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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

JOHN DAVID DU WORS, an individual,

Plaintiff,

v.

JENNIFER SCHWEICKERT, an individual,

Defendants.

Case Number: 15-2-02482-7

**DEFENDANT'S REPLY BREIF TO
PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS
AND REQUEST TO STRIKE**

I.

INTRODUCTION AND MOTION TO STRIKE

Mr. Du Wors' response memorandum to defendant's Motion to Dismiss is, on the whole, legally improper, not brought within the proper scope for a 12(b)(6) motion, and interpleads improper facts and allegations that are outside the scope of plaintiff's own complaint. Plaintiff spends an inordinate amount of time in his response focused on a non-litigant to these proceedings – Mark Phillips. In fact, quite oddly, the bulk of the response is focused on matters tangential to the allegations raised in plaintiff's complaint, including, allegedly, "a concerted borage [sic] of civil and administrative complaints." (Opposition at ¶ 3). Whether or not Mark Phillips played any role in either the prior litigation brought by defendant or in her filing of the

1 bar complaint against Mr. Du Wors is irrelevant. Mark Phillips is not named as a defendant;
2 there is no allegation in Plaintiff's complaint for a cause of action for "conspiracy" to commit
3 any of the causes of action. Under a 12(b)(6) motion, the court cannot consider matters outside
4 of the complaint; it must stand as it has been pleaded. In this instance, there is a rather great
5 disconnect between Mr. Du Wors' response, which impugns Mark Phillips as the instigator for
6 much of the conduct aggrieved, and yet he is conspicuously absent as a defendant in the
7 complaint. For the purposes of this 12(b)(6) motion, the defendant urges the court to strike from
8 Mr. Du Wors' response all mention of matters unrelated and irrelevant to the proceedings at
9 hand. Lest the court need any reminder, the proceedings at hand concern only whether defendant
10 *alone* is liable for committing acts that constitute abuse of process and malicious prosecution.¹
11

12 Plaintiff is alarmingly and unnaturally fixated on Mark Phillips, a former client and
13 current husband of Defendant.² But a review of the relevant pleadings conclusively rebuts
14 Plaintiff's bizarre allegations of a "wild scheme" or "borage [sic] of complaints" in concert
15 between them. Defendant sued Mr. Du Wors because of his statements made to Defendant as the
16 attorney for Hunts Point Ventures, which statements helped induce her investment in HPV. As
17 Defendant's bar complaint against Mr. Du Wors makes clear, she was complaining solely
18 because of his failure to produce documents to which she and her counsel believed her entitled.
19 By contrast, Plaintiff requests this Court to suspend disbelief and attribute ulterior motives to
20

21 ¹ Plaintiff argues in his Opposition that the Court should strike the "facts" raised in Defendant's motion to
22 dismiss, while allowing him to include extraneous "facts" to support his woeful pleading. This is obtuse; the
23 reference to other "evidence" by Defendant is to other pleadings and Court rulings; documents and evidence
24 of which this Court may take judicial notice.

25 ² Plaintiff does not hide his motivations in filing this lawsuit, nor does he attempt to provide a patina of
26 paucity that the motivation is really his desire to "avenge" his former client, Mark Phillips. The Opposition's
27 opening line admits this fact: "The genesis of this dispute is that defendant Jennifer Schweickert's husband,
Mark Phillips, was convicted of federal felony fraud in Spring 2011, and sentenced to roughly four years in
jail." (Opposition at ¶1). Plaintiff believes that this argument supports his cause, rather than making him
look the obsessive, quixotic figure his pleadings reveal.

1 filings and pleadings that contract those very documents; and his bogey-man is always the same:
2 Mark Phillips. Whether third parties, such as Mark Phillips, played any role in propagating the
3 defendant's actions is an issue for the trier of fact at some distant date; it is not relevant at all to
4 whether the facts, as pleaded in the complaint, are legally sufficient to support its causes of
5 action. But plaintiff's Opposition is predicated upon such obfuscation and misdirection, because
6 the Complaint filed by Plaintiff is a poorly drafted, bizarre attempt to extract his revenge on a
7 former client, with whom he is obsessed, and, by extension, his former client's current wife.
8 These naked motivations cannot, as a matter of law, demonstrate a possibility of recovery based
9 upon the clear allegations of the Complaint, and further demonstrate that Defendant is entitled to
10 dismissal of the Complaint.
11

12 **II.**
13

14 **PLAINTIFF'S COMPLAINT MUST FAIL AS A MATTER OF LAW**

15 **A. LEGAL STANDARD UNDER RULE 12(b)(6)**

16 For the reasons already stated in defendant's motion to dismiss, Mr. Du Wors' complaint
17 has no basis at law and is factually insufficient, as pleaded, to support any legal relief. On a
18 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied
19 unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle
20 the plaintiff to relief on the claim. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 545 P.2d 13
21 (1975); *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291, 77 A.L.R.3d 436 (1975); *Hofto v.*
22 *Blumer*, 74 Wn.2d 321, 444 P.2d 657 (1968); *Barnum v. State*, 72 Wn.2d 928, 435 P.2d 678
23 (1967). As stated in *Brown*,

24 A CR 12(b) (6) motion questions only the legal sufficiency of the allegations in a
25 pleading. But since this legal determination cannot always be made in a vacuum, it

1 may be necessary to postulate factual situations which might form the basis for the
2 pleading. No reason appears why one such "hypothetical" situation should not be that
3 which the complaining party contends actually exists. The court need not find that
4 any support for the alleged "facts" exists or would be admissible at trial, as it should
5 on a summary judgment motion. The question under a CR 12(b) (6) motion is
6 basically a legal one, and the "facts" are considered only as a conceptual backdrop for
7 the legal determination defeats a 12(b)(6) motion if it is legally sufficient to support
8 plaintiff's claim.

9 *Brown v. MacPherson's, Inc., supra* at 298 n. 2.

10 Mr. Du Wors' complaint fails to state any actual facts or suggest any facts that might lead
11 to a hypothetical scenario, upon which any relief could be granted. The complaint merely pleads
12 that defendant "initiated litigation against Mr. Du Wors at Mr. Phillips' behest..." which was
13 dismissed on summary judgment, and that "in retaliation for the dismissal, Ms. Schweickert
14 submitted a bar grievance against Mr. Du Wors even though Ms. Schweickert has never been
15 Mr. Du Wors' client." (Complaint, ¶¶ 12 and 13). ***These are the only facts pleaded in support***
16 ***of the causes of action for abuse of process and malicious prosecution.*** Based upon these facts,
17 Mr. Du Wors summarily argues: "in filing her lawsuit and bringing her [bar] complaint, Ms.
18 Schweickert was motivated by an ulterior purpose to accomplish an object not within the proper
19 scope of those legal processes." (Complaint, ¶ 16). In support of the malicious prosecution
20 claim, the complaint states, "Ms. Schweickert's lawsuit was instituted by Defendant
21 Schweickert," (Complaint, ¶ 19) and "That proceeding was instituted out of malice."
22 (Complaint, ¶ 20).

23 It is plain upon the face of the complaint that there are no "facts" pleaded in support of
24 the causes of action. The "facts" are actually just a recitation of the statutory elements, and as
25 such, are legally conclusory. The complaint merely repeats the statutory elements of those

1 causes of action without asserting any hypothetical or actual facts in support of them. As the
2 Opposition purports to summarize the complaints compliance with the pleading requirements:

3 (1) Defendant Schweickert initiated both the lawsuit and the bar complaint; (2) that both
4 proceedings lacked a foundation of probably [sic] cause; (3) that both proceedings were
5 driven by malice, specifically Defendant Schweickert's desire to obtain revenge for her
6 husband's criminal conviction; and (4) that both proceedings were dismissed in
7 Plaintiff's favor."

8 (Opposition at ¶ 5)

9 Such conclusory statements not only require the suspension of disbelief and the
10 acceptance that the pleadings filed by Defendant were only a "cover" for some other nefarious,
11 unnamed plot; but they fail to refer this Court to any "facts" that would prove any possibility of
12 recovery by Plaintiff.

13 Next, the two "facts" as described in the complaint, that defendant initiated litigation
14 against Mr. Du Wors and filed a bar complaint in retaliation when that litigation was dismissed,
15 cannot be massaged or construed to support any finding of liability for either abuse of process or
16 malicious prosecution.

17 **B. THERE CAN BE NO CAUSE OF ACTION FOR STATEMENTS MADE
18 TO THE WSBA**

19 Statements made by a grievant to the WSBA are protected communications. The Rules
20 for Enforcement of Lawyer Conduct specifically state:

21 "Communications to the Association, Board of Governors, Disciplinary Board, review
22 committee, hearing officer, disciplinary counsel, adjunct disciplinary counsel,
23 Association staff, or any other individual acting under authority of these rules, are
24 absolutely privileged, and no lawsuit predicated thereon may be instituted against any
grievant, witness, or other person providing information."

25 ELC 2.12

26 Plaintiff has filed a lawsuit and continues to prosecute it expressly upon that basis. (See
27 Complaint, ¶¶ 12 and 13: stating the bar complaint was filed in retaliation for the dismissal of

1 defendant's prior litigation against Mr. Du Wors, and ¶ 16, stating that the lawsuit and bar
2 complaint was motivated by an ulterior purpose to accomplish an object not within the proper
3 scope of those legal processes). Despite being an attorney, who should have a higher knowledge
4 of the law than a lay person, and despite the clear prohibition against maintaining *any* cause of
5 action based upon statements made to the WSBA, Mr. Du Wors filed and persists in prosecuting
6 this complaint. The cause of action for abuse of process must fail as a matter of law since the
7 complaint pleads that the litigation coupled with the bar complaint were a part of the same series
8 of conduct motivated with the same ulterior purpose to accomplish an object not within the scope
9 of that legal process.

11

12 **C. PLAINTIFF'S DISMISSAL ON SUMMARY JUDGMENT, ALONE, IS
13 NOT AN ADEQUATE BASIS TO SUPPORT HIS CAUSES OF ACTION**

14 Even standing alone, as pleaded in the complaint, the simple fact of defendant's prior
15 litigation being dismissed on summary judgment cannot form an adequate basis to support the
16 legal sufficiency of plaintiff's causes of action. As already explicated in defendant's motion to
17 dismiss, the mere institution of a legal proceeding even with a malicious motive does not
18 constitute an abuse of process. *Fite v. Lee*, 11 Wn. App. 21, 27-28, 521 P.2d 964 (1974).
19 Further, the tort of abuse of process requires the misapplying of process for an end other than
20 that which it was designed to accomplish, usually in the form of coercion, to obtain a collateral
21 advantage, not properly involved in the proceeding itself. There are no facts, hypothetical or
22 otherwise, that supports that defendant's prior litigation was filed for some ulterior purpose and
23 was not designed to accomplish the purpose for which it was filed. In fact, plaintiff included a
24 copy of the summary judgment motion as Exhibit C to his Motion to Compel, which makes
25 plainly clear the findings of the court. It is startling, and indicative of the level of frivolousness
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1 of Mr. Du Wors' complaint, that that court did not state the litigation was in bad faith, or was
2 brought with any improper motive or purpose. And yet, here comes Mr. Du Wors, alleging the
3 same. It is further worth noting that Mr. Du Wors was represented in that litigation by the law
4 firm of LEE SMART P.S., INC., and that the other defendants were represented by the law firm
5 of FOSTER PEPPER PLLC. However after summary judgment was granted as to those
6 defendants, no party brought any motion for sanctions against defendant for having pleaded or
7 filed her complaint with any of her causes of action that did not have a valid, legal or factual
8 basis.³ That court was in the best position to make any such determination "regarding abuse of
9 process" or "bad faith," and yet Mr. Du Wors avoided making any such allegation for an entire
10 year, filing his complaint *only after* defendant filed a bar complaint against him *for conduct that*
11 *plaintiff admits was unrelated to that prior litigation*. As plaintiff clearly pleaded in his own
12 complaint, Mr. Du Wors' complaint was prompted by defendant's filing of the bar complaint.
13 (Complaint, ¶¶ 12, 13). Despite the absolute privilege found in ELC 2.12, Mr. Du Wors
14 improperly pleads the act of filing a bar complaint as a "fact" that supports his poorly drafted,
15 poorly reasoned complaint against Defendant. Furthermore, Mr. Du Wors must not have felt he
16 had a sufficient factual support to bring his causes of action, including for "abuse of process,"
17 until defendant had filed her bar complaint. This timing of events, in light of ELC 2.12,
18 underscores the frivolousness of Mr. Du Wors' complaint, and highlights the fact that he is the
19 *only party* who has "retaliated" against defendant by his use of the legal process.
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26 ³ Defendant did obtain some relief from that litigation in the form of a judgment for \$200,000 plus
27 annualized 8% interest of \$60,000 against the corporation that she had loaned money for which Mr. Du
Wors was counsel.

1 Third, it is worth noting that virtually all case law surrounding abuse of process claims
2 involves a scenario where that cause of action is brought as a counter-claim. In other words,
3 abuse of process is rarely seen as a stand-alone cause of action in a complaint precisely because
4 its elements require that it be raised in response to litigation that is brought to accomplish a
5 purpose not within the proper scope of the process. As will not surprise this court, there was no
6 counter-claim filed against defendant in her litigation, and there was no allegation in that lawsuit
7 (as there isn't in Mr. Du Wors' current Complaint), that the prior litigation was brought to
8 accomplish some "ulterior" purpose.

9

10 **D. THE FACTS ARE LEGALLY INSUFFICIENT AS A MATTER OF LAW TO
11 SUPPORT THE MALICIOUS PROSECUTION CAUSE OF ACTION**

12 With respect to the malicious prosecution cause of action, the motion to dismiss focused
13 solely on whether the bar complaint could form the factual basis to constitute a cause of action
14 for 'malicious prosecution.' Applying the same statutory analysis to whether defendant's prior
15 litigation constitutes a malicious prosecution, plaintiff's complaint is still legally deficient. With
16 respect to the element of probable cause and malice, plaintiff's complaint pleads no facts in
17 support of the defendant having a lack of probable cause (a reasonable belief that she could
18 establish the relevant facts), and of having malice (undertaken from improper or wrongful
19 motives or in reckless disregard of the rights of the plaintiff). Again, the summary judgment
20 order contains the findings of the court which make no such findings. Last, Mr. Du Wors
21 provides no facts in support of his allegation that he suffered injury or damage (which would be
22 dubious, since his malpractice carrier assigned counsel and covered the costs of the defense), and
23 has pleaded no facts that there was any arrest or seizure of property or special injury. In fact, Mr.
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1 Du Wors ability to obtain damages based on the defendant's bar complaint is specifically
2 precluded. The ELC rules prohibit such recovery:

3 A respondent lawyer may not seek to charge a grievant a fee or recover costs from a
4 grievant for responding to a grievance unless otherwise permitted by these rules.
5 ELC 2.13(b)

6 Again, the proper venue and time to avail himself of relief as an aggrieved party has long
7 since passed – and that decision was undoubtedly made upon the basis that the findings in the
8 court's summary judgment order foreclosed such opportunity. This court should not so indulge
9 Mr. Du Wors.

10 **III.**

11 **CONCLUSION**

12 Based upon the facts and pleadings herein, plaintiff's complaint must be dismissed for
13 failure to state a viable cause of action. In short, plaintiff has filed a complaint against defendant
14 for having filed a bar complaint against him; despite the fact that bar complaint are privileged
15 communications and that a "respondent lawyer may not seek to charge a grievant a fee or recover
16 costs from a grievant for responding to a grievance." More importantly, based upon plaintiff's
17 bizarre conduct and assertions in this case, CR 11 sanctions are appropriate against the plaintiff.
18 Defendant requests dismissal of attorney John Du Wors' Complaint and leave to brief the court
19 on the issue of attorney fees and sanctions under CR 11.

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21 Dated this 26th day of January, 2016



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23 Reed Yurchak, WSBA #37366
24 Attorney for Defendant
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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

JOHN DAVID DU WORS, an individual,

Case Number: 15-2-02482-7

Plaintiff,

CERTIFICATE OF SERVICE

v.

JENNIFER SCHWEICKERT, an individual,

Defendants

The undersigned hereby certifies that on January 26th, 2016, I caused the foregoing

- 1) Defendant's NOTE to Motion Docket for Motion for Protective Order
- 2) Defendant's Motion for Protective Order and its Exhibits
- 3) Defendant's Reply to Plaintiff's Response to Motion to Dismiss
- 4) Defendant's Response to Plaintiff's Interrogatories

To be serviced via the method of Personal Delivery:

John David Du Wors, Esq.
Newman & Du Wors, LLP
2101 Fourth Ave., Suite 1500
Seattle, WA 98121

I certify under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct and that this certificate was executed on January 26th, 2016 at Seattle, Washington.

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2 Dated this 26nd day of January, 2016 at Seattle, WA
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Mark Phillips
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