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SUPREME COURT
STATE OF WASHINGTON

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No. 29836-1

COURT OF APPEALS, DIV III

RAY STEINBOCK, a married individual,
BARBARA STEINBOCK, a married individual.

Appellant,

v.

FERRY COUNTY PUBLIC UTILITY
DISTRICT No. 1

Respondent.

APPEAL FROM THE SUPERIOR COURT
FERRY COUNTY
HONORABLE HAROLD D. CLARKE, III

REPLY BRIEF OF APPELLANT

JAMES A. von SAUER, WSB 26297
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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

In the Brief of Respondent, hereinafter BR, Ferry County Public Utility District No 1, hereinafter PUD, the asserted Statement of the Case is cursory. The BR's Statement of the Case does not provide a fair basis on which an analysis of the parties' arguments can be made.

The Petitioners, Ray and Barbara Steinbock, hereinafter the Steinbocks, filed their original action in 2006 seeking to restore electrical power to their business the Hitch-in-Post, hereinafter HP, restaurant. The complaint was based in tort, contract and requested equitable relief. Steinbocks' tort claims were dismissed from their original complaint, without prejudice, in response to a motion to dismiss for failure to file a claim with the PUD prior to bringing their tort claims.

The PUD quickly filed a Motion for Summary Judgment, hereinafter MSJ#1, on the Steinbocks' claim of breach of contract and the request for equitable relief asserting that there was no breach of contract and that equitable relief could not be granted as the Steinbocks' had lost the HP through foreclosure. The PUD prevailed on their MSJ#1.

Steinbocks' case was effectively split into two cases when the trial court went forward, at PUD's request, with MSJ#1 before the Steinbocks could possibly comply with RCW 4.96.020. The Steinbocks subsequently

filed tort claims and after the claims were denied, filed this action against the PUD. The PUD's initial response to Steinbocks' First Amended Complaint, hereinafter FAC, was MSJ#2. [CP54]. The PUD subsequently answered the FAC, [CP57-67] and asserted four affirmative defenses, one of which was collateral estoppel. [CP67]. MSJ#2 was filed by PUD in spite of the trial court's prior dismissal without prejudice and the Court of Appeal, hereinafter CA, holding that no election of remedies occurred due to the dismissal without prejudice. The CA affirmed the trial court's grant of MSJ#1

PUD's Statement of the Case contains only those facts it deems important and other statements asserted without factual support. PUD claims that "soon after signing the contract, Ms Steinbock's account became delinquent". [CP 69]. PUD's General Manager, Roberta Weller, hereinafter simply Weller, declares Steinbocks' account was opened 9-2-2005 and "as soon as November of the same year, the account began to have delinquencies." Before an account can be delinquent, there must have at least a demand for payment and a failure to pay.

PUD never disputed Mrs. Steinbock's, hereinafter Steinbock, assertion that the PUD did not bill her for the HP's usage until late November 2005 and that the HP's October and November bills were not

sent to her until December 2005. If the delinquencies were first noticed in November, that may explain why the Steinbocks started to receive the HP bills in late November 2005 and early December. PUD admits the account was “connected to Mrs. Steinbock’s name,” but never demonstrated that the billing address on the account was changed from the former owner to the Steinbocks. The PUD never produced any bills to show that any invoice was ever sent directly to the Steinbocks. Nonetheless, the PUD paints the Steinbocks as deadbeats.

Weller claims that she attempted to provide pre-termination notice to the Steinbocks but failed to document any of the attempts and never explained why posting and/or mailing was not considered an option. Both PUD and the HP were located on the same block in the small town of Republic. The PUD on 5-3-05 provided a written 24 hour demand to pay but did not explain why in July there no notice given.

The PUD admits that it demanded in April 2006 that the 90-day past due bills be paid but denied there was a policy not to terminate until the account was over 90 days past due. If there was no policy with respect to the termination of power when an account was more than 90 days past due, why insist on the 90 day past due amounts be paid? Why wait until November to discover the HP account was unpaid and wait an additional 6

months before threatening disconnection the power to the HP?

In MSJ#1, the PUD stated that the newly demanded security deposit was set pursuant to Section 5.4 of the PUD's Service Policies, hereinafter SP and attached a copy of the SP without the title and table of content pages. This was the first time the Steinbocks became aware of the SP. When the Steinbocks disputed that PUD supposed setting of the security deposit rationale based on the actual language of Section 5.4, the PUD failed to explain why they used an artificially high estimate when they had actual knowledge of the HP's two highest months of usage. No explanation was given by the PUD as to why the alternative methods of posting a security deposit in Section 5 were not available to the Steinbocks. A question of fact exists as to the unreasonableness of the setting of the security deposit especially when there was no current arrearage.

The PUD never contested Steinbock's assertion that she told the PUD when she paid the July 24, 2006 payment that she would be in on Friday to pay the balance due on the HP account. [CP93]. PUD never communicated any objection to the Steinbocks' late July payments or to the proposed Friday payment. Instead PUD, unannounced, terminated power to Steinbock's residence and HP on Thursday.

BR, page 2, states, without any factual support, “As a way of circumventing having to pay for the past due power, Steinbock’s friend had the power to her residence switched over to his name.” No evidence supports that motive. The Space 3 account was not an unpaid Park Place account. [CP 73, 74, 92]. Further, the evidence shows that the Steinbocks made payments on the past due Park Place debts until the PUD forced the closing of the HP. No evidence was presented by the PUD to show how and when they first knew that Steinbock was residing in Space 3 and how they discovered the alleged ruse stated in BR 2-3.

The statement about what the “P.U.D. manager told Mr. Hursh” is also without support and contradicts her letter to Mr. Hursh. Mr. Hursh’s declaration evidences what he did and why.

MOTION FOR LEAVE TO AMEND

The PUD admits that the right to amend a pleading shall be freely given when justice so requires. PUD asserted that justice required the denial of the Motion for Leave to Amend, hereinafter MFLA, solely on the grounds that the PUD would be prejudiced because the proposed amendments are barred by the doctrine of collateral estoppel and thus are frivolous. Neither, the trial court nor, the PUD, discussed the effect of the prior “dismissal without prejudice” or precisely how PUD was prejudiced.

The PUD asserts correctly that manifest abuse of discretion is the standard on review citing *Herron v. Tribune Publ'g Co.*, 108 Wn 2d 162, 165, 736 P2d 249 (1987). *Herron*, is enlightening for more than just stating the standard of review.

Herron, supra, at page 165, stated that the “purposes of Rule 15 are to "facilitate a proper decision on the merits", (citation omitted) and to provide each party with adequate notice of the basis of the claims or defenses asserted against him. *Pierce County Sheriff v. Civil Serv. Comm'n*, 98 Wash.2d 690, 695, 658 P.2d 648 (1983). (Citations omitted) Leave to amend should be freely given "except where prejudice to the opposing party would result." (Citations omitted). *Herron* , supra, at pages 165-166, discussed the factors that a court could consider in granting or denying leave to amend, including undue delay and unfair surprise, but never mentioned frivolity as one of the factors to be considered.

Herron did recognize at page 166-167 that amendments “which pertain to the original claims asserted are more likely to be granted and noted:

Appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert a new legal theory based upon the same circumstances set forth in the original pleading. See, e.g., *Foman v. Davis*, supra, 371 U.S. at 182, 83 S.Ct. at 230. (“[T]he amendment would have done no more

than state an alternative theory for recovery.... If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); Caruso, 100 Wash.2d at 350-51, 670 P.2d 240 (original)

Herron explained

“The judicial preference for those amendments based on the underlying circumstances set forth in the original complaint--as compared with amendments raising new claims based on new factual issues--is consistent with the policies behind CR 15. When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits. When the amended complaint raises entirely new concerns, the plaintiff's right to relief based on the facts in the original complaint is unaffected. Moreover, the defendant in the latter case is more likely to suffer prejudice because he has not been provided with notice of the circumstances giving rise to the new claim and may have to renew discovery.

In the instant case no discovery had commenced in the tort case as the MSJ#2 was the first order of business.

PUD argues that the proposed amendments were either futile or frivolous and should be denied based on *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn.App. 872, 890, 155 P.3d 952 (2007). *Haselwood*, apparently based this suggestion on a misreading of *Herron*. *Herron* never stated that frivolity or futility of an amendment was a proper factor to be considered in the granting or denying of a motion to amend.

Herron did not list frivolity as a consideration for good reason. If a trial court could consider frivolity or futility when ruling on a motion for leave to amend, the judge's personal bias may prevent a party from ever having their day in court under the guise of considering the merits of an amendment before allowing the party an opportunity to prove their case, This does violence to the concept of seeking a trial on the merits and have the effect of turning a standard Motion to Amend into a disfavored demurrer. Frivolity or the futility of the amendment should not be a standard consideration on a motion to amend. *Haselwood*, supra, should be limited to its procedural facts. There the motion to amend was brought after a successful summary judgment had already been granted. See *Haselwood*, supra, at 890-891, This procedural setting is central to a proper understanding of the *Haselwood* opinion.

The trial court found, and the PUD argued, that Steinbocks' proposed amendments were futile in that all the Steinbocks ever had was a contractual remedy. This argument ignores the fundamental differences between causes of action based in tort and those based on a mutual agreement.

Election of Remedies

When Steinbocks complied with RCW 4.96.020 and refiled their tort claims as a new case, the trial court held that those claims were barred by the ruling on MSJ#1. How this does not result in a forced election of remedies is hard to fathom when the result is the same.

By using the doctrine of collateral estoppel, the trial court effectively barred consideration of the PUD's violation of its governmental duty to insure that the constitutional rights of its customers were observed and that public policy was enforced. All this was accomplished without discussion as to whether or not collateral estoppel could be invoked. The effect of the "dismissal without prejudice" was not discussed nor was the issue of whether collateral estoppel would work an injustice.

Now the PUD seeks to distance itself from the trial court's *sub silentio* acceptance of the invitation to bar the Steinbocks' claims under collateral estoppel. The PUD unabashedly argues "that the decision of the trial court in the case at bar did not turn on the issue of collateral estoppel because the trial court did not reference that term in its decision and simple took guidance from the Court of Appeal decision. The PUD's reasoning is misleading and disappointing. MSJ#2 was based on the

doctrine of collateral estoppel, was an asserted affirmative defense, and the trial court willingly accepted the PUD's arguments. [CP193-194].

PUD recognizes that it had the burden to show that the application of the doctrine would not work an injustice. How could the PUD meet this burden when PUD's motion obtained the original dismissal of the Steinbocks' tort claims without prejudice. Barring the tort claims on the ground that the contract claims precluded the Steinbocks' from raising them in a subsequent action is hardly "without prejudice" and not consistent with the concept of fairness. Collateral estoppel in any form was not applicable in this situation.

Civil Rights Claim

Even though the PUD admitted that issues regarding the violation of the Steinbocks right to due process of law were not before the court in MSJ #1, the PUD pressed the trial court to preclude the Steinbocks from raising the violation of procedural due process as a claim in the tort action. The right to due process of law is not a matter of contract and does not depend on the agreement of the parties. The right arises independently from the state and federal constitutions. Whether or not the Steinbocks' civil rights of due process were in fact violated should not have been a consideration of the trial court on the motion to amend. The consideration

should have been limited to whether or not the PUD was prejudiced. It was the PUD's litigation tactics that put the Steinbocks in the position that they were in and thus the PUD could not have been prejudiced in any manner by their own conduct.

Declaratory Relief

PUD was not forced to enact the SP, in fact they were exempted from so doing. The PUD's Board of Commissioners chose to make the PUD subject to the same protections as Washington law gave citizens from arbitrary conduct from regulated private utilities. PUD immediately acknowledges that the SP are binding on them when the SP provides a benefit to management, but when the SP are inconvenient or burdensome, the PUD's management acts as if the SP does not exist. Forcing the PUD to openly acknowledge the SP in all aspects of their business is in the public interest and declaratory relief is one way to accomplish this task. In this case, not only did the PUD fail to act in accordance with the intent of the SP, they purposefully thwarted the Steinbocks from ever exercising the due process protections contained in the SP. Not only were the Steinbocks' own personal rights violated, but so were the rights of each of PUD's customer/owner. The necessity for the court issuing declaratory relief was far more real than it was fanciful. Further declaratory relief was

supported by the same facts underlying the Steinbock tort claims.

MOTION FOR SUMMARY JUDGMENT

The trial court's focus in MSJ#2 should have been limited to a determination of whether collateral estoppel applied as this was the gravamen of MSJ#2. This was a pled affirmative defense. If collateral estoppel was found to be inapplicable, MSJ#2's arguments regarding the negligence causes of action would have collapsed because they had no independent basis. The trial court's determination that the other causes of actions had no merit appeared to be grounded on the assumption that if the allegations that supported the negligence causes of action failed under collateral estoppel, those same allegations did not provide independent support for the outrage, harassment or wrongful debt collection practices claims. The trial court ruling was akin to sustaining a demurrer without leave to amend ruling that as a matter of law if the allegations were found to be true, no cause of action was stated.

Balise v. Underwood, 62 Wn2d 195,199, 381 P2d 966 (1963) reviews the general principles that need to be considered when ruling on a MSJ. The Steinbocks have no quarrel with the purpose and usefulness of a MSJ, but do quarrel with the notion that the pleadings have no purpose in framing what is a material issue of fact. Washington Civil Rule 8

established that a claim or defense must be set forth in a pleading. The trial court's reliance on the Court of Appeal's opinion for any purposes other than to see what was in fact decided in MSJ#1 was erroneous. The same pleadings and issues were not involved.

What was before the court in MSJ#2 was the FAC, the PUD's answer and MSJ#2. The supposed factual support for MSJ#2 was entirely from MSJ#1. The factual allegations raised by the FAC were not used to determine what were in fact the material issues. MSJ#2 was brought on a theory that MSJ#1 barred the filing of FAC on by reason of collateral estoppel and the Steinbocks' failure to prove their contractual claim barred their tort claims. ¹ The PUD did not attempt to refute any material fact which was necessary to establish the tort claims alleged by Steinbocks. MSJ#2 was based entirely on the PUD's fourth affirmative defense and it is disingenuous for them to now contend otherwise.

Collateral Estoppel

To the extent that MSJ#2 presented factual issues, those issues only went to what was before the trial court in MSJ#1 and to some extent the Court of Appeals decision on appellate review of MSJ#1. Thus it was

¹ *Balise*, (Ibid) notes that credibility of a witness might be a triable issue of fact where the witness is impeached. Steinbock's testimony contradicts that of Bobbi Weller in many important aspects each raising a triable issue of fact in the tort action.

the PUD burden to show that the grant of MSJ#1 precluded or otherwise barred the Steinbocks' subsequently filed tort claims. As part of that burden the PUD was required to show that the application of the doctrine of collateral estoppel would not work an injustice. This burden the PUD has never attempted to meet.

This may have been a different case if the Steinbocks had not asserted tort claims in their first lawsuit, but tort claims were asserted. When the PUD moved in the trial court to dismiss Steinbocks' tort claims for failure to comply with RCW 4.96.020 and such dismissal was obtained albeit without prejudice to refiling tort claims after compliance with the statute, the PUD waived or was estopped to assert issue preclusion on anything other claim other than the contract claim actually adjudicated in MSJ#1.

Negligence

The thrust of Steinbocks' negligence claim is two fold. The PUD's Service Policies created a duty on the PUD to give pre-termination notice before cutting off the power to its customers and a duty to give the pre-termination notice in advance so that the customer could arrange for the informal hearing, obtain the PUD decision and exercise the right to an informal or formal appeal. As the right to an appeal required 7 day prior

notice, the Steinbocks contend the pre-termination notice had to be no shorter than 10 days before the power was to be cut-off.

Failure to give the Steinbocks and Mr. Lester Godfrey any pre-termination notice prevented them from protecting themselves from an erroneous disconnection. In this case the termination of the accounts was egregious in that the bills for the personal residence and the HP were not delinquent. A question of fact is presented as to whether the decision to terminate the power to the Steinbock's business, without notice was reasonable especially when the PUD knew that such a termination would create disastrous consequences. While a private concern may act with impunity a governmental agency should not. This constitutes ordinary negligence. If the conduct violated their state and federal constitutional rights to due process of law, then the PUD's actions constituted negligence per se. The right to continue to receive public power should at least trigger some due process protections.

Negligent Supervision

Contrary to the PUD's claim, the duty involved here is different than the duty alleged in the first negligence cause of action. The PUD Commissioners as a whole have the power to appoint and remove a district manager pursuant to RCW 654.16.100. Here the commissioners exercised

the power to appoint but failed to supervise their manager and they were the only body that had that power and the duty. They in essence abdicated that duty and allowed their manager to act unsupervised.

As the PUD asserts, the district manager is responsible to the commissioners to carry out the orders of the commissions and to see that the laws pertaining to the function of the managers department are carried out. Steinbock contacted the commissioner from her district who told her there was nothing the Board could do because they gave Weller a free rein. Steinbock felt forced to accept Weller's demands.

The PUD asserts that the Steinbocks did not make an appeal to the Board of Commissioners. The Steinbocks did not know that they had a right to appeal until the SP surfaced MSJ#1 as support for the 5-8-06 exorbitant security deposit. Appeal rights need to be requested 7 day before the termination.

The Commissioners did nothing to ensure that the general manager complied with the laws of the land in conducting the business of a public utility and ignored the fact that Weller did nothing to inform PUD customers that the SP existed or to comply with the SP procedures. This is not micromanaging, but the appointment of a *defacto* PUD czar.

The PUD cites the case of *Niece v. Elmview Group Home*, 131

Wn.2d 39, 48, 929 P.2d 420 (1997). The cited quotation is from a discussion dealing with the difference between an employer's liability under doctrine of *respondeat superior* and the breach of an independent duty owed by the employer to the plaintiff. Just how that quotation sheds light on the issues needs illumination. The Commissioners' duty is to establish policy and see that it is enforced. That duty was abandoned.

On page 16 of RB, PUD asserts that a consumer has the right to appeal a decision of the manager. No where does the PUD state just how a consumer might become aware of this fact. The only document that contains any reference to the SP is the Application for Utility Service, [CP 96-98] which refers to the "PUD Rules and Regulations and Rate Schedules now existing or hereafter adopted." Weller never told Steinbock about the SP during the entire time Steinbock was with Weller when the 5-8-05 agreement was prepared and signed. It is no wonder the PUD purposefully failed to include the title page and the table of contents in their Exhibit D? [CP 75]. PUD did not mention that the right of appeal requires the customer to give 7 days notice prior to the termination. [CP 79].

OUTRAGE

In Washington we call the tort of intentional infliction of emotional

distress, hereinafter IIED, Outrage. The tort has three elements. The element in issue here is whether the conduct alleged was in fact outrageous. One thing is perfectly clear, and that is, the way you frame the question determines the answer. If one asks if the conduct of the PUD in the termination of the power to a customer was outrageous when the prime fact given was that a customer failed to pay the bill, the answer is usually No. However, if you ask the question and include the facts alleged in the FAC, the response is more likely affirmative.

The Steinbocks contend that outrageousness must be viewed in conjunction with the following facts: 1. The power bills for the HP and Steinbock's personal residences were current. This negated any concern about the Steinbocks getting deeper in debt for unpaid power which might have justified an immediate termination of power. 2. The Park Place debt was in fact being reduced though regular payments. 3. The new security deposit of \$3167 lacked only \$320 from being deposited in full which would have reduced the weekly payments by \$150. 4. The PUD knew that the Steinbock's business was the only available source of funds for repayment of the Park Place debts. 5. The debt collection practices of the PUD were unconscionable, oppressive and unreasonable. 6. The debt collections practices of the PUD violated the public policy stated in the

Federal Fair Debt Collection Practices Act and the Washington Consumer Protection Act. 7. PUD's post-termination conduct evidenced a malicious and vexatious and continuing intent. All of these facts support an issue as to whether or not reasonable people could find the PUD's conduct outrageous. A jury question was presented.

The PUD relies on *Citoli v. City of Seattle*, 115 Wn App 459, 61 P3d 1165 (2002) for the proposition that unpopular actions that are privileged or otherwise allowed might not be sufficient to give rise to liability for IIED. *Citoli* does not apply here. PUD's conduct was not privileged and no emergency existed which would have justified the denial of due process protections contained in the PUD's own rule, regulations and policies. Unlike *Citoli*, the PUD was not acting for the greater public good in following police orders to shut off the power to prevent the continuation of a public disturbance. Lastly, the record does not support the reasonableness of the PUD's decision to terminate power without notice.

The PUD states that the Court of Appeals decision established that the PUD did not breach its contract and that it followed its own policies. The Court of Appeals decision did find that Steinbocks had not established a breach of contract but did not hold that the PUD followed its policies.

The PUD cites Restatement of Tort 46 comment (g) as offering support for the PUD's position that it was acting in a manner that was either privilege or just exercising its rights and no liability for intentional infliction of emotional distress is possible. Well, in the abstract that sounds good, except in a situation where the actor has, by his own conduct, limited his ability to act. Here the PUD promised the public and each of its customers that it would not act arbitrarily and that it would afford protections to the power using public that they would not needlessly suffer through an arbitrary termination of their right to receive power.

The PUD directs our attention from the other comments to Restatement of Torts 46, such as comment (c), which expressly notes that the law is in a constant state of development in this area and that no hard and fast rule exists. Comment (e) which states that liability may result from the abuse of a position of power over an individual. Comment (e) illustrations of liability found on debt collector. Comment (f) statement that the outrageous conduct may result from the actor knowledge of some physical mental or other peculiarity. Comment (f) recognizes the conduct engaged in might not be outrageous if the actor did not have such knowledge but "the conduct may become heartless, flagrant and outrageous when the actor proceeds in the face of such knowledge."

Weller exercised and abused her position of power over the Steinbocks' interests in an arbitrary, ruthless manner, without any hesitation in inflicting severe emotional distress on the Steinbocks. Weller had actual knowledge that she had the last asset from the Steinbocks' hands when the Steinbock paid the \$5961 demanded on 5-8-06.

Barbe v. Great Atlantic & Pacific Tea Co., 722 F. Supp 1257, 1262 (D.Md.1989) and *Therrien v. UAL, Inc.* 670 F. Supp.1517.1525 (D. Colo.1987) cited by the PUD are not relevant to the instance case. In *Barbe*, supra, at page 1257 the question presented was whether an employee's state common law actions of defamation and intentional infliction of emotional distress against her employer were preempted by § 301 of the Labor Management Relations Act when the employment relationship is governed by a collective-bargaining agreement. Just what this case has in common with Steinbocks' case is not explained. The cited proposition is dicta and the privilege involved is specific to defamation.

Therrien, supra, dealt with the firing of an employee which had a written terminable at will clause in the employment agreement. Here, the Steinbocks various Applications for Service, hereinafter AS, CP 96-98, had language that stated the provision of electric power was "subject to all provisions of PUD Rules, Regulations and Rate Schedules". In the AS, the

SP was not mentioned. Nonetheless, PUD asserts that the SP was included in the Steinbocks applications by this reference. This is the only similarity that the Steinbocks' case has with *Therrien*. The Steinbocks claims are supported and not diminished by the AS. *Kok v. Harris*, 563 So 2d 374(La App.1 Cir 1990) is likewise factually distinguishable.

PUD relies on language in the case of *Cebulski v. Belleville*, 156 Mich. App.190, 193-194 (Mich. Ct. App. 1986). *Cebulski* was decided before Michigan formally recognized the tort of IIED. *Cebulski* recognized that if any other common law claim was asserted the emotional distress damages sought could have been awarded. The opinion is just dicta regarding the instant matter. The dissenting opinion opined that there was in fact outrageous conduct and based on the dissenting opinion, the court should have determined that reasonable minds could differ and a jury question was presented. This 25 year old case is not a proper bell weather to limit the breath or the scope of the Steinbocks' Outrage claim.

The *House v Hicks*, 218 Ore. App 348, 358 (2008) quotation used by the PUD to emphasis that breath of the court's gate-keeper function regarding IIED claims is at best extreme. That quote should not be used as a standard of measurement in a court of law lest socially despicable but socially tolerable behavior becomes un-actionable in a court of law.

Persecution, prosecution and/or torture of non-conforming minorities or ideas could be justified under this standard.

The *House* opinion does back away from that extreme statement to a more moderate approach. See *House*, supra, at pages 358-367.

House, at page 358-359, states:

“Whether conduct is an extraordinary transgression is a fact-specific inquiry, to be considered on a case-by-case basis, based on the totality of the circumstances. We consider whether the offensiveness of the conduct "exceeds any reasonable limit of social toleration[,]" which is "a judgment of social standards rather than of specific occurrences." (citation omitted)

Any "judgment of social standards" requires, in the first instance, an evaluation of whether the conduct in question is favored or made privileged by law, or disfavored or made unlawful by the legislature. The Restatement at § 46 comment g speaks of "privileged" conduct:

"The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. Apart from this, there may perhaps be situations in which the actor is privileged to resort to extreme and outrageous words, or even acts, in self-defense against the other, or under circumstances of extreme provocation which minimize or remove the element of outrage."

House also notes that the relationship between the plaintiff and the defendant can change the analysis. *House* states at page 360 that:

Our precedents identify several contextual factors that guide the court's classification of conduct as extreme and outrageous. The most important factor is whether a special relationship exists

between a plaintiff and a defendant, such as an employer-employee, physician-patient, counselor-client, landlord-tenant, debtor-creditor or government officer-citizen, that shapes the interpersonal dynamics of the parties. A defendant's relationship to the plaintiff may be one that "imposes on the defendant a greater obligation to refrain from subjecting the victim to abuse, fright, or shock than would be true in arm's-length encounters among strangers." (Citations omitted) Indeed, a " 'special relationship' between the parties has played a role in every case in this state involving [a successful claim of IIED]," (citations omitted), a factor that has remained "generally true" in more recent cases. (Citation omitted)

Other factors include whether the conduct was undertaken with an ulterior motive or to take advantage of an unusually vulnerable individual. (Citation omitted). The setting in which the conduct occurs, for example, whether it occurred in a public venue or in an employment context, also bears on the degree of its offensiveness. (Citation omitted)

In a similar vein *Metropolitan Life Ins. Co v. McCarson*, 467 So.2d 277 (1985) is not applicable. Whatever rights the PUD had, they were not similar to contract right asserted in *Metropolitan Life*. *Metropolitan Life* involved a contractual right to demand evidence of no coverage under Medicare before their coverage would kick in.

WRONGFUL DEBT COLLECTION PRACTICES

Here the Steinbocks' power was cut off not because their current power consumption being unpaid but solely to collect on a debt owed to the PUD. The PUD lost the right to terminate the power to the Park Place accounts when PUD closed those accounts on 5-8-06 and transferred them

into the name of the actual power users.

The PUD admits that any unfair and deceptive acts or practices in the conduct of any trade or business are unlawful, they claim when the PUD does such acts, they are engaged in privileged conduct because they are collecting on their own debt. The PUD has not disputed that the FDCPA, the CPA, and the WDCPA are codifications of public policy. The PUD does claim that it is not required, as a governmental agency to effectuate public policy through its own actions. While the PUD must act for the public good it must not act in a manner that is against public policy.

CONCLUSION

The denial of MLSAC was an abuse of discretion based on a misconception of law regarding the application of collateral estoppel and the failure to give effect to the prior dismissal without prejudice. The MSJ#2 was granted, at least in part, on the same erroneous reasoning. The Steinbocks' tort claims should not have been barred before they could even be asserted and tested in trial.

March 21, 2011

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify, under penalty of perjury under the laws of the State of Washington, that a copy of the within Brief of Appellant dated March 18, 2011 was sent to the following parties on the date shown below:

Steven Graham
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PO Box 1077
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Clerk of the Supreme Court
Post Office Box 40929
Olympia, WA 98504-0929

Dated this 18th day of March 2011

James A. von Sauer, WSBA 26297

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You will kindly find attached Petitioner's Reply Brief. If this needs to be mailed kindly advise. Otherwise, thank you for making things easy. James A. von Sauer WSBA 216297 Attorney for Ray and Barbara Steinbock