pate"). Shortly after meeting with Pate, Tahraoui agreed to buy the generator and paid Pate \$250 cash. Also, Pate informed Tahraoui that he was moving

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out of state and has a lot of tools for sale. Then, Tahraoui agreed to meet Pate at his house, later that day, to see if there are some tools he wanted to buy. CP 16-21

2. Around 6 p.m., that same day, Tahraoui arrived at Pate's house and inspected the tools that are for sale. Few hours later, Tahraoui bought a dozen of tools from Pate and paid him \$450 cash. Before leaving, Tahraoui informed Pate that he was also interested in buying his forklift. Tahraoui and Pate, again, agreed to meet next day, at his house, to discuss the sale of the forklift.

3. The next day, May 10, 2008, around 10 a.m., Tahraoui arrived at Pate's house where a garage sale was under way. Pate's step father, Shelly, was conducting the sale and collecting the payment. Pate, however, was not seen around and was not involve in the sale. Tahraoui asked Shelly to see Pate, and Shelly told him that Pate will be available in about half hour. Tahraoui start going through the garage sale while waiting for Pate to came out. Some time after, Tahraoui saw Pate from distance, in tear, getting to his car and leaving the house with his wife. Tahraoui asked Shelly about Pate and why he was in tear. Shelly told him that Pate's father has passed away and Pate was going to his father's house.

4. During the garage sale on that day, Tahraoui bought few more items from Shelly and paid him \$200 cash, including a trailer hitch (“hitch”) priced at \$50. And at around 12 p.m., Tahraoui left Pate’s house driving home without talking to Pate.

5. On May, 11, 2008, Pate telephoned Tahraoui and informed him that his step father shelly made a mistake by selling him the hitch because it was not for sale. In rude manner, Pate asked Tahraoui to bring him back the hitch immediately. Tahraoui explained to Pate that he bought the hitch from Shelly and he is not obligated to give it back to him. However, he may consider give him back the hitch if can be respectful and willing to come his home and get it. During that conversation, a dispute arouses between Tahraoui and Pate as to whether the hitch was properly sold to the Tahraoui. CP 18-19

6. On that same day, Pate contacted the Pierce County Sheriff to report that Tahraoui had stolen the hitch from him. Respondent Deputy Sheriff Franklin Brown (“Brown”) was dispatched to Pate’s house to investigate the theft claim.

7. At 12:01 p.m., Brown, arrived at Pate’s house.

8. At 12:07 p.m., less than 6 minute after arriving at Pate’s house and without conducting an investigation in good faith

or a meaningful one, Brown called and left a message for the Tahraoui threatening to arrest him in very quick manner if he did not return the hitch to Pate immediately. Brown said in his message:

“Hafid, this is Depute Brown with the Pierce County Sheriff’s Department. You took the trailer hitch from Eric (Pate) from his house. I’ll bet that you will return the hitch before I get my hand on you and put you in the Pierce County Jail. If you want to contact me call 911 and ask for Deputy Brown”.

9. After hearing Brown’s message, Tahraoui was shocked and frighten. He called Brown immediately and tried to explain to him that he bought the hitch and he (Brown) should hear his side of the story before deciding to arrest him for something he did not do. Brown told him that he must return the hitch before he catches him. Also, Tahraoui tried to remind Brown that a warrant or probable cause is needed for the arrest. Brown responded that he does not need anything to arrest him. To prove his point, Brown asked Tahraoui for his address so he can come to his home and arrest him. However, Tahraoui refused to answer his request.

10. Brown made some contact with other police agencies in an effort to locate Tahraoui and arrest him. Brown was able to gather private and personnel information about Tahraoui such us

his home and work address, what car or truck he owns and other things. Subsequently, that information was given to Pate so he can help locate Tahraoui.

11. Later that day, Pate telephoned Tahraoui and told him that he was given a lot of information about him and he will be waiting for him at his work place until he gets back the hitch. As a result of this revelation, Tahraoui become more afraid and was worried that Pate may attack him if he goes to work.

12. On May 12, 2008, Tahraoui contacted the Pierce County Sheriff several times to complaint about Brown's misconduct with him. However, Tahraoui could not get anyone to help him with his complaint.

13. Hours later, Respondent Lieutenant Rustin Wilder ("Wilder") telephoned Tahraoui to investigate his Complaint. Tahraoui complained to Wilder about Brown bias and mishandling of the theft claim. He told Wilder that Brown wants to arrest him without investigation or a good faith belief that he stole the hitch from Pate. Wilder assured Tahraoui that he will investigate his complaint and get back to him with an answer.

14. Afterward, and according to the police report, wilder setup a ruse to arrest Tahraoui. He telephoned Tahraoui and asked

him to come down to the South Hill precinct and fill out a statement about his complaint. Tahraoui become suspicious and asked Wilder if he is going to be arrested. At first, Wilder try to hide his intention, but few minutes after, he informed Tahraoui that his is facing arrest for multiple crimes including theft and extortion. Wilder told Tahraoui that he was lying in his complaint and Brown had every right to arrest him.

15. Without any further investigation, and less than 30 hours after the theft claim, Wilder recommended to the Pierce County Prosecutor's office to charge Tahraoui with felony in Superior Court, even though the hitch is not worth more than \$100. However the prosecutor's office declined to do so.

16. On May 13, 2008, Tahraoui contacted the Pierce County Executive office to complaint about his growing problem with the Pierce county Sheriff. However, Tahraoui was advised by the executive assistant that the executive office has no control over the Sheriff and can not review its decision. The assistant explained that the Sheriff is an elected position and the Department is an independent agency from Pierce county Executive.

17. On May 22, 2008, Defendants Deputies Montgomery Minion ("Minion") and Foster travel to Tahraoui's work Place in

Kent, King County, to arrest him on theft charge. However, Tahraoui was not found and kept him self out of reach.

18. Defendant Minion telephoned Tahraoui and told him that he was charged with theft and he will be arrested and better for him to return the hitch to Pate.

18. For the following weeks and months, Tahraoui was fearful from the imminent arrest he was facing and did not know to whom else to complain. He limited his movement and driving activities to the minimum and did not travel to Pierce County to avoid arrest.

19. For financial reason, Tahraoui was unable to hire an attorney to resolve the theft claim. He hoped that his problem with the Sheriff will go away over time if he is not arrested.

20. On March 4, 2009, Tahraoui received a criminal complaint charging him with theft in Pierce County District Court. He contacted the prosecutor office and asked them to drop the charge against him based on the lack of probable cause in the case and Brown's misconduct. But they refused to do so.

21. On March 13, 2009, Tahraoui was arraigned on the theft charge and pleaded not guilty. And in subsequent hearings,

the Court dismissed with prejudice the charges against Tahraoui on May 5, 2009.

22. On July 11, 2011, Tahraoui filed a lawsuit against Respondent in Pierce County Superior Court for various federal and state claims.

23. In November 2011, Respondents removed Tahraoui's action to Federal Court.

24. On February 13, 2012, U.S. District judge dismissed all Tahraoui's federal claims and reminded the balance of the case on state claims to Pierce County Superior Court.

25. On March 29, 2013, the trial court granted Respondents' CR 12(c) motion and dismissed Tahraoui's action in its entirety.

26. On April 29, 2013, Tahraoui filed a timely notice of appeal to this court.

E. ARGUMENT

1. Standard of review

A motion to dismiss for failure to state a claim (CR 12(b)(6)) and a motion for judgment on the pleadings (CR 12(c)) raise identical issues and are subject to the same standard of review. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128

P.3d 627 (2006). The court of appeals reviews a trial court's dismissal of a claim under either CR 12(b)(6) or CR 12(c) de novo. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). In making this determination, the court must presume that the plaintiff's allegations are true and may consider hypothetical facts that are not included in the record. *Burton*, 153 Wn.2d at 422. A CR 12 motion should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. *Fondren v. Klickitat County*, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). It is under this standard that the court of appeals must decide the issues raised on appeal.

2. Respondents' Statement of Factual background of their CR 12(c) Motion is False and Misleading Therefore; it should be stricken by the court

As preliminary matter, the trial court erred by not striking or at least disregarded Respondents' statement of factual background in their CR 12 (c) motion.

Because Respondents' motion was brought under CR 12(c), the only facts allowed before the court are the one alleged by the

plaintiff's (Appellant) complaint which must be presumed to be true by the court. Respondents' motion, however, came up with new facts and they attribute them to Plaintiff's complaint, namely:

Respondents state that "instead of leaving, Tahraoui remained on the property". See Defendants' Motion p. 2. Nowhere in plaintiff's complaint such allegation can be found. This allegation by the Respondents which is false is very important because, it gives the impression that Plaintiff did not have permission to be at Pate's house. The plaintiff, however, did have permission and did not leave Pat's house because of the garage sale which was open to the general public conducted by Shelly, Pate's step father, on behalf of Pate's.

Defendants state that "plaintiff was told by third party that Pate's father had passed away and Pate was going to his father's house". Here Defendants deliberately concealed the identity of this so called third party to show that Pate and this third party are not related and therefore this third party could not act on behalf of Pate and had no permission to sell Pate's stuff. Where in fact, this third party is Shelly, Pate's step father, who was authorized by Pate to conduct the garage sale.

Defendants state that "Tahraoui left Pate's house with the trailer hitch and without first talking to Pate concerning this action". This is also another material false allegation made by the Defendants and it is unfounded in plaintiff's complaint. This false allegation by the defendants gives the impression that plaintiff knew that the hitch was a private property of Pate and the third party had no permission to sell it. The true fact, however, is that the hitch was for sale at the garage sale like any other items. Plaintiff and Shelly did not know that the hitch was not for sale at the garage sale. Plaintiff could not be held responsible for the sale of hitch by Shelly.

Defendants state that "On May 11, 2008, Pate telephoned Tahraoui and told him the hitch was not for sale". Here Defendants deliberately omitted that Pate told Plaintiff his step father made a mistake by selling him the hitch.

Defendants hide the fact that Deputy Brown spent less than 5 minutes to investigate the theft claim before he decided to arrest Tahraoui.

The above are some of the false statements by the Respondents in their motion. These facts are contrary to the allegation in Plaintiff's complaint and they can easily prejudice the

Plaintiff if considered by the court. Therefore, the court should strike part of Defendant's motion named "Factual background".

3. Tahraoui alleged sufficient facts to support that Respondents lacked probable cause to arrest, institute or continue criminal proceedings against him, and as such, Tahraoui's claim for malicious prosecution should not be dismissed

The trial court erred in dismissing Tahraoui's claim for malicious prosecution.

In order to maintain an action for malicious prosecution in this state, a plaintiff must plead and prove the following elements: (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 852 P.2d 295 (1993). Although all elements must be proved, malice and want of probable cause constitute the gist of a malicious prosecution action. *Hanson* 121 Wn.2d 552 at 554.

Respondents argued below that Tahraoui's claim for malicious prosecution should be dismissed because Tahraoui failed to show that "officers lacked probable cause". See Defendants' motion at p. 5. (CP 5)

Probable cause for a warrantless arrest exists when the facts and circumstances within the arresting officer's knowledge at the time of the arrest are sufficient to lead a reasonably prudent officer to believe in good faith that the person was violating the law. *Sennett v. Zimmerman*, 50 Wn.2d 649, 651, 314 P.2d 414 (1957). However, "unless the evidence conclusively and without contradiction establishes the lawfulness of the arrest, it is a question of fact for the jury to determine whether an arresting officer acted with probable cause." *Gurno v. Town of LaConner*, 65 Wn. App. 218, 226, 828 P.2d 49 (1992)

Here, Tahraoui's amended complaint alleged sufficient facts to support that defendants did not have probable cause to arrest, institute or continue criminal proceedings against plaintiff. He alleged the followings: See complaint at p. 4

a. Defendants were not reasonably prudent and were careless and disregarded Plaintiff's right in investigating the theft claim. Defendant Brown arrived at Pate's house, after 911 call, at

12:01 pm and at 12:07 pm he decided that Plaintiff should be arrested for the theft of the trailer hitch. Brown spent less than 5 minutes investigating Pate's claim and examining the victim/witness "Pate", who did not witness the theft claim and was not at the house. In these circumstances, Brown did not, and could not have conducted a meaningful investigation in less than 5 minutes, that can lead a reasonably prudent officer to believe in good faith that a crime has been committed, especially when there is no emergency and Brown did not have to rush to make judgment.

b. Defendants did not act in good faith to gather sufficient evidence to evaluate Pate's claim. Brown did not want to hear Plaintiff's explanation to how he obtained the hitch.

c. Defendant Brown did not act in good faith when he deliberately failed to ask or examine Shelly, Pate's step father, who was the only witness for the theft claim. In addition, Shelly was authorized by Pate to conduct the garage sale on his behalf.

Tahraoui alleged that Defendants instituted or continued their criminal proceedings through malice based on Brown and wilder actions. Only 5 minutes after he arrived at Pate's house, Brown called Plaintiff and left a voice mail stating the following:

“Hafid, this is Depute Brown with the Pierce County Sheriff’s Department. You took the trailer hitch from Eric (Pate) from his house. I’ll bet that you will return the hitch before I get my hand on you and put you in the Pierce County Jail. If you want to contact me call 911 and ask for Deputy Brown”. See complaint at p. 4.

Wilder was mad at the Plaintiff because he complained about Brown’s actions, later wilder setup a ruse to arrest Plaintiff. Complaint at p. 5.

Furthermore, Tahraoui alleged that defendants did not act in good faith, and did not make a full and fair disclosure of all material facts known to them such as that Plaintiff did purchase the hitch and other item, and deliberately forward a false report to the prosecuting attorney to file charges.

It is the Defendants who recommended to the prosecuting attorney to charge Plaintiff with theft based on their investigation.

Defendants argue that Plaintiff committed theft under RCW 9A.56.020 (a) because he took Pate’s hitch without first telling Pate. This assertion is false and not supported by Plaintiff’s complaint. The hitch, like all other items, was available for sale at Pate’s garage sale under the supervision of Shelly. There is no reason for the Plaintiff to tell Pate that he bought the hitch or any other item

because Shelly, who was in charge of the sale and acting on behalf of Pate, knew about all item sold that day. In addition, Pate was not at the house when the Plaintiff bought the hitch. Tahraoui clearly alleged in his complaint that “On May 11, 2008, Pate telephoned Tahraoui and informed him that his step father, Shelly, made mistake by selling him hitch because it was not for sale.”

In this situation, Pate tried to cover up Shelly’s mistake in selling the hitch, by claiming that Tahraoui stole the hitch. The most what can be said about this controversy it is a civil dispute between two people but there was no theft.

Respondents also argue that Tahraoui’s claims that he bought the hitch is only an affirmative defense to the theft and can not negate the existence of probable cause. This argument has no merit and Defendant reliance on *McBride v. Walla County*, 95 Wn. App. 33, 975 P.2d 1029, 990 P.2d 967 (1999) and *State v. Fry*, 168 Wn.2d 1, 18, 228 P.3d 1 (2010) is misplaced. Because, as our supreme court explain in *State v. Fry*, hitting someone and smoking marijuana are still crimes unless there is affirmative defense of “self defense” or “compassionate use defense”. Where as, buying or taking possession of something are not crimes unless proven otherwise. Therefore, the requirement to establish probable cause

when there is an act of hitting someone or an act of smoking marijuana is much lower than in a theft act. In theft claim, an officer is required to conduct a meaningful investigation, in good faith and ask all parties involved before finding probable cause and making arrest. This proposition is also supported by *Bender v. Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492 (1983).

Defendants did not act in good faith, were not reasonably prudent and were careless and disregarded Plaintiff's right. They did not have probable cause and did not make a full and fair disclosure of all material facts known to them to the prosecuting attorney. The court thus should not dismiss plaintiff malicious prosecution claim.

4. Tahraoui Alleged Sufficient Facts to Support a Claim for Abuse of Process Therefore Dismissal of Said Claim is not Appropriate

The trial court erroneously concludes that Tahraoui's claim for abuse of process should be dismissed.

According to the *Washington Practice*, Vol. 16A, p. 65, "Washington courts apply the Restatement definition of abuse of process: "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

abusive process." For the tort of abuse of process, "the crucial inquiry is whether the judicial system's process, made available to insure the presence of the defendant or his property in court, has been misused to achieve another, inappropriate end." *Gem Trading Co. v. Cudahy Corp.*, 92 Wn.2d 956, 965, 603 P.2d 828 (1979).

The court characterized the "essential elements" as "(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." *Fite v. Lee*, 11 Wn. App. 21, 27-28, 521 P.2d 964 (1974)

In this case, Tahraoui alleges that he rightfully acquired the trailer hitch at a garage sale and was not obligated to give it back to Pate. Respondents Brown and Wilder had an ulterior motive of coercing the Tahraoui to give back the trailer hitch to Pate. Respondents improperly used the legal process by instituting a criminal proceeding against the Tahraoui to accomplish that motive. In addition, Respondents misuse the criminal legal process to cover up their illegal conduct toward Tahraoui.

In *Gibson v. City of Kirkland*, Dist. Court, WD Washington 2009. See US District Court, No. C08-0937-JCC. , a case similar to

the one at bar, the court denied Defendants' summary judgment on abuse of process claim and ruled that:

If a reasonable jury believed Plaintiffs' allegations that the officers (1) used excessive force against Edward and Elliot, and (2) arrested the brothers without probable cause to suggest that they had committed any crime, it would not be unreasonable to infer that the arrest was intended to cover up the use of excessive force. *Batten v. Abrams*, 626 P.2d 984 (Wash. Ct. App. 1981) ("the ulterior motive or purpose may be inferred from what is said or done about the process . . .") (Quoting *W. Prosser, Law of Torts* § 121 at 856 (4th ed. 1971)). Because a reasonable jury could conclude that the officers initiated the arrest for an ulterior purpose, the Court DENIES Defendants summary judgment as to Plaintiffs' abuse of process claims.

Respondents argue that the claim for abuse of process should be dismissed because Tahraoui cannot show that Respondents Brown and Wilder were involved in any form in the criminal legal process once has been issued on March 2008.

Respondents' argument is disingenuous. It is Brown and Wilder, with their deliberate faulty investigation and disregard to Tahraoui's right, who instituted or continued the criminal legal process against Tahraoui. Brown and Wilder knew that Tahraoui did not steal the hitch from Pate but they chose to provide the prosecuting attorney with false report and recommend that Tahraoui

be charged with crime in order to extract from him the hitch and cover up their wrongful conduct. In these circumstances, the criminal legal process was misused by Respondents for extortion and cover-up purposes.

Furthermore Respondents rely on *Loeffelholz v. Citizens* 119 Wn. App. 665, 690-91, 82 P.3d 1199 and *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008) to support their position, However those cases are not on point and distinguishable from the instant case because in those cases, the abuse of process was sought as counterclaim and the court could not find extortion and misuse of the process.

Tahraoui alleged that Respondents Brown and Wilder had an ulterior purpose of coercing Tahraoui to give back the hitch to Pate. In addition, he alleged that Respondents improperly used the legal process by initiating a criminal proceeding against the Tahraoui for extortion and cover up purpose. The Court thus should not dismiss his claim for abuse of process.

5. Tahraoui Alleged Sufficient Facts to Support a Claim for Intentional Inflection of Emotional Distress/Outrage therefore it should not be dismissed

To state a claim for the tort of outrage a plaintiff must show “(1) extreme and outrageous conduct; (2) intentional or reckless

infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.” *Birkliid v. Boeing Co.*, 127 Wn.2d 853, 865, 904 P.2d 278 (1995)

In this case, the trial committed error by dismissing Tahraoui’s claim for outrage because his complaint alleged plenty of facts to support a claim for outrage. Tahraoui claimed that he was deprived of his freedom of movement and was in hiding from Brown, wilder and other deputies because of fear from arrest he was facing. Tahraoui was unable to go to work. He claims that he was subjected to malicious prosecution and was facing prison time for a crime he did not commit. Tahraoui alleged that as direct result of Respondents’ actions, he suffered severe emotional distress over long period of time (over 1 year) and sustained substantial damages. Also, Tahraoui alleged that Respondents were aware that there was a high probability that their conduct would cause severe emotional distress upon him, and contrary to Respondents assertion, Tahraoui was facing a lot more than “mere threat of arrest”. Because those threat were eminent and caused Tahraoui to go in hiding.

6. The Pierce County Sheriff and Pierce County Should not be Dismissed From Tahraoui's Complaint

The trial court erred in dismissing the Pierce County Sheriff and Pierce County from Tahraoui's lawsuit.

a. Tahraoui has already served the Pierce County Sheriff Pastor with summons and complaint and would substitute the Defendant Pierce county sheriff's department for defendant Pierce county sheriff.

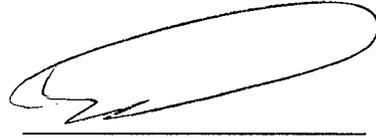
b. Because Tahraoui's complaint supports claims of liability against Respondents Brown, wilder and other who are employees of Pierce County, Pierce County is liable for its employees' actions or inactions, therefore it should not be dismissed.

F. CONCLUSION

For the foregoing reasons, Tahraoui respectfully requests that the Court reverse the trial court grant of Respondents' CR 12(c) motion for judgment on the pleadings.

Dated this 4th day of November, 2013.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, sweeping loop that ends in a sharp point, with a smaller loop below it.

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DECLARATION OF SERVICE

I hereby declare, under penalty of perjury under the laws of the State of Washington, that on November 4, 2013, I caused to be served true and correct copy of the following document:

- Appellant's opening brief

to the counsel of the record listed below via first class mail.

Donna Y. Masumoto
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Dated this 4th day of November, 2013.



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