

No. 29836-1
COURT OF APPEALS, DIV III

b/1 E

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

BRIEF OF APPELLANT

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INTRODUCTION: IDENTITY OF THE PARTIES

This appeal is presented by the Petitioners Ray and Barbara Steinbock, hereinafter referred to collectively as Steinbock, the plaintiffs in the Ferry County Superior Court cause 09-2-00038-1. Steinbock seeks review of the trial court's decisions denying Steinbock's Motion for Leave to File Second Amended Complaint, herein after MLSAC, and from the Respondents', Ferry County Public Utility District No. 1, hereinafter PUD, and Roberta Weller, Chris Kroupa, Kathryn L. Ciais and Gregg B. Caudell, the Defendants below, successful Motion Summary Judgment, hereinafter MSJ#2 directed at Plaintiffs First Amended Complaint, hereinafter FAC. The Notice of Appeal was filed 3-19-2010.

ASSIGNMENTS OF ERROR

1. Did the trial court commit error when it held *sub-silento* that collateral estoppel prevented Steinbock from proceeding with their tort actions?
2. Did the trial court commit error when it *sub-silento* gave effect to a perceived election of remedies?
3. Was the trial court in error when it refused to give effect to the prior dismissal without prejudice of Steinbock's tort claims?
4. Did the trial court commit error in granting MSJ#2 by finding that the negligence claims in the FAC presented no triable issues of fact?

5. Did the trial court commit error in granting MSJ#2 by finding as a matter of law that Steinbock claim for outrage was not established?
6. Did the trial court commit error in granting MSJ#2 by finding that the cause of action for Harassment entitled Steinbock to no relief?
7. Did the trial court commit error in granting MSJ#2 by finding that the Wrongful Debt Collection Practices claim in the FAC presented no triable issues of fact?
8. Did the trial court commit error by finding that Steinbocks were not entitled to any relief by the court?

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERRORS

ISSUE 1. Was the denial of Steinbock's MLSAC an abuse of discretion?

ISSUE 2. Was the grant of MSJ#2 on the FAC erroneous?

STANDARD OF REVIEW

The standard of review on appeal of Issue 1 is in part *de novo* and in part manifest abuse of discretion. The standard of review regarding leave to amend is generally subject to only a manifest abuse of discretion standard. *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn.App. 324,338-339, 229 P.3d 893 (2010). Here, the trial court exercised its discretion under a mistaken view that issue preclusion applied. The issue of whether collateral estoppel applies in a case is an issue of law and *de novo* review

is the standard. *State v. Vasquez*, 109 Wn.App. 310, 314, 34 P.3d 1255 (2001). The standard of review on a grant of summary judgment is *de novo*. *Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993).

STATEMENT OF THE CASE

After complying with the RCW 4.96.020, the Steinbocks, hereinafter collectively referred to as simply Steinbock, filed their complaint against PUD on 5-04-2009 asserting four causes of action, negligence, Negligent Supervision, Outrage and Harassment. [Clerk's Papers, hereinafter CP, CP:1-24, 45:9-12]. That before the Complaint was served, Steinbock filed their First Amended Complaint, hereinafter FAC, on 5-14-09, which added additional language and a cause of action for Wrongful Debt Collection Practices. CP 27-52.

The FAC alleged that Steinbock had lived in Republic, Washington since 1994 and owned several parcels of real estate in Ferry County. Steinbock purchased a local business known as the Hitch-n-Post, hereinafter HP, which was a restaurant and saloon. They paid \$300,000.00 for the HP business and financed the purchase by a third party loan and seller financing from the then owner Mr. Ron Tatlow, hereinafter Tatlow. Steinbock was required to put up all of their real estate holdings valued at 196,000.00 in addition to the HP to secure the third party loan. One of the

holdings was the Park Place Mobile Home Estates, herein after Park Place, which Mrs. Steinbock owned outright. CP27:1, 28:17-29:12.

On 9-2-05 Steinbock went into possession of the HP and the power was "connected" to Mrs. Steinbock's name. No security deposit was paid as the HP was an established business. Steinbock received no bills from PUD until late November 05 when they received the September 05 bill. The November bill was paid in early December 05. CP29:1-24. In early December 2005 Steinbock became aware, after receiving the October and November 05 bills, that the HP was in arrears in an amount over \$3000. CP 30:1-6. In early December 05, hunting season was over and the tourist trade, upon which the business was dependant, would not return till spring of 2006. Park Place receipts were used to help bail-out the HP and the Park Place utility accounts became seriously delinquent. Steinbock made multiple payments on the HP accounts until 5-8-06 when PUD shut off the power to the HP. CP30:1-21.

Tatlow and PUD manger, Bobbi Weller, hereinafter Weller, were friends and they did dine together at the HP. Steinbock had not paid on Tatlow's second trust deed and Tatlow made his displeasure known and personally interfered with the HP business. CP 30:22-31:8.

On 4-7-06 Weller orally demanded that Steinbock pay PUD the

Steinbock to pay the outstanding balance owed on the HP account and a newly demanded security deposit of \$3170.00 of which \$1500.00 was to be paid up front and \$1670 was to be financed at the rate of \$150 per week until paid. Steinbock was to pay \$5961.00 by 5:00 pm on 5-10-06. The four trailer court accounts were to be closed and the power put in the individual tenant's names; The Park Place final bill was to be calculated and paid off in installments of \$100.00 per week beginning 5-15-06. Steinbock paid and power to the HP was reconnected. CP34:4-21, 35:1-12.

After the "agreement" Steinbock paid the monthly HP power bills but was late twice in July on the weekly payments. On 7-24-06 when Steinbock paid the weekly payment, Steinbock advised Weller they would be in on Friday 7-28-06 to pay off the balance on the HP security deposit. CP36:8-12. On 7-27-06, without prior notice the HP power was terminated. Steinbock tendered the weekly payment of \$250 on 7-27-06, which was for the first time refused. CP35:10-16.

When the HP terminated power to the HP building on 5-8-06, Mrs. Steinbock was living in a pre-existing residential apartment in the HP building. Mrs. Steinbock relocated to a vacant unit in Park Place and arranged with friend, Lester Godfrey, hereinafter Godfrey, to arrange for the power account to be put in his name and for him to pay the power bills

amounts that were over 90 days past due, i.e. \$1882.61. Mrs. Steinbock was led to believe that if she did that she would be given more time to deal with the other amounts then not over 90-days past due. Steinbock paid the amount demanded and additional sums. CP31:9-15, 32:8-24.

On 5-3-06 Weller, by written note, gave Steinbock 24 hours to pay up or the power would be turned off on 5-8-06. In a written reply, Mrs. Steinbock stated that she had in fact paid the \$1882.61 demanded and more but PUD unilaterally allocated the payments in a manner which she did not direct. Notwithstanding the reply, PUD disconnected the power to the HP on 5-8-06 and to Park Place for past due payments of \$4,316.00. CP 31:918, 31:24-32:9, 33:1-2.

Steinbock tried to get PUD Commissioner Ciaia to intervene but Commissioner Ciaia advised Mrs. Steinbock that PUD Board of Commissioners just does as Weller requests. Steinbock felt that she had no choice but to enter into the 5-8-06 “agreement”, hereinafter referred to as “agreement”, with PUD to restore power to the HP so that the perishable inventory and the business would re-open. CP33:20-34:5.

Park Place had separate meters but the tenant’s received their power through Mrs. Steinbock’s account. The “agreement” referenced the Park Place account and the HP account. The “agreement” terms required

on that unit. On 7-27-06, Godfrey's power account was current. CP33:16-19, 35:21-23. The HP, Steinbock and Godfrey did not receive any advance notice that their accounts were to be disconnected and not reconnected after the scheduled power outage on July 26, 2006. CP36:1-7.

Mr. Steinbock went to PUD to make the weekly payment; he asked why the HP electricity was not turned back on. Mr. Steinbock was told that Weller ordered the power shut down and not to reconnect unless all amounts owing were paid and that no partial payments would be accepted. CP 36:21-24, 37:1-4. Godfrey complained to PUD that his account was shut off. PUD told him that the account was shut off because "Barbie was living there" and that the account would not be reconnected unless he paid off the Park Place account and the balance due on the HP account. CP36:13-17.

The HP had \$10,000.00 of perishable inventory on hand on 7-27-06 when the power was shut off. PUD had actual knowledge that the cutting off the power would cause the perishable inventory to rot in the HP freezers and refrigerators and Steinbock had no other funds available to them. CP37:5-9, 32:3-4, CP73. PUD, instead of refunding the balance of the security deposit to Steinbock, used the security deposit as a set-off against the Park Place debt. This insured that Steinbock would not be able

to use the security excess fund to cover PUD's demand for a new HP security deposit before reconnecting power. Steinbock was thus, effectively put out of business. Their lender foreclosed on the HP and Steinbock lost all of their real estate holdings including Park Place. CP37:9-17, 38:1-4, 72, 44:3-9.

Steinbock hired an attorney to get PUD to restore power to the HP and to Mrs. Steinbock's unit in Park Place. Steinbock filed suit in cause number 06-2-00067 -0 in the Ferry County Superior Court. The lawsuit requested equitable relief and damages based on breach of contract and tort claims. CP37:18-24. PUD filed a successful Motion to Dismiss on the tort claims based on Steinbock's failure to file a tort claim with PUD prior to filing suit. Steinbock's tort claims were dismissed without prejudice. CP40:3-12, 43:23-25, CP213.

From 7-27-06 until 12-22-06 PUD tried to collect from Steinbock and from Les Godfrey the remaining \$320 balance on "agreement" security deposit. CP 38:1-14. On 12-18-06, PUD contacted Mrs. Steinbock's neighbor and demanded that he cease heating the Park Place incoming water lines and implied that he would be criminally prosecuted if he continued to do so. PUD at that time looked through Mrs. Steinbock's windows and saw electric lights going on and off. It was near

Christmas 06. CP39:10-24.

PUD filed MSJ#1 shortly after the tort claims were dismissed. MSJ#1 was successful on the breach of contract and the equitable relief claims. CP 40:8-12, 19-25. Just before the hearing on the MSJ#1, Mrs. Steinbock's lender, Tri-County Development gave her an eviction notice because she did not have "PUD approved power". To prevent Mrs. Steinbock's imminent eviction Mr. Les Godfrey paid to PUD the remaining balance owed on the Park Place account and arranged to have the power restored to Mrs. Steinbock's unit. CP39:25-40:2, 40:13-18. The Motion to Dismiss and MSJ#1 were both affirmed on appeal. CP179-187.

In the FAC, Steinbock claimed that PUD was negligent for failing to follow its customer SP. CP42:6-43:11, 45:17-24, 46:1-3; asserted that the elected Board of PUD Commissioners negligently failed to supervise PUD's managing officers to ensure that they followed the SP when managing PUD's business. CP 46:18-47:22; alleged that the conduct of PUD was outrageous and intentional and caused Steinbock to suffer severe emotional distress and outlined some of the conduct considered to be outrageous, and PUD's post-termination conduct. CP47:24-49:18, CP93-95; asserted that PUD harassed Mrs. Steinbock by violating Mrs. Steinbock's right of privacy and created a hostile living environment with

their unwarranted prying into her private affairs, the affairs of her neighbors and the affairs of her new landlord all which occurred after PUD terminated the power to Mrs. Steinbock's personal residence. CP49:20-50:7; and alleged a cause of action for wrongful debt collection practices seeking to impose liability based on PUD's violation of their own policies which reflected the public policy stated in RCW 19.29A.020, the public policy stated in the Consumer Protection Act, hereinafter CPA, the public policy stated in Federal Fair Debt Collection Practices Act, hereinafter FDCPA. CP50:9-51:12.

Before Steinbock served the FAC, PUD filed a Notice of Appearance on 5-29-09. CP53. On 6-2-09 PUD noted MSJ#2 to be heard on 7-24-09 and filed a one page pleading entitled Defendant's MSJ#2. CP54-55. On 6-10-09 Steinbock filed an objection to the MSJ#2 based on the grounds that MSJ#2 was not complete. CP56. On 6-10-09 PUD filed but failed to serve their answer until 6-16-06. CP57-67. On 6-25-09 PUD filed its coversheet in MSJ#2 for the previously filed MSJ#1 Declarations of Roberta Weller and Randy Sage. CP68-104. The Declaration of Randy Sage indicated that he does the terminations for PUD at the request of the general manager. CP103:15-18.

On 6-25-09, PUD filed its Memorandum in Support of MSJ#2.

CP105-124, which challenged the negligence cause of action on the grounds of collateral estoppel, CP107:19 -108:20 and that violation of agency policy is not negligence per se and a special jury instruction is needed. CP108:21-109:12. PUD challenged the negligent supervision cause of action on the same grounds as the negligence cause of action and added that PUD's Board of Commissions was not authorized to micro-manage their appointed manager. CP109:15-111:3. PUD challenged the Outrage cause of action on the ground that Steinbock's allegations did not as a matter of law establish outrageous conduct. CP111:6-115:23. PUD challenged the Harassment cause of action solely on the ground that RCW 10.14.010 only allows for a civil anti-harassment order and does not authorize a civil cause of action. PUD cited *Burchell v. Thibault*, 74 Wn App.517 for the proposition that protection orders are not designed to provide redress for past injury. PUD reasoned that since this was not a case seeking a protection order no cause of action was stated. PUD challenged the cause of action for wrongful debt collection practices on the grounds that the CPA and the FDCPA did not apply to the facts before the court. CP 116:14 -117:20, 50:9-51:12.

On 6-16-06, Steinbock affected service of the FAC on Bobbi Weller, hereinafter Weller, solely because PUD failed to list her in their

Notice of Appearance or in their answer. CP125.

Steinbock filed their opposition to MSJ#2, the Amended Declaration of Barbara Chase, which reflected her divorce from Ray Steinbock and attached the title page and the index page for the Customer Service Policies for the Electric Distribution System of Your PUD District No.1, which the PUD omitted. The declaration provided evidence demonstrating severe emotional stress she suffered. CP 126-129.

The Amended Opposition to Defendants Motion for Summary Judgment was filed 7-14-09. It challenged the use of the doctrine of collateral estoppel in that there was no trial on the issue of PUD Compliance with the SP, that by its nature MSJ#1 could only find that either there was no issue of fact to be tried or there was an issue to be tried, but not to determine that issue, that to apply collateral estoppel would be unfair and unjust, that there was a question of fact as to whether PUD's actions constituted outrageous conduct, and it is the facts of an action, not its title, which determines whether or not relief can be granted. CP 130-149, 130: 17-132:4, CP130:19-133:4.

Steinbock's Opposition to MSJ#2 was based in part on the Declaration of James A. von Sauer which attached documents that were considered with Steinbock's Opposition to MSJ#1. These documents were

the complaint in cause 6-2-0067-0; the 5-8-06 agreement; the order dismissing the tort causes of action without prejudice to refiling; PUD's MSJ#1; the plaintiffs' Motion to Continue the Trial and the MSJ#1; the 11-2-07 Order Setting MSJ#1 for hearing on 11-16-07; the Declaration of James A. von Sauer regarding his inability to completely prepare for the 11-7-07 pleading deadline; the Affidavit of Raymond Steinbock; the Affidavit of Lester Godfrey; the Declaration of Lester Godfrey; the Declaration of Randy Hursh; the Declaration of Barbara Steinbock with attachments; Motion to Strike Attachments to the Declaration of Roberta Weller; Objection to Proposed Order Granting MSJ#1; and Order Granting MSJ#1. CP202-260. These documents provided the factual basis for most of the allegations contained in the FAC.

Steinbock had argued that collateral estoppel should not apply because the circumstances leading up to the hearing on the MSJ#1 were characterized as unfair. CP132:16-137:20. The hearing was asserted to be unfair in that the court considered late filed documents and was rushing Plaintiffs' attorney. CP136:8-12. PUD failed to prove the elements of collateral estoppel. CP137:23-140:24 and the FAC asserted tort liability was not before the trial court MSJ#1. CP138:11-20. Steinbock's opposition made it clear that PUD negligence per se argument, which was

apparently accepted by the trial court, was based on an apparent misconception of what negligence per se means. CP141:2-7.

Steinbock argued that the Negligent Supervision cause of action was based on the fact that the Weller, PUD manager, did not follow the SP procedures on how a customer's power was to be terminated and that PUD allowed Weller to ignore the SP. The failure to supervise was supported by an admission of a PUD's speaking agent, PUD Commissioner Ciaia. RCW 54.16.100 established that the only control over the manager was through the Board of Commissioners and whether such control was ever used by the Board created a question of fact. CP142:2-20.

The opposition to MSJ#2 regarding the Outrage cause of action was based on existence of sufficient alleged facts to raise a factual question, CP142:23-144:24. The opposition cited *Jackson v. People Federal Credit Union* as establishing the appropriate test to be used in a debtor-creditor situation. The factors are whether the creditor is legally entitled to pursue the remedy involved, either as a statutory or contract right, and in pursuit of the remedy the creditor did not use measures that were clearly and obviously excessive. CP144:18-24. Steinbock argued the manner in which PUD exercised the termination remedy purposefully denied them of their rights under RCW 19.29A.020, *Mansour v King*

County, 131 Wn App 255, 128 P3d 1241 (2006) and PUD's own Service Policy. CP145:61-147:14. The PUD subsequent actions to collect on the debt were also unreasonable, .i.e., the efforts to freeze out Mrs. Steinbock, keeping her residence under surveillance, waiting until shortly before Christmas to yank the heat provided by Mr. Hursh to keep the Park Place water supply from freezing, and the coercion of Randy Hurst by misrepresentation to force him to discontinue using his paid power to heat the Park Place water lines. CP136:13-137:6. CP136:13-18, CP145:61-147:14.

The opposition to MSJ#2 regarding the Harassment cause of action was raised the fact that MSJ#2 did not address whether the factual basis for the cause of action entitled Steinbock to any relief. MSJ#2 attacked just the label of the cause of action not the right to relief. Steinbock asserted that the facts entitled them to relief. CP147:16-19, CP 27-52.

The opposition to MSJ#2 regarding the wrongful debt collection practices cause of action was based on the public policies stated in the FDCPA and the CPA even though these acts did not expressly apply to a creditor collecting on its own account. These acts expressed public policy regarding what are unfair debt collection practices and conduct which is harmful to consumers. This cause of action was an action to enforce a

public agency to comply with public policy. CP 147:21-149:17. Public policy was not addressed in MSJ#2. Steinbock also argued that to allow PUD's characterization of the complaint to govern the law to be applied violated the Plaintiffs' right to be the master of their own complaint. CP 149:6-17.

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

On 8-18-09, Judge Harold D. Clarke III was appointed to be the trial judge after the previously assigned judge had recused. CP 150. On 9-28-09, Steinbock gave notice that they would be seeking leave to amend via a Motion for Leave to File a Second Amended Complaint, hereinafter MLSAC. The court gave Steinbock until 10-30-09 to file their MLSAC. On 10-23-09, Steinbock filed the MLSAC which was to be heard prior to MSJ#2. CP 151-165. The MLSAC sought to add two causes of action based on the same underlying facts, one for violation of civil rights and the other for declaratory relief. The Declaration of James A. von Sauer in support of the MLSAC detailed the events subsequent to the filing of the FAC and showed that the delay, if any, was excusable and not prejudicial. Steinbock explained that his counsel had thought the case *Will v Michigan Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L.Ed 2d 45 (1983) would bar the contemplated new cause of action. Further research revealed

the case of *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S.Ct.2018, 56 L.Ed 2d 611 (1978). Counsel had thought that *Will* overruled *Monell* but continued research indicated that *Monell* was still good law.

PUD filed its Memorandum in Opposition to the MFLSAC and claimed but did not demonstrate prejudice. PUD also asserted that the proposed causes of action were frivolous. CP166-169. PUD argued that in light of the Court of Appeals decision Steinbock could not base a tort claim on actions the PUD was contractually entitled to do.

PUD argued the futility of the amendment at the hearing. [Verbatim Transcript of Hearing 12-21-09, herein after RP12-21-09, 7:2-13]; PUD conceded that the issue of due process was not before the court in MSJ #1 [RP12-21-09 8:20-23]; prejudice was not shown; the delay between filing and the motion was at most 5 months and that the 5 month delay did not establish prejudice [RP12-21-09, 5:16-6:1]; MSJ #1 did not involve the issue of pre-termination notice; the delay was caused by the PUD litigating the selecting of a new judge; that no court had dealt with asserted tort theories; and that Steinbock should be allowed a trial on the merits. [RP12-21-09, 6:14-19]. MLSAC was denied on 12-21-09. CP 170.

MOTION FOR SUMMARY JUDGMENT

Judge Clarke set the hearing on MSJ#2 for 1-15-10. Steinbock filed Supplemental Opposition on 1-6-10. CP 171-187. The Supplemental Opposition argued that the tort claims were dismissed “without prejudice” and “without prejudice” meant just that; that no Washington case allowed collateral estoppel to bar an action that was previously dismissed without prejudice; that when Mrs. Steinbock made a direct inquiry to Commissioner Ciaia, the Commissioner had a duty to provide correct information; the information Ciaia gave to Steinbock was erroneous in that it was the duty of the Board to see that Weller followed the SP; that the issue of PUD’s compliance with the SP was not litigated in the prior action; and, that different standards apply to tort actions and that different standards apply to contract actions, which render the doctrine of collateral estoppel inapplicable to the subsequent action. CP171:19-172:5, 173:3-9. CP 173:11-174:11, 174:13-175:4.

Steinbock asserted that PUD failed to meet their specific burden of proof on collateral estoppel, i.e., by clear, cogent and convincing evidence. CP 175:5-176:2. Steinbock argued that even if one could determine that the identical issue were involved in MSJ#1 the different legal standards rule would prevent its application citing *Cloud v Summers*,⁹⁸ Wn App

724,730, 991 P2d 1169. CP176:4-23.

Steinbock's last argument in the Supplemental Opposition was that it was PUD's rush to summary judgment on the contract action, before Steinbock could file the required tort claim with the PUD and re-file the dismissed tort claims, which caused Steinbock to file two separate lawsuits. This should have barred PUD from arguing collateral estoppel or in any other manner arguing the contract action foreclosed the tort claims.

The Steinbock attached the then non-final court of Appeal Decision (CP179-187), which expressly stated that Steinbock had three years in which to raise their tort claims in accordance with RCW 4.96.020 and that by dismissing the tort-claims without prejudice no election of remedies occurred. The opinion expressly stated it did not address Steinbocks' FDCPA claim. CP 183. The opinion held that the issue of an excessive security deposit or PUD's subsequent modification of the original agreement was not properly before the court. CP 187.

At the 1-15-10 MSJ#2 hearing, PUD argued that it was different from Avista Utilities because Avista was regulated by the Washington Utility and Transportation Commission and PUD was governed by RCW Title 54 and the common law. Verbatim Transcript of Hearing 1-15-10, herein after RPMSJ#2, 18:2-8. PUD argued that if it had the right to

terminate the power by contract, there was no basis to give rise to tort liability. RPMSJ#2, 18:25-19:4. PUD addressed the tort of outrage, harassment and wrongful collection practices stating that the court needs to be a gate keeper. RPMSJ#2, 19:5-15.

Steinbock argued at the hearing that this case illustrates the difference between procedural due process and substantive due process. RPMSJ#2, 20:17-19. The Court of Appeal reasoning that Steinbock was on notice from day one that if they did not pay their bill they would be subject to being disconnected was too simplistic and missed the point. RPMSJ#2, 21:1-4. Here the governmental agency involved enacted procedural protections to protect its customers from unreasonable and arbitrary conduct by its officers and then turned a blind eye to the fact that its managing officer was in fact ignoring and preventing those protections from being known or exercised by PUD customers. RPMSJ#2, 21:11-22:1. Steinbock reiterated that the Court of Appeal's opinion left open the issue of wrongful debt collection practices. RPMSJ#2, 24:4-20.

Steinbock orally argued that dismissal of the tort claims without prejudice prior to MSJ#1 prevented the court from even addressing the tort claims and thus the doctrine of collateral estoppel never came into play. RPMSJ#2, 24:19-25:1, 25:2-26:3. Steinbock argued that a dismissal

without prejudice is inconsistent with an election of remedy and would also prevent the doctrine of collateral estoppel from coming into play. RPMSJ#2, 26:4-24. Steinbock argued that the questions of fact were presented by the PUD's failure to follow the SP procedural safeguards regarding termination of power and whether the "agreement" repayment plan was a reasonable and feasible effort precluded summary judgment. RPMSJ#2, 28:20-30:1, 30:2-9.

On 2-18-10 Judge Clarke granted MSJ#2. CP188. Steinbock filed a Notice of Appeal on 3-19-10 attaching the Order Denying MLSAC with the trial court's Memorandum Decision, hereinafter MD, on the MFSAC, and attaching the Order Granting Defendant's MSJ#2 with Judge Clarke's MD on the MSJ#2.

The MD-MLSAC noted that the court had ordered the MFSAC to be filed by 10-30-09. The MD-MLSAC stated that prejudice to the defendant is the "touchstone" of a denial of a motion to amend and that a delay of 5 months was been held to be insufficient to demonstrate prejudice. CP193. The MD-MLSAC demonstrated that the trial judge felt that Steinbock had already elected their remedy and that collateral estoppel barred all future actions by Steinbock. The MD-MLSAC recited on page 2 the following:

“The Court of Appeals unanimously ruled that Defendant was contractually entitled to make the power disconnection. Furthermore the Court stated, “[r]easonable minds could reach but one conclusion; PUD did not fail to notify Steinbock of the possibility of service discontinuance for nonpayment.” Plaintiffs’ Second Amended Complaint requests additional causes of action for a violation of Plaintiffs’ civil rights and for declaratory relief to Defendants business practices. The Court of Appeal’s decision characterized the dispute between the parties as contractual and determined that the Defendant had, through its business practices, provided adequate, notification to Plaintiffs. Thus, Plaintiffs’ additional causes of actions are futile and meritless in light of the Court of Appeals’ recent ruling.”

The MD-MSJ#2 stated that the trial court held that as a matter of law there was no civil recovery for acts that constitute harassment and that the facts pled entitled Plaintiffs to no remedy at law; that PUD’s conduct as alleged, even if true, did not amount to outrageous conduct, and even if it did Plaintiffs’ failed to show that PUD intended to inflict or recklessly inflicted severe emotion distress on Plaintiffs; that if a common law action for wrongful debt collection practices existed, plaintiffs’ failed to alleged sufficient facts to implicate such a cause of action. The MD-MSJ#2 indicated that with respect to the negligence causes of action, this cause of action can only be contractual in nature and the contractual aspect of this litigation had already been decided against the Plaintiffs. No cause of action for negligence could have been pleaded as a matter of law and ipso facto the negligent supervision cause of action also fails. CP197-198.

On 3-26-10 the Clerk of the Supreme Court acknowledged receipt of the direct appeal to the Washington Supreme Court. CP 199-201.

ARGUMENT

THE DENIAL OF THE MFLSAC

The trial court found that leave to amend would be futile in light of the fact that the Court of Appeal had already decided that Steinbock's tort causes of action could not have merit because the only cause of action Steinbock possessed against PUD was contractual in nature. The Court of Appeals upheld the original trial court's finding that no breach of contract was shown. This same reasoning was used to support the trial court's grant of the MSJ#2 on the negligence based claims.

Contract actions and tort actions are in fact different. In *Smith v. Bates Technical College*, 139 Wash. 2d 793, 803-804, 991 P.2d 1135 (2000) the court stated:

Holding the tort of wrongful discharge in violation of public policy does not extend to employees who may be dismissed only for cause simplistically ignores the fundamental distinction between tort and contract actions. As the court explained in *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 176, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980), the theoretical reason for labeling a discharge as "wrongful" is not based on the terms and conditions of an employment contract, but rather arises out of the employer's duty to conduct its affairs in compliance with public policy. Professor Prosser has explained: '[Whereas] [c]ontract actions are created to protect the interest in having promises performed,' '[t]ort

actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties....' Koehrer, 181 Cal.App.3d at 1165, 226 Cal.Rptr. 820 (quoting William L. Prosser, *The Law of Torts* 613 (4th ed.1971)); see also Foley, 47 Cal.3d at 667 n. 7, 254 Cal.Rptr. 211, 765 P.2d 373 ("What is vindicated through the cause of action is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy."). It logically follows when any employee is terminated in violation of a clear mandate of public policy, the employee should be permitted to recover for the violation of his or her legal rights.

Here the wrong sought to be made right was not the promises made directly to Steinbock but the promises made by PUD to all its customers. PUD promised it would not act in an arbitrary manner and that it would do everything reasonable to insure that a retail customer would be able to keep their power on even if they should encounter temporary financial difficulties. Weller subjected Steinbock to arbitrary and unreasonable conduct which PUD had promised in their Service Policies would not happen. Every customer damaged from an agency's failure to follow its own rules should be able to via a tort action to hold the agency accountable for any damage suffered. Such actions promote the clear mandate of the agency's enacted policy and general public policy preventing a governmental agency from engaging in arbitrary,

discriminatory and unreasonable conduct. The contractual terms of the customer's agreement with the agency should not and does not have a bearing on whether or not an agency is required to follow its own rules. The contract claims and the tort claims are different but not necessarily inconsistent.

SP§15 created a duty on PUD to arrange for a reasonable and feasible repayment plan and not the take it or leave it proposition it demanded by Weller. SP §15.1 did not allow the termination without notice or otherwise of Godfrey's power. SP §15.1(b) and 15.2 by necessity implies that PUD had a duty to provide to its customers some kind of pre-termination notice before it terminated the customer's power. Notwithstanding the SP, PUD is a governmental agency and must comply with the constitutional requirements of providing some due process of law under the state and federal constitutions. The right to due process of law does not arise from the agreement of the parties.

The promise of pre-termination notice is central to effect some of the other SP promises made to PUD customers such as the right to an informal and formal appeal under SP§15.3. A formal appeal must be requested 7 days prior to termination. The pre-termination notice triggers the right to a hearing with the credit department and the department's duty

to arrange for the reasonable and feasible repayment plan under SP§ 15.2 and 15.3.

The only notice PUD ever provided Steinbock was the 5-3-06 letter Weller delivered to Steinbock giving her 24 hour notice to pay in full or the power would be terminated on 5-8-06. This letter is not consistent with purpose of the pre-termination notice required by the SP. By failing to provide Steinbock with sufficient pre-termination notice on 5-3-06 and no notice on 7-27-06, PUD purposefully prevented Steinbock from enjoying the benefits the SP promised to provide.¹

ELECTION OF REMEDIES

MD-MSJ#2 reflected the trial court's interpretation of the Court of Appeals opinion that the tort claims and contract claim are mutually inconsistent. This interpretation amounted to the trial court enforcement of an election of remedies despite the fact that no such election was ever made. This appears inconsistent with the Court of Appeals holding that no such election of remedies occurred because the dismissal was without prejudice. CP183.

¹ While Steinbock was unaware of the SP until it raised in MSJ#1. The Application for Service referred to the P.U.D. Rules and Regulation and Rate Schedules now existing or hereafter adopted as the incorporated document. The SP terms state it is binding on the customer as well as the PUD. CP40:22-23, 42:6-43:9, CP71:5-6, CP98 and CP238:5-13.

Anderson Feed & Produce Co. v. Moore, 66 Wash. 2d 237,242,

401 P.2d 964 (1965) recognized on page 242:

“A defendant cannot compel a plaintiff to choose at his peril the theory upon which he intends to rely and thereby possibly defeat a recovery where two consistent, concurrent or cumulative theories can be urged without prejudice to the defendant's ability to defend. If an actionable wrong has taken place recovery is to be granted regardless of theory and relief must not be denied through the vehicle of a forced election. (Citation omitted.)

Steinbock was never given the opportunity to elect a remedy. PUD made that decision for them. The MSJ#2 court did what the defendant was forbidden to do. It enforced an election of remedy. CP213.

In MSJ#1, the trial judge did not exercise discretion on the motion to dismiss under RCW 4.96.040. The MSJ#1 trial judge agreed with PUD's assertion that because of Steinbock's failure to comply with RCW 4.96.020 jurisdiction was lacking. A finding of lack of jurisdiction necessarily implies that no decision on the merits could have been made. The dismissal could have only been without prejudice.

A dismissal with prejudice generally acts as a bar to a subsequent action between the same parties on the same claim. While a dismissal 'with prejudice' appropriately follows an adjudication on the merits, a dismissal 'without prejudice' means that the existing rights of the parties are as open to legal controversy as if no judgment or dismissal had been

entered, i.e. that no prior action had been filed. See *Parker v. Theubet*, 1 Wn.App. 285, 291, 461 P.2d 9 (1969). There was no adjudication on the merits of any tort claim by Steinbock.

THE DOCTRINE OF COLLATERAL ESTOPPEL

PUD asserted in MDJ#2 that the doctrine of collateral estoppel barred Steinbock' tort claims. The trial court agreed and this was error. When MSJ#1 was heard, the tort claims were not before the trial court as those claims had been dismissed without prejudice less than 60 days earlier. The tort claims could not have been precluded by any ruling the trial court could have made on the MSJ#1 contract claims.

In *Christensen v. Grant County Hospital District No. 1*, 152

Wash.2d 299,306, 96 P.3d 957, (2004) the court noted:

“Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, Washington Practice, Civil Procedure § 35.32, at 475 (1st ed.2003). ...It is distinguished from claim preclusion “in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.” (Citations omitted) Claim preclusion, also called res judicata, “is intended to prevent relitigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.” *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm'n*, 72 Wash.2d 887, 894, 435 P.2d 654 (1967)

Christensen, supra, stated at page 307 the following:

Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. *Shoemaker*, 109 Wash.2d at 507, 745 P.2d 858. Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wash.2d 255, 264-65, 956 P.2d 312 (1998). For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger*, 134 Wash.2d at 449, 951 P.2d 782; *State v. Williams*, 132 Wash.2d 248, 254, 937 P.2d 1052 (1997); Claim and Issue Preclusion, 60 Wash. L.REV. at 831.

The party asserting the preclusion effect of collateral estoppel has the burden to prove all four elements. *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997); *McDaniels v. Carlson*, 108 Wn.2d 299, 303-04, 738 P.2d 254 (1987). Absence of any element prevents application of collateral estoppel. See *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003).

In *Henderson v. Bardahl Int'l Corp.*, 72 Wn.2d 109, 119, 431 P.2d 961 (1967). The court quoting Professor Currie stated:

No legal principle, perhaps least of all the principle of collateral estoppel, should ever be applied to work injustice....
It is generally recognized that the doctrine of res judicata (and this applies to that branch known as collateral estoppel by judgment) is

not to be applied so rigidly as to defeat the ends of justice, or [431 P.2d 968] to work an injustice. *Di Carlo v. Angeloni*, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990 (1935). See 30A Am.Jur., Judgments, § 325.

PUD had the burden of affirmatively establishing each of the required elements to show that collateral estoppel was applicable. PUD did not even bother to attempt this task. PUD did not prove that there was an identity of issues that were in fact litigated. What PUD did was to invite the court to speculate as which issues were in fact involved in MSJ#1. No proof was shown that PUD's compliance with the "policies outlined in SP, especially sections 1, 2, 5, 15 and the Fee Summary" was in fact even considered by the court.

In *State v. Harris*, 78 Wn.2d 894,899-901, 480 P.2d 484 (1971)

beginning at page 899 the court stated in part:

...constitutional collateral estoppel posits the familiar question of whether an ultimate fact which must be proved in the second case has already been fully litigated in the first trial. There are two elements in this question: (1) identity of issues, and (2) completeness of the prior litigation.

Here, an examination of the instructions and evidence in the first trial render it beyond serious contention that, for all practical purposes, the sole contested issue was whether defendant mailed the bomb. That same issue would necessarily be present in a trial under this second information. Thus, the first of the above stated elements is present.

However, the second element must also be present for collateral estoppel to apply. The law must regard the issue as one which has been fully contested in the first trial.

The logic of this requirement is found in the purpose of collateral estoppel, namely, the conclusiveness of litigation and the prevention of duplicitous and vexatious trials. The public policy supporting this concept properly prohibits the state from relitigating issues which were or could have been fully and completely contested in an earlier trial. But the same policy must recognize the right of society, as represented by the state, to have an opportunity to fully and completely place before the tribunal all facts relevant and material to the charge. This logic has been expressed by courts in terms of an exception to the applicability of res judicata or collateral estoppel if injustice will result. See *Beverly Beach Properties, Inc. v. Nelson*, 68 So.2d 604, 41 A.L.R.2d 1071 (Florida, 1953); *In re Estate of DiCarlo*, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990 (1935). See also 9 Stanford L.Rev. 281 (1956-57).

... We are of the opinion that, in cases where evidence is rejected for reasons that have no bearing on the quality of the evidence, the issue on which that evidence bears is not fully litigated. This is to be distinguished from evidence which is rejected on grounds of its irrelevancy, untrustworthiness, or cumulative nature. In such latter instances, the end determination on the particular issue is as fully litigated as proper administration of justice will allow. But there are other instances where, for some reason of policy, the law does not completely litigate an issue. We regard the policy which precludes otherwise relevant and competent evidence in certain instances on the grounds of privilege as such a situation. In such cases, collateral estoppel does not preclude subsequent litigation of the particular issue, since it has not been fully litigated in the first instance.

The trial court's prior dismissal without prejudice of Steinbock' tort claims renders the tort claims not fully litigated in MSJ#1.

In *Butkow v. Stewart Title Co.*, 99 Wn. App. 533, 547, 991 P.2d

697 (2000) the court stated that because the courts do not favor estoppel, a party asserting estoppel must prove each of its elements by clear, cogent and convincing evidence. In the instant case there was no proof of each element shown by the PUD yet alone what might be considered as clear, cogent and convincing evidence.

The dismissal without prejudice expressly allowed Steinbock to assert and to litigate the tort claims. To allow collateral estoppel to contravene the dismissal without prejudice and bar the tort claims before they could even be heard works a grave injustice. Exactly what was not supposed to happen, did happen. Steinbock was denied their day in court on the tort claims.

In *Cloud v. Summers*, 98 Wn. App. 724, 730, 991 P.2d 1169 (1999) the *Cloud* Court stated: "... collateral estoppel does not apply where a substantial difference in applicable legal standards differentiates otherwise identical issues of mixed law and fact. (Citations Omitted). Here different legal standards applied and issue preclusion did not. Steinbock refilled the tort claims in the manner in which PUD required them to do.

THE CIVIL RIGHTS CAUSES OF ACTION

The MFSAC sought to assert a causes of action for the violation of Steinbock's civil right to procedural due process of law before the power

was terminated to their power dependant business. This was an action under 42 U.S.C. 1983. Steinbock also asserted a cause of action for declaratory relief.

In *Bosteder v. City of Renton*, 155 Wash.2d 18, 38, 117 P.3d 316, (2005) the court noted on page 38 the following:

A municipality may be subject to sec. 1983 liability because it is considered a 'person' as the term is used in the statute. *Sintra*, 119 Wn.2d at 11. However, a municipality is not liable under sec. 1983 'solely because it employs a tortfeasor.' *Bd. of County Comm'rs*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed. 2d 626 (1997). Rather, a plaintiff wishing to compel liability upon a municipality under sec. 1983 must show that an official policy or pervasive custom of the city caused the plaintiff's injury. *Id.*; see also *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978).

Here the allegations showed that while PUD did enact the SP, which sought to protect its customers from arbitrary and capricious conduct and from erroneous terminations of their customer electrical power. PUD's manager failure to follow the SP policies. PUD manager was allowed to do as she pleased. Under *Bosteder*, supra, the proposed pleading should have been sufficient.

THE DECLARATORY RELIEF CAUSE OF ACTION

The Declaration of Rights cause of action demonstrated that a controversy existed and a declaration of the parties' rights, duties, and

obligations were requested to be declared. A party is entitled to a declaration of rights even if it is adverse. *Greyhound Corp. v. Division 1384 of Amalgamated Ass'n of St. Elec. Ry. and Motor Coach Employees of America*, 44 Wn.2d 808, 822, 271 P.2d 689 (1954) The proposed causes of action did not prejudice the defendants' ability to interpose defenses and/or otherwise to prepare and defend the action. The trial court denied leave to amend on an erroneous view of the law. A ruling based on an erroneous view of the law constitutes an abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). The MFLSAC should have been granted.

THE GRANTING OF MSJ#2

The trial court justified its grant of MSJ#2 on the same erroneous views of the law as involved in the denial of MFSAC. The previous arguments and citations to the law with respect the doctrine of collateral estoppel, election of remedies and the dismissal without prejudice are equally applicable here, at least with respect to the MSJ#2's resolution of the negligence and negligent supervision causes of action. Those arguments are incorporated by this reference.

Summary Judgment is proper if the pleadings, depositions, admissions on file, and any affidavits demonstrate that no genuine issue of

material fact exists and that the moving party is entitled to judgment as a matter of law. Civil Rule 56(c); *Hartley v. State*, 103 Wn. 2d 768, 774, 698 P.2d 77 (1985). The facts submitted and all reasonable inferences arising from those facts must be considered in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982). The burden is on the moving party to show that no genuine issue of material fact exists. *Jacobsen v. State*, 89 Wash.2d 104, 108, 569 P.2d 1152 (1977).

NEGLIGENCE-COMPLIANCE WITH POLICY

Steinbock asserts that the trial court believed that collateral estoppel or res judicata resolved all of the issues to be tried in MSJ#1 and thus there was nothing to resolve in MSJ#2. If this premise is incorrect then MSJ#2 dissipates into the same thin air of which it is composed. It will then be shown that all reasonable inferences and the facts were construed in a light most favorable to the moving party, and not to the non-moving party, which is error. Steinbock was entitled under RCW 5.40.050 to show as evidence of negligence PUD's violation of its own policies or rules and that the actions taken by PUD against Steinbock were done in violation of public policy. PUD basically conceded in their moving papers that if collateral estoppel did not apply, Steinbock had

evidence of negligence. CP108:21-109:12. Violations of a company's policies are sufficient, if shown, to get the case to the jury and thus were sufficient to overcome MSJ#2.

“Mere surmise that plaintiff may not prevail at trial is not a sufficient basis to refuse her, her day in court. *Meadows v. Grant's Auto Brokers Inc.*, 71 Wash. 2d 874, 882, 431 P.2d 216 (1967).

Nowhere did PUD make a showing of compliance with SP §15. SP §15 requires PUD to make every effort to arrange a reasonable and feasible deferred payment program before termination of power.² Weller ignored the SP§15.2's requirement of pre-termination notice when she ordered the 5-8-06 and the 7-27-06 terminations of power. Reading §15.1, §15.2 , and §15 together one can come up with the rational conclusion that some formal notice, by at least certified mail is required to be given more than 7 days before the shut-off otherwise the rights of appeal will be lost before they can be exercised and the Steinbock would not be able to request the “special consideration.” the SP allowed. CP79. The PUD arranged the deferred payment plan by solely ultimatum.

The SP Fee Summary lists the fee for a security deposits as being

² Feasible is defined by Webster's New World Dictionary, College Edition to mean “capable of being done or carried out,” “practicable,” or “likely”.

\$200. The SP does not limit this specified security deposit to residential customers. The SP§5 discusses other ways to impose security from customer requesting service other than the deposit of cash. PUD did not show why the other means of posting security were not discussed or made available to Steinbock. All PUD established was they demanded a \$3170 cash security deposit. PUD justified this demand by claiming it was the estimate of the two highest monthly amounts per SP§5 but failed to provide any real information to show how that amount was calculated and why it exceeded the HP's two highest months of usage by almost \$1000.00.³, The HP was not a new commercial or industrial account. If PUD had used the actual two highest months of actual usage, the HP security deposit would have been paid in full two weeks 7-27-06.

PUD failed to treat the collected HP security deposit as a security deposit. PUD failed to refund the balance as required under SP §5 treating the security deposit as ordinary funds on deposit and set off the funds like a banker's lien. PUD offered to restore Mrs. Steinbock's residential power only if the HP security deposit balance of \$320.00 was paid with a new \$500.00 security deposit. Could a reasonable person come to the conclusion that the SP security deposit requirements meant nothing if

³ CP72 shows the highest two months was \$2573.00,

Steinbock was involved?

NEGLIGENT SUPERVISION

Defendants purported justification for MSJ#2 regarding the negligent supervision cause of action that the only persons in PUD to whom Roberta Weller was answerable was PUD Board of Commissioners. PUD asserted that under RCW 54.16.100, the manager shall carry out the orders of the Board of Commissioners and see that the laws pertaining to matters within the functions of his or her department are enforced. This is precisely what the Board of Commissioners did not do, see that their orders are followed. Insuring that the PUD manager enforces the SP is not micro managing the business. The Board cannot abdicate its duty to exercise control of its manager and still comply with RCW 54.16.100. PUD Commissioner Kathy Cia's comments to Mrs. Steinbock are an admission that the Board of Commissioners impliedly allow their appointed manager to engage in whatever conduct the manager desired, including the arbitrary and capricious actions of which Steinbock complains. The Board's failure to act means that the PUD knew or should have known of Weller's failure to follow the SP and yet did nothing.

OUTRAGE

The MD-MSJ was most charitable to PUD when it stated that

Steinbock's allegations were that they were simply upset that PUD did not accord them all appropriate procedural rights when it disconnected the power to their business due to non payment of the bill for power. The MD-MSJ stated that Steinbock presented no facts that indicated that PUD intentionally or recklessly subject or inflicted severe emotional distress on them. This is the rationale for the trial court's determination that a cause of action for outrage was not shown.

Steinbock contends that the trial court did not construe the facts and inferences in a light most favorable to the non-moving party. The uncontested facts in MSJ#2 showed that Steinbock did not receive the September bill from PUD until late November 2005, which they paid 12-6-05. CP238:21-22. Steinbock received the October and November bills shortly thereafter. CP239:1-4. In early December 2005, Steinbock realized they were indebted to PUD in the sum of \$3124. CP42. Steinbock did not ignore the HP's obligations to PUD. They made the following payments on the account from 12-6-05 up to and including 5-8-06 before the PUD first cut of the power to the HP. The HP payments in December totaled \$827, in January \$800.00, in February \$400.00, in March \$700, in April

\$1600.00 and on 5-8-06 \$162.⁴ CP 72.

Mrs. Steinbock's letter to PUD Commissioners and Weller demonstrated her state of mind that she had paid \$2200 in April 06 on her past due accounts but the payments were not allocated as instructed. Mrs. Steinbock complained that she had paid the \$1822 demanded by Weller on 4-7-06 and an additional \$939.39 on PUD accounts and would not be able to continue to pay her bills if she was shut down. Steinbock reassured PUD that she would continue to pay down her accounts. CP 246. PUD's response was to shut off the power on 5-8-06. CP91.

On 5-8-06, Mrs. Steinbock tried to get the HP power back on. PUD Commissioner Cia's told Steinbock that the Commissioners could do nothing for her. Mrs. Steinbock felt that she had no choice but to contact Weller and accede to Weller's demands. Weller wrote up the 5-8-06 "Agreement". The "Agreement" demanded \$5961.00 by 5:00 pm on 5-10-06, called for a new security deposit of \$3170 and required, among other things, that the HP bill be paid by the 15th of every month. CP92. Mrs. Steinbock informed Weller that she would have to sell her only unencumbered asset to generate the funds necessary to fund the 5-10-06 payment. The \$5961 was paid on 5-10-06. CP241 and CP248:3-7.

⁴ The record reflects \$562 paid on all of the accounts on that date.

Weller's payment history shows that Steinbock were paying but were late on two of the weekly payments in July. Steinbock informed Weller when she paid on Monday 7-24-06 that she would be in on Friday to pay off the security deposit. On Thursday, 7-27-06, the HP power and Steinbock's personal residence were not reconnected. PUD had on deposit \$2850 of Steinbock's cash, the Park Place accounts were closed and the balances were being reduced, and the HP and Mrs. Steinbock's residential bill was current. Why the rush to terminate the accounts?

PUD had advertised scheduled system wide power outage which was to occur between 7-26-06 and 7-27-06. When the power was scheduled to resume, everyone's power came back on except for the HP and Mrs. Steinbock's residence. This clearly is not the pre-termination notice contemplated by the SP. Steinbock had already paid \$2850 on the "new security deposit" and owed only \$320 and they had reduced the Park Place account by \$900.00. CP93-95.

PUD had actual knowledge that shutting the power of would destroy the HP business and the ability of Steinbock to survive. PUD knew that the HP was the sole source of Steinbock income. PUD knew that Steinbock was impecunious and that HP's perishable inventory would be hard for Steinbock to replace. To insure the HP would not reopen, PUD

off-set the refundable portion of the HP security deposit in violation of SP§5. Just to make the Steinbock plight worse, the power to Mrs. Steinbock's personal residence was shut off just because "Barbie was living there." Even after assuring that Steinbock was destitute, PUD still keep tabs on Mrs. Steinbock, used misleading threats to coerce Mr. Hursh, to stop supplying electricity to heat to the Park Place water lines, still attempted to collect the \$320 balance and advised Mrs. Steinbock's landlord that she did not have an approved power supply. Les Godfrey felt compelled to pay off the Park Place account so that Mrs. Steinbock and her seeing eye-dog would not be evicted and become homeless. What is not outrageous by PUD's conduct? Is there really no evidence to support Steinbock's claim that PUD intended or did act in reckless disregard that their actions could cause severe emotional distress to Steinbock?

What Steinbock was forced to endure is not trivial annoyance or just petty oppression. Putting a pair of business owners, who were at least paying on their debts, out of businesses because they were they out of tune with an arbitrary time schedule seems a bit overly harsh, especially when more than 50% of the scheduled payments were due to a unilaterally inflated and unreasonably high security deposit. PUD's refusal to accept their 7-27-06 tender under scores the unreasonableness of PUD's conduct.

The injury and damage suffered by Steinbock was certainly not unexpected. What more is needed to create a jury question on the issue of outrageous conduct and intent to cause severe emotional distress?

PUD claims it was privileged to act as it did. For PUD acts to be privileged would seem to depend on whether or not PUD followed its own rules when it acted. This PUD did not do. It only followed those rules and regulations that gave it an advantage and ignored the rules designed to protect its customers. As stated in *Reid v. Pierce County*, 136 Wash.2d 195,202, 961 P.2d 333 (1998), a case-by-case approach is necessary to define the precise limits of what is outrageous conduct.

Here PUD was the sole local provider of electricity in the Republic area. Steinbock could not remain in business without electricity and was struggling to make ends meet. PUD knew that the SP protections were not given to Steinbock. The Restatement of Torts § 46 factors were in fact shown by Steinbock. Using the *Jackson v. Peoples Federal Credit Union*, supra, factors, was PUD's conduct a reasonable debt collection strategy or was it clearly and obviously excessive? A question of fact is presented.

PUD never advised the court or Steinbock that PUD had at all times, the implied authority to create a lien on their real estate to secure the payment of their bill. See *Hite v. Pub. Util. Dist. No. 2*, 112 Wn.2d 456,

459, 772 P.2d 481 (1989). PUD never suggested to Steinbock that securing the unsecured debt until the unpaid balances were paid in full would be an alternative to putting them out of business.

In *Mansour v. King County*, 131 Wash.App. 255,263-264, 128 P.3d 1241, (2006) the Court of Appeal noted:

Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." In determining what process is due, a court weighs (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used; (3) the probable value of additional procedural safeguards; and (4) the government interest involved. ...Due process essentially requires the opportunity to be heard 'at a meaningful time and in a meaningful manner.

This determination was not made by the trial court when it decided that Steinbock did not have a right to procedural due process.

PUD purposefully failed to advise Steinbock' of their rights and remedies as mandated under RCW 19.29A. RCW 19.29A.005 states:

That the (1) The legislature finds that: (a) electricity is a basic and fundamental need of all residents; and that the legislature intends to ensure that all retail electrical customers have the same level of rights and protections; and to require the adequate disclosure of the rights afforded to retail electric customers.

While PUD might be exempt as a small utility under RCW 19.29A.040, it voluntarily agreed to be governed by RCW 19.29A by

enacting the SP to comply with the requirements of RCW 19.26A.020 and 19.26A.030. Notwithstanding its own voluntary act to subject to RCW19.29A, PUD's management did everything after the enactment of the SP to keep its customers in the dark about their rights. It hid the existence of the SP by calling it something totally different in the Application for Utility Service and indicating that the customer should ask for the erroneously described document at the PUD office to understand their rights. How exactly this was to occur, PUD fails to explain.

PUD then engaged in a course of conduct of intentionally failing to give prior notice of its terminations of power so that the SP rights granted would be impossible to use. Just because PUD is a small utility, PUD does not give them the right to do away with their obligation to comply with the constitutional right to due process of law. PUD is still a governmental agency. The government must comply with due process of law and protect their costumers from arbitrary, capricious and malicious conduct.

HARASSMENT

PUD offered little to support their MSJ#2 with respect to the cause of action for Harassment except to characterize it as an order for protection under RCW10.14.010. RCW §10.14.140 states that "Nothing in this chapter shall preclude a petitioner's right to utilize other existing civil

remedies.” Thus RCW 10.14, by itself, is not a bar to this cause of action.

MSJ#2 on harassment should have been denied as Steinbock should be entitled to some relief at the hands of the court. Civil Rule 2 states “The one action rule.” Ever since *Dunlap v. Rauch*, 24 Wash. 620, 623,64 P. 807 (1901) it was stated:

“We have frequently observed that the form of the action is immaterial, if the facts stated entitle the plaintiff to any relief, and the case is fairly tried. The case of *Hurlbutt v. Saw Co.*, 93 Cal. 55, 28 P. 795, is pertinent. The court observed: 'There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs (Code Civ. Proc. § 307), and the facts constituting the cause of action are required to be stated in ordinary and concise language.

Even if the court had felt that harassment cause of action was subsumed by the other pled causes of action the MSJ should not have been granted as Steinbock would have been entitled to some relief. This trial court felt there was no legal basis for Steinbock to proceed to trial.

WRONGFUL DEBT COLLECTION PRACTICES

Steinbock did not expressly base this cause of action on the CPA, the Washington Collection Agency Act or FDCPA because these statutes by their terms or by case law did not expressly apply to the Steinbock’s factual situation. However, the statutes do reflect public policy in today’s society regarding what are unfair, deceptive, abusive and unfair debt

collection practices.

FDCPA, § 802 states “(a) [t]here is abundant evidence of the use of abusive, deceptive and unfair debt collection practice by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs and to the invasions of individual privacy.” Congress recognized in subsection (b) (Ibid) that “existing laws and procedures for redressing these injuries are inadequate to protect consumers.”

While the FDCPA was aimed toward and regulated the conduct of debt collectors as a profession, the public policy stated, the prevention of abusive debt collection practices and the deleterious effect on the debtor and society is the same for creditors who use the same tactics when they collect on their own debts. The FDCPA is a reflection of national public policy. Steinbock’s cause of action seeks damages from PUD for their intentional acts in violation of public policy.

FDCPA §1.19 prohibits the use of false or misleading acts as a method of collecting on a debt; §1.20 prohibits the use of unconscionable means of collecting or attempting to collect a debt, §1.22 makes it unlawful for “any person” to provide certain deceptive collection forms and this applies to creditor collecting their own debts, and § 807 (15 USC 1692e) defines

false and misleading representations, in part, as the threat to take any action that cannot legally be taken or that is not intended to be taken and/or the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer. FDCPA also prohibits the collection of an unauthorized or an unlawful amount.

The FAC reflects PUD did many action which violated the FDCPA. The some of things PUD said and did to Mr. Godfrey and Mr. Hursh were false and or misleading. The PUD's attempts to collect on the purported debt of \$320 were outright fraud. The PUD's attempt to collect on the unauthorized \$3170 security deposit may itself have been a violation. Was notifying Mrs. Steinbock's landlord that she had a "non-PUD approved electrical supply" just another unfair and abusive means of collecting a debt? Was the cutting off of the service to Mrs. Steinbock's trailer an abusive and unfair means of collecting a debt? Was the purported justification of "benefit of service" rule used by PUD to justify the without notice termination of Godfrey's account abusive, unfair, false and/or misleading? PUD claimed that under law no one was allowed to pay the Steinbock's utility bill because that would impede their collection on the Park Place accounts. Imagine not being able to put electric power into your name to protect a disabled relative, a parent suffering from dementia

or to help a destitute friend. Is that a fair debt collection practice when the collector is the only source for a vital need? See RCW 19.29A.005.

Washington Practice, §1.61, pages 82-94, states that debtors with claims under the FDCPA or the CAA may in addition seek remedies for abusive collection methods under common law tort theories. Remedies under tort theories may also be sought by debtors not protected by the FDCPA and the CCA ...and debtors who are the object of their creditor's direct attempts to collect debts owed to them, protected by neither the FDCPA nor the CCA. Common law tort actions for wrongful debt collection practices have been recognized in causes of action for defamation, outrage, and negligent infliction of emotional distress.

PUD's conduct in collecting this relatively minor debt was unreasonable, vexatious and unconscionable. If it is bad for private enterprises to engage in such predatory conduct it is more outrageous for a public agency to do so. This cause of action serves public policy and a reasonable person could come to the conclusion that PUD used unconscionable and unfair means to collect on the Park Place account.

CONCLUSION

The denial of MLSAC was an abuse of discretion based on a misconception of law regarding collateral estoppel, the effect of the prior

dismissal of the Steinbock tort claims without prejudice and the doctrine of election of remedies. The MSJ#2 was granted, at least in part, for the same erroneous reasoning. The Steinbock tort claims should not have been barred before they could even be asserted. PUD's violation of public policy supported the remaining Steinbock tort claim and those claims should have been allowed to proceed to trial.

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Respectfully submitted,



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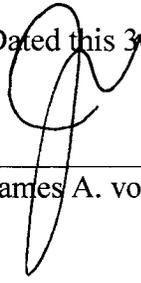
CERTIFICATE OF MAILING

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 September 29, 2010 was sent to the following parties on the date shown below:

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Dated this 30th day of September 2010



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