

NO. 66557-0-1

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

DENISE V. ENGSTROM, Petitioner,

v.

REBECCA HARDESTEN, Respondent.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 MAR 25 PM 2:51

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
REBUTTAL ARGUMENT	1
1. Review Includes All Evidence in the Trial Court Record	1
2. The Court Below Erred in Denying Plaintiff’s Motion to Strike Defendant’s Request for Trial De Novo Because Defendant Hardesten Did Not Authorize or Consent to the Filing of the MAR Appeal.	3
3. Hardesten’s Duty to Cooperate with Unitrin Insurance is Not Implicated in This Review	6
CONCLUSION	6

TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page(s)</u>
<i>Bohn v. Cody</i> , 119 Wn.2d 357, 832 P.2d 71 (1992)	4
<i>Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC</i> , 139 Wn. App. 743, 754-55, 162 P.3d 1153 (2007)	2
<i>Sneidar v. Hoddersen</i> , 114 Wn.2d 153, 164, 786 P.2d 781 (1990)	2
 <u>Non-Washington Cases</u>	
<i>In re Users System Services, Inc.</i> , 22 S.W.3d 331, 42 Tex. Sup. Ct. J. 836 (1999).	4
 <u>Other</u>	
CR 11.	1
ER 801(d)(2).	3
MAR 7.1(a).	1
RAP 9.12	2
RAP 9.6	1
RPC 4.2	4

REBUTTAL ARGUMENT

The Snohomish County Superior Court erred in striking the declarations of John Williams and defendant Rebecca Hardesten, denying plaintiff's motion to strike the request for trial de novo and imposing CR 11 sanctions. The clear language of MAR 7.1(a) requires that the "aggrieved party" authorize or consent to the filing of a Request for Trial De Novo – not the aggrieved party's attorney and certainly not the aggrieved party's liability insurance company. The proper filing of an MAR appeal is jurisdictional in nature, and but for the proper filing of the appeal, the Superior Court has no other jurisdiction to consider the merits of the case in a subsequent trial.

1. REVIEW INCLUDES ALL EVIDENCE IN THE TRIAL COURT RECORD.

RAP 9.6 allows either party to designate those portions of the trial court record it wishes to have before the appellate court on review. There is no question that defendant Hardesten's unsolicited email is part of the trial court record, despite defense counsel's numerous attempts to get it stricken. Even though not produced at the time of the original hearing, the unsolicited email from defendant Hardesten is specifically referred to in attorney Williams' original declaration. CP 19 at paragraph 3. As reflected in the attachments to her Motion to Strike, the trial court has

denied her requests to have the valid, legitimate evidence stricken every time she has raised the issue. She has not filed any appeal of these decisions. Therefore, the evidence constitutes part of the trial court record and may be cited on review.

Respondent's reliance on *Sneidar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990) and *Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754-55, 162 P.3d 1153 (2007), is misplaced. Rather, the Supreme Court's decision affirms the notion that material in the trial court record may be cited on review; only those materials **not** in the trial court record are properly excluded. *Sneidar*, 114 Wn.2d at 164. In *Jacobs*, the Court of Appeals decision was clearly limited to the special rule governing summary judgment decisions. RAP 9.12 limits the record on review to those items specifically identified by the trial court in granting a motion for summary judgment, including "any supplemental order of the trial court." *Id.*, at 755. There is no corresponding rule that would preclude the Court of Appeals' consideration of this trial court evidence on review.

The Hardesten **unsolicited** email to plaintiff's attorney Williams contains all the information Williams later incorporated into a formal declaration. On November 3, 2010, ten days following the filing of a

Request for Trial De Novo on her behalf, Hardesten initiated contact with Williams by stating unequivocally:

I do not agree to a new trial.
I am not happy with these events, with my lawyers, or with Unitrin pursuing this further. . . .
I am consulting with third party attorneys, but feel free to contact me further as I do not wish to be represented by [Unitrin appointed attorney] Mr. Welchman.

Rebecca Hardesten (formerly Goodman).

CP, at 44, Exhibit 1.

Hardesten's email constitutes *bona fide* evidence in the trial court record which the Court should consider in reaching a decision on the merits in this case. It is an out of court statement by a party-opponent and is admissible as such under Evidence Rule 801(d)(2).

2. THE COURT BELOW ERRED IN DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S REQUEST FOR TRIAL DE NOVO BECAUSE DEFENDANT HARDESTEN DID NOT AUTHORIZE OR CONSENT TO THE FILING OF THE MAR APPEAL.

Completely ignoring defense counsel's unethical conduct in filing the MAR appeal without his client's knowledge, authorization or consent - even over her clear objections - defense counsel takes issue with the former plaintiff counsel's declaration and that of her own "client."

At the time defendant Hardesten sent the unsolicited email to attorney John Williams, she stated in writing that she was no longer represented by defense counsel Philip Welchman and was seeking independent counsel. The existence of an attorney – client relationship turns largely on a client’s subjective belief that one exists, as long as the subjective belief is reasonably formed based upon the attending circumstances. *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992). Hardesten clearly believed she had no attorney-client relationship with defense counsel Welchman and said so to attorney Williams. This is precisely the situation addressed in *In re Users System Services, Inc.*, 22 S.W.3d 331, 42 Tex. Sup. Ct. J. 836 (1999), where the Texas Supreme Court – applying the same ethical standards as RPC 4.2 – ruled that an attorney representing an opposing party was free to communicate with an opposing party in litigation where that opposing party initiated the contact and stated that he was no longer represented by the opposing counsel of record.

Therefore, for purposes of RPC 4.2, Hardesten was not represented by legal counsel. The fact that defense counsel Welchman decided not to file Notice of Withdrawal until later is immaterial.

Furthermore, as evidenced in the unsolicited email itself, attorney Williams did not learn *anything* in his subsequent communication with

Ms. Hardesten solely for the purpose of preparing her declaration that he did not already know from her email. Thus, there was no overreaching or other improper conduct by attorney Williams that warranted the trial court's decision to strike his declaration and that of defendant Hardesten. The trial court fundamentally misunderstood this when it declared that the declarations "contain information improperly obtained from the Defendant [Hardesten]." CP, 39. There was nothing improper whatsoever in Hardesten's voluntary, unsolicited email communication to attorney Williams.

Both the trial court and defense counsel exaggerate and embellish the extent of attorney Williams' communication with Ms. Hardesten. The record reflects a single contact by attorney Williams to Hardesten simply for purposes of preparing a formal declaration incorporating the statements Hardesten herself made in the unsolicited email. Without any citations to the record, defense counsel categorically states that "Attorney Williams proceeded to engage in several conversations with [Hardesten]." Resp. Br., at 2. Further she states – again without any citation to the record – that Williams engaged in "several ex parte communications" with Hardesten. Id., at 3. Finally, she argues that "Judge Wilson was particularly troubled by the number of prohibited contacts" between Williams and Hardesten. Id., at 5.

3. HARDESTEN'S DUTY TO COOPERATE WITH UNITRIN INSURANCE IS NOT IMPLICATED IN THIS REVIEW.

Finally, defense counsel argues that Ms. Hardesten had a contractual duty to cooperate to the Request for Trial de Novo. This issue is not before the Court and is truly a red-herring. Whether or not Ms. Hardesten's decision not to seek further litigation after the mandatory arbitration decision on the merits breached any contractual agreement with Unitrin insurance is beside the point. The fact remains that Ms. Hardesten – and only Ms. Hardesten – had standing to authorize or consent to the filing of the Request for Trial de Novo. She chose not to.¹

CONCLUSION

The central fundamental fact on review remains that defendant Rebecca Hardesten wrote an unsolicited email to plaintiffs' counsel John Williams on November 3, 2010, ten days following the filing of a Request for Trial De Novo on her behalf, in which she stated unequivocally:

¹ While defense counsel's argument regarding the duty to cooperate is irrelevant to this proceeding, it is worth noting that Ms. Hardesten obviously did cooperate to the full extent required in presenting the case on the merits to mandatory arbitration. Her decision not to prolong the litigation through further appeals is perfectly reasonable.

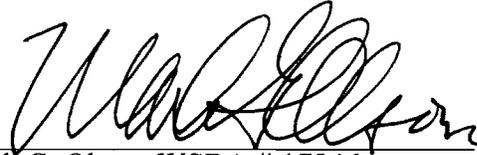
I do not agree to a new trial.
I am not happy with these events, with my lawyers, or with
Unitrin pursuing this further. . . .
I am consulting with third party attorneys, but feel free to
contact me further as I do not wish to be represented by
[Unitrin appointed attorney] Mr. Welchman.

Rebecca Hardesten (formerly Goodman).

CP, at 44, Exhibit 1.

The filing of an MAR appeal without the aggrieved party's
authorization and over her clear objections mandates reversal of the trial
court's decisions to strike the declarations of John Williams and Rebecca
Hardesten, deny Plaintiff's Motion to Strike the Request for Trial De
Novo, and impose sanctions against attorney Williams be reversed.

RESPECTFULLY SUBMITTED this 24th day of August, 2011.



Mark G. Olson, WSBA # 17846
Attorney for Appellant Denise Engstrom

DECLARATION OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered the foregoing **APPELLANT'S REPLY BRIEF** to the following parties:

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DATED this 24th day of August, 2011.

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